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

PRESENT: DEBRA A. JAMES PART 59
Justice

THE GRAPHIC ARTISTS GUILD,
Plaintiff,

- v -

BRAD HOLLAND, KEN DUBROWSKI, BRUCE LEHMAN, TERRY BROWN, CYNTHIA TURNER and THE ILLUSTRATORS PARTNERSHIP OF AMERICA, INC.,
Defendants.

Index No.: 109149/08 -E
Motion Date: 07/19/10
Motion Seq. No.: 03
Motion Cal. No.: 6

E-FILED

The following papers, numbered 1 to 3 were read on this motion for reargument.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits - Exhibits	2
Replying Affidavits - Exhibits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

Motion sequence numbers 003, 004, and 005 are consolidated for disposition.

The defendant Brad Holland 'Holland) moves, pursuant to CPLR 2221 (d) (2), for an order granting leave to reargue, and upon reargument, dismissing the sole remaining defamation claim against him (Motion Sequence No. 3).

The plaintiff The Graphic Artists Guild, Inc. (Guild) moves, pursuant to CPLR 2221 (d) (2), for an order granting leave to reargue, and upon reargument, reinstating the Guild's defamation

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check One: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

claims against the defendants Bruce Lehman (Lehman) and The Illustrators Partnership of America (Partnership) (Motion Sequence No. 4).

The plaintiff Guild also moves for an order granting its request that the court receive in support of its motion to reargue, an attached complete transcript of the February 21, 2008 meeting (Motion Sequence No. 5).

The plaintiff Guild is a labor organization of illustrators and graphic artists. The defendant Partnership is a rival organization of illustrators and graphic artists. The individual defendants are all involved in the defendant Partnership. This is an action by the Guild to recover damages for defamation which allegedly occurred at a Partnership organizing meeting held on February 21, 2008. It is alleged that, during the question and answer period of the Partnership meeting, the defendant Lehman accused the Guild of surreptitiously taking from foreign collecting societies, millions of dollars in royalties yielded by artists' reprographic rights and diverting such funds from the artists. The complaint originally set forth ten causes of action. The plaintiff Guild concedes that it has received foreign reproductive royalties, but contends that it has used the funds to advance the graphic artist community through advocacy and lobbying. The Guild also concedes that it does not distribute any of the money to artists.

In an order dated January 12, 2010, this court dismissed the entire complaint as against all of the defendants except for Holland, and as against Holland, this court dismissed all of the claims except for the first (defamation in a radio interview) and second (defamation for reading from a Guild financial report) causes of action.

In support of his motion to reargue, Holland argues that the language of the court's order, and the body of the court's decision, do not correlate, in that the court actually only sustained the third cause of action concerning the direct comments made at the January 12, 2010 Partnership meeting, accusing the Guild of surreptitiously taking and diverting millions of dollars in artists' reprographic rights from foreign societies. Holland asserts that it is undisputed that it was the defendant Lehman, rather than Holland, that uttered the allegedly defamatory statement.

In support of its motion to reargue, the plaintiff Guild argues that the court mistakenly held that there is no personal jurisdiction over the defendant Lehman and that the defendant Partnership is not vicariously liable for the defendant Holland's tort.

In support of its motion for the court to receive a complete transcript of the February 21, 2008 meeting, the Guild argues

that on the prior motions only a partial transcript was placed before the Court.

Preliminarily, the Guild's motion to reargue, and submit a complete transcript, is granted. It is probably best in a defamation action for the court to have placed before it all, rather than selected fragments, of the disputed language.

Turning to the balance of the relief sought, the court will grant reargument, and upon reargument dismiss all ten causes of action in the complaint as against all of the defendants because the communications are entitled to the protection of a common-interest qualified privilege, and because truth is a defense. In addition, the prior order of this court mistakenly found that the allegedly defamatory remarks were made by Holland and it is undisputed by the parties that the speaker of the allegedly defamatory remarks actually was Lehman.

