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

AM

PRESENT: JANE S. SOLOMON Justice PART 55

Index Number : 117363/2009
HUMANE LEAGUE OF PHILADELPHIA
VS.
BERMAN AND CO.
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

E 11/3/10 ec

INDEX NO.
MOTION DATE 8/13/10
MOTION SEQ. NO.
MOTION CAL. NO.

this motion to/for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-6
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided by the annexed memorandum decision and order

NB PC set at end of decision for Nov 22

FILED
NOV 04 2010
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Dated: 11/1/10

JANE S. SOLOMON J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 55

THE HUMANE LEAGUE OF PHILADELPHIA, INC. and BRYAN PEASE,

Plaintiffs,

INDEX NO. 117363/09

-against-

DECISION & ORDER

BERMAN AND COMPANY, CENTER FOR CONSUMER FREEDOM, RICHARD BERMAN, DAVID MARTOSKO, THE NEW YORK TIMES, MICHAEL HARDWOOD, BOB SARBAN, ZIGGY NUNYA, DUCKWACKER, OURICLE, TIPPHILLBILL, CUSETOWNGIRL, and DOES 1-100,

Defendants.

JANE S. SOLOMON, J.:

In this action for defamation, defendants Center for Consumer Freedom (CCF), Berman and Company (Berman and Co.), Richard Berman (Berman), David Martosko (Martosko) (together, CCF defendants), and the New York Times (the Times) (together, moving defendants) move, pursuant to CPLR 3212, for summary judgment, dismissing the first two causes of action.

BACKGROUND

Berman and Co. is a Washington, D.C. public affairs firm which provides research, communications, and advertising services. CCF is a not-for-profit organization, which deals with food-related issues of public concern. Berman is the head, and Martosko is an employee, of both entities.

CCF has been a watchdog for a non-party the Humane

003

Society of the United States (HSUS), a major not-for-profit animal protection organization. In particular, CCF monitors whether HSUS has connections to radical, violent elements within the animal rights movement.

Plaintiff the Humane League of Philadelphia, Inc. (the League) is a not-for-profit animal rights organization which was incorporated in 2005 as Hugs for Puppies, Inc., and, in 2008, assumed its current name (Cooney Aff., ¶ 5). Non-parties Nicholas Cooney (Cooney) and David Lambon (Lambon) are the League's current executive director and one of its former directors, respectively.

On December 11, 2008, CCF ran an advertisement (the Ad) in a hard copy edition of the Times, as well as online on CCF's own website, www.consumerfreedom.com, and on a website dedicated to CCF's monitoring of HSUS, www.humanewatch.org (Complaint, ¶¶ 22-23). The Ad claimed that the League was a "terrorist group" and that HSUS was helping the League raise money (Martosko Aff., exhibit C, the Ad). According to the Ad, the League was first called SHAC Philly, which was later renamed to Hugs for Puppies before assuming its current name. The Ad claimed that SHAC Philly was established as a chapter of non-party SHAC USA, allegedly a violent animal rights group which was convicted in 2006 "on federal terrorism charges" and whose "national leaders remain in federal prison" (*id.*). The Ad also stated that, in

2006, the League's own "president was convicted of Making Terrorist Threats" for, according to the media, threatening to kill the children of a drug company employee (*id.*). The Ad featured a photo (the Photo) of a man and a woman speaking over a loud speaker, as well as a time line (the Time Line) tracing the League's origins to SHAC USA (*id.*).

The first cause of action for defamation is against only the CCF Defendants and the Times. The second cause of action is against only the CCF Defendants for violation of the New York Civil Rights Law (Civil Rights Law), sections 50 and 51 (*id.*, ¶¶ 37-44). The other causes of action are not against the moving defendants.

The CCF Defendants and the Times now move for summary judgment to dismiss the first two causes of action.

DISCUSSION

To obtain summary judgment, a movant must tender evidentiary proof that would establish the movant's cause of action or defense sufficiently to warrant judgment in his or her favor as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "[T]o defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue of fact" (*id.*, quoting CPLR 3212 [b] [internal quotation marks omitted]).

I. Civil Rights Law

The CCF Defendants argue that the League does not have a claim under the Civil Rights Law, sections 50 and 51, because this statute protects only individuals whose name or picture was used for commercial purposes without their consent.

Sections 50 and 51 of the Civil Rights Law "were drafted narrowly to encompass only the commercial use of an *individual's* name or likeness and no more" (*Arrington v New York Times Co.*, 55 NY2d 433, 439 [1982] [emphasis added]; *see also Molina v Phoenix Sound, Inc.*, 297 AD2d 595, 597 [1st Dept 2002] [the statute protects usage of a person's "name, portrait, picture, or voice" "for purposes of advertising or trade"]).

Indisputably, the League, the only plaintiff named in this cause of action, is not an individual, and, as such, does not have a cause of action for violation of the Civil Rights Law, sections 50 and 51 (*see Arrington*, 55 NY2d at 439). Accordingly, it is irrelevant whether or not, according to the complaint, the Ad may have had a commercial purpose to promote the services of Berman and Co. (*see* Complaint, ¶ 43). Therefore, the second cause of action is dismissed.

II. Defamation

"The elements [of 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 [1st Dept 1999]). "The essence of the tort of libel is the publication of a statement about an individual that is both false and defamatory" (*Brian v Richardson*, 87 NY2d 46, 50-51 [1995]; *see also Matovcik v Times Beacon Record Newspapers*, 46 AD3d 636, 637 [2d Dept 2007]).

The League alleges that the following statements in the Ad were defamatory: (1) that the League is a terrorist group; (2) that the League was originally established as SHAC Philly and was a chapter of SHAC USA; (3) that the Photo depicted two individuals affiliated with the League, when, in fact, they were not; and (4) that Cooney threatened to kill the children of a drug company employee (Complaint, ¶¶ 21-36).

A. "Terrorist Group" and Connection to SHAC USA

The moving defendants argue that their characterization of the League as a "terrorist group" is an expression of opinion, which is constitutionally protected speech.

"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*" (*Brian v Richardson*, 87 NY2d at 51 [emphases in the original]). Expressions of opinion are nonactionable (*see id.*). "Whether a particular statement

constitutes an opinion or an objective fact is a question of law" (*Mann v Abel*, 10 NY3d 271, 276 [2008]). To distinguish between actionable statements of fact and protected expressions of opinion, the courts consider: (1) the meaning of the specific language in issue, (2) "whether the statements can be proven true or false, and (3) