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Index No.: 17737-14

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice

RALPH BOSCAINO,

Plaintiff,

-against-

CHARLES BARBA and
TULLY CONSTRUCTION CO., INC.,

Defendants.

CASE DISPOSED: NO
MOTION R/D: 4/21/16
SUBMISSION DATE: 3/22/19
MOTION SEQUENCE NO.: 003;
MOTD

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Upon the following papers read on the application by defendants for an order pursuant to CPLR 3211 [a][5] and [7] dismissing plaintiff's amended complaint: Notice of Motion and Affirmation in Support dated March 29, 2016 together with Exhibits A through G annexed there to; Affirmation in Opposition dated October 21, 2016 together with Exhibits A through F annexed thereto; Reply Affirmation dated October 31, 2016; it is

ORDERED that defendants' motion to dismiss the amended complaint pursuant to CPLR 3211 [a][5] and [7] is granted, only as to the first through seventh and ninth through thirteenth causes of action; and it is further

ORDERED that all claims are dismissed as against defendant Tully Construction Co., inasmuch as the remaining eighth cause of action is alleged against only defendant Charles Barba.

This action was commenced by the filing of a summons with notice on September 9, 2014. Plaintiff subsequently served and filed his complaint. Defendants moved to dismiss the complaint

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and plaintiff opposed the motion and cross-moved to file an amended complaint. The court granted plaintiff's motion to file an amended complaint by order dated November 2, 2015. Defendants now move to dismiss the amended complaint pursuant to CPLR 3211 [a][5] and [7]. Plaintiff opposes the motion and defendants reply.

Plaintiff, a former employee of defendant Tully Construction Co. ("Tully"), seeks to recover damages in his amended complaint arising from his termination as a heavy equipment operator for Tully. Plaintiff alleges that he was employed with Tully from May of 1999 until September of 2013, when he was discharged by his supervisor, defendant Charles Barba ("Barba"). Plaintiff alleges thirteen causes of action in his amended verified complaint, as follows: (1) age discrimination and hostile work environment based upon age pursuant to §296 of the New York State Human Rights Law (the "NYSHRL"); (2) retaliation based upon age discrimination pursuant to §296 of the NYSHRL; (3) aiding and abetting age discrimination pursuant to §297 of the NYSHRL; (4) discrimination and hostile work environment based upon age pursuant to New York City Administrative Code ("NYC Code") and Title VII; (5) retaliation based upon age pursuant to the NYC Code and Title VII; (6) aiding and abetting age discrimination pursuant to the NYC Code and Title VII; (7) prima facie tort; (8) assault; (9) battery; (10) defamation; (11) defamation per se; (12) intentional infliction of emotional distress; and (13) tortious interference with employment contract. Plaintiff alleges specific incidents from September of 2004, the Summer of 2009, September of 2010, March of 2012, August of 2013 and September of 2013.

It is well established that on a motion to dismiss a complaint pursuant to CPLR 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (***Connaughton v. Chipotle Mexican Grill, Inc.,*** 29 NY3d 137, 141-42, 53 NYS3d 598 [2017]; ***Rosenblum v. Island Custom Stairs, Inc.,*** 130 AD3d 803, 803, 14 NYS3d 82 [2d Dept 2015];***Country Pointe at Dix Hills Home Owners Assn., Inc. v. Beechwood Organization,*** 80 AD3d 643, 649, 915 NYS2d 117 [2d Dept 2011], *quoting* ***Schneider v. Hand,*** 296 AD2d 454, 744 NYS2d 899 [2002]). "The test of the sufficiency of a pleading is 'whether it gives sufficient notice of the transaction, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments'" (***Hampshire Prop. v. BTA Bldg. and Developing, Inc.,*** 122 AD3d 573, 573, 996 NYS2d 129 [2d Dept 2014], *quoting* ***Leon v. Martinez,*** 84 NY2d 83, 88, 638 NE2d 511, 614 NYS2d 972 [1994]; *see also* (***JPMorgan Chase v. J.H. Electric of N.Y., Inc.,*** 69 AD3d 802, 803, 893 NYS2d 237 [2d Dept 2010], *quoting* ***Moore v. Johnson,*** 147 AD2d 621, 621, 538 NYS2d 28 [1989]; CPLR 3013). Thus, the inquiry is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (***Sokol v. Leader***, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010]). "Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss" (***EBC I, Inc. v. Goldman, Sachs & Co.***, 5 NY3d 11, 19, 799 NYS2d 170 [2005]). However, "conclusory averments of wrongdoing are insufficient to sustain a complaint unless supported by allegations of ultimate facts" (***Muka v. Greene County***, 101 AD2d 965, 965, 477 NYS2d 444 [4th Dept 1984]; *see* ***DiMauro v. Metropolitan Suburban Bus Auth.***, 105 AD2d 236, 483 NYS2d 383 [2d Dept 1984]; ***Melito v. Interboro Mut. Indem. Ins. Co.***, 73 AD2d 819, 423 NYS2d 742 [4th Dept 1979]; ***Greschler v. Greschler***, 71 AD2d 322, 422 NYS2d 718 [2d Dept 1979]). "Dismissal of the complaint is warranted if they plaintiff fails to assert facts

