

CIVIL COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 34

Index No. CV-033073-12/NY

JEFFREY H. ROTH,

Plaintiff,

-against-

LAURENT DROGIN, ALAN TARTER
AND TARTER KRINSKY & DROGIN LLP,

Defendants.

DECISION/ORDER

RECEIVED

JUL 10 2013

Robert R. Reed
Judge of the Civil Court

WADE CLARK MULCAHY

Recitation, as required by CPLR §2219(a), of the papers considered in the review of motion(s) and/or cross-motion(s), as indicated below:

Papers	Numbered
Notice of Motion, Affidavits and Exhibits Annexed	1-2
Order to Show Cause	
Answering Affidavits and Exhibits Annexed	3
Cross-Motion	4
Replying Affidavits	5-6
Other:	

Upon the foregoing cited papers, the Decision/Order on defendants' motion to dismiss plaintiff's claims, pursuant to CPLR§ 3211(a)(7), and on plaintiff's cross-motion to amend the complaint, pursuant to CPLR sections 2001, 3025, and 3026, is as follows:

Defendants' motion to dismiss plaintiff's claims, pursuant to CPLR§ 3211(a)(7), is GRANTED, and plaintiff's cross-motion to amend the complaint, pursuant to CPLR sections 2001, 3025, and 3026, is DENIED.

In his Endorsed Complaint, plaintiff Roth, a former partner in defendant law firm Tarter Krinsky & Drogin LLP ("TKD"), alleges that his former partners defendants Drogin and Tarter "communicated defamatory, false and malicious words and statements to several of my former partners at [TKD] which words and statements prejudiced, harmed and injured my reputation," concluding that such conduct "constitute[d] slander and/or defamation." Inasmuch as CPLR 3016(a) requires that, "[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint," the Endorsed Complaint's spare rendering of plaintiff's cause of action is plainly inadequate. CPLR 3016(a)'s requirement that the defamatory words must be quoted verbatim is strictly enforced (*see Erlitz v Segal, Liling & Erlitz*, 142 AD2d 710, 712).

In response to defendants' motion to dismiss the Endorsed Complaint, plaintiff, by his cross-motion, seeks to amend his complaint's sole cause of action to now read as follows:

"Defendant ... Drogin and/or an unidentified attorney at [TKD] communicated defamatory, false and malicious words and statements to

several of my former partners at TKD, including ... Tarter, which words and statements prejudiced, harmed and injured my reputation.

"The aforesaid defamatory statement was made by ... Drogin and/or an unidentified attorney at TKD to ... Tarter and other attorneys at TKD. ... Tarter, the managing partner of TKD[,] personally conveyed the foregoing to me at the office of TKD on or about September 27, 2012.

"As a result of the defamatory statement communicated on or about September 27, 2012, to wit, 'Jeff Roth has taken cash from a client of TKD on the side without reporting same to TKD,' several of my former partners at TKD approached me regarding said defamatory statement and inquired about same harming my reputation at the firm and in the legal community."

The proposed Amended Complaint alleges that plaintiff sustained damages by reason of the foregoing stated conduct. This proposed new rendering by plaintiff, however, also fails to state a cause of action for slander.

A defamation claim directed at spoken words is a claim for slander (*see Albert v Loksen*, 239 F3d 256, 265 [2d Cir. 2001]). To prove slander under New York law, a plaintiff must show (i) a defamatory statement of fact, (ii) that is false, (iii) published to a third party, (iv) 'of and concerning' the plaintiff, (v) made with the applicable level of fault on the part of the speaker, (vi) either causing special harm or constituting slander per se, and (vii) not protected by privilege (*id.* at 265-266). New York courts, applying the specificity requirement for pleading a cause of action for defamation under CPLR 3016(a), have required not just that the particular words complained of be set forth, but that the complaint specify the time, place and manner of the purported defamatory statement, including the identity of the person making the remarks and the person to whom the remarks were published (*see Bell v Alden Owners, Inc.*, 299 AD2d 207; *Williams v Varig Brazilian Airlines*, 169 AD2d 434; *Geddes v Princess Properties Int'l, Ltd.*, 88 AD2d 835).

As an initial matter, plaintiff's proposed Amended Complaint lacks the specificity required by CPLR 3016(a) as to the allegedly defamatory statements' time, place and manner of utterance/publishing. The date or time "on or about September 27, 2012" is inexact and ambiguous, and doesn't suffice for purposes of CPLR 3016(a). In *Fuel Digital, Inc. v Corinella*, 15 Misc 3d 1122(A) [Lowe, J.], the New York County Supreme Court dismissed a defamation claim (actually, a counterclaim in that instance) in part because of its averment that the alleged defamatory statement was made "on or about July 4, 2006" and "on or about the first week of August 2006." The court there wrote: "Such ambiguous times and dates will not suffice to satisfy CPLR 3016(a)'s specificity requirements" (*id.*). Moreover, the *Fuel Digital* court observed, the claim there failed to "assert the location where the remarks were made, nor the method in which the statements were delivered" (*id.*), noting that the party in that case "[did] not state that the comments were made at an employee meeting or an industry conference via a verbal communication, email or inter-office memorandum" (*id.*). Although the proposed Amended Complaint in the present action indicates how plaintiff learned of the offending remarks and where he learned that such remarks had been made, it is silent as to *where, when* and *on what occasion* the alleged defamatory remarks were originally made.

