2012 WL 4335428

NOT DESIGNATED FOR PUBLICATION
Court of Appeal of Louisiana,
First Circuit.

James LODATO, III
v.
Kandace LeBOEUF and National Oil Well Varco, LP.

No. 2012 CA 0152. | Sept. 21, 2012.

Appealed from the Twenty–Second Judicial District Court, In and for the Parish of St. Tammany, State of Louisiana, Suit Number 2009–14001, Honorable William J. Knight, Presiding.

Attorneys and Law Firms

Anthony J. Glorioso, Metairie, LA, for Plaintiff/Appellant, James Lodato, III.

Re#e E. Thorne, Daisy M. Guardián, New Orleans, LA, for Defendants/Appellees, Saia Motor Freight Line, Inc., Vivian Twilbeck, and Victoria Moorehead.

Sidney J. Angelle, Eric B. Berger, New Orleans, LA, for Defendant/Appellee, Victory Packaging, LP.

Jack E. Truitt, Virginia Erwin Sirera, Nancy N. Butcher, Jennifer Cortes Poirier, Ingrid Cruz, Covington, LA, for Defendant/Appellee, Robert Babin.

Before CARTER, C.J., GUIDRY, and GAIDRY, JJ.

Opinion

GUIDRY, J.

***1** Plaintiff, James Lodato, HI, appeals from a judgment of the trial court granting summary judgment in favor of defendants, Robert Babin and Victory Packaging, LP (Victory), and dismissing his claims against them with prejudice. Lodato also appeals from a judgment of the trial court sustaining an exception raising the objection of no cause of action filed by Saia Motor Freight Inc. (Saia), Vivian Twilbeck, and Victoria Moorehead. For the reasons that follow, we affirm both judgments.

FACTS AND PROCEDURAL HISTORY

James Lodato, III was a sales representative employed by Saia. As a sales representative, Lodato was required to call upon corporate customers for the purpose of securing transportation services. However, in June 2009, Saia terminated Lodato's employment.

On July 10, 2009, Lodato filed a petition for damages, naming Kandace LeBoeuf and her employer, National Oil Well Varco, LP (National), as defendants. Lodato alleged that LeBoeuf, while acting in the course and scope of her employment, contacted a representative of Saia sometime prior to June 5, 2009, and made allegations of alleged inappropriate conduct by Lodato. According to the petition, such allegations were false and were made with malicious intent and resulted in Saia's decision to terminate Lodato's employment.

Thereafter, on July 16, 2010, Lodato filed a first supplemental and amending petition, naming Saia, Vivian Twilbeck, Robert Babin, and Victory as additional defendants. Lodato alleged that Twilbeck was aware of the allegations that LeBoeuf communicated to Saia, and Twilbeck subsequently communicated these allegations to Babin. Lodato alleged that Twilbeck requested that Babin lodge a complaint against Lodato, and that Babin subsequently composed a handwritten note dated June 9, 2009, which Babin provided to Twilbeck. Lodato alleged that the contents of the note were false and were made with malicious intent, and as a result of the contents of the note, Saia terminated his employment.

Babin and Victory filed a motion for partial summary judgment, asserting that Lodato cannot prove that Babin, with actual malice or other fault, published a false statement with defamatory words that caused Lodato damages. Following a hearing on November 10, 2010, the trial court passed on Babin and Victory's motions for partial summary judgment to allow for the taking of Babin and Twilbeck's depositions. Thereafter, on March 29, 2011, Babin and Victory re-urged their motions for summary judgment.

On May 20, 2011, Lodato filed a second supplemental and amending petition, naming Victoria Moorehead, another employee of Saia, as an additional defendant. Lodato alleged that during the course of events already described, Moorehead became aware of the allegations that LeBoeuf communicated to Saia and contacted LeBoeuf by telephone, flew to New

Orleans and met with Twilbeck, and Twilbeck personally visited LeBoeuf. Lodato also alleged that Moorehead contacted Saia's human resources representative to advise him that a complaint had been made by Babin and also contacted Saia's regional vice president seeking authority to terminate Lodato. Lodato alleged that on June 10, 2009, Moorehead caused a handwritten note to be transmitted to individuals at Saia and to be made a permanent part of Lodato's personnel file. Lodato alleged that Twilbeck, Moorehead, and Babin conspired to prepare the complaint reflected in the handwritten note dated June 10, 2009. Finally, Lodato alleged that the allegations made by Babin concerning his meetings with Lodato are false, unsubstantiated and were made with malicious intent; the handwritten note by Moorehead, along with verbal and electronic communications, were also false, unsubstantiated and were made with malicious intent; and that the combined efforts of defendants led to his wrongful discharge.

