

Thompson v. Bosswick

855 F. Supp. 2d 67 (S.D.N.Y. 2012)

OPINION BY DISTRICT JUDGE SWEET:

The Defendants Mark Bosswick ("Bosswick") and Sanford E. Ehrenkranz ("Ehrenkranz") (named solely in their capacity as Trustees of the Riverside Trust, hereinafter the "Trust") and Peter Lambert (named individually and in his capacity as Manager of the Trust) ("Lambert") have filed a motion . . . to dismiss the complaint filed by the plaintiff Michael Thompson ("Thompson" or the "Plaintiff"). Upon the facts and conclusions set forth below, the Defendants' motion for summary judgment is granted in part and denied in part. * * *

Thompson . . . is a former employee of the Trust. The Trust is the owner of an estate in Ulster County, New York owned by Robert DeNiro and Grace Hightower DeNiro. Bosswick and Ehrenkranz are trustees of the Trust, and Lambert, . . . was Thompson's supervisor during the time he was employed with the Trust. According to the Plaintiff, Thompson's chosen field of employment is domestic estate management for high wealth individuals and families, and, prior to the conduct alleged in this lawsuit, Thompson had an untarnished work record in this field.

Thompson began working for the Trust in September 2007. . . . * * * The Plaintiff contends that when he first started, he understood from Lambert that Jelske, who Plaintiff was succeeding, would remain employed in a diminished role under the Plaintiff's supervision. * * * The Plaintiff contends that Lambert requested that Thompson assist him in investigating Jelske, who Lambert determined may have been involved in criminal acts. The Plaintiff states that his investigation confirmed that Jelske had been demanding kickbacks from vendors, paying ghost employees including his family members and demanding at least one vendor to over-bill and sharing the difference with the vendor.

According to the Defendants, for part of 2008 and all of 2009, Thompson received free lawn mowing services at his personal residence from Lynn Warren Landscaping, the Trust's outside landscape contractor. The Defendants also contend that, in 2009, Thompson received free snowplowing services from the Trust's snowplow vendor. . . . The Plaintiff disputes these allegations and states that, with respect to the snow removal services, he instructed the vendor to bill him

for all services provided, that invoices were received and that he paid each invoice promptly. According to the Defendants, there is no admissible evidence in the record that Lambert ever told Robert or Grace DeNiro that Thompson received free lawn mowing services prior to Thompson's termination from the Trust. The Defendants also contend that Thompson never heard Lambert tell the DeNiros or anyone else that he received free lawn mowing services. The Plaintiff disputes these contentions.

The Defendants state that, on or about September 23, 2009, the Plaintiff was told that his employment with the Trust was being terminated. * * * According to the Plaintiff, on October 1, 2009, Lambert met with Thompson in Thompson's office to discuss the transition arrangements, and Lambert stated that finding the Plaintiff's replacement would take considerable time and that Thompson's continued employment would be needed for at least three to four months. * * * The Plaintiff continued his employment during this transition period. . . . According to the Plaintiff, Lambert was consoling about the nature of Thompson's termination and promised Thompson that he would write a reference letter, assist in finding a new job, forward along job contacts and help the Plaintiff in any way he could. The Plaintiff states that, in reliance on Lambert's statements, he put Lambert's name down as a reference in submissions to employment agencies.

In early October 2009, Thompson began looking for a new job. . . . While looking for a new job, Thompson sent resumes to four employment agencies: the Pavillion Agency ("Pavillion"), the Calendar Group ("Calendar"), Mahler Private Staffing ("Mahler") and Vincent Minuto of Hampton Domestics ("Minuto"), as well as several others. According to the Plaintiff, these four agencies are the dominant employment agencies capable of placing individuals in estate management positions.

Pavillion sent Thompson on an interview with the family of Robert and Melissa Soros, who ultimately elected not to hire Thompson. Although the Defendants contend that there is no evidence that Lambert gave a bad reference to either Pavillion or the Soros Family, the Plaintiff states that, prior to a follow-up interview, he was told by a Pavillion agent that Pavillion would be securing a reference from Lambert and was

later informed by Pavillion that no progress was being made related to the position. According to the Plaintiff, Thompson has had similar promising leads through Calendar Group and Mahler Private Staffing also fail to materialize after the employment agencies informed Thompson that they would be conducting a reference check.

