CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

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ROY DEN HOLLANDER,

Plaintiff,

-against-

EPIQ SYSTEMS, INC., DOMINICK OLIVO and JUAN DOE, an apparent illegal alien working for Select Office Suites,

Defendants.

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Index No. 000854/2016

AFFIRMATION IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT

Loretta J. Hottinger, an attorney duly admitted to practice law in the Courts of the State of New York, hereby affirms the following to be true under the penalties of perjury pursuant to CPLR §2106:

1. Your affirmant is associated with the Law Offices of Charles J. Siegel, attorneys for defendants, Dominic Olivo and Jairo Franco, and as such I am fully familiar with all the facts and circumstances heretofore had herein, the source of your Affirmant's knowledge being the file maintained by her office.

2. I submit this Affirmation in Support of the within motion to dismiss and/or summary judgment on behalf of defendants DOMINIC OLIVO and JAIRO FRANCO s/h/a JUAN DOE, an illegal alien working for Select Office Suites (OLIVO and FRANCO).

PROCEDURAL AND FACTUAL BACKGROUND

3. Plaintiff Hollander commenced the main action by the service of a Summons and Complaint naming as direct defendants OLIVO and FRANCO and EPIQ SYSTEMS, INC. (EPIQ) on or about January 20, 2016. See, Summons and Complaint attached hereto as **Exhibit "A"**. Subsequently without leave of court, the plaintiff served an "Amended"

complaint, removing EPIQ as a defendant and naming only OLIVO and FRANCO and making basically what could be construed as Civil RICO allegations against these defendants. See, Summons and "Amended" Complaint attached hereto as **Exhibit "B"**.

4. This motion seeks summary judgment as to the original complaint pursuant to CPLR 3212and seeks dismissal in lieu of an answer to the "amended" complain pursuant to 3211(a) 1, 7.

5. Defendants OLIVO and FRANCO files an answer to the first complaint on or about February 18, 2016 along with various discovery demands. See Answer and Discovery Demands attached hereto as **Exhibit "C"**.

6. Upon information and belief, plaintiff was employed by defendant EPIQ as a temporary worker on documents review project housed at 1115 Broadway, New York, New York. EPIQ leased temporary space on the penthouse floor of 1115 Broadway. Suites Over Soho (SOS) operated floors 10, 11, 12 and the penthouse at that location. OLIVO and FRANCO worked for SOS as Sales and Marketing and handyman respectively on the two dates in question.

7. On January 7, 2016, the penthouse space had only one men's room for about 30-40 workers so Hollander went to another floor to go to the men's room. He was to gain access to those other floors with a swipe card. As he was doing this, Hollander encountered Jairo Franco (FRANCO) at an access door on another floor where FRANCO as doing paining in his duties as SOS handyman. See Incident Report contained herein as **Exhibit "D"**. See Affidavit of FRANCO as **Exhibit "E"**.

8. Franco did not want to close the door as he was discussing a work project from one space to another with another employee and Hollander was insisting he close the door so he could test his access card. Hollander called him an "F------ illegal" and threatened to call immigration on him.

9. On January 8, 2016 Hollander continued to go to different floors and speak to receptionists and other handymen looking for FRANCO. See Affidavit of Michelle Castaneda of SOS as **Exhibit "F"** and paragraph 19 of Hollander's original complaint annexed as **Exhibit "A"**.

10. After that, FRANCO who was shaken by the incident and reported this to OLIVO. OLIVO wrote up an incident report and spoke with Ceasar Bagui, an employee of SOS who had a direct relationship with EPIQ. The incident report was requested by EPIQ Human Resources and SOS sent it to them by email to Patrick Gallagher, (Director of Operations, and Document Review Services) on January 8 at 1:04 p.m. See Affidavit of Bagui as **Exhibit "G"**.

11. Personnel from EPIQ via email attempted to contact Hollander and arrange to meet with him to discuss this matter. When Hollander refused to meet with EPIQ, he was fired from EPIQ. See Emails attached to Hollander Complaint as **Exhibit "A" to "B"**.

12. Prior to January 11, 2016 OLIVO offered to EPIQ that they could assign FRANCO to another location or find space for Epiq's work at a nearby location to the two men would not meet. See Affidavit of Dominic Olivo annexed as **Exhibit "H"**.

ARGUMENT

SUMMARY JUDGMENT OF CAUSES OF ACTION IN THE ORIGINAL COMPLAINT AS TO DEFENDANTS OLVIO AND FRANCO ON DEFAMATION AND TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS

POINT I

SUMMARY JUDGMENT MUST BE GRANTED AS TO DEFAMATION BECAUSE OLIVO and FRANCO ARE ENTITLED TO QUALIFIED PRIVILEGE

A "qualified privilege" extends to communications made by one person to another upon a subject in which both has an interest.

> 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.
>
> The rationale for applying the privilege in these circumstances is that so long as the privilege is not abused, the flow of information between persons sharing a common interest should not be impeded. (Internal quotation marks and citations omitted) Liberman v. Gelstein, 80 N.Y.2d 429, 437 (1992).

In this setting, OLIVO and FRANCO and plaintiff's employer, EPIQ had a continuing business relationship and occupied the same physical space. Witnesses for SOS set forth the relationship that EPIQ and SOS had which a mutual expectation was of open communications regarding the work space and the interaction involving their employees.

Peace in the work environment of SOS's employees and EPIQ was a common interest of each party. In such case SOS (OLIVO AND FRANCO) AND EPIQ had a common interest in open communications to keep a good working environment and so OLIVO AND FRANCO are entitled to a qualified privilege. *Present v. Avon Products, Inc.,* 235 A.D.2d 183. (1st Dep't 1999); *Clark v. Somers,* 162 A.D.2d 982, (4th Dep't 1990); *Conciatori v. Longworth* 259 A.D.2d 459 (2nd Dep't 1999).

"Once a qualified privilege is shown to exist, the burden of proof shifts to the plaintiff to establish that the communication was not made in good faith but was motivated solely by malice. Mere conclusory allegations, or charges based upon surmise, conjecture, and suspicion are insufficient to defeat the claim of qualified privilege." (Citations omitted, emphasis added) Golden v. Stiso, 279 A.D .2d 607, 608 (2nd Dep't 2001).

It will be difficult for Hollander to raise a spectre of malice surrounding this situation to the contrary, Olivo (and Bagqui?) discussed with EPIQ that they would assign FRANCO to another SOS space in the neighborhood or find space for EPIQ at that location so Hollander

could work there, thereby separating the two men from future encounters. See Affidavit s of OLIVO, Baqui and FRANCO, **Exhibits "E", "G "and "H "**.

OLIVO was attempting to provide another work location for Hollander, not get him fired. FRANCO was amenable to relocation to avoid future contact. Franco in no way was trying to make trouble for Hollander (See, FRANCO Affidavit).

There is no evidence that OLIVO and FRANCO were angry or had any malice toward Hollander.

Quite literally, there is no other evidence offered by plaintiff in support of his claim of malice.

In a defamation action, malice has a duel meaning, and a showing of either would suffice to defeat a claim of qualified privilege. At common law, malice meant spite or ill will. In a defamation case, the spite or ill will refers to the speaker's motivation for making the allegedly defamatory comment and not the speaker's feelings about the plaintiff.

"A triable issue is raised only if a jury could reasonably conclude that malice was the one and only cause for the publication" (Internal quotation marks and citations omitted; emphasis added), *Grier v. Johnson*, 332 A.D.2d 846, 848, (3rd Dep't 1996). However, as stated above there is no evidence whatsoever of OLIVO or FRANCO's malice, let along that malice was the one and only cause for the publication. In fact, SOS by OLIVO's investigation gave it a good faith, non-malicious cause for giving over the incident report o EPIQ. Consequently, there is no triable issue of fact on the question of malice under the "spite or ill will" definition of that word.

The other definition of "malice" is that the speaker made the statement with knowledge that it was false or with reckless disregard as to the whether it was a false or not. "Under this standard, plaintiff must demonstrate that the statements were made with a high

degree of awareness of their probable falsity" (Internal quotation marks and citations omitted, emphasis added); Id.

In this case, there is no evidence that OLIVO or FRANCO knew the statements to be false, or that the statements were made by OLIVO or FRANCO with reckless disregard as to their falsity. Indeed, OLIVO and FRANCO had a good faith belief in the truth of the statements, having experienced or investigated the matter and the incident report was shared with EPIQ after the matter was investigated.

However, even if OLIVO did not undertake an investigation, the Court of Appeals has said that a failure to investigate, standing alone, does not establish actual malice. *Sweeney v. Prisons Legal Services of NY*, 84 N.Y.2d 786 (1995).

As stated earlier, plaintiff offers nothing more than his speculation and conjecture in support of his claim of malice against OLIVO and FRANCO. In fact, no evidence of malice was offered particularly of the type that would suffice to strip them of their qualified privilege from liability in this action.