***2** Following a May 25, 2011 hearing on Babin and Victory's motions for summary judgment, the trial court signed a judgment on June 29, 2011, granting summary judgment in favor of Babin and Victory and dismissing all of Lodato's claims against them with prejudice. [1]

1 Lodato has separately appealed from this judgment, which is addressed in *Lodato v. LeBoeuf,* 2012CA0150 (La.App. 1st Cir.9/21/12) (unpublished opinion).

Thereafter, on June 20, 2011, Saia, Twilbeck and Moorehead filed an exception of no cause of action, asserting that Louisiana law does not provide for a cause of action for wrongful discharge. Additionally, on July 22, 2011, Victory filed a motion for summary judgment, asserting that based on allegations in the second supplemental and amending petition, Lodato cannot prevail on such claims against Victory because Louisiana law does not recognize a tort for wrongful discharge nor is there evidence that Victory or its employee, Babin, were part of any kind of a conspiracy.

Following a hearing on the exception of no cause of action and motion for summary judgment, the trial court signed a judgment sustaining the exception in favor of Saia, Twilbeck and Moorehead and dismissing Lodato's claims against them with prejudice. The trial court also signed a judgment granting summary judgment in favor of Victory and Babin, dismissing Lodato's second supplemental and amending petition with prejudice. [2] Lodato now appeals from these judgments.

2 At the hearing on the motion for summary judgment, Babin's counsel stated that he had filed a motion adopting Victory's motion for summary judgment. Although the court could not recall any such motion, and we are unable to locate said motion in the designated record on appeal, Lodato's counsel stated that he had no objection to the judgment reflecting that the motion was granted as to both Babin and Victory.

DISCUSSION

No Cause of Action

The peremptory exception raising the objection of no cause of action is designed to test the legal sufficiency of the petition by determining whether the plaintiff is afforded a remedy in law based on the facts alleged in the pleading. *Fink v. Bryant,* 01–0987, p. 3 (La.11/28/01), 801 So.2d 346, 348–349. The function of the objection of no cause of action is to question whether the law extends a remedy to anyone under the factual allegations of the petition. *Fink,* 01–0987 at pp. 3–4, 801 So.2d at 348. No evidence may be introduced to support or controvert the objection that the petition fails to state a cause of action. *Fink,* 01–0987 at p. 3, 801 So.2d at 349. The exception is triable on the face of the petition, and for purposes of determining the issues raised in the exception, the well-pleaded facts in the petition must be accepted as true. *Fink,* 01–0987 at p. 4, 801 So.2d at 349. A petition should not be dismissed for failure to state a cause of action unless it appears beyond doubt that the plaintiff can prove no set of facts in support of any claim. *Fink,* 01–0987 at p. 4, 801 So.2d at 349. Any doubts are resolved in favor of the sufficiency of the petition, *Van Hoose v. Gravois,* 11–0976, p. 6 (La.App. 1st Cir.7/7/11), 70 So.3d 1017, 1021.

The burden of demonstrating that the petition states no cause of action is on the mover. *Ramey v. DeCaire,* 03–1299, p. 7 (La.3/19/04), 869 So.2d 114, 119. In reviewing the judgment of a trial court on an exception of no cause of action, an appellate court conducts a *de novo* review, because the exception raises a question of law, and the trial court's decision is based only on the sufficiency of the petition. *City of Denham Springs v. Perkins,* 08–1937, p. 12 (La.App. 1st Cir.3/27/09), 10 So.3d 311, 321–322, *writ denied,* 09–0871 (La.5/13/09), 8 So.3d 568.

***3** Louisiana Civil Code article 2749 states:

> If, without any serious ground of complaint, a man should send away

> a laborer whose services he has hired for a certain time, before that time has expired, he shall be bound to pay to such laborer the whole of the salaries which he would have been entitled to receive, had the full term of his services arrived.

Further, La. C.C. art. 2747 provides that "[a] man is at liberty to dismiss a hired servant attached to his person or family, without assigning any reason for so doing." Accordingly, where an employee is employed for an indefinite term, Louisiana law allows the employment relationship to be terminated at the will of either party. *Stevenson v. Lavalco, Inc.*, 28,020, p. 2 (La.App. 2nd Cir.2/28/96), 669 So.2d 608, 610, *writ denied,* 96–0828 (La.5/17/96), 673 So.2d 611. An employee hired for an indefinite term has no action against his employer for wrongful discharge. *Hoover v. Livingston Bank,* 451 So.2d 3, 5 (La.App. 1st Cir.1984).