In his proposed Amended Complaint, plaintiff, additionally, fails to specify the person uttering the purportedly slanderous remarks; rather, he equivocates by using the words "and/or," to wit, the speaker may have been Drogin, *or* an unidentified person, *or* both. By pleading in this alternative form, the proposed Amended Complaint fails to affix specific responsibility to defendant Drogin -- and thus fails to provide the requisite specificity. Notably, in the proposed Amended Complaint, Defendant Tarter is now identified as a person *to whom* the alleged slanderous remark was published, and *not* as one who published said remark to a third party. Thus, unless the proposed Amended Complaint is meant to suggest that defendant Tarter is liable simply for apprising plaintiff that he had heard the subject remarks by a third party, the proposed Amended Complaint would seem to absolve defendant Tarter of any responsibility for the remark. As noted above, to be responsible for purportedly slanderous remarks, the words must have been uttered to *a third party* by the accused speaker -- and not merely revealed by that speaker to the purported victim.

The proposed Amended Complaint also fails to identify in full the persons to whom the remarks were published. While it is clearly alleged that the remarks were made to defendant Tarter, the managing partner of defendant TKD, the proposed Amended Complaint asserts that the alleged defamatory remarks also were published to "several of my former partners at TKD" and "other attorneys at TKD." Thus, by the words of the proposed Amended Complaint, other than the managing partner of the firm, the identities of those persons hearing the subject remarks are unspecified. In *Bell v Alden Owners, supra*, plaintiff's defamation claim was held to be defective where, among other things, the alleged defamatory remarks "were alleged to have been made by unknown persons to certain unspecified individuals" (*id.* 299 AD2d at 208). Thus, even assuming there were no equivocation on the identity of who uttered the alleged defamatory remarks, the proposed Amended Complaint could only survive scrutiny if defendant Tarter, the only person specifically identified in the proposed Amended Complaint as having heard the remarks, had no privilege to hear such remarks.

In this case, the proposed Amended Complaint itself suggests that the alleged defamatory statements are protected by the common interest privilege (*see Dillon v City of New York*, 261 AD2d 34, 40). "Good faith communications of a party having an interest in the subject, or a moral or societal duty to speak, are protected by a qualified privilege if made to a party having a corresponding interest or duty" (*Boyd v Nationwide Mut. Ins. Co.*, 208 F3d 406, 409-410 [2d Cir 2000]). Here, the only person specifically identified in the proposed Amended Complaint as having heard the allegedly defamatory remarks is defendant Tarter, who, as managing partner of plaintiff's then-law firm, surely was entitled to hear a comment by another partner or attorney of that firm about plaintiff's conduct as a partner of that firm -- unless such statement was purely motivated by actual malice (*see Panghat, M.D. v New York Downtown Hospital*, 85 AD3d 473; *Grynberg v Alexander's Inc.*, 133 AD2d 667). Plaintiff merely asserted in conclusory fashion that the statement at issue was made with malice; this is insufficient to overcome the privilege (*see id.*; *Hollander v Cayton*, 145 AD2d 605, 606).

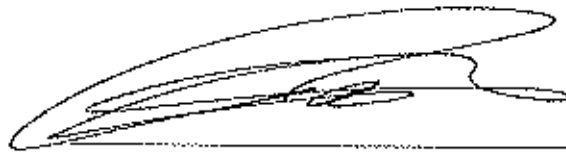
Finally, this Court will not grant plaintiff permission to replead (*see CPLR 3211[e]*). Plaintiff has failed to disclose evidence demonstrating that he had a cause of action sounding in slander or any other form of defamation (*see Ott v Automatic Connector, Inc.*, 193 AD2d 657). Although in a handwritten reply on his cross-motion to amend, plaintiff identifies a TKD partner other than defendant Tarter who heard the purportedly slanderous remarks and offers further details of how and where he learned of the remarks, plaintiff has set forth not one fact that would show that the remarks --

presumably uttered by one partner to another partner about the conduct of yet another partner in relation to the business of the partnership -- were not protected by the common interest privilege. Thus, this Court is not satisfied that plaintiff has good ground to support his cause of action (see Pritchard Services v First Winthrop Properties, Inc., 172 AD2d 394; Fuel Digital, Inc. v Corinella, supra).

Therefore, for the above stated reasons, defendants' motion to dismiss plaintiff's claims, pursuant to CPLR§ 3211(a)(7), is GRANTED, and plaintiff's cross-motion to amend the complaint, pursuant to CPLR sections 2001, 3025, and 3026, is DENIED.

The foregoing constitutes the Decision and Order of the Court.

Dated: July 3, 2013



Robert R. Reed
Judge of the Civil Court