

Weisfeld v MacMillan Holdings, LLC

2009 NY Slip Op 33455(U)

December 8, 2009

Supreme Court, New York County

Docket Number: 102610/2009

Judge: O. Peter Sherwood

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61**

-----X
JARRED WEISFELD,

Plaintiff,

-against-

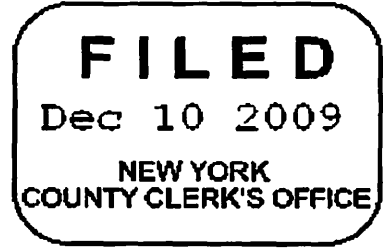
**MACMILLAN HOLDINGS, LLC, MACMILLAN
PUBLISHERS INC., FARRAR, STRAUSS AND
GIROUX, LLC, FABER AND FABER, INC. and
JAIME LOWE,**

Defendants.

-----X
O. PETER SHERWOOD, J.:

**DECISION AND
ORDER**

Index No. 102610/2009



In this action to recover damages for defamation, defendants move for an order pursuant to CPLR § 3211 (a) (1) and (7) dismissing the verified complaint on the ground that the statements claimed by plaintiff to be defamatory are not susceptible of a defamatory meaning and/or constitute non-actionable opinion.

This libel action arises out of a book titled *Digging for Dirt – The Life and Death of ODB* (“the Book”), written by defendant Jaime Lowe (“Lowe”) about deceased rap music artist Russell Jones, who performed as a member of the musical group *The Wu Tang Clan* and under the pseudonyms *Ol’ Dirty Bastard* and/or *ODB* (“ODB”). Plaintiff Jarred Weisfeld (“plaintiff” or “Weisfeld”) co-managed *ODB* together with Cherry Jones, *ODB*’s mother, from May 1, 2003 until *ODB*’s untimely death on November 13, 2004 at the age of 35. The Book was published in November 2008 by defendant Faber and Faber (“F&F”), a Division of defendant Farrar, Strauss and Giroux (“FSG”), both of which are divisions of defendant Macmillan Publishers, Inc. (“MP”), and all of which are owned in the United States by defendant Macmillan Holdings, LLC (“MH”).

The Verified Complaint

The verified complaint asserts a single cause of action for defamation. In the verified complaint, Weisfeld alleges that defendants willfully and maliciously with intent to damage his good name and reputation as an entrepreneur within the entertainment industry published the Book knowing that passages regarding Weisfeld were false and defamatory or that they published the Book

with reckless and wanton disregard of whether the challenged passages were false. Specifically, plaintiff contends he was damaged by three passages in the book which may be categorized as: (1) the press conference statements; (2) the reality show statements; and (3) statements relating to plaintiff's demand for payment of his management fees.

1. The Press Conference Statements

On page 191 of the 257-page Book are statements alleged to have been made in the context of a press conference held in May 2003, after *ODB*'s release from prison on a drug conviction, to announce his signing of a million-dollar contract with Damon Dash of Roc-A-Fella Records. Questions allegedly posed by members of the music industry press and *ODB*'s responses were recounted. Weisfeld contends the following question is defamatory:

Who's that grinning, shady-looking white guy behind you?
That's my man Jarred, and we're doing our thing, we're Roc-A-Fella.

Defendants acknowledge that the author Lowe in relating the exchanges between *ODB* and the press mistakenly believed that parody questions, including the above-referenced question found in a YouTube video version of the press conference, were the questions posed at the actual press conference. Weisfeld states that the actual exchange had been:

Who's your current manager going to be from now on?
That's my man Jarred, and we're doing our thing, we're Roc-A-Fella.

Weisfeld claims that the defamatory description of him as a "shady" character was reinforced by the following passage, also on page 191:

Jarred slinked onstage like he had just been bar mitzvahed. . . .
When Cherry Jones sat me down and told me her son died in jail, she was right. *ODB* was out and he was signed to a flashy label and he was being followed around by VH1 cameras and a hungry twenty-three-year-old manager who was now financially invested in his very being. His breath was 20 percent Jarred's, his face furthering a brand, and his crazy, well it was amped up when necessary.

The latter part of the passage, in Weisfeld's opinion, is a literary allusion to the Shakespeare character *Shylock*.

2. Reality Show Statements

The Book describes a reality television show starring *ODB* (“the Show”), allegedly completed “just weeks before *ODB*’s death”, which was scheduled to be aired on Spike TV, but was cancelled following *ODB*’s death. Weisfeld challenges the passage as based upon unverified and inaccurate information which further denigrated him “by attempting to link the Show, and through the Show Weisfeld, to *ODB*’s death”. The specific passage claimed to be defamatory reads, as follows:

They [Weisfeld and Cherry Jones] also jointly announced the airing of Weisfeld’s second reality TV attempt, *Stuck on Dirty*. In the show, which finished filming just weeks before *ODB*’s death, a man was challenged to hang out with the rapper for five straight days. The concept was for Bob, a mild-mannered Italian guy from Queens, to stay within ten feet of *ODB* over three half-hour episodes. He was electronically tethered to *Dirty* by a mechanism that beeped if he moved too far from the rapper. Each time the alarm sounded, Bob lost \$5,000 of the \$25,000 jackpot. According to a newspaper report, *Dirt*, true to his name and reputation, didn’t bathe the entire shoot. I guess it’s a funny concept if you’re throwing around ideas in a bar, but when you consider that these were his dying days, when he was least functional, least aware, least willing to live, it’s not just sad, but offensive. This was a man on the brink of suicide and suffering from paranoid hallucinations, and yet he was filming a reality show with buzzers buzzing while a strange white guy shadowed his every move.

Weisfeld states that the filming for the show actually finished six months before *ODB*’s death and that Lowe presents her statements as opinion based upon researched and verified facts and gives the reader the impression that she is privy to additional information that is not presented in the Book.

3. Statements Concerning Weisfeld’s Management Fees

The Book refers to the fact that *ODB* did not have a will so that a chaotic situation for control of his estate developed among his wife, his mother, the children *ODB* had fathered, which apparently numbered about a dozen, and the children’s mothers. Weisfeld contends that the highlighted portion of the following passage on p. 244 of the Book is defamatory:

[I]t seems illogical that someone who lived with a death wish and a rumored dozen babies would get out of jail, receive a high-profile contract, and not write a will. *But this was Dirty and really the*

money he left behind was the least of his afterlife worries. His legacy was still under Jarred Weisfeld's management until 2008.

A continuing discussion of the conflicts concerning *ODB's* Estate and the multiple civil lawsuits filed seeking control of the estate appears on pp. 245-246. The relevant portion reads as follows:

To complicate matters, Damon Dash refuses to release *ODB's* last album, *A Son Unique*, because Weisfeld and Jones are demanding final payments to the tune of several hundred thousand dollars on the million-dollar contract negotiated when *Dirt* was alive. The court papers read, "If money is still owed to the estate . . . Mr. Dash does not intend to pay them and will drop his plans to release the record." The album that was set for release in early 2004 and again in the fall of 2006 and again in November 2007 has yet to materialize.

Weisfeld contends that these passages are inaccurate inasmuch as he was specifically excluded from having any say in the estate affairs and, therefore, could not control *ODB's* legacy or demand money from Dash. In addition, he claims he had nothing to do with *ODB's* last album being released. Weisfeld faults Lowe with having relied on internet reports concerning the estate rather than taking the time to review primary source materials contained in the estate file maintained at the Surrogate's Court in Brooklyn for use in the Book. Weisfeld contends that the fact Lowe did not rely on the actual source documents is evidence of her maliciousness and willfulness or gross disregard for the truth and that she wrote the above-referenced passages with intent to damage his good name and reputation as an entrepreneur in the entertainment industry.

Weisfeld states that further evidence of the negative impact of Lowe's book on his reputation can be found in a review of the Book and an interview with Lowe published in *The Village Voice* and authored by Zach Baron, whom Weisfeld contends is Lowe's friend. In the article, Baron refers to Weisfeld as the "scum-sucking final *ODB* manager". Weisfeld contacted *The Village Voice* to inquire as to the reason he was so labeled in the Baron article. The editor of *The Village Voice* offered Weisfeld the opportunity to have his side of the story published. Thereafter, Zach Baron published a follow-up story in *Sound of the City* blog in which he stated that his description of Weisfeld was in reliance upon Lowe's book.

Motion to Dismiss

In lieu of answering, defendants have moved to dismiss the verified complaint pursuant to CPLR § 3211 (a) (1) and (7) on the ground that the statements plaintiff challenges are non-actionable opinions, do not give rise to a defamatory meaning and/or are substantially true. With respect to the statements about *ODB's* press conference, defendants contend that the description of Weisfeld constitutes "colorful hyperbole and opinion", cannot be proved true or false, and is, therefore, not actionable. The statements concerning the reality show do not, as plaintiff contends, suggest that Weisfeld was responsible for *ODB's* death and that plaintiff's suggestion that they do is strained and should be rejected. Lastly, the statements concerning Weisfeld's demand for his management fees on income derived from *ODB's* last album is supported by his attorney's statements in the estate proceeding before the Brooklyn Surrogate's Court that Weisfeld was *ODB's* manager from 2003 to 2008 pursuant to the terms of a management agreement. Defendants annex to their attorney's affirmation in support of the motion to dismiss the supporting and reply affirmations of Weisfeld's attorney on the application to remove the Administrator of *ODB's* estate and the management agreement between *ODB*, his mother Cherry Jones and Weisfeld. Thus, defendants contend that the documentary evidence shows that statements in the Book concerning both Weisfeld's management of *ODB*, as well as his and Cherry Jones' demands for their management fees, are true and cannot support a claim for defamation.

Plaintiff responds that the challenged statements are reasonably susceptible of defamatory meaning and, at this early stage of the litigation, are sufficient to support a cause of action for defamation. Plaintiff contends that the Book's statements suggested that he was unduly greedy - - comparing him to the Shakespearean character *Shylock*, that he played a significant role in holding up *ODB's* final album by demanding that the estate pay his management commissions and that Damon Dash pay the estate such additional monies, and that he contributed to *ODB's* death by having the reality show filmed when *ODB* was on the brink of suicide when in fact filming was completed months before *ODB's* death. Plaintiff argues that Lowe failed to conduct an appropriate fact check of her information and then by referring to newspaper reports and court papers implies the existence of undisclosed facts about Weisfeld.

On a motion to dismiss a pleading pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the Court's role is limited to determining whether the complaint states a cause of action (*see, Frank v Daimler-Chrysler Corp.*, 292 AD2d 118 [1st Dept 2002]). The standard on such motion is not whether a party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements a cause of action can be sustained (*see, Stendig, Inc. v Thorn Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]). The court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). Thus, generally, if the Court determines that the non-moving parties are entitled to relief on any reasonable view of the facts stated, the inquiry is complete and the counterclaim must be declared legally sufficient (*see, Campaign for Fiscal Equity, supra; Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, bare legal conclusions, as well as factual claims, that are inherently incredible or flatly contradicted by documentary evidence are not presumed to be true (*see, McKenzie v Meridian Capital Group, LLC*, 35 AD3d 676 [1st Dept 2006]; *Gershon v Goldberg*, 30 AD3d 373 [1st Dept 2006]). Where the moving party offers evidentiary material, the court must determine whether the proponent of the pleading has a cause of action, not simply whether he, she or it has stated one (*see, Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Kantrowitz & Goldhamer, P.C. v Geller*, 265 AD2d 529 [2d Dept 1999]).

The tort of defamation with respect to written expressions (libel) consists of the publication of a statement about an individual that is both false and defamatory (*see, Brian v Richardson*, 87 NY2d 46, 50-51 [1995]). "Since falsity is a *sine qua non* of a libel claim and since only assertions of fact are capable of being proven false . . . a libel action cannot be maintained unless it is premised on published assertions of *fact*" (*id.*). A determination of whether a particular statement constitutes an opinion or an objective fact is a threshold question of law for the Court to determine (*see, Mann v Abel*, 10 NY3d 271, 276 [2008]; *Aronson v Wiersma*, 65 NY2d 592, 593-94 [1985]) and depends

upon “whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff” (*Brian v Richardson, supra* at 52, quoting *Immuno AG v Moore-Jankowski*, 77 NY2d 235, 254 [1991]). Statements that merely express opinion are not actionable no matter how offensive, vituperative or offensive they may be (*id.*).