In his petition, Lodato does not allege that he was hired for a specific term of employment. Thus, Lodato is an at-will employee, as acknowledged at the hearing on the exception. *See Crooms v. Lafayette Parish Government,* 628 So.2d 1224, 1226 (La.App. 3rd Cir.1993). Accordingly, Saia was at liberty to terminate Lodato at any time, for any reason, without incurring liability for wrongful discharge. Thus, the trial court was correct in finding that Lodato had no cause of action for wrongful discharge against Twilbeck, Moorehead, and Saia.

Further, after reviewing the original petition, first supplemental and amending petition, and second supplemental and amending petition, we find that Lodato has also failed to establish a cause of action for defamation. Four elements are necessary to establish a defamation cause of action: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault (negligence or greater) on the part of the publisher; and (4) resulting injury. *Costello v. Hardy,* 03–1146, p. 12 (La.1/21/04), 864 So.2d 129, 139. The fault requirement is often set forth in the jurisprudence as malice, actual or implied. *Costello,* 03–1146 at p. 12, 864 So.2d at 139.

Lodato alleged that Moorehead, an employee of Saia, transmitted a note, the contents of which Lodato alleges to be false, unsubstantiated and made with a malicious intent, to other individuals at Saia, and that the allegations contained in the note caused Saia to terminate his employment. However, La. C.C.P. art 891(A) provides that a petition must contain "a short, clear, and concise statement of ... the material facts of, the transaction or occurrence that is the subject matter of the litigation." To plead "material facts," the petitioner must allege more than mixed questions of law and fact. Rather, "[t]he Code requires the pleader to state what act or omission he or she will establish at trial." *Fitzgerald v. Tucker,* 98–2313, p. 7 (La.6/29/99), 737 So.2d 706, 713. To plead material facts, a petitioner alleging a cause of action for defamation must set forth in the petition with reasonable specificity the defamatory statements allegedly published by the defendant. *Fitzgerald,* 98–2313 at p. 7, 737 So.2d at 713.

***4** From a plain reading of the face of Lodato's three petitions, Lodato has not alleged what defamatory statements were made, other than generally referencing a January 10, 2009 note. Further, Lodato has not alleged facts supporting his assertion that Moorehead, the alleged author of the note, acted with malice. Malice, for purposes of the tort of defamation, is a lack of reasonable belief in the truth of the allegedly defamatory statement. *Thinkstream, Inc. v. Rubin,* 06–1595, p. 11 (La.App. 1st Cir.9/26/07), 971 So.2d 1092, 1101, *writ denied,* 07–2113 (La.1/7/08), 973 So.2d 730. Accordingly; from our review of the record, we find that Lodato has failed to assert a cause of action for defamation against Moorehead and Saia.

Further, though we recognize that when the grounds of an objection pleaded by peremptory exception may be removed by amendment of the petition, the judgment sustaining the exception shall order such amendment within the delay allowed by the court, the decision to allow amendment of a pleading to cure the grounds for a peremptory exception is within the discretion of the trial court. *See* La. C.C.P. art. 934; *FIA Card Services, N.A. v. Gibson,* 43,131, p. 7 (La.App. 2nd Cir.3/19/08), 978 So.2d 1230, 1235. In the instant case, the trial court, in declining Lodato the opportunity to amend his petition to state a cause of action, noted that Lodato had already amended his petition twice, after extensive discovery. From our review of the record, we find that Lodato has failed to demonstrate that he will be able to remove the grounds for the exception of no cause of action by a third amendment of the petition. Accordingly, the trial court did not abuse its discretion in declining Lodato an opportunity to amend his pleadings.

Finally, to the extent that Lodato alleged a claim for conspiracy to commit the tort of defamation or wrongful discharge, we note that conspiracy, by itself, is not an actionable claim under Louisiana law. *Ross v. Conoco, Inc.*,

02–0299, p. 7 (La.10/15/02), 828 So.2d 546, 552. Rather, it is the "tort which the conspirators agreed to perpetrate and which they actually commit in whole or in part" that constitutes the actionable elements of a claim. *Ross,* 02–0299 at pp. 7–8, 828 So.2d at 552. In order to recover under this theory of liability, a plaintiff must prove that an agreement existed to commit an illegal or tortious act which resulted in the plaintiff's injury. *Aranyosi v. Delchamps, Inc.,* 98–1325, p. 10 (La.App. 1st Cir.6/25/99), 739 So.2d 911, 917, *writ denied,* 99–2199 (La.11/5/99), 750 So.2d 187.

As stated previously, Louisiana law does not recognize a claim for wrongful discharge under the facts of this case. Therefore. Lodato cannot assert a claim for conspiracy to cause wrongful discharge. Further, because we find that Lodato failed to state a cause of action for defamation against Moorehead and Saia, and that the trial court was correct to dismiss Lodato's petitions with prejudice, we likewise find that Lodato cannot show that the defendants were involved in a conspiracy to defame. Therefore, we find no error in the trial court's decision sustaining Twilbeck, Moorehead, and Saia's exception raising the objection of no cause of action and dismissing Lodato's claims against them with prejudice.

Motion for Summary Judgment

***5** Appellate courts review summary judgments *de novo* under the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. *Costello,* 03–1146 at p. 8, 864 So.2d at 137. The summary judgment procedure is expressly favored in the law, and it is designed to secure the just, speedy, and inexpensive determination of civil actions. La. C.C. P. art. 966(A)(2). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B).

The mover has the burden of proof that he is entitled to summary judgment *See* La. C.C.P. art. 966(C)(2). However, if the mover will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather, to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. La. C.C.P. art. 966(C)(2). If the mover has put forth supporting proof through affidavits or otherwise, the adverse party may not rest on the mere allegations or denial of his pleadings, but his response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial. La. C.C.P. art. 967(B).

Because of the chilling effect on the exercise of free speech, defamation actions have been found particularly susceptible to summary judgment. *Kennedy v. Sheriff of East Baton Rouge,* 05–1418, p. 25 (La.7/10/06), 935 So.2d 669, 686. Summary judgment, being favored in the law, is a useful procedural tool and an effective screening device to eliminate the unmeritorious defamation actions that threaten the exercise of First Amendment rights. *See Kennedy,* 05–1418 at p. 25, 935 So.2d at 686.

In order to prevail on a defamation claim, a plaintiff must prove that the defendant, with actual malice or other fault, published a false statement with defamatory words which caused plaintiff damages. *Costello,* 03–1146 at p. 12, 864 So.2d at 139–140. If even one of the required elements of the tort is lacking, the cause of action fails. *Costello,* 03–1146 at p. 12, 864 So.2d at 140.

As noted above, five days prior to the hearing on Victory and Babin's first summary judgment, Lodato filed a second supplemental and amending petition, attempting to restyle the same defamation allegations against Babin as a conspiracy. However, the record demonstrates that this second supplemental and amending petition was not served on Victory until June 6, 2011, after the hearing on the first motion for summary judgment. Accordingly, these claims were not before the trial court at the prior hearing, which fact was acknowledged by the trial court at that hearing. Therefore, Victory and Babin filed another motion for summary judgment as to the conspiracy claims raised in the second supplemental and amending petition.

***6** As noted above, in order to recover under a conspiracy theory of liability, a plaintiff must prove that an agreement existed to commit an illegal or tortious act which resulted in the plaintiff's injury. *Aranyosi,* 98–1325 at p. 10, 739 So.2d at 917. In support of its motion for summary judgment, Victory submitted the deposition of Babin, wherein he stated that he did not communicate his interaction with Lodato to anyone at Saia until June 2009, several months after his one-time meeting with Lodato, when someone from Saia

contacted him to ask why his business with Saia had slowed down. Babin's testimony does not include any testimony of a conspiracy or an agreement between Babin and anyone else to defame Lodato. Additionally, Victory submitted copies of Saia employee emails and a copy of Lodato's deposition, confirming that Twilbeck contacted Babin to merely to find out why Victory's business with Saia had declined.

Accordingly, the burden shifted to Lodato to present evidence of an agreement between Babin and the other defendants to defame Lodato. Lodato, however, did not present any such evidence at the hearing. Therefore, the trial court was correct to grant summary judgment in favor or Victory and Babin and to dismiss Lodato's claims against them as contained in his second supplemental and amending petition.

CONCLUSION

For the foregoing reasons, we affirm the August 31, 2011 judgment of the trial court sustaining Twilbeck, Moorehead, and Saia's exception raising the objection of no cause of action and dismissing Lodato's claims against them with prejudice. We also affirm the September 16, 2011 judgment of the trial court granting Victory and Babin's motion for summary judgment and dismissing Lodato's second supplemental and amending petition with prejudice. All costs of this appeal are assessed to James Lodato, III.

AUGUST 31, 2011 JUDGMENT AFFIRMED; SEPTEMBER 16, 2011 JUDGMENT AFFIRMED.

CARTER, C.J., concurs.

Parallel Citations

2012-0152 (La.App. 1 Cir. 9/21/12)

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