

**Greenky v Toussaint**

2010 NY Slip Op 30214(U)

January 14, 2010

Supreme Court, New York County

Docket Number: 603184/07

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Joan A. Madden

PART 11

Index Number : 603184/2007  
**GREENKY, SETH**  
 vs.  
**TOUSSAINT, SALLIE**  
 SEQUENCE NUMBER : 002  
 DISMISS ACTION

INDEX NO. \_\_\_\_\_  
 MOTION DATE 9-24-09  
 MOTION SEQ. NO. \_\_\_\_\_  
 MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:    Yes     No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the unopposed memorandum ~~Decision~~ Decision and Order.

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

**FILED**  
 JAN 22 2010  
 NEW YORK  
 COUNTY CLERK'S OFFICE

Dated: January 19, 2010

[Signature] J.S.C.

Check one:     FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:    DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

-----X  
SETH GREENKY d/b/a GREEN KEY MANAGEMENT,

Plaintiff,

INDEX NO.603184/07

-against-

SALLIE TOUSSAINT and ROCHELLE S. AYLES,

Defendants

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JOAN A. MADDEN, J.:

**FILED**  
JAN 22 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Defendant Sallie Toussaint ("Toussiant") moves pursuant to CPLR 3211(a)(7) to dismiss the complaint against her. Plaintiff Seth Greenky d/b/a/ Green Key Management, LLP ("Greenky") opposes the motion, which is granted for the reasons below.

**BACKGROUND**

Toussaint, a former model and actor, entered into a personal management agreement ("PMA") with Greenky in May 2005. In this action, Greenky asserts a single cause of action against Toussaint for defamation based on statement regarding him posted on Toussaint's MySpace.com blog. Prior to commencing this action, plaintiff brought an action against Toussaint in this court under Index No. 604360/06 asserting claims for breach of the PMA, unjust enrichment and seeking an accounting (hereinafter "the 2006 action"). Toussaint moved for partial summary judgment dismissing the breach of contract claim and to transfer the 2006 action to the Civil Court of the City of New York. By decision and order dated January 14, 2008, Justice Barbara Kapnick denied the motion for partial summary judgment as premature and transferred the 2006 action to the Civil Court.

In the meantime, in September 2007, Greenky filed this action. In addition, to the first

cause of action against Toussaint, Greenky also asserted claims against defendant Rochelle Aytes, an actor who was also represented by Greenky, for defamation and tortious interference with contract. By decision and order dated January 9, 2009, this court dismissed these claims for failure to state a cause of action.

The first cause of action against Toussaint alleges that, "on or about December 1, 2006, ... Toussaint maliciously and intentionally published or caused to be published on an internet web site known as "MySpace.com/Sallie Toussaint," certain false, scandalous, malicious and defamatory statements about [Greenky] and/or from which [Greenky] could be readily identified. Specifically, it is alleged that Toussaint made the following statements on her MySpace blog on December 1, 2006:

there is a leech that latched on to me right after I did the Departed. He promised to manage my career and take it to the next level. He lied about his clients and lied more and more. He even kept my name and likeness on his site during the peak of the Departed and blocked work from me (because when clients googled me during that time his site came up). He is in a lot of trouble for that. I have been getting work on my own through my own efforts, and he has lied to many people taking the credit when he brought nothing to the table... This sleazy male worm has tried to get a cut of my earnings (20%) in fact when he has done nothing to earn it... This showbiz reject should get his daughter, put her out there and leech off of her for doing nothing. What a parasite. I feel sorry for his clients as they will see that they are doing more for him than the opposite. Many people do not respect him and have said very insulting things about him during the time I tried to work with him. He is a loose cannon and would call me in the middle of the night sometimes over and over again. I would be on a date and that fool would be calling over and over again for no reason. Yuk! He has done this to many people and thank goodness have researched and have contact with most.

It is further alleged that Toussaint made the following statements about Greenky (and a

publicist) on her MySpace blog on April 11, 2007:

I foolishly had a parasite manager and pathological [sic] of a publicist latch on to me. They were lazy, they used my name, Scorsese's name, Nicholson, the Departed and whatever to lure people to them and their businesses, but hung themselves...Beware of these two people. They are unethical and sleazy and I pray for them. To the people who have been contacting me references to these two characters, please do not email me asking about them because here are the answers. Just get yourself some good insect spray and move on.

Toussaint now moves to dismiss the defamation claim, asserting that the statements complained of, which appeared on Toussaint's personal blog, constitute nonactionable opinion. Greenky opposes the motion, asserting that the statements are actionable as Toussaint's words, including that Greenky is "a leach" that he "lied" and that he is "a sleazy male worm" "a showbiz reject" "a parasite" and "a loose cannon" defames him in the segment of society in which he works by a disgruntled client. Moreover, Greenky asserts that the fact that the statements were posted on an on personal blog on the internet cannot shield Toussaint from liability for defamation.

### DISCUSSION

On a motion pursuant to CLR 3211 (a) (7), the court is limited to ascertaining whether the pleading states any cause of action and not whether there is evidentiary support for the complaint Guggenheimer v Ginzburg, 43 NY2d 268 (1977). The complaint must be liberally construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true. Id.; Morone v Morone, 50 NY2d 481 (1980).

The elements for a claim for defamation are "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum a

negligence standard, and, it must either cause special harm or constitute defamation per se.”

Dillon v. City of New York, 261 AD2d 34, 38 (1<sup>st</sup> Dept 1999) (citation omitted). The determination of whether a statement expresses fact or opinion is question of law for the court, to be resolved “on the basis of what the average person hearing or reading the communication would take it to mean.” Steinhilber v. Alphonse, 68 NY2d 283, 290 (1986). The Court of Appeals generally analyzes the following factors to distinguish fact from opinion: “(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to ‘signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact.’” Gross v. New York Times Co., 82 NY2d 146, 153 (1993) (quoting Steinhilber v. Alphonse, *supra*).

Applying these factors, the courts have found that statements of opinion not based in fact that criticize the job performance of a plaintiff are statements of opinion, which are not actionable. See e.g., Aronson v. Wiersma, 65 NY2d 592, 593-594 (1985)(holding that statements that defendant “is neglectful of her job” and is “not doing her job” are a “general reflection upon plaintiff’s character [and]... does not defame plaintiff in her trade or profession”); Williams v. Varig Brazilian Airlines, 169 AD2d 434, 438 (1<sup>st</sup> Dept), appeal denied, (1991)(letter concerning plaintiff’s work and attitude are expressions of opinion which do not constitute defamatory statements); Epstein v. Board of Trustees of Dowling College, 152 AD2d 534 (2d Dept 1989)(statements in letters to the editor in college newspaper accusing college professor of

“lying, deceiving, making false promises, not advising or ill advising, and misleading” are protected statements of opinion); Miller v. Richman, 184 AD2d 191 (4<sup>th</sup> Dept 1992)(statements by attorneys in law firm that plaintiff was one of the worst secretaries in the firm were nonactionable expressions of opinion); Howard v. Alford, 229 AD2d 996 (4th Dept 1996)(statement by manager in newspaper article that the plaintiffs were terminated from their employment as they “were not producing as they should” are statements of constitutionally protected opinion).

Here, as in the above cited cases, certain of the words and phrases used by Toussaint to describe Greenky on her MySpace blog of December 1, 2006, and in particular that he is “a leech,” “a sleazy male worm” “a showbiz reject” “a parasite” “a loose cannon” fall into this category and constitute constitutionally protected opinion regarding Greenky’s performance of his duties as a manager. Likewise, certain words and phrases in the second posting on the MySpace blog on April 11, 2007, are also not actionable since they are constitutionally protected statements of opinion. These include Toussaint’s statements that Greenky is a “parasite manager” “pathological (sic)” “lazy” “unethical and sleazy.”

That being said, however, certain other statements made by Toussaint including on the December 1, 2006 blog that Greenky “kept my name and likeness on his site during the peak of the Departed and blocked work from me” and that Toussaint was “getting work from her own efforts, and he lied to many people taking the credit when he brought nothing to the table” are factual. Likewise, the statement on the April 11, 2007 blog that Greenky “used my name .... to lure people to his business,” is factual. These factual statements, if proven by Greenky to be false, provide a potential basis for a defamation claim. See Brown v. Albany Citizens Council

Alcoholism, Inc., 199 AD2d 904 (3d Dept 1993)(discharged employee of not-for-profit corporation stated a cause of action for defamation based on statements made by the not-for-profit's executive directors at a meeting accusing plaintiff of mismanaging funds, recommending possible disciplinary action, and indicating that fraudulent financial reports were submitted by plaintiff).

Accordingly, the motion to dismiss must be denied to the extent that the MySpace blogs at issue contained statements about Greenky that are factual in nature. That being said, however, those parts of the statements identified above as non-actionable statements of opinion do not provide a basis for a defamation claim.

Finally, given the nature and limited extent of the actionable portions of the first cause of action, this action is being transferred to the Civil Court of the City of New York in accordance with annexed order. Once this action is transferred to the Civil Court, Toussaint may seek to consolidate it with the 2006 action.

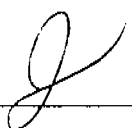
**CONCLUSION**

In view of the above, it is

ORDERED that the motion to dismiss the first cause of action against defendant Sallie Toussaint is granted only to the extent of finding that the above identified statements of opinion are not actionable; and it is further

ORDERED that the remainder of the action, i.e. the remaining portion of the first cause of action, is transferred to the Civil Court of the City of New York in accordance with the annexed order.

DATED: January 14, 2010

  
\_\_\_\_\_  
J.S.C.

**FILED**  
JAN 22 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

At an Individual Assignment Part 11 of the Supreme Court of the State of New York, held in and for the County of New York, at the courthouse thereof in the County of New York, City, and State of New York, on the 17 of JULY, 2010

PRESENT:

HON: JOAN MADDEN  
JUSTICE.

PRE-NOTE OF ISSUE

ORDER OF TRANSFER-325(d)

Greenly  
vs.  
Toussaint

County Clerk's

Index No. 603184 / 18 / 20 07

It appearing that the Civil Court of the City of New York has jurisdiction of the parties to this action and pursuant to Rule 202.13(a) of the Uniform Civil Rules for the Supreme Court and the County Court, it is

ORDERED, that this cause bearing Index Number 603184/07 be, and it hereby is, removed from this court and transferred to the Civil Court of the City of New York, County of New York, and it is further

ORDERED, that the clerk of New York County shall transfer to the clerk of the Civil Court of the City of New York, County of New York, all papers in this action now in his possession, upon payment of his proper fees, if any, and the clerk of the Civil Court of the City of New York, County of New York, upon service of a certified copy of this order upon him and upon delivery of the papers of this action to him by the clerk of the County of New York, shall issue to this action a Civil Court Index Number without the payment of any additional fees, and it is further

ORDERED, that the above-entitled cause be, and it is hereby, transferred to said Court, to be heard, tried and determined as if originally brought therein but subject to the provisions of CPLR 325(d).

ENTER,

[Signature]  
HON. JOAN A. MADDEN  
J.S.C.