SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Saliann Scarpulla Justice PART 19

Index Number : 157490/2012
ENCORE I INC.
vs
KABCENELL, PETER
Sequence Number : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the accompanying decision/order.

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

Dated: 7/31/13

SALIANN SCARPULLA, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

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ENCORE I INC.,

Plaintiff,

-against-

Index No.: 157490/12
Submission Date: 3/13/13

PETER KABCENELL,

DECISION AND ORDER

Defendant and Counterclaimant/Cross-Claimant,

-against-

GREG SELIG,

Additional Defendant on Counterclaim/Cross-Claim,

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For Encore I. Inc. and Greg Selig:
LeClairRyan
885 Third Avenue, 16th Floor
New York, NY 10022

For Peter Kabcenell:
Josh Bernstein, P.C.
116 West 23rd Street, 5th Floor
New York, NY 10011

Papers considered in review of the motion to dismiss:

Notice of Motion 1
Aff in Opposition 2
Aff in Reply 3

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for, *inter alia*, breach of contract, Greg Selig ("Selig"), additional defendant on counterclaim/cross-claim pursuant to CPLR §3019(d), moves to dismiss the claims asserted against him.

Plaintiff Encore I Inc. ("Encore"), owned and operated by the Selig family, is an online and storefront consignment business that sells clothing and accessories. In or

about March 2001, defendant Peter Kabcenell ("Kabcenell"), who had known Selig for many years, contacted Selig to ask him for a place to stay after being evicted from his apartment. Kabcenell resided with Selig for approximately one month. Selig's mother, Carol Selig ("Carol"), then offered Kabcenell the opportunity to reside in an apartment at 1132 Madison Avenue as well as a job at Encore. At that time, Carol was Encore's president.

On or about May 31, 2001, Encore and Kabcenell entered into a Non-Disclosure Agreement. At that time, Kabcenell worked as Encore's general manager, and his duties included obtaining goods on consignment for Encore, offering those goods for sale on the Internet, and managing the retail storefront. Selig's brother, Scott Selig dealt with the financial aspects of the business.

Selig became Encore's president in or about October 2008. On October 5, 2011, Kabcenell and Encore entered into an Employment Agreement with a three year term. Pursuant to the terms of that agreement, Kabcenell was paid $27.00 an hour, and 6% of sales, payable in quarterly installments. According to Selig, Encore entered into that agreement with Kabcenell to induce Kabcenell to not compete with Encore's business and to ensure that Kabcenell would work in the store as agreed upon.

The relationship between Encore/Selig and Kabcenell then became contentious, with Selig accusing Kabcenell of selling items that were consigned to Encore for his own personal economic benefit, using Encore's account on www.ebay.com for his own sales,

contacting Encore's clients and customers to solicit business for himself, deleting and reinstating Encore's ebay account, and reporting hours on his payroll account that were more than the hours he actually worked. By email dated August 20, 2012, Encore terminated Kabcenell's employment "as a result of financial duress and uncertainty for continued business survival for the near future."

In or about October 2012, Encore commenced this action seeking to recover damages for, *inter alia*, breach of contract.[1] According to the allegations of the complaint, Encore claimed, *inter alia,* that Kabcenell breached the Non-Disclosure Agreement and the Employment Agreement.

Kabcenell answered the complaint and denied all material allegations. Kabcenell also interposed counterclaims/cross claims against Encore, as well as non-party Selig pursuant to CPLR §3019(d). Kabcenell alleged that he was not paid his commissions for the second and third quarters of 2012, as well as the remaining two years on his contract. Kabcenell further maintained that after his termination, Encore received a poor review on the website www.yelp.com, which Selig believed was written by Kabcenell, and in retaliation, Selig posted negative reviews of Kabcenell under the username "pkisasociopath" on that website, accusing him of being a sociopath, an addict, a traitor, criminal and thief.

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[1] In an order dated March 13, 2013, this Court dismissed the second, fifth, seventh and ninth causes of actions without prejudice.

Kabcenell asserted that (1) Encore breached the employment contract by failing to pay commissions owed to him and by terminating his contract without just cause; (2) Encore and Selig violated Labor Law Article 6 by failing to provide proper notice and failing to pay wages/commissions owed to him; and (3) Encore and Selig's postings on the Yelp.com website constituted defamation and defamation per se.

Selig now moves to dismiss the claims asserted against him in Kabcenell's answer, arguing that (1) Selig is not a party to the subject Employment Agreement and thus can not be held liable for any alleged breach thereof; (2) Selig can not be held personally liable for claims based upon violations of Labor Law Article 6; and (3) the defamation cause of action must be dismissed against Selig because Kabcenell failed to plead either that the comments referred to Kabcenell by name and that the comments were comprised of false and defamatory statements of fact that were actionable. In addition, Selig argues that he was not properly served with the summons and answer in that an additional copy was not mailed to him after the original copy was served upon him in person.

In opposition, Kabcenell first argues that personal service was properly effectuated and submits the affidavit of service, indicating that the answer was hand delivered and then mailed the next day. Kabcenell next argues that (1) the breach of contract claim is only asserted against Encore, and not Selig; (2) Selig is personally liable for violating Labor Law Article 6 as Kabcenell's employer, who supervised him and determined his work and pay; and (3) the posting on www.yelp.com is actionable defamation because it

referred to Kabcenell indirectly through the use of his initials and the description of "a recently terminated employee of Encore," and contained statements of fact.