The court will first dispose of the issues of personal jurisdiction and respondeat superior. Although, as described below, the claim against Lehman is being dismissed, the court finds that there is personal jurisdiction over the defendant Lehman, a nondomiciliary attorney. New York's long-arm statute for tortious acts committed within or without the state specifically excludes actions for defamation (CPLR 302 [a] [2] and [3]). However, New York courts have permitted jurisdiction under CPLR 302 (a) (1) in defamation cases where the defamation

complained of arises from or is connected with the transaction of business within the state. As an out-of-state resident, Lehman cannot be subject to personal jurisdiction in New York unless the Guild proves that New York's long-arm statute confers jurisdiction over him by reasons of his contacts within the state (Copp v Ramirez, 62 AD3d 23, 28 [1st Dept], lv denied 12 NY3d 711 [2009]). The burden rests on the Guild, as the party asserting jurisdiction. Although New York has a narrow approach to long-arm jurisdiction in defamation cases (Pontarelli v Shapero, 231 AD2d 407 [1st Dept 1996]), long-arm jurisdiction over a nondomiciliary, such as Lehman, may be predicated on CPLR 302 (a) (1) where a defendant transacted business within the state and the cause of action arose from that transaction of business. "If either prong of the statute is not met, jurisdiction cannot be conferred under CPLR 302 (a) (1)." Johnson v Ward, 4 NY3d 516, 519 (2005). In addition the plaintiff must demonstrate a "substantial relationship" between those activities, and the cause of action. Determining whether a defendant has transacted business within the meaning of the long-arm statute requires consideration of the totality of the circumstances to decide if he has transacted business in such a way that it constitutes purposeful activity (Ehrenfeld v Bin Mahfouz, 9 NY3d 501 [2007]; SPCA of Upstate N.Y., Inc. v American Working Collie Assn., 74 AD3d 1464 [3d Dept 2010]). Purposeful activity is defined as

some act by which the defendant purposefully "avails [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Fischbarg v Doucet, 9 NY3d 375, 380 (2007).

The case previously relied upon by this court, Legros v Irving (38 AD2d 53 [1st Dept], app dismissed 30 NY2d 653 [1972]), upheld jurisdiction over a non-domiciliary against whom a defamation claim had been raised. The Court exercised jurisdiction based upon its finding that defendant Irving had performed substantial work in New York on the book in which the alleged libel was published, negotiated his contract with the publisher in New York and the book had been printed in New York (accord Henderson v Phillips, 2010 WL 2754080, 2010 NY Misc LEXIS 3019, 2010 NY Slip Op 31654[U], 8 [Sup Ct, NY County, 2010]; Aintabi v Horn, 2009 WL 4617661, 2009 NY Misc LEXIS 5325, 2009 NY Slip Op 32805[U], 5 [Sup Ct, NY County, 2009]; AVGraphics, Inc. v NYSE Group, Inc., 2009 WL 833356, 2009 NY Misc LEXIS 4708, 2009 NY Slip Op 30623[U], 4 (Sup Ct, NY County, 2009).

In Montgomery v Minarcin (263 AD2d 665, 668 [3d Dept 1999]), the Court found that the defendant had engaged in purposeful journalistic activity in New York that was "directly related to and form[ed] the basis of [the] plaintiff's causes of action" for defamation. In GTP Leisure Prods. v B-W Footwear Co., (55 AD2d 1009, 1010 [4th Dept 1977]), the allegedly defamatory statement,

made out of state, subjected the non-domiciliary defendant to the jurisdiction of the New York court because the subject of the statement was a decisive ingredient in the transaction in which the defendant had engaged in New York.

Here, it is undisputed that all of the operative acts giving rise to the Guild's claims occurred in New York, and the allegedly defamatory statement is embedded directly in the product of the business that the defendant Lehman transacted in New York. Lehman's coming to New York to speak purposefully availed himself of the privilege of conducting activities within New York, thus invoking the benefits and protections of New York's laws. Kreutter v McFadden Oil Corp., 71 NY2d 460, 467 (1988). Additionally, New York courts have held that a nondomiciliary which takes advantage of New York's unique resources in the entertainment industry has purposefully availed itself of the benefits of conducting business in the State so that long-arm jurisdiction may be asserted where the cause of action arises out of that transaction (Courtroom Tel. Network v Focus Media, 264 AD2d 351 [1st Dept 1999]).

Turning to the Guild's motion to reinstate its claim against the Partnership, an employer can be held vicariously liable for the torts of either its employee, or its special employee, committed in the course of the employer's work, even if the acts are done irregularly, or with disregard of instruction. Riviello

v Waldron, 47 NY2d 297, 302-305 (1979). In an action against an employer based upon the doctrine of respondeat superior, the servant allegedly committing the tortious conduct is not a necessary party. Trivedi v Golub, 46 AD3d 542 (2d Dept 2007). Therefore, jurisdiction over the defendant Partnership is not dependent on whether or not there is jurisdiction over the defendant Lehman. Furthermore, the cases finding that the employee or special employee was acting in furtherance of the employer's business, include the wilful tort of defamation. Murray v Watervliet City School Dist., 130 AD2d 830, 831 (3d Dept 1987).

In support of its position, the plaintiff Guild alleges that the defendant Lehman, a prominent copyright lawyer: accepted an invitation to be the key-note speaker at the January 12, 2010 Partnership meeting; in the past, helped to found the Partnership by supplying it with an office, computers and a staff; and to this day remains "closely connected" with the Partnership. It is not alleged in this case that the Partnership negligently supervised or instructed Lehman in the making of his statement. See Sandra M. v St. Luke's Roosevelt Hosp. Ctr., 33 AD3d 875 (2d Dept 2006).

Where the work of a professional is involved, the pertinent inquiry in determining the existence of an employment relationship is whether the purported employer exercises "control

over important aspects of the services performed other than results or means." Matter of Concourse Ophthalmology Assoc. (Roberts), 60 NY2d 734, 736 (1983). The Guild's papers submitted on the motions extensively detail Lehman's activities on behalf of the Partnership, but it is not alleged that the Partnership exercised control over Lehman's services performed for the Partnership. See Matter of Rosen (Vidicam. Inc.-Commissioner of Labor), 73 AD3d 1352 (3d Dept 2010) lv denied 15 NY3d 706 (2010).

The general rule is that a party who retains an independent contractor over whom it does not exercise control, as distinguished from an employee, has no liability for the independent contractor's negligent acts. Kleeman v Rheingold, 81 NY2d 270 (1993). Therefore, as a matter of law, the defendant Partnership is not liable for Lehman's conduct.

Finally, the complaint fails to state a claim for defamation, the only possible tort on the facts alleged. On a CPLR 3211 motion to dismiss for failure to state a cause of action, the pleading is to be afforded a liberal construction. The court accepts "the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine[s] only whether the facts as alleged fit within any cognizable legal theory." Leon v Martinez, 84 NY2d 83, 87-88 (1994).

Moreover, "Where extrinsic evidence is used, the standard of review under a CPLR 3211 motion is 'whether the proponent of the pleading has a cause of action, not whether he has stated one.' Bioni v Beekman Hill House Apt.Corp. (257 AD2d 76, 81 [1st Dept 1999] aff'd 94 NY2d 659 [2000]) quoting Guggenheimer v Ginzburg, 43 NY2d 268. 275 [1977].)

Defamation is defined as a false statement that exposes a person to public contempt, ridicule, aversion or disgrace (Foster v Churchill, 87 NY2d 744, 751 [1996]). The question of whether the particular words are reasonably susceptible of a defamatory connotation is a legal question to be resolved by the court in the first instance. Weiner v Doubleday & Co., 74 NY2d 586, 593 (1989), cert denied 495 US 930 (1990). A defamation claim which fails to state a cause of action, is subject to a pre-answer motion to dismiss. See McRedmond v Sutton Place Rest. and Bar, Inc., 48 AD3d 258 (1st Dept 2008).

Further, even when a statement is defamatory, a qualified privilege may exist where the communication is made to persons who have some common interest in the subject matter. Liberman v Gelstein, 80 NY2d 429 (1992). A communication made upon any subject matter in which the party communicating has an interest, or has a duty, is privileged if made to a person having a corresponding interest or duty, although it contained matter which, without this privilege, would be slanderous and

actionable. Park Knoll Assoc. v Schmidt, 59 NY2d 205, 208 (1983). The duty need not be a legal one, but only a moral or social duty. 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, 763 (4th Dept 2000).

Here, the plaintiff Guild's factual allegations demonstrate that the defendants' statements were both true, and fall within the parameters of the common-interest privilege (Phillips v Carter, 58 AD3d 528 [1st Dept 2009]; Manfredonia v Weiss, 37 AD3d 286 [1st Dept 2007]; Silverman v Clark, 35 AD3d 1, 12-13 [1st Dept 2006]). The plaintiff Guild has conceded that it received foreign reproductive royalties and that it does not distribute any of the money to artists. Since Lehman's communication was made by a lawyer to several others, upon a subject in which they all, as artists and union people interested in being compensated, had a common interest, the communication is entitled to the protection of a qualified privilege. See Id. In order to overcome the defense of qualified privilege the plaintiff must make a showing that the statement was made with actual malice, defined as ill will, personal spite, or recklessness. Shapiro v Health Ins. Plan of Greater N.Y., 7 NY2d 56 (1959).

The complaint fails to allege facts demonstrating that the defendant's statements were uttered with malice, which includes

either common-law malice (motivated by spite or ill will) or constitutional malice (statements made with a high degree of awareness of their falsity) (Silverman v Clark, 35 AD3d 1 [supra]). Moreover, as the statement was made to further a protected interest, the ill feelings and earlier disputes between the parties are insufficient to defeat the privilege. Liberman v Gelstein, supra, 80 NY2d at 439; Shapiro v Health Ins. Plan, supra, 7 NY2d at 64.

An inference of common-law malice may be drawn from a statement that is extravagant in its denunciations or vituperative in its character. Herlihy v Metropolitan Museum of Art, 214 AD2d 250, 259-260 (1st Dept 1995); Misek-Falkoff v Keller, 153 AD2d 841, 842 (2d Dept 1989). Here, the Guild fails to plead any facts showing that the statements were extravagant or vituperative. Rather, the statement alleges specific acts by the plaintiff. Plaintiff fails to allege facts demonstrating that the communication was made with the sole purpose of injuring the Guild.

Actual malice means that the defendants published the false information about the plaintiff "with knowledge that it was false or with reckless disregard of whether it was false or not" (New York Times Co. v Sullivan, 376 US 254, 280 [1964]). To satisfy the reckless disregard standard, plaintiff had to allege that defendants in fact "entertained serious doubts as to the truth of

[the] publication . . . or that they actually had a . . . high degree of awareness of [its] probable falsity." Harte-Hanks Communications v Connaughton, 491 US 657, 667 (1989), quoting St. Amant v Thompson, 390 US 727, 731 (1968) and Garrison v Louisiana, 379 US 64, 74 (1964). Inasmuch as the statement was true, plaintiff's claim cannot rest on allegations of a reckless disregard of whether it was false or not. Truthful and accurate statements do not give rise to defamation liability concerns.

The defamation claims must be dismissed on findings that the statements are protected by the common-interest privilege, and that the plaintiff Guild fails to plead facts sufficient to raise an issue of fact as to defendants' malice. Galison v Greenberg, 51 AD3d 466 (1st Dept 2008).

Accordingly, it is

ORDERED that the motions to reargue (Motion Sequence Nos. 3 and 4)are GRANTED; and it is further

ORDERED that, upon reargument, the Court vacates its prior order, dated January 12, 2010, and GRANTS the defendants' motions to dismiss the complaint in accordance with and for the reasons stated herein; and it is further

ORDERED that the complaint is DISMISSED as against all defendants and the Clerk is directed to enter judgment accordingly.

This is the decision and order of the court.

Dated: April 18, 2011 ENTER:

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J.S.C.