Accordingly OLIVO and FRANCO are entitled to a qualified privilege and are, therefore, entitled to summary judgment.

OLIVO and FRANCO ARE ENTITLED TO SUMMARY JUDGMENT BECAUSE THE ELEMENTS OF A DEFAMATION CAUSE OF ACTION ARE NOT SATISFIED

Should OLIVO and FRANCO be found not entitled to a qualified privilege, plaintiff will have to establish the four elements of a defamation cause of action.

First, plaintiff must prove the statement was defamatory, meaning that the statement had a tendency to expose the plaintiff to public hatred, contempt, ridicule or disgrace. Second he must prove that the statement referred to him. Third, he must prove that OLIVO and FRANCO made the statement to another. And, fourth, plaintiff must prove that the statement was a substantial factor in causing him to suffer a financial loss. See PJI 3:23B.

There is little dispute that an incident report was made about the encounter of plaintiff and FRANCO and that it was communicated to EPIQ. Therefore, we need only focus on the first and fourth elements of a defamation cause of action.

Again, the first element of a defamation cause of action is that the statement had a tendency to expose the plaintiff to public hatred, contempt, ridicule or disgrace. Whether the statement is reasonably susceptible to a defamatory connotation presents a question of law. *Aronson v. Wiersman,* 65 N.Y.2d 592 (1985). Here, the statement was that plaintiff was involved in a work place incident. There is not defamatory.

While being involved in a work place incident or disagreement may not be admirable conduct, it is not of the type that would expose plaintiff to public hatred, contempt, ridicule or disgrace. This is particularly so where, as here OLIVO and FRANCO made no representations as to plaintiff's ill-motive or malice. The bare statement that one was involved in a disagreement without comment about the circumstances of motives is not defamatory.

Additionally, the statements cannot be defamatory because plaintiff could not say whether anyone who was aware of the allegation believed in its truth. In such case, there is no basis for a finding that plaintiff was exposed to public hatred, contempt, ridicule or disgrace.

Even EPIQ whose decision to fire plaintiff is at the heart of this action, only acted after plaintiff failed to respond to its request to meet with EPIQ HR personnel to discuss the matter. See the email from EPIQ as Exhibit **"I"**.

Moreover, plaintiff is the one bringing the incident into the public view voluntarily by the filing of this action.

Consequently, the first element of a defamation cause of action is not satisfied, and so the claim must fail.

The evidence also fails to support the fourth element of plaintiff's defamation cause of action, i.e., that the statement was a substantial factor in causing plaintiff to suffer financial loss.

First plaintiff was an "at will" employee who could have been fired for any reason whatsoever. And so, plaintiff had no assurance or right to continued employment with EPIQ.

Second, EPIQ's decision to terminate plaintiff was made only after plaintiff failed to respond to their request to meet and discuss the incident. There is no evidence that plaintiff's termination was based solely on the incident with Franco.

For the foregoing reasons, the subject statements were not a substantial factor in plaintiff's allegedly sustaining a financial loss.

Upon the foregoing, even if OLIVO and FRANCO were not entitled to a qualified privilege, the plaintiff cannot establish the elements of a defamation cause of action. Accordingly, both are entitled to summary judgment.

PLAINTIFF CANNOT PREVAIL ON HIS TORTUOUS INTERFERENCE WITH CONTRACTUAL RELATIONS OF ACTION BECAUSE THE ELEMENTS OF DEFAMATION CANNOT BE SATISFIED

Plaintiff's causes of action against OLIVO and FRANCO are for tortious interference with contractual relations, the foundation of which is his defamation claim.

First, the predicate for plaintiff's tortious interference claim is his allegation of defamation. However, for each of the reasons set forth above, including "qualified privilege" and plaintiff's inability to establish the elements of defamation, the predicate for his tortious interference cause of action does not exist. In such case, he cannot prevail on this claim.

Second, as set forth in the complaint, plaintiff bases his tortious interference claim upon OLIVO and FRANCO's alleged reckless disregard for the truth of the statements made. However, for each of the reasons set forth above OLIVO and FRANCO acted in good faith in preparation of the incident report and SOS communicated it to a business partner after an investigation of the matter prior to conveying the report to EPIQ. In such case there is no evidence of reckless disregard for the truth.

Third, Plaintiff was an "at will" employee who had no right to continued employment, nor did he have an employment contract with which could have been interfered.

Fourth, as stated above, it appears that plaintiff was terminated only after his employer sought to meet with him about the matter and plaintiff refused. Plaintiff's insubornation to EPIQ, not the underlying incident sealed his fate.

Indeed, the elements of plaintiff's tortious interference with contractual relations claim are largely the same as a defamation claim. See PJI 3:55. Consequently, for the reasons that plaintiff's defamation claim fails, his tortious interference claim fails as well.

For the foregoing reasons, plaintiff's tortious interference claim must be dismissed.

SUMMARY JUDGMENT MUST BE GRANTED AS TO BATTERY AGAINST DEFENDANT FRANCO AS THERE IS NO EVIDENCE THAT IT IS OFFENSIVE IN NATURE

1. To establish a battery, plaintiff must show that the defendant made bodily contact with the plaintiff and that the contact was either offensive in nature or without his consent. *Messina v. Matarasso, 284 A.D.2d 32 (1st Dep't 2001).*

2. The First Department held that once intentional offensive contact has been established, the actor is liable for assault. *Cagliostro v. Madison Square Garden, Inc.*, 73 A.D.3d 594 (1st Dept. 2011).

3. However, in this situation defendant FRANCO never touched plaintiff in an intentional, offensive manner. There is video tape documenting the interaction between plaintiff and FRANCO. A Still image excerpted from that video and the video tape are annexed as **Exhibit "J"**. The affidavit of the custody of control of JOHN REGALADO is annexed as **Exhibit "K"**. There is no action portrayed in this video that could be interpreted to be an intentional offensive touching. Even plaintiff Hollander at paragraph 15 of his original

complaint annexed herein as **Exhibit "A"** refers to the touch as a "grazing" contact and characterizes the touch as "minor".

4. Absence a contact that meets the elements of battery, the defendant FRANCO is entitled to summary judgment.

5. Summary judgment is warranted if a plaintiff is unable to establish any element of the claim. *Frank Crystal & Co., Inc. v. Dillmann*, 84 A.D.3d 704 (1st Dept. 2011).

MOTION TO DISMISS THE ALLEGATIONS IN THE AMENDED COMPLAINT IN LIEU OF ANSWER

ARGUMENT

To prevail on a CPLR 3211(a) (1) motion, the moving party must show that the documentary evidence conclusively refutes plaintiff's allegations. *AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co.*, 5 N.Y.3d 582 (N.Y. 2005); *Lezama v. Cedano,* 119 A.D.3d 497 (1st Dept. 2014). Moreover, conclusory allegations, claims consisting of bare legal conclusions with no fractural specificity, are insufficient to survive a motion to dismiss.

Generally, on a motion to dismiss made pursuant to CPLR 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within cognizable legal theory" (*Leon v. Martinez* 84 NY2d 83, 87-88 [1994]).

However, "[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference (*Biondi v. Beekman Hill House Apt. Corp.* 257 A.D.2d 76, 81 *affd* 94 N.Y.2d 659; *Kliebert v. McKoan* 228 A.D.2d 232, *lv denied* 89 N.Y.2d 802), and the criterion becomes whether the proponent of the pleading has a cause of action not whether he has stated one (*Guggenheimer v. Ginzburg,* 43 NY2d 268, 275; see also *Leon v. Martinez, supra* at 88)". (*Ark Bryant Park Corp. v. Bryant Park Restoration Corp.,* 285 AD2d 143, 150 [2001]). On a

motion to dismiss pursuant to CPLR 3211 (a) (1) "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v. Martinez*, 84 NY2d at 88; see also *Teitler v. Max J. Pollack & Sons,* 288 AD2d 302 [2001]; *Jaslow v. Pep Boys –Manny, Moe & Jack*, 279 AD2d 611, 612 [2001]).

Plaintiff alleges in his Amended Complaint dated March 2, 2016 that defendant OLIVO and FRANCO engaged in an Enterprise of hiring illegal aliens in violation of 8 USC §1324(a) (3) (A). Somehow plaintiff links the communication to his employer of the incident report as an act committed by OLIVO and FRANCO to "silence" Hollander from exposing the criminality of their actions. See p. 33 of Amended Complaint **Exhibit "B"**.

For plaintiff to prevail under 18 USC §1961(5) and §1961(1), he must (a) show the commission of at least two predicate of criminal activity offenses conducted by the defendants (b) which are in furtherance of a common scheme and (c) either constitute or threaten long term criminal activity. See *Lichenstein v. Pollizzotto,* 152 Misc. 2d 241 (1991).

Further, Hollander asserts that this alleged pattern of racketeering activity in violation of 18 USC § 1961 et. Seq. has injured his contractural relationship and seeks triable damages including attorneys' fees under 18 USC§1964(c).

Hollander's amended complaint must be dismissed because he fails to establish that elements required by the statute and fails to show that his alleged loss of his job is related to this.

Once, defendant OLIVO and FRANCO are employees themselves, not an owner or an employer who would engage "illegal immigrant". Olivo is involved in the sales and marketing of office space, he does not hire or fire employees for any entity.

Olivo is not subject to 8 USC §1324 (a) (3) () as he has not harbored any alien as involves his employment at Suites over Soho, LLC (SOS) or in any capacity. As evidenced by the Affidavit of Angela Olivo, a member of SOS who operates the location at 1115 Broadway where the "incident" occurred, all persons who are hired to do work at the location are screened

through a contractor TeamlinkHR. Ms. Olivo's affidavit is annexed as **Exhibit "L"**. In the 11 years SOS has existed, no violations related to 8 USC§1324 has been brought against SOS.

Further to Defendant FRANCO, first he is not an "illegal" alien as plaintiff admittedly called FRANCO during the incident. See Franco affidavit annexed as **Exhibit "E"**. See copy of Social Security number verification system as to Mr. Franco annexed as **Exhibit "M"**. *(The full social security number was redacted to protect privacy of the individual.)*

To, Defendant FRANCO, in his employment as a handyman, for SOS, does not engage or harbor illegal immigrants violation of 8 USC§1324(a)(3)(A).

Present employees have been screened by SOS's Contractor, TeamLINK HR, through the same government system as was done for FRANCO and the results are set forth at **Exhibit "N".** *(Last names and the full social security numbers were redacted to protect privacy of the individuals.)*

Without the establishment of an initial predicate act by plaintiff as to these defendants, there is no basis to show a continuity or pattern of activity that would give rise to recovery under this provision and therefore his action must fail. See *Lichenstein v. Pollizzotto,* 152 Misc. 2d 241 (1991). Also *HJ Inc. v. Northwestern Bill Telephone Co.* 492 U.S. 29 (1989).

DEFENDANTS' MOTION TO DISMISS SHOULD BE GRANTED AS THERE IS NO SHOWING ALLEGED RICO VIOLATIONS WERE CAUSALLY RELATED TO PLAINTIFF'S INJURY

Under *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2nd 532, anyone who seeks recovery under the civil RICO must show that the allege violation is the proximate cause of plaintiff's injury.

The Court in *Holmes* states "some direct relation between the injury asserted and the injurious conduct alleged" must be established, 503 U.S. 258, 268, 112 S. Ct. 1311. Olivo's or Franco's employment of illegal immigrants even if true, did not cause plaintiff to lose his job.

There is no allegation that an illegal was hired in place of Hollander after he was discharged by EPIQ.

PLAINTIFF'S CAUSE OF ACTION FOR TORTIOUS INTERFERENCE WITH PRESENT OR FUTURE CONTRACTUAL RELATIONS MUST BE DISMISSED

The plaintiff's cause of action for Tortious Interference with Contractual Relations – Present and Future should be dismissed in the amended complaint upon the same arguments as set forth in the motion for summary judgment as it is arises from the faulty Defamation claim in the original complaint.

As stated above, the elements of plaintiff cause of action for tortious interference and "prospective" with contractual relations are intertwined contractual relations with his unsupported defamation claim.

ALTERNATIVE RELIEF

If in the court's discretion, the motion for summary judgment as to the causes of action in the original complaint and the motion to dismiss the amended complaint in lieu of an answer are denied, then the defendants OLIVO and FRANCO request that the caption of this action remain as in the original complaint.

It is further requested that EPIQ remains as a party as there were cross claims asserted against EPIQ in their answer to the original complaint. EPIQ's settlement with plaintiff (of which there has never been written documentation) does not destroy OLIVO and FRANCO's claim against it. At the very least, EPIQ should be deemed a third party defendant based on the cross claims.

Further, in the case of denials of Defendants' motion, the Defendants request 30 days extension of time to serve and file an answer to the amended complaint.

WHEREFORE, it is respectfully requested that the defendants OLIVO and FRANCO's motion for summary judgment as to all causes of action in the original complaint and be granted

and that the defendants OLIVO and FRANCO's motion to dismiss the "amended" complaint in its entirety be granted and for such other and further relief that this court may find to be just proper and appropriate.

Dated: New York, New York
April 26, 2016

Yours, etc.,

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