Discussion

In determining whether to grant a motion to dismiss pursuant to CPLR §3211, the court should accept as true the facts alleged in the pleading, accord the drafter the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory. *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). The court notes that the note of issue has not yet been filed in this case, and the court records reflect that the parties have not yet engaged in discovery.

The court first finds that Selig's argument that he was not properly served with the summons and answer is without merit. Kabcenell produces the affidavit of service of the summons and answer upon Selig, which indicates that the pleadings were properly served.

Nevertheless, the court denies Selig's motion to dismiss the claims asserted against him by Kabcenell. Selig first argues that Kabcenell's claim asserting Selig's violation of the Labor Law Article 6 must be dismissed because he is only an officer of Encore and there is no private right of action against corporate officers for violations of Article 6. Article 6 of the Labor Law regulates the payment of wages by employers. *Kausal v. Educational Prods. Info. Exch. Inst.*, 105 A.D.3d 909 (2nd Dept. 2013). Although Selig correctly maintains that there is no private right of action against corporate officers for

violations of Article 6 of the Labor Law, (*see Stoganovic v. Dinolfo*, 92 A.D.2d 729 (4th Dept. 1983), *affd* 61 N.Y.2d 812 (1984), here, in his pleading, Kabcenell is alleging that Selig was his employer, not just a corporate officer of Encore. He contends that Selig determined his pay increases and decreases, and supervised him at work. Therefore, Kabcenell's claim asserting Selig's violation of Article 6 will not be dismissed at this time. *See Bonito v. Avalon Partners, Inc.*, 106 A.D.3d 625 (1st Dept. 2013); *Wing Wong v. King Sun Yee*, 262 A.D.2d 254 (1st Dept. 1999).

Selig next argues that the defamation claim asserted against him must be dismissed because Kabcenell failed to plead that the comments referred to Kabcenell by name and that the comments were comprised of false and defamatory statements of fact that were actionable. To recover on a cause of action for defamation, a plaintiff must establish that defendants made (1) an unprivileged statement of fact, (2) concerning plaintiff, (3) with the requisite degree of fault, (4) that is false and defamatory, and (5) that damaged plaintiff. *Dillon v. City of New York*, 261 A.D.2d 34 (1st Dept. 1999); *Cassini v. Advance Publ., Inc.*, 2013 N.Y. Slip Op 30796(U) (Sup. Ct. N.Y. Co., Mar. 14, 2013).

An allegedly defamatory statement is not actionable if it is an expression of pure opinion. *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 289 (1986). The distinction between fact and opinion is made on the basis of what the average person hearing or reading the communication would take it to mean, and certain factors are considered in making this assessment: (1) whether the specific language employed is precise or vague and

ambiguous, (2) whether the statement may be objectively characterized as either true or false, (3) the context in which the statement appears and (4) the broader social setting surrounding the communication, including a custom or convention which might serve to indicate that it is an expression of opinion and not fact. *Sandals Resorts Intl. Ltd. v. Google, Inc.*, 86 A.D.3d 32 (1st Dept. 2011); *O'Loughlin v. Patrolmen's Benevolent Ass'n*, 178 A.D.2d 117 (1st Dept. 1991); *Parks v. Steinbrenner*, 131 A.D.2d 60 (1st Dept. 1987). Here, the statements made in the www.yelp.com posting consisted of both precise and vague language. Certain of the precise statements could be objectively characterized by a reasonable reader as true, specifically, statements such as "this individual was 3 months homeless and living on the streets of NY after squandering his family inheritance on many addictions," "he was given an apt. to live in, taught a skill and given gainful employment, and given the time and opportunity to conquer his addictions," and "he currently has civil and criminal complaints against him." Selig contends that the posting can only be construed as a statement of opinion and not of fact, given that the website provides a forum for people to give reviews and opinions. However, the Court finds that taken as a whole, the statements could be construed by a reasonable reader as conveying facts about Kabcenell, and not just opinions.

Further, a party alleging defamation must demonstrate that the allegedly defamatory statement was of and concerning him or her. *Prince v. Fox Tel. Stas., Inc.*, 33 Misc.3d 1225(A) (Sup. Ct. N.Y. Co., 2011). Selig maintains that the posting on

www.yelp.com is not actionable because it does not refer to Kabcenell by name. Where a libel does not name the aggrieved party, he or she may give evidence of all of the surrounding circumstances and other extraneous facts which will explain and point out the person to whom the allusion applies. *Cole Fischer Rogow, Inc. v. Carl Ally, Inc.*, 29 A.D.2d 423 (1st Dept. 1968). It is not necessary that all the world should understand the libel; it is sufficient if those who knew him can make out that he is the person meant. *See Prince v. Fox Tel. Stas., Inc.*, 33 Misc. 3d 1225(A) (Sup. Ct. N.Y. Co., 2011). The court finds that the facts, as pled, could lead to a finding that the allegedly defamatory statements were of and concerning Kabcenell because the statement refers to an "ex-employee that was terminated from Encore just recently." Encore is not a large company with a large amount of employees. People who knew Kabcenell presumably would have known that he was recently terminated from Encore, and would make the connection that the subject posting was written about him. As such, Kabcenell's defamation claim will not be dismissed at this time.

In accordance with the foregoing, it is hereby

ORDERED that additional defendant on counterclaim/cross-claim pursuant to CPLR §3019(d) Greg Selig's motion to dismiss the claims asserted against him is denied.

This constitutes the decision and order of the Court.

Dated: New York, New York
July 31, 2013

ENTER

J.S.C.

8 SALIANN SCARPULLA