2011 NY Slip Op 51037(U)

MARK YONATY, Plaintiff,
v.
JEAN MINCOLLA, Defendant.

2009-1003.

Supreme Court, Broome County.

Decided June 8, 2011.

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PHILLIP R. RUMSEY, J.

In this action, plaintiff asserts causes of action for defamation, intentional infliction of emotional distress and prima facie tort, based on statements concededly made by defendant Mincolla to third-party defendant Koffman that plaintiff is gay or bisexual. Mincolla commenced the third-party action seeking indemnification from Koffman, based on Koffman's republication of the allegedly slanderous statements to non-party Marilyn Geller. Plaintiff denies the allegations. Third-party defendant now moves for summary judgment dismissing the third-party complaint and defendant moves for summary judgment dismissing the complaint.

Mincolla avers that when she was advised that plaintiff is gay or bisexual and that he was actively engaging in homosexual conduct, she became concerned that such conduct posed a danger to Kara Geller, who was then dating plaintiff. While she felt that Kara should be made aware of the alleged conduct, she did not feel that she had a sufficiently close personal relationship with the Geller family that would enable her to directly relate the information to Kara. Rather, she met with third-party defendant Koffman — whom she knew to be a close friend of Kara's mother, Marilyn Geller — to ask Koffman to tell Marilyn Geller that plaintiff was either gay or bisexual and that he had engaged in sexual relationships with men. Koffman relayed those allegations to Marilyn Geller, who, in turn, told Kara, who then terminated her relationship with plaintiff.

Third-party defendant moves for dismissal of the third-party action on the basis that her publication to Marilyn Geller was protected by the "common interest" qualified privilege which she asserts attaches to "communications relative to family members, made in good faith to the proper parties, by members of a family, intimate friends, and third persons under a duty to speak" (*Garson v Hendlin*, 141 AD2d 55, 62 [1988], *lv denied* 74 NY2d 603 [1989], *quoting* 50 Am Jur 2d, Libel and Slander, § 203, at 711,

and *citing* Restatement [Second] of Torts, § 597). In an attempt to establish her entitlement to the privilege, Koffman notes her personal relationship with the Geller family: She has known Marilyn Geller for over 30 years; the families often socialized and traveled together; and she thought of Kara — whom she has known since birth — as a daughter. She avers that her concern for Kara's physical and emotional health prompted her to share the information with Marilyn Geller. It bears noting that Koffman volunteered the information; it does not appear that the Geller family ever requested that she provide them with information about plaintiff, specifically, or regarding individuals with whom Kara may have had a dating relationship.

In considering whether the "common interest" qualified privilege should be applied to facts similar to those at issue in this case, the Court of Appeals held that the need to protect against the evils of gossip and defamation outweighed the competing consideration of affording protection to those who volunteer information to persons to whom they are not related, noting that:

"One may not go about in the community and, acting upon mere rumors, proclaim to everybody the supposed frailties or bad character of his neighbor, however firmly he may believe such rumors, and be convinced that he owes a social duty to give them currency that the victim of them may be avoided; and, ordinarily, one cannot with safety, however free he may be from actual malice, *as a volunteer*, pour the poison of such rumors into the ears of one who might be affected if the rumors were true."

Byam v Collins, 111 NY 143, 152 (1888) (emphasis supplied). The Court proceeded to specifically hold that the statements of a person who volunteered unsolicited information about the suitor of the recipient — whom she had known for her entire life — were not privileged because the speaker was not a family member of the recipient and, therefore, had no duty to provide the information. While *Byam* was decided more than a century ago, there is nothing to suggest that it has been superseded or abrogated. Like the Court in *Byam* — which observed that, although "some loose expressions may doubtless be found" supporting extension of the privilege under such circumstances to non-family members, its exhaustive research showed that there was "absolutely no reported decision to that effect" — this court has been unable to locate, and third-party defendant was unable to cite, a single case in which the common interest privilege has been extended to statements voluntarily made by a person who was not a family member of the recipient, or of the person whose interests the speaker allegedly sought to protect (*see id.,* at 156-157; *see also* Libel and Slander — Privilege: Qualified — Moral Duty to Exhibit to Plaintiff's Wife and Former Employer Letter Charging Plaintiff with Immorality, 43 Harv. L. Rev. 966 [1930]; *cf. Garson* [qualified privilege protected statements made by the aunt of a mother involved in a child custody dispute — a "family member" — where the statements were made at the mother's request, and were premised largely upon the speaker's own personal knowledge], and the cases cited therein [141 AD2d at 62]).[1]

Accordingly, although the court does not doubt the sincerity of Koffman's motivation under the circumstances, it is constrained to follow the existing law as enunciated in *Byam;* therefore, her motion must be, and hereby is, denied.

Defendant seeks summary judgment dismissing all three causes of action asserted by plaintiff. She argues that his defamation claim is legally insufficient due to plaintiff's

failure to allege special damages, which involve "the loss of something having *economic* or *pecuniary* value" (*Liberman v Gelstein*, 80 NY2d 429, 434-435 [1992] [quotation omitted] [emphasis supplied]). However, special damages are not a necessary element of a cause of action for defamation where the statement complained of constitutes defamation per se (*see Dickson v Slezak*, 73 AD3d 1249, 1250 [2010]), and plaintiff argues that the statement falsely accusing him of homosexuality constitutes slander per se.

The Court of Appeals has never expressly held that a statement imputing homosexuality is defamation per se (*see Stern v Cosby*, 645 F Supp 2d 258, 273 [SDNY 2009]). While the law may, at some point, change in response to evolving social attitudes regarding homosexuality, the existing law in New York, as expressed by the Appellate Divisions — which this court is bound to follow — is that imputation of homosexuality constitutes defamation per se (*see Klepetko v Reisman*, 41 AD3d 551 [2007], *citing Matherson v Marchello*, 100 AD2d 233, 242 [1984]; *Nacinovich v Tullet & Tokyo Forex*, 257 AD2d 523 [1999]; *Dally v Orange County Publ.*, 117 AD2d 577 [1986]; *see also Gallo v Alitalia-Linee Aefee Italiane-Societa per Azioni*, 585 F Supp 2d 520, 549 [SDNY 2008]; Elder, Defamation: A Lawyer's Guide § 1:13 [2010]; *see generally Tourge v City of Albany*, 285 AD2d 785 [2001], *quoting Privitera v Town of Phelps*, 79 AD2d 1, 3 [1981], *lv dismissed* 53 NY2d 796 [1981]). Accordingly, plaintiff's cause of action for defamation may not be dismissed for failure to state a claim based on the fact that he did not allege any special damages.

Defendant's argument that her statements are protected by the common interest qualified privilege is unavailing. As noted with respect to third-party defendant's motion, the privilege does not protect statements voluntarily made by a person who — like Mincolla — was not a family member of the recipient, or the person whose interests the speaker allegedly sought to protect.[2]

Turning to consideration of plaintiff's claims of intentional infliction of emotional distress and prima facie tort, it bears noting that they are based upon the same allegations as his defamation claim — that Mincolla published the allegedly defamatory statements to Koffman. Such conduct does not state a viable claim for intentional infliction of emotional distress because it is not so outrageous in character or extreme in degree as to be "regarded as atrocious, and utterly intolerable in a civilized community" (*Howell v New York Post Co.*, 81 NY2d 115, 122 [1993] [quotation omitted]; *see also Freihofer v Hearst Corp.*, 65 NY2d 135, 143-144 [1985]; *Wadsworth v Beaudet*, 267 AD2d 727 [1999]). Plaintiff may not recast his defamation claim as a cause of action for prima facie tort (*see Freihofer*, 65 NY2d at 143; *Morrison v Woolley*, 45 AD3d 953 [2007]) and, in any event, the failure to allege special damages is also fatal to a prima facie tort claim (*see Freihofer*, 65 NY2d at 142-143; *Wadsworth*, 267 AD2d at 729).

Based on the foregoing, defendant's motion is granted, to the extent of granting summary judgment dismissing plaintiff's causes of action for intentional infliction of emotional distress and for prima facie tort, and is otherwise denied. This decision constitutes the order of the court. The transmittal of copies of this decision and order by the court shall not constitute notice of entry.

[1] The Restatement (Second) of Torts does not require a different result. It provides that a publication of information regarding the well-being of a member of the recipient's immediate family is conditionally privileged if "the recipient has requested the publication of the defamatory matter or is a person to whom its publication is otherwise within generally accepted standards of decent conduct" (Restatement [Second] of Torts, § 597[2][c]). Like *Byam,* it recognizes that application of the privilege generally requires a balancing of the harm likely to result to the interest of the recipient's family member through ignorance of the matter communicated against the harm likely to be caused to plaintiff's reputation (*see id.,* comment on subsection 2). Notably, it also recognizes that volunteering of unsolicited information is disfavored, and that a person who is not a family member has no duty to provide information (*see id., see also* § 595[2] and comment on subsection 2; Elder, Defamation: A Lawyer's Guide § 2:27 [2010] ["generally accepted standards of decent conduct" is not established merely by proof that the recipient's family has an interest in the information, or that the speaker is acquainted with the recipient]).

[2] Plaintiff correctly notes that defendant waived the affirmative defense of privilege by failing to plead it (*see Lerwick v Kelsey,* 24 AD3d 918 [2005], *lv denied* 6 NY3d 710 [2006]). However, waiver is retracted where, as here, the unpleaded affirmative defense is asserted by defendant in support of a summary judgment motion, thereby affording plaintiff the opportunity to address the relevant issues (*id.*). In this case, it is also apparent that the facts upon which defendant's claim of privilege rest were explored during the extensive examinations before trial conducted by the parties.