The process of distinguishing between protected expressions of opinion and actionable assertions of fact has often presented a daunting task for the courts (*see, Mann v Abel, supra; Brian v Richardson, supra; Guerrero v Carva*, 10 AD3d 105, 111 [1st Dept 2004]). In order to facilitate that analysis, the Court of Appeals enunciated a three-pronged test, the relevant factors of which are as follows: (1) whether the language used has a precise meaning which is readily understood; (2) whether the statements are capable of objectively being proven true or false; and (3) the full context of the entire communication or the broader social context surrounding the communication (*see, Brian v Richardson, supra; Gross v New York Times Co.*, 82 NY2d 146, 153 [1993]). However, even where a statement is found to fall within the realm of expressions of opinion, it will lose its protective shield and become actionable if such statement of opinion “implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it” (*Steinhilber v Alphonse*, 68 NY2d 283, 289 [1986]).

Applying these standards articulated by the Court of Appeals to the matter presently before the Court and deeming the allegations of the complaint as true for purposes of this motion, this Court concludes that the challenged passages of the Book largely constitute protected opinion and are, therefore, not actionable. While the reference to Weisfeld as a “grinning, shady-looking white guy” considered with other passages that Weisfeld “slinked onstage like he had just been bar mitzvahed” and that he was a “hungry twenty-three-year-old manager who was now financially invested in [ODB’s] very being” present a negatively biased view of Weisfeld, the average reader of such statements in the immediate and broader context of the tragic circumstances of ODB’s abbreviated life and the subsequent battle over his estate would understand that the challenged statements represent the critical viewpoint and opinion of the author rather than fact. Nor may it be said, as plaintiff contends, that the statements are actionable because they imply the existence of undisclosed facts detrimental to Weisfeld.

In addition, accepting Weisfeld's allegations with respect to the reality show as suggesting he caused *ODB's* death would require a strained interpretation and a logical leap not supported by the challenged passage or the larger context. Those statements are simply not reasonably susceptible of a defamatory meaning as they do not specifically disparage Weisfeld in his profession, but rather indicate the author's opinion concerning the concept of the reality show in light of *ODB's* alleged fragile mental health. The statements concerning the reality show even when combined with the fact of *ODB's* subsequent death are simply not capable of being proven true or false.

Lastly, the statements made concerning Weisfeld's demand for management fees are supported by the affirmation of Weisfeld's attorney submitted in the Surrogate's Court proceeding and, thus, such statements are not false or otherwise actionable. Accordingly, although one may sift through the Book and argue that some of the author's assertions are based upon false information, viewing the Book as a whole this Court concludes that the statements are not actionable because either the undisputed facts (that Weisfeld was *ODB's* manager and sought management fees in the estate proceeding) are not false or otherwise defamatory or Lowe's opinions as to plaintiff's judgment concerning *ODB's* artistic endeavors or his personal style cannot state a defamation claim.

Conclusion

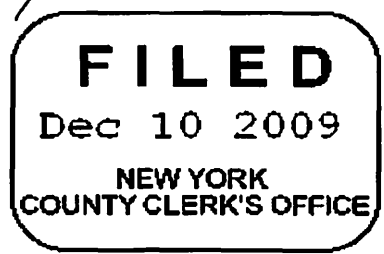
Based upon the above analysis, this Court finds as a matter of law that the challenged passages in the subject Book are not defamatory and it is hereby

ORDERED, that defendants' motion to dismiss the complaint is granted and the complaint is hereby dismissed, without costs or disbursements; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: 12/8/09



ENTER,
O.P. Sherwood
O. PETER SHERWOOD
J.S.C.