in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (***Connaughton v. Chipotle Mexican Grill, Inc.,*** 29 NY3d 137, 141-42, 53 NYS3d 598 [2017]).

Plaintiff's first and fourth causes of action are for age discrimination under Title VII and the NYSHRL. To establish a prima facie case of age discrimination under the federal Age Discrimination in Employment Act of 1967 ("ADEA") or the NYSHRL, plaintiff must show (1) that he was within the protected age group, (2) that he was qualified for the position, (3) that he experienced adverse employment action, and (4) that such action occurred under circumstances giving rise to an inference of discrimination (***Graves v. Deutsche Bank Securities, Inc.,*** 548 Fed. Appx. 654, 120 Fair Empl. Prac. Cas. (BNA) 1836 [2d Cir. 2013], *citing* ***Gorzynski v. JetBlue Airways Corp.,*** 596 F3d 93, 107 [2d Cir. 2010]; *see also* ***Anderson v. Davis Polk & Wardwell LLP,*** 850 FSupp2d 392, 409 [S.D.N.Y. 2012]). The complaint must plead "sufficient facts to state a plausible claim" that the discharge was due to or influenced by his age (***Anderson v. Davis Polk & Wardwell LLP,*** 850 FSupp2d at 409). Here, plaintiff does not allege any statements made by Barba or anyone else at defendant Tully indicating that plaintiff's age was a factor at all in the decision to terminate his employment. Plaintiff also alleges no facts from which it can be inferred that his discharge was due to his age. Rather, plaintiff alleges in his amended complaint that when he insisted that Barba explain the reason for his discharge, Barba told plaintiff that the decision was based upon his poor performance, which is a legitimate non-discriminatory reason for discharging the plaintiff (***Gorzynski v. JetBlue Airways Corp.,*** 596 F3d 93, 107 [2d Cir. 2010]; ***Anderson v. Davis Polk & Wardwell LLP***, *supra*). Further, plaintiff has not alleged a hostile work environment based upon his age, as none of the statements made by Barba alleged in the amended complaint concern plaintiff's age nor can it be inferred that they relate to plaintiff's age. Moreover, there are no allegations that the plaintiff's workplace "permeated with discriminatory intimidation, ridicule, and insult" (***Gorzynski v. JetBlue Airways Corp.,*** 596 F3d at 103). While plaintiff alleges that Barba made derogatory comments towards plaintiff and cursed at him on a few occasions, no statements alleged to have been made were based upon his age nor did they relate in any respect to plaintiff's age. Plaintiff's conclusory allegations are insufficient to state a claim of age discrimination or a claim of hostile work environment based upon his age under the ADEA or the NYSHRL.

Plaintiff also failed to allege a retaliation claim based upon his age in his second and fifth causes of action. To make a prima facie showing of retaliation, a plaintiff must show (1) participation in a protective activity known to defendant; (2) an adverse employment action; and (3) a causal connection between the protected activity and the adverse employment action (***Forrest v. Jewish Guild for the Blind***, 3 NY3d 295, 327, 786 NYS2d 382 [2004]; *see also* ***Anderson v. Davis Polk & Wardwell LLP,*** 850 FSupp2d at 413; ***Simeone v. County of Suffolk***, 36 AD3d 890, 828 NYS2d 560 [2d Dept 2007]). An employee engages in a protected activity by complaining about unlawful discrimination (***Forrest v. Jewish Guild for the Blind***, *supra*; ***Brunache v. MV Transp., Inc.***, 151 AD3d 1011, 59 NYS3d 37 [2d Dept 2017]). Here, plaintiff alleges in conclusory fashion that defendants retaliated against him "because of his opposition to its discrimination against him in the terms and conditions of his employment on the basis of his age." These conclusory allegations are insufficient in that there are no allegations that defendants had a policy or practice of age discrimination nor does plaintiff allege specifically any actions taken by him in regards to any alleged discriminatory practices. Plaintiff offers no details, statements, or dates describing when

these alleged discriminatory events occurred and what measures he took other than to state that he complained of "such conduct and informed defendants' supervisory employees of the unlawful conditions to which he was subjected." Thus, plaintiff's retaliation claims are wholly insufficient and dismissed. As plaintiff has not alleged any claims under the ADEA, NYSHRL or retaliation claims, plaintiffs third and sixth causes of action alleging that defendants aided and abetted discriminatory or other unlawful employment practices, similarly, are dismissed.

