

**Brooks v US Xpress, Inc.**

2023 NY Slip Op 32861(U)

August 15, 2023

Supreme Court, New York County

Docket Number: Index No. 160083/2017

Judge: Alexander M. Tisch

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ALEXANDER M. TISCH PART 18**

*Justice*

-----X

DANIELLE BROOKS,

Plaintiff,

- v -

US XPRESS, INC., US XPRESS OF NEW YORK, JOHN  
AND JANE DOES 1-10, XYZ CORP. 1-10,

Defendants.

-----X

INDEX NO. 160083/2017

MOTION DATE 12/07/2022

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, defendant US Xpress, Inc. (hereinafter "USX")<sup>1</sup> moves pursuant to CPLR 3212 to dismiss the plaintiff's complaint seeking damages for defamatory statements in its entirety with prejudice.

**BACKGROUND**

USX is a trucking carrier and employed over 4,000 truck drivers at the time of the occurrences alleged in the complaint (NYSCEF Doc. No. 55, USX's Undisputed Facts, ¶ 6 and 7). USX's primary function is to deliver freight to and from customers in a safe manner, pursuant to state and federal regulations (NYSCEF Doc. No. 55, USX's Undisputed Facts, ¶ 7). As it pertains to safety violations and preventability measures, USX requires its drivers to follow specific procedures when involved in an accident (NYSCEF Doc. No. 55, USX's Undisputed Facts, ¶ 11).

<sup>1</sup> The same defendant also does business as "U.S. Xpress of New York," named co-defendant (see NYSCEF Doc. No. 33). It is undisputed that the two named defendants are in fact one in the same.

For example, when a truck driver is involved in an accident, they must provide assistance to anyone injured and report the accident to the authorities (NYSCEF Doc. No. 55, USX's Undisputed Facts, ¶ 11). The driver is also required to report the accident to USX and document the accident by taking pictures of the scene and any damage to the driver's own vehicle or other vehicles (NYSCEF Doc. No. 55, USX's Undisputed Facts, ¶ 12). Once USX receives a report, its safety department reviews the accident claim and makes a preventability determination (NYSCEF Doc. No. 138, D. Tomshack EBT, 33: 1-23; 35: 13-19). Preventability, as USX defines it, "is based on 'if a driver who exercises normal judgment and foresight could have foreseen the possibility of the accident that in fact occurred, and avoided it by taking steps within his/her control which would not have risked causing another kind of mishap'" (NYSCEF Doc. No. 59, USX Handbook Acc. Eval.Sec.). USX also maintains an accident matrix for the purposes of driver discipline which lists each type of accident in which a driver may be involved (NYSCEF Doc. No. 55, USX's Undisputed Facts, ¶ 15). The various matrix codes are assigned a classification ranging from class A through D, based on the seriousness of the accident, along with corresponding points based on the class of the accident (NYSCEF Doc. No. 55, USX's Undisputed Facts, ¶ 16). If a USX driver accumulates 40 points or more within a 12-month period, the driver will be subject to termination.

On or about June 8, 2016, plaintiff was hired by USX as a truck driver (NYSCEF Doc. No. 55, USX's Undisputed Facts, ¶ 26). In connection with her USX employment, plaintiff signed and agreed to a consumer reports disclosure and release agreement (NYSCEF Doc. No. 55, USX's Undisputed Facts, ¶ 30). By signing the agreement, plaintiff acknowledged that USX may obtain one or more consumer/background reports which may include public information, driving history, motor vehicle reports, employment history, criminal history and/or safety history from consumer reporting agencies, including but not limited to DAC Services (a/k/a HireRight), Tenstreet,

DriverFacts, and/or Federal Motor Carrier Safety Administration (FMCSA) (NYSCEF Doc. No. 55, USX's Undisputed Facts, ¶ 31). Plaintiff also acknowledged that if she were hired by USX, that DriverFacts and DAC Services may obtain her work history with USX and that said history will be supplied by DAC Services and DriverFacts to other companies that subscribe to them and request such information (NYSCEF Doc. No. 55, USX's Undisputed Facts, ¶ 32).

On December 2, 2016, while employed with USX, plaintiff was involved in a motor vehicle accident while making a right-hand turn and struck a mailbox (NYSCEF Doc. No. 55, USX's Undisputed Facts, ¶ 34-36). After review of this accident, USX's safety review committee deemed the accident was preventable and determined that this was a Class B accident, resulting in 15 points for plaintiff (NYSCEF Doc. No. 55, USX's Undisputed Facts, ¶ 43). On December 16, 2016, while plaintiff was pulling into a truck stop to park her motor vehicle, plaintiff's vehicle slid on ice and struck the bumper of another vehicle (NYSCEF Doc. No. 55, USX's Undisputed Facts, ¶ 47). After review of this accident, USX's safety review committee determined that the accident was preventable and deemed this accident a class B, which resulted in plaintiff receiving another 15 points. On February 7, 2017, plaintiff was allegedly involved in a hit and run accident as she grazed the rear door and replacement fender of another vehicle and fled the scene (NYSCEF Doc. No. 55, USX's Undisputed Facts, ¶ 55-68). Canton, Georgia Police Officer St. Val reported to the scene and was informed about the accident by the other driver (NYSCEF Doc. No. 55, USX's Undisputed Facts, ¶ 55-68). Officer St. Val reviewed the nearby surveillance cameras and contacted USX, informing the company that plaintiff was the driver assigned to the vehicle and was involved in the accident (NYSCEF Doc. No. 55, USX's Undisputed Facts, ¶ 55-68). Within days to a week after the accident occurred, plaintiff was suspended pending a USX investigation into the matter (NYSCEF Doc. No. 55, USX's Undisputed Facts, ¶ 69). Though the charges against

plaintiff were ultimately dismissed, USX determined that the accident was preventable and assessed plaintiff 15 points for the accident (NYSCEF Doc. No. 55, USX's Undisputed Facts, ¶ 71-72). By now, plaintiff accumulated a total of 45 points within a 12-month period, and her employment with USX was terminated as of March 31, 2017 (NYSCEF Doc. No. 55, USX's Undisputed Facts, ¶ 73-74).

In accordance with USX's subscription agreements with consumer reporters, USX reported the December 2, 2016, December 16, 2016, and February 7, 2017, accidents that plaintiff was involved in (NYSCEF Doc. No. 55, USX's Undisputed Facts, ¶ 76). Nevertheless, as alleged by USX, after plaintiff was suspended by USX, but before she was terminated, plaintiff obtained employment with another trucking company, Paschall Trucking Lines in February of 2017 (NYSCEF Doc. No. 55, USX's Undisputed Facts, ¶ 77). Plaintiff's employment with Paschall ended in May of 2017, because of plaintiff's refusal to take dispatch with hours available to run more load (NYSCEF Doc. No. 55, USX's Undisputed Facts, ¶ 78). Additionally, in June of 2017, plaintiff was hired by J & R Schugel Trucking, Inc., however, after failing to obey a traffic signal and being arrested for reckless driving, plaintiff was terminated by J & R in September of 2017 (NYSCEF Doc. No. 55, USX's Undisputed Facts, ¶ 80-93).

### **PARTIES CONTENTIONS**

Plaintiff's complaint alleges that USX is liable for defamation by intentionally making false and defamatory statements about plaintiff to consumer reporting agencies and directly to prospective employers and individuals. USX moves pursuant to CPLR 3212 to dismiss plaintiff's complaint in its entirety, arguing that it is entitled to summary judgment because plaintiff's defamation claim is preempted by the Fair Credit Reporting Act (FCRA), that plaintiff fails to set forth a claim for defamation, that its statements about plaintiff are protected by a qualified

privilege, and that plaintiff is barred from recovery because she is “libel-proof.” In opposition, plaintiff argues that defendant is unable to articulate a legitimate excuse or privilege that allows it to intentionally advertise and make false defamatory statements about plaintiff.

### DISCUSSION

“Defamation is 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 deprive him of their friendly intercourse in society’ (Stepanov v Dow Jones & Co., Inc., 120 AD3d 28, 34 NYS2d 37 [1st Dept 2014] [internal quotation marks omitted]). ‘To create liability for defamation there must be: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication’ (Restatement [Second] of Torts § 558)” (Franklin v Daily Holdings, Inc., 135 AD3d 87, 91 [1st Dept 2015]).

### DEFAMATORY STATEMENT

As it pertains to the accidents that occurred on December 2nd and 16th, USX argues that plaintiff’s claim for defamation revolves around its use of the word preventable when it evaluated plaintiff’s accidents. USX argues that plaintiff takes issue that it reported these accidents to consumer reporters as preventable, when plaintiff believes that the accidents should have been described as non-preventable, especially the accident that occurred on December 16th, because “that was due to weather, so that should have gone down as non preventable [sic] incident” (NYSCEF Doc. No. 95, plaintiff’s EBT, 159: 3-17). However, USX simply followed its own policy in classifying the December 2nd and 16th accidents as preventable, and this preventability determination cannot sustain a defamation claim, because USX’s categorization of the accidents as preventable qualifies as an opinion and therefore does not meet the defamation standard. For “[e]xpressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter

how offensive, cannot be the subject of an action for defamation” (Mann v Abel, 10 NY3d 271, 276 [2008]).

“In distinguishing between facts and opinion, the factors the court must consider are (1) whether the specific language has a precise meaning that is readily understood, (2) whether the statements are capable of being proven true or false, and (3) whether the context in which the statement appears signals to readers that the statement is likely to be opinion, not fact” (Crime Victims Ctr., Inc. v Logue, 181 AD3d 556, 557 [2d Dept 2020] quoting Silverman v Daily News, L.P., 129 AD3d 1054, 1055 [2d Dept 2015]).

Here, the context of the complained-of-statements make it clear that a reasonable reader would conclude that USX’s determinations of plaintiff’s accidents as preventable were opinions made by its safety review committee, because that was the safety review committee’s job. The safety review committee was tasked with determining whether “the driver [did] everything reasonable to prevent the accident from happening without causing another accident,” and “if [they] feel that [the driver] didn’t [do such], then [the accident] would be [labeled] preventable” (NYSCEF Doc. No. 138, D. Tomshack EBT, 39: 14-18). Therefore, as an interpretation and opinion of the safety review committee based on the evidence they were provided, the complained of statements do not meet the falsity requirement of a valid defamation claim.

Plaintiff argues that it is incorrect for USX to evaluate the December 2nd and 16th accidents as preventable but fails to offer factual and legally recognizable arguments in opposition. Plaintiff argues that she is entitled to a non-preventable categorization of the December 2 accident because the damage to the mailbox did not exceed \$500. However, David Tomshack, USX’s director of safety, established that as of February 2016, USX no longer assigned a monetary value to accidents or labeled, what some would consider lessor tier accidents as incidents (NYSCEF Doc. No. 138, D. Tomshack EBT, 36-37: 16-5). Everything was regarded as an accident and was deemed either preventable or non-preventable (NYSCEF Doc. No. 138, D. Tomshack EBT, 37-

38: 24-3). Accordingly, plaintiff is unable to challenge the safety review committee's determination that plaintiff failed to do everything reasonably possible to prevent the accident that occurred on December 2nd, because in accepting employment with USX she agreed to their employment terms which included the accident evaluation protocol for USX drivers. The same applies for the December 16th accident where plaintiff claims her vehicle failed to stop due to ice. The safety board determined that she failed to comply with every reasonable option in making sure the accident didn't occur, and therefore was assigned a preventable rating which does not amount to defamation.

As for the February 7th accident, plaintiff argues that USX falsely and intentionally reported that plaintiff was involved in a preventable accident because she hit or forced another vehicle off the road. Plaintiff argues that USX's claims qualify as defamation because the evidence demonstrates that plaintiff's truck never came in contact with the other vehicle, and that USX's claims were presented as a fact, rather than opinion. In support of her argument, plaintiff argues that the Canton, Georgia police department determined that no such accident occurred on February 7th, and that the claims against plaintiff were dismissed further represents that USX's claims were false and intentional. Nevertheless, the Court finds that USX's statements to consumer reporters regarding the February 7th accident "are expressions of opinion and are therefore not actionable" (Kerns v Ishida, 208 AD3d 1102, 1103 [1st Dept 2022]).

Plaintiff claims that USX has no grounds for determining that plaintiff's vehicle hit or forced the other vehicle off the road, but the police report that was generated at the scene, which was one of the documents that the safety review committee used to assess the matter, stated such. Moreover, regardless of whether the charges were dismissed or not, it was not unreasonable for USX to rely on the details of the Canton, Georgia police offense/incident report that detailed



plaintiff caused damage to another vehicle. The safety review committee's determination was an opinion that is not actionable as defamation.

### **QUALIFIED PRIVILEGE**

"The common interest privilege is a qualified privilege [that is]...broadly applied. The parties need only have such a relation to each other as would support a reasonable ground for supposing an innocent motive for imparting the information" (Anas v Brown, 269 AD2d 761, 762 [4th Dept 2000]). "Even though a statement is defamatory, there exists a qualified privilege where the communication is made to persons who have some common interest in the subject matter" (Foster v Churchill, 87 NY2d 744, 751 [1996]).

"The defense of qualified privilege will be defeated by demonstrating a defendant spoke with malice. Moreover, the conditional or qualified privilege is inapplicable where the motivation for making such statements was spite or ill will (common-law malice) or where the 'statements [were] made with [a] high degree of awareness of their probable falsity' (constitutional malice)" (Foster v Churchill, 87 NY2d 744, 751-52 [1996] quoting Liberman v Gelstein, 80 NY2d 429, 437-438 [1992]).

USX argues that plaintiff's claim for defamation must be rejected because the statements USX made about plaintiff to consumer reporters are protected by a qualified privilege since each share a common interest in the subject matter. The purpose of USX's agreement with consumer reporting agencies is twofold. The consumer reporting agencies provide USX with information about prospective driving candidates and USX provides these agencies with information about its own drivers. USX maintains that this agreement serves a public or societal interest because it ensures that USX hires safe drivers that will minimize risk on the road. Plaintiff argues that USX's statements are not protected by a qualified privilege because they are false and were made with malice. However, the Court does not agree and finds no evidence demonstrating a question of fact on this issue. USX and the consumer reporting agencies transparently work in tandem to ensure

companies such as USX have access to safe drivers. USX cannot be held liable for defamation for sharing information plaintiff may deem unfavorable when she was made aware when she was hired by USX that it would share such information with consumer reporters. Moreover, the Court does not find any evidence of malice concerning the statements that USX shared with the consumer reporters, as this material reflects the decisions made by USX's safety review committee when they evaluated plaintiff's accidents. As such, the Court finds that USX's statements about plaintiff are protected by a qualified privilege.

Thus, as the Court finds that plaintiff does not have a valid defamation claim against USX, the Court need not reach the parties' remaining contentions.

Accordingly, it is ORDERED that defendant's motion to dismiss the complaint and summary judgment is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendant(s) US Xpress Inc. and US Xpress of New York, together with costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs.

This constitutes the decision and order of the Court.

8/15/2023  
DATE

  
ALEXANDER M. TISCH, J.S.C.

CHECK ONE:

CASE DISPOSED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE