Jiminez v Bavaro Carting Corp.
2022 NY Slip Op 33140(U)
September 12, 2022
Supreme Court, Kings County
Docket Number: Index No. 518528/2019
Judge: Richard Velasquez
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mot seq 1,2

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 12th day of September, 2022.

P R E S E N T:

HON. RICHARD VELASQUEZ,
Justice.

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GEORGE JIMINEZ,

Plaintiff,

- against -

Index No. 518528/2019

BAVARO CARTING CORP., VOLMAR CONSTRUCTION, INC., and JOHN DOE, INDIVIDUALLY,

Defendants.

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The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations)	21-31 32-39
Opposing Affidavits (Affirmations)	79-91 93-105
Reply Affidavits (Affirmations)	116-117 118

Upon the foregoing papers in this defamation action, defendant Bavaro Carting Corp. (Bavaro) moves (in motion sequence [mot. seq.] one) for an order, pursuant to CPLR 3211 and/or CPLR 3212, dismissing plaintiff George Jiminez's (plaintiff) claims and all cross claims asserted against it. Defendant Volmar Construction, Inc. (Volmar) moves (in mot. seq. two) for an order, pursuant to CPLR 3211(a) (7), dismissing plaintiff's amended complaint.

Facts and Procedural History

Plaintiff alleges in his amended complaint that he worked for the City of New York as a New York City Department of Transportation (NYC DOT) Apprentice and Sewer Inspector (NYSCEF Doc No. 27, Jiminez amended complaint at ¶ 8). Bavaro and Volmar were both contractors involved in work taking place at/or near Harway Avenue between 26th Avenue and Bay 43rd Street, in Brooklyn. In the course of his work as an inspector, plaintiff issued nine summonses to Bavaro on various dates within the span of a month (beginning on February 26, 2018 and ending on March 28, 2018) (*id.* at ¶¶ 6-8). All nine summonses were issued for the failure to have proper street protection under a commercial refuse container (*id.* at ¶ 6). Plaintiff alleges that months after issuing the last violation, in June or July of 2018, he was in civilian clothing and not on duty when, while driving, he reversed his vehicle which bumped into the same refuse container that had been the subject of the violations he issued to Bavaro (*id.* at ¶¶ 10-11). According to plaintiff, the container had just been emptied so it was light and shifted off its wooden blocks (*id.* at ¶ 10). After bumping the container with his vehicle, plaintiff claims that he stopped, exited his vehicle, and spoke to the on-sight contractor, who he alleges was an employee of Volmar named "Tim (*id.* at ¶¶ 4, 10-11). ." Tim is named in this action as John Doe. Plaintiff claims that when he spoke to John Doe, he (plaintiff) offered to fix the refuse container (*id.* at ¶ 10). As plaintiff attempted to place the container back onto the wooden blocks, John Doe took photographs of him (*id.*).

On September 6, 2018, a hearing related to the nine summonses issued to Bavaro was held before a Hearing Officer at the Office of Administrative Trials and Hearings/Environmental Control Board (OATH), which plaintiff alleges was attended by Bavaro, Volmar, and John Doe (*id.* at ¶¶ 12 and 21). Plaintiff states that, upon information and belief, it was customary at OATH that when matters are contested, the inspector who issued the summonses is contacted or is asked to be present to testify (*id.* at ¶ 13). According to plaintiff, he was neither asked to testify nor was he contacted by any representative of the City of New York appearing at such hearing (*id.*). Plaintiff alleges that, upon information and belief, during the hearing, Bavaro, and Volmar "jointly and/or severally through John Doe and others" submitted photographs, which were undated and without proper foundation or chain of custody, and claimed that the photographs were taken the same date of Bavaro's violations (*id.* at ¶ 14). Plaintiff alleges, upon information and belief, that the defendants told the Hearing Officer that he knocked the container off of the blocks and then proceeded to issue the nine summonses (*id.*). He further alleges that these statements were knowingly false when they were made (*id.*). Plaintiff also alleges that John Doe also submitted to the Hearing Officer a false, "perjured" affidavit with the same false statements (*id.* at ¶ 15). According to plaintiff, the Hearing Officer issued a decision based on the false testimony of John Doe, Bavaro, and Volmar, as well as the "perjured" affidavit and the photographs, and determined that plaintiff had tampered with the container on the date he issued the summonses (*id.* at ¶ 16). Plaintiff alleges that as a result of the defendants' "obvious and egregious defamation" and their "false statements

and willful misconduct," he was terminated for cause from his employment with the NYC DOT (*id.* at ¶¶ 18 and 47). He further alleges that the statements of "John Doe and others" were "intentional, malicious, knowingly false when made, and/or grossly negligent when made", and were made with the intent to injure him (*id.* at ¶ 19). Lastly, plaintiff alleges that because of the defendants' actions, he has endured loss of professional standing, "suffered irreparable, continuing harm" to his reputation, well-being, and to his personal and marital life (*id.* at ¶¶ 26 and 35).

On August 21, 2019, plaintiff commenced this action with the filing of a Summons With Notice naming Bavaro, Volmar, and John Doe individually, as defendants. On November 12, 2019, Volmar responded with a Notice of Appearance and Demand For Complaint. On November 21, 2019, Bavaro also responded with a Notice of Appearance and Demand For Complaint. On May 28, 2020, plaintiff filed a verified complaint alleging three causes of action against all three defendants: (1) libel; (2) slander; and (3) negligent infliction of emotional distress, and subsequently amended the complaint to add a fourth cause of action for (4) tortious interference with employment relationship.

On August 17, 2020, Volmar filed an amended answer to the amended complaint in which it denied the material allegations therein, asserted numerous affirmative defenses including, failure to state a claim, and asserted cross claims against Bavaro. On September 21, 2020, Bavaro filed an amended answer to the amended complaint in which it denied the material allegations therein, and asserted numerous affirmative defenses, including that

plaintiff fails to state a viable cause of action, and asserted cross claims against Volmar and John Doe, individually.[1]

Bavaro and Volmar's Motions to Dismiss

Bavaro and Volmar both move, separately, to dismiss plaintiff's claims, pursuant to CPLR 3211, for failure to state a cause of action. At the outset, the court notes that the plaintiff has withdrawn his claim for negligent inflectional of emotional distress. As such, the court will only address plaintiff's libel, slander and tortious interference with employment relationship claims. In support of their respective motions, Bavaro and Volmar both argue that plaintiff fails to specifically allege any defamatory words in the complaint as is required to state a claim for defamation (libel or slander). Volmar also asserts that plaintiff fails to show that any of the alleged statements were malicious in nature. In addition, Bavaro asserts that none of the false statements are attributed to any principal, employee, or agent of Bavaro as plaintiff only identifies John Doe, the on-sight contractor of defendant Volmar, as an individual source of the alleged false statements and does not name any individual source from Bavaro. According to Bavaro, plaintiff's claim that defendants acted "jointly and/or severally" does not relieve plaintiff of his burden to plead which person from Bavaro made defamatory statements. Bavaro argues that plaintiff's libel claim is based solely on the affidavit written by John Doe, and therefore the libel claim must fail as against Bavaro.

[1] Defendant "John Doe" has not appeared in this action.

With respect to plaintiff's claim for tortious interference with employment relationship, Bavaro argues that this claim is derivative of plaintiff's libel and slander claims, and therefore must be dismissed. Bavaro further argues that the litigation privilege should be applied to the tortious interference with employment relationship claim because the same policy considerations that shield the alleged false statements from claims of defamation should apply.

Volmar argues that plaintiff, as an at-will employee with the NYC DOT, fails to meet the elements required to state a claim for tortious interference with employment relationship because he fails to state how Volmar interfered with his employment. In this regard, Volmar argues that the plaintiff does not give any indication as to the specific nature of Volmar's alleged statements and conduct. Volmar therefore argues that plaintiff's "bare legal conclusions" and the conclusory nature of his allegations that Volmar made "false statements" and engaged in "willful misconduct" are insufficient to state a claim for tortious interference with employment relationship.

Plaintiff's Opposition to Bavaro and Volmar's Motions

In opposition to Bavaro and Volmar's respective motions, plaintiff argues that his pleadings "are sufficient to put all parties on notice of what the claimed defamatory language is, along with the requirement of providing, time, place, manner and to whom the statements were made." Plaintiff asserts that Bavaro would clearly know what the defamatory statement is since it was present at the hearing and the statements were made on its behalf. He further argues that the litigation privilege, specifically absolute privilege,

applies only to John Doe but not to Bavaro, and that the statements from the OATH proceeding may be used in another proceeding against Bavaro since John Doe is the only one who testified and proffered an affidavit. Thus, plaintiff contends that John Doe, who was not employed by Bavaro, is the only one protected by the litigation privilege.[2] Since Bavaro neither testified nor provided a sworn affidavit for the hearing, plaintiff contends that the litigation privilege is not Bavaro's to assert. Plaintiff points out that the OATH hearing only occurred because Bavaro received nine summonses and that the statements of John Doe were made on Bavaro's behalf, and in its defense, and therefore such statements can be attributed to Bavaro. In addition, plaintiff asserts that since Volmar did not appear at the OATH hearing as a witness or a party thereto, it does not have immunity under the absolute litigation privilege.

As to his claim for tortious interference with employment relationship, plaintiff argues that it is not derivative of his claims for libel and slander. He asserts that this cause of action is sufficiently pleaded broadly, and that the statements of John Doe provided during the OATH hearing can be used to prove his case against Bavaro and Volmar. Plaintiff contends that Bavaro and Volmar, "are clearly coordinating," which he argues is evidence of a plot between them to interfere tortiously with plaintiff's employment rights. Plaintiff posits that there were conversations between Bavaro and Volmar before the OATH hearing, otherwise Bavaro would not have known of John Doe and been able to

[2] Plaintiff concedes that John Doe's statements and affidavit are privileged and withdraws any request for relief from John Doe.

procure the affidavit which was prepared before the hearing. Lastly, plaintiff argues that since this case is in its early stages, he should be permitted discovery and to undertake depositions of all the individuals involved.

Discussion

A party may move for an order, pursuant to CPLR 3211 (a) (7), dismissing a cause of action against it on the ground that the pleading fails to state a cause of action. In considering a dismissal motion for failure to state a cause of action, "the pleadings must be liberally construed and '[t]he sole criterion is whether from [the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Gershon v Goldberg*, 30 AD3d 372, 373 [2d Dept 2006], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Dinerman v Jewish Bd. of Family & Children's Servs., Inc.*, 55 AD3d 530, 531 [2d Dept 2008]; *Morone v Morone*, 50 NY2d 481, 484 [1980]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]).

The court may consider affidavits and other evidentiary material submitted by the movant to establish conclusively that no viable causes of action exist (*see Simmons v Edelstein*, 32 AD3d 464, 465 [2d Dept 2006]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]). A court considering a motion to dismiss must both accept as true the allegations in the complaint and afford the plaintiff the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Great Eagle Intl. Trade, Ltd. v Corporate Funding Partners, LLC*, 104 AD3d 731 [2d Dept 2013]). In essence, the

court must determine whether the alleged causes of action are sustainable "upon any reasonable view of the facts as stated" (*Schneider v Hand,* 296 AD2d 454, 454 [2d Dept 2002]; *see also Manfro v McGivney*, 11 AD3d 662, 663 [2d Dept 2004]).

Defamation

A defamatory statement is "a false statement that tends to expose a person to public contempt, hatred, ridicule, aversion, or disgrace . . ." (*Thomas H. v Paul B.*, 18 NY3d 580, 584 [2012]). "The elements of a cause of action for defamation are (a) a false statement . . . (b) published without privilege or authorization to a third party, (c) amounting to fault as judged by, at a minimum, a negligence standard, and (d) either causing special harm or constituting defamation per se" (*Greenberg v Spitzer*, 155 AD3d 27, 41 [2d Dept 2017]). Here, the plaintiff's amended complaint does not set forth the specific false statements that Bavaro or Volmar made that are alleged to be defamatory. "CPLR 3016 (a) provides that [i]n 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. The requirement that the defamatory words must be quoted verbatim is strictly enforced" (*Erlitz v Segal, Liling & Erlitz*, 142 AD2d 710, 712 [2d Dept 1988] [citations and internal quotations omitted]; *see* CPLR 3016; *Abe's Rooms, Inc. v Space Hunters, Inc.*, 38 AD3d 690, 693 [2d Dept 2007]; *Skinner v Government Empls. Ins. Co.*, 196 AD2d 494, 494 [2d Dept 1993] ["Since the plaintiff failed to set forth the particular words complained of in his complaint, his…cause of action for defamation should have been dismissed"]).

In his amended complaint, plaintiff alleges that Bavaro, Volmar, and John Doe, acting jointly or severally during the OATH hearing made statements that taken together support their false contention that plaintiff issued the summonses to Bavaro after he knocked the refuse container off the wooden blocks that served as its foundation, and that they submitted photographs falsely representing they were taken on the same date as Bavaro's violation. There are no specific words attributed to any of the defendants. Indeed, plaintiff does not quote a single word alleged to have been spoken or written by Bavaro or Volmar in the amended complaint and only vaguely alleges that they made "false statements" to the OATH hearing officer. Even with the most liberal reading of plaintiff's amended complaint, the court can find no defamatory statement alleged against Bavaro or Volmar. By failing to quote the alleged defamatory words verbatim as required under CPLR 3016, plaintiff fails to state a claim against Bavaro or Volmar for libel or slander (*see Simpson v Cook Pony Farm Real Estate, Inc.*, 12 AD3d 496, 497 [2d Dept 2004]; *Varela v Investors Ins. Holding Corp.*, 185 AD2d 309 [2d Dept 1992]). In light of this determination, the court sees no need to address the question of whether the unspecified statements complained of were subject to an absolute privilege. Accordingly, plaintiff's defamation claims are dismissed as a matter of law.

Tortious Interference With Employment Relationship

Plaintiff's amended complaint also fails to state a claim for tortious interference with employment relations against Bavaro and Volmar.

> "An employee who does not work under an agreement for a definite term of employment is an at-will employee who may be discharged at any time with or

> without cause (*see Murphy v American Home Prods. Corp.*, 58 NY2d 293 [1983]). New York does not recognize a cause of action for the tort of abusive or wrongful discharge of an at-will employee, and this rule cannot be circumvented by casting the cause of action in terms of tortious interference with employment (*McHenry v Lawrence*, 66 AD3d 650, 651 [2d Dept 2009], citing *Smalley v Dreyfus Corp.*, 10 NY3d 55 [2008]; *see Horn v New York Times*, 100 NY2d 85 [2003]; *Ingle v Glamore Motor Sales*, 73 NY2d 183 [1989]; *Barcellos v Robbins*, 50 AD3d 934, 935 [2008]).

However, " 'an at-will employee may assert a cause of action alleging tortious interference with employment where he or she can demonstrate that the defendant utilized wrongful means to effect his or her termination' " (*McHenry*, 66 AD3d at 651, quoting *Schorr v Guardian Life Ins. Co. of Am.*, 44 AD3d 319, 323 [1st Dept 2007]). To plead a claim for tortious interference with employment, plaintiff must allege "(1) the existence of a business relationship between the plaintiff and a third party; (2) the defendants' interference with that business relationship; (3) that the defendants acted with the sole purpose of harming plaintiff or used dishonest, unfair, improper or illegal means that amounted to a crime or an independent tort; and (4) that such acts resulted in the injury to the plaintiff's relationship with the third party" (*id.*; *see McHenry*, 66 AD3d at 651; *Schorr*, 44 AD3d at 323).

Here, although plaintiff has alleged that he had an at-will employment relationship with the NYC DOT that was terminated for cause, he has failed to set forth a factual basis for his conclusory claims that the defendants intentionally interfered with this employment relationship. Plaintiff's complaint consists entirely of bare conclusory allegations that defendants, through John Doe, made unspecified false statements about plaintiff tampering with the refuse container on the dates on which he issued the summons to Bavaro, and that

their "willful misconduct did in fact cause plaintiff's employment…to be terminated" (NYSCEF Doc No. 27, Jiminez amended complaint at ¶ 47). Plaintiff, however, fails to specify what false statements Bavaro and/or Volmar allegedly communicated to his employer or how same resulted in injury to his employment relationship (*see McHenry*, 66 AD3d at 652). Furthermore, the plaintiff has failed to allege that Bavaro and Volmar "acted with the sole purpose of harming plaintiff" or that they used any "unfair, improper, or illegal means that amounted to a crime or an independent tort" (*id.* at 651). Thus, plaintiff's complaint fails to set forth factual allegations against Bavaro or Volmar which, taken together, manifest a claim for tortious interference with employment relationship. Accordingly, said claim is hereby dismissed as against Bavaro and Volmar.

Conclusion

Accordingly, it is hereby **ORDERED** that Bavaro's motion (mot. seq. one), pursuant to CPLR 3211, for dismissal of plaintiff's claims and all cross claims against it is granted; and it is further **ORDERED** that Volmar's motion (mot. seq. two), pursuant to CPLR 3211(a) (7), to dismiss plaintiff's amended complaint and all cross claims against it is granted. This constitutes the decision, order and judgment of the court.

ENTER FORTHWITH:

HON. RICHARD VELASQUEZ

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