Plaintiff's seventh cause of action is for prima facie tort. A cause of action for prima facie tort consists of four elements: (1) intentional infliction of harm, (2) causing special damages, (3) without excuse or justification, (4) by an act or series of acts that would otherwise be lawful (*see* ***Burns Jackson Miller Summit & Spitzer v. Lindner***, 59 NY2d 314, 464 NYS2d 712 [1983]). The complaint must contain "a particularized statement of the reasonable, identifiable, and measurable special damages" (***Varela v Investors Ins. Holding Corp.***, 185 AD2d 309, 311 [2d Dept 1992]). Broad and conclusory claims of damages are insufficient to state a cause of action for prima facie tort (***Id.***). Here, plaintiff's amended complaint alleges special damages consisting of "loss of economic opportunity, loss of wages and income...and a general loss of reputation." These allegations lack the required specificity necessary to sustain this claim. Thus, plaintiff's prima facie tort cause of action is dismissed.

The eighth and ninth causes of action for assault and battery, respectively, arise from incidents alleged to have occurred on September of 2004, the summer of 2009, September 10, 2010, March of 2012, August 2, 2013 and September 10, 2013. The statute of limitations for assault and battery is one year (CPLR 215 [3]). Inasmuch as plaintiff filed his summons with notice on September 9, 2014, those incidents claimed to have occurred more than one year prior thereto cannot form the basis for plaintiff's assault and battery claims. The only incident that falls within the one-year statute of limitations is alleged to have occurred on September 10, 2013. In that regard, plaintiff asserts that defendant Barba "became angry with the plaintiff and tried to stab the plaintiff with what appeared to be an exacto-knife." A "claim for battery exists where a person intentionally touches another without that person's consent" (***Aberbach v. Biomedical Tissue Servs., Ltd.***, 48 AD3d 716, 718, 854 NYS2d 143 [2d Dept. 2008]). No claim for battery is stated, as plaintiff does not allege that either Barba or the alleged object touched him. For plaintiff to state a cause of action for assault plaintiff must allege "physical conduct placing the plaintiff in imminent apprehension of harmful contact." Accepting the facts as alleged in the complaint as true and according plaintiff the benefit of every possible favorable inference, plaintiff has stated a claim for assault against defendant Barba (*see* ***Butler v. Magnet Sports & Entertainment Lounge, Inc.***, 135 AD3d 680, 23 NYS3d 299 [2d Dept. 2016]).

Plaintiff's tenth and eleventh causes of action are for defamation. These causes of action are governed by a one-year statute of limitations (CPLR 215 [3]). Plaintiff's summons with notice was filed on September 9, 2014, and as such, only the September 10, 2013 incident falls within the statute of limitations. Plaintiff alleges that when he demanded an explanation for his termination, Barba stated, in the presence of the other workers, that plaintiff was "incapable of carrying out his job correctly, unable to operate machinery properly." Barba also cursed at plaintiff and made a disparaging remark about plaintiff. Plaintiff claims that he has suffered lost earnings and severe emotional distress as a result of Barba's statements.