The Plaintiff contends that on or about November 30, 2009, Mahler designated the Plaintiff "dnp," meaning "do not place," because of Lambert's bad reference. The Plaintiff also contends that on December 1, 2009, Thompson had a telephone conversation with Vincent Minuto during which Minuto informed him that his employment agency would be unable to help the Plaintiff because he had heard about the Plaintiff taking kickbacks during his employment with the Trust. * * *

"New York law allows a plaintiff to recover for defamation by proving that the defendant published to a third party a defamatory statement of fact that was false, was made with the applicable level of fault, and either was defamatory per se or caused the plaintiff special harm, so long as the statement was not protected by privilege." "In deciding whether the jury should be allowed to pass upon statements alleged to be defamatory, the court need only determine that the contested statements 'are reasonably susceptible of defamatory connotation.' If any defamatory construction is possible, it is a question of fact for the jury whether the statements were understood as defamatory."

Under New York law, "only statements alleging facts can properly be the subject of a defamation action." In addition, a plaintiff must allege the time, place and manner of the false statement and identify to whom the false statement was made. Special harm means economic or pecuniary loss. Special harm "must flow directly from the injury to reputation cause by the defamation[,] not from the effects of defamation." In order to constitute defamation per se, the statement must (i) charge an individual with a serious crime, (ii) injure another in his or her trade, business, or profession, (iii) claim an individual has a loathsome disease or (iv) impute unchastity to a woman. To find that a statement qualifies as one that tends to injure another in his or her trade, business or profession, the statement "must be made with reference to a matter of significance and importance for [the operation of the business], rather than a more general reflection upon the plaintiff's character or qualities." The statement must be targeted at the specific standards of performance relevant to the plaintiff's business and must impute conduct that is "of a

kind incompatible with the proper conduct of the business, trade, profession or office itself."

The Plaintiff has identified five statements that are alleged to be defamatory. First, on December 16, 2009, Lambert allegedly made the following statement regarding Thompson to Claudia Pache, an employee at a professional reference checking company: "I would go for impromptu inspections. Normally I take what someone tells me as the truth; but in performing audits things didn't come out accurately." Second, on December 16, 2009, Lambert allegedly made the following response to a question from Ms. Pache: "Q. Based on this information, would you say that he was not always honest? A. Yes." Third, on October 28, 2009, Lambert stated to Vincent Minuto, the principal at one of the employment agencies, that it had been confirmed that Thompson had been taking kickbacks, failing to report to work and working from home. Fourth, on or about mid-October 2009, Lambert stated to Scott Gerow, a colleague of the Plaintiff, that he had found out that Thompson was "stealing . . . that there were actual physical things that had been taken from the property. . . ." Fifth, on or about October 13, 2009, Lambert stated to Lynn Warren, the provider of lawn services to the DeNiro estate: "Michael wasn't there. He was trying to manage the place from [another state]" and "we think he's doing the same things as Joe [Jelske]," a reference to the criminal conduct of Thompson's predecessor.

1. Lambert's Statements To Claudia Pache

The Plaintiff has alleged that two statements Lambert allegedly made to Claudia Pache constitute defamation. Ms. Pache is employed as a professional reference checker for a company called www.checkmyreference.com, a service that contacts former employers and obtains references. "There are, generally speaking, four elements necessary to establish a prima facie case of slander: (1) an oral defamatory statement of fact, (2) regarding the plaintiff, (3) published to a third party by the defendant, and (4) injury to the plaintiff. The fourth element is presumed when the defamatory statement takes the form of slander per se." The Plaintiff asserts that Lambert defamed him when he told Pache that he would "go for impromptu inspections" and that "in performing audits things didn't come out accurately." The Plaintiff, however, has failed to present any evidence suggesting this comment to be false. The second statement the Plaintiff asserts to be defamatory is that Lambert replied in the affirmative to Pache's question, "Based on this information, would you say that he

is not always honest?" Rather than constitute a statement of fact, this remark represents Lambert's opinion and is not actionable. Accordingly, there is insufficient evidence of defamation to support the Plaintiff's allegations concerning Lambert's statements to Pache, and the Defendants' motion for summary judgment is granted with respect to these statements.

2. Lambert's Statements To Vincent Minuto

Another instance of defamation alleged by the Plaintiff involves an October 28, 2009 telephone conversation in which Lambert allegedly told Vincent Minuto, the principal of Hampton Domestic, that Thompson had been taking kickbacks, not reporting to work, working from home and engaging in other misconduct. To support his allegations, the Plaintiff cites testimony from Lambert's deposition. . . . However, the reasons for Thompson's termination, according to Lambert's deposition testimony, involved "mold and mud that was found on the property" rather than the defamatory statements the Plaintiff has alleged.

The Defendants have presented evidence suggesting that Lambert made no defamatory statements to Minuto during the October 28 conversation. In an email dated January 26, 2011, Minuto wrote to Thompson, in relevant part, "I have no idea what you are referring to in your last email regarding your last position of employment." Additionally, in an affidavit sworn on February 25, Minuto stated, in relevant part:

**** To be clear, Lambert has never to my memory told me, in words or substance, that Thompson had been taking kickbacks, that he routinely (or ever) failed to report to work, or that Thompson had engaged in any kind of "venal and criminal activity." Neither has anyone else affiliated with Riverside. I never made any such statements to me.*

It is well-established that credibility issues, which are questions of fact for resolution by a jury, are inappropriately decided by a court on motion for summary judgment. Additionally, there is a factual dispute as to the truth of the comments Lambert allegedly made to Minuto, as the Defendants assert that Thompson did receive kickbacks, while the Plaintiff denies this allegation. Because a genuine issue of material fact has arisen, the Defendants' motion for summary judgment with respect to the defamatory comments Lambert allegedly made to Minuto is denied.

3. Lambert's Statements To Scott Gerow

The Plaintiff alleges that on or about mid-October 2009, Lambert stated to Scott Gerow, a colleague at the Trust, that he had found out that Thompson was "stealing . . . [and] that there were actual physical things that had been taken from the property . . ." The Defendants contend that this does not constitute defamation because Thompson admittedly accepted free landscaping services thereby making Gerow's statement true, Thompson was not damaged by the statement and the statement is privileged as the statement of a co-worker relating to the common business of Gerow, Thompson and Lambert, all of who were employed at the Trust.

As noted above, there are material questions regarding whether the Plaintiff did or did not pay for the lawn mowing services that are the alleged "kickback." While the Defendants highlight deposition testimony in which Thompson stated that he received services for free, the Plaintiff contends that he never asked for any services for free, insisted on being billed for all services performed at his private residence and paid for every invoice he was given by Warren. Notwithstanding the Defendants' contention that Thompson was not harmed by Gerow's statement, damages in this case are presumed since Gerow's statement "tend to injure another in his or her trade, business, or profession" and, as such, constitute defamation per se.

The Defendants also contend that the alleged statements from Thompson to Gerow are not defamation because they are protected by qualified privilege. "Courts have long recognized that the public interest is served by shielding certain communications, though possibly defamatory, from litigation, rather than risk stifling them altogether." "One such conditional, or qualified, privilege extends to a communication made by one person to another upon a subject in which both have an interest. This 'common interest' privilege has been applied for example to employees of an organization." The rationale for applying the privilege is that the flow of information between persons sharing a common interest should not be impeded. * * * However, qualified privilege can be dissolved if a plaintiff can demonstrate that the defendant spoke with "malice." . . . New York courts have applied "malice" to have both its common law meaning as well as its constitutional meaning. Under the [constitutional] standard for malice, a plaintiff must establish that the "statements were made with a high degree of awareness of their probable falsity." "Under common law, malice meant spite or ill will."

Here, because the Plaintiff has failed to establish Lambert's malice, ill-will or any degree of awareness that his statements to Gerow were false, Lambert's statements to Gerow are shielded by the qualified privilege of common interest and cannot be considered defamatory. Accordingly, the Defendants' motion for summary judgment is granted with respect to Lambert's remarks to Gerow.

4. Lambert's Statements To Lynn Warren

The Plaintiff alleges that on or about October 13, 2009, Lambert stated to Lynn Warren, the vendor who provided lawn services to the Trust, that "Michael wasn't there. He was trying to manage the place from [another state]" and "we think he's doing the same things as Joe [Jelske] . . ." The reference to Jelske refers to Thompson's predecessor at the Trust who engaged in various acts of illegal conduct, including stealing, demanding kickbacks and complicity in overbilling the DeNiros. The Defendants contend that Lambert's remark to Warren is not specific enough to constitute defamation. The Defendants also contend that the phrase "we think" classifies Lambert's statement as an opinion rather than a statement of fact.

* * * The statements alleged here imply that Thompson had been engaged in criminal conduct and also

could be interpreted as injuring Thompson in his trade of estate management. Because Lambert's statements to Warren are reasonably susceptible of a defamatory connotation, the Defendants motion for summary judgment concerning these statements is denied. * * *

CASE QUESTIONS

1. What was the legal issue in this case? What did the court decide?
2. What are the allegedly defamatory statements that were made about the plaintiff in this case? For which statements was summary judgment granted to the defendants? Why? For which statements was summary judgment denied? Why?
3. What is qualified privilege? Is there an argument to be made that all of the alleged defamatory statements are shielded by qualified privilege, and not just the statements made to Gerow? Why or why not?
4. How does a former employee know whether he or she is being defamed in references from a former employer?
5. Given the circumstances of his termination, how should representatives of the Riverside Trust have responded to requests for references on the plaintiff?