CPLR 3016 [a] provides that in "an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally." In addition, the complaint "must also allege the time when, place where, and manner in which the false statement was made, and specify to whom it was made (***Epifani v. Johnson,*** 65 AD3d 224, 233, 882 NYS2d 234, 242 [2d Dept. 2009]). "Defamation has long been recognized to arise from the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to drive him of their friendly intercourse in society. The elements are 'a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se'" (***Dillon v. City of New York,*** 261 AD2d 34, 37-38, 704 NYS2d 1 [1st Dept. 1999]; *see also* ***Thomas H. v Paul B.***, 18 NY3d 580, 584, 942 NYS2d 437 [2012]; ***Foster v Churchill***, 87 NY2d 744, 751, 642 NYS2d 583 [1996]; ***Epifani v Johnson***, 65 AD3d 224, 882 NYS2d 234 [2d Dept 2009]; ***Salvatore v Kumar***, 45 AD3d 560, 845 NYS2d 384 [2d Dept 2007], *lv denied* 10 NY3d 703, 854 NYS2d 104 [2008]). "In cases involving defamation per se, the law presumes that damages will result, and special damages need not be alleged or proven" (***Gatz v. Otis Ford,*** 274 AD2d 449, 450, 711 NYS2d 467 [2d Dept. 2000]). The per se categories consist of the following statements: [1] the plaintiff committed a crime; [2] the statements tend to injure the plaintiff in his or her trade, business or profession; and [3] the plaintiff has contacted a loathsome disease among others (*see* ***Matherson v. Marchello,*** 100 AD2d 233, 473 NYS2d 152 [2d Dept. 1984]). When the defamatory statement falls into one of these categories, "the law presumes damage to the slandered individual's reputation so that the cause of action is actionable without proof of special damages" (***60 Minute Man v. Kossman,*** 161 AD2d 574, 575, 555 NYS2d 152 [2d Dept. 1990]). When a plaintiff does not allege that he sustained special damages, *i.e.*, "the loss of something having economic or pecuniary value" (***Liberman v. Gelstein,*** 80 NY2d 429, 434, 605 NE2d 344, 590 NYS2d 857 [1992]), liability for defamation will not be imposed unless the statements underlying the action fall within an exception in which damages are presumed, as where the statements charge another with a serious crime and where the statements are injurious to another in his trade, business or profession (***Kowalczyk v. McCullough,*** 55 AD3d 1208, 1210, 868 NYS2d 773 [3d Dept 2008]). To be actionable as words that tend to injure another in his profession, the challenged statement must be more than a general reflection upon the person's character or qualities; rather, the statement must reflect on his performance or be incompatible with the proper conduct of his business (*see* ***Golub v. Enquirer/Star Group, Inc.,*** 89 NY2d 1074, 681 NE2d 1282, 659 NYS2d 836 [1997]).

"Since falsity is a necessary element of a defamation cause of action and only 'facts' are capable of being proven false, 'it follows that only statements alleging facts can properly be the subject of a defamation action'" (***Gross v. New York Times Co.***, 82 NY2d 146, 152-153, 603 NYS2d 813 [1993], *quoting* ***600 W. 115 th St. Corp. v. Von Gutfeld***, 80 NY2d 130, 139, 589 NYS2d 825 [1992]; *see* ***Thomas H. v Paul B.***, 18 NY3d 580, 942 NYS2d 437; ***Brian v. Richardson***, 87 NY2d 46, 637 NYS2d 347 [1995]). Conversely, expressions of pure opinion, whether false or not, libelous or not, pernicious or not, are protected speech under the First Amendment (*see* ***Steinhilber v. Alphonse***, 68 NY2d 283, 508 NYS2d 901 [1986]; ***Rinaldi v. Holt, Rinehart & Winston***, 42 NY2d 369, 397 NYS2d 943 [1977]; ***Melius v. Glacken***, 94 AD3d 959, 943 NYS2d 134 [2d Dept 2012]). Expressions of "mixed opinion," i.e., statements that imply they are based upon facts which justify such opinion but which are unknown to the reader or listener, however, are actionable (*see*

Steinhilber v Alphonse, 68 NY2d 283, 508 NYS2d 901; ***Sandals Resorts Intl. Ltd. v. Google, Inc.***, 86 AD3d 32, 925 NYS2d 407 [1st Dept 2011]). When tasked with distinguishing between a statement of fact and a statement of opinion, a court must consider the following factors: (1) whether the specific language in issue has a precise meaning which is readily understood or whether it is indefinite and ambiguous; (2) whether the statement is capable of being objectively characterized as true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal to readers or listeners that what is being heard or read is likely to be an opinion, not a fact (***Gross v New York Times Co.***, 82 NY2d 146, 153, 603 NYS2d 813; ***Steinhilber v. Alphonse***, 68 NY2d 283, 292, 508 NYS2d 901).

Moreover, performance evaluations of employees are considered privileged statements by an employer. In this context, the plaintiff must allege that the statement was false and that it was made with malice (*see* ***Bayer v. City of New York,*** 60 AD3d 713, 875 NYS2d 209 [2d Dept. 2009]; ***Noble v. Creative Tech. Servs.,*** 126 AD2d 611, 511 NYS2d 51 [2d Dept. 1987]). Defendant Barba has asserted a qualified privilege regarding the alleged communications, as involving matters of common business interest, also known as the qualified common-interest privilege (*see* ***Franco Belli Plumbing & Heating & Sons, Inc. v. Dimino,*** 164 AD3d 1309, 84 NYS3d 195 [2d Dept. 2018]; ***Melious v. Besignano,*** 125 AD3d 727, 4 NYS3d 228 [2d Dept. 2015]; ***Bayer v. City of New York,*** *supra*).

Here, the cursing and name calling by Barba are not defamatory under any standard. Name calling is not actionable but rather is considered "rhetorical hyperbole expressing an opinion" (*see* ***Zysk v. Fidelity Title Ins. Co. of N.Y.,*** 14 AD3d 609, 790 NYS2d 135 [2d Dept. 2005]; *see also* ***Walter Boss, Inc. v. Katen,*** 26 AD3d 371, 809 NYS2d 190 [2d Dept. 2006]). In addition, these statements were made by Barba in the presence of other employees at plaintiff's insistence, as plaintiff alleges in his complaint that he demanded an explanation from Barba. Moreover, plaintiff has not alleged special damages to sustain a claim of defamation for statements that are outside of the per se category of defamatory statements.

As to the comments allegedly made regarding plaintiff's performance, such statements are protected by the qualified common-interest privilege and plaintiff was required to allege malice, that is, Barba knew or should have known the statements were false, had a reckless disregard for the truth or "the statements were made with a high degree of awareness that they were false" (*see* ***Liberman v. Gelstein,*** 80 NY2d 429, 438, 590 NYS2d 857, 863 [1992]; *see also* ***Udeogalanya v. Kiho,*** 169 AD3d 957, 94 NYS3d 367 [2d Dept. 2019]). No such allegations exist in the defamation claims and no special damages are pled. Thus, the defamation counts are dismissed.

The twelfth claim in plaintiff's amended complaint is for intentional infliction of emotional distress. For this claim, plaintiff must allege conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*see* ***Murphy v. American Home Products Corp.,*** 58 NY2d 293, 303, 461 NYS2d 232 [1983]; ***Leonard v. Reinhardt,*** 20 AD3d 510, 799 NYS2d 118 [2d Dept. 2005]). Here, the claim for intentional infliction of emotional distress is duplicative of the assault claim and is dismissed as such (***Leonard v. Reinhardt***, *supra*). As well, the amended complaint does

not allege extreme or outrageous conduct to sustain such a claim. Indeed, insults, indignities, and annoyances are insufficient to state a claim for intentional infliction of emotional distress (*see* ***Liebowitz v. Bank Leumi Trust Co. of New York,*** 152 AD2d 169, 548 NYS2d 513 [2d Dept. 1989]).

Plaintiff's thirteenth cause of action is for tortious interference of contract. To state a claim for tortious interference of contract, the plaintiff "must allege the existence of a valid contract between it and a third party, the defendant's knowledge of that contract, the defendant's intentional procurement of the third party's breach of that contract without justification, and damages" (***Ferrandino & Sons, Inc. v. Wheaton Builders, Inc., LLC,*** 82 AD3d 1035, 1036, 920 NYS2d 123, 125 [2d Dept. 2011]). In addition, the plaintiff "must allege the contract would not have been breached but for the defendant's conduct" (***Id.***). Here, plaintiff does not allege the existence of a contract between himself and a third party or the existence of a contract with anyone. Notwithstanding, plaintiff purports to allege interference by one of the purported contracting parties, that is, defendant Barba, his supervisor. Plaintiff acknowledges that Barba was his "supervisor" and "had the power to make personal decisions regarding plaintiff's employment and to direct and oversee plaintiff's work." Barba, as his supervisor, admittedly was an agent working on behalf of defendant Tully and cannot be considered a third party. Thus, plaintiff's claim of tortious breach of contract claim fails to state a cause of action. The court notes that other than plaintiff's arguments regarding his assault claim, plaintiff does not refute the arguments raised by defendants in regards to any other claims asserted in the amended complaint, and to that extent, plaintiff has waived any opposition to same (*see* ***Patel v. American Univ. of Antigua,*** 104 AD3d 568, 962 NYS2d 107 [1st Dept. 2013]). The court has considered plaintiff's remaining arguments and find that they lack merit.

Accordingly, defendants' motion is granted as to the first, second, third, fourth, fifth, sixth, seventh, ninth, tenth, eleventh, twelfth and thirteenth causes of action and is denied as to the eighth cause of action for assault.

The foregoing constitutes the ***Decision*** and ***Order*** of the Court.

Dated: 6-4-20

Hon. Denise F. Molia
HON. DENISE F. MOLIA, A.J.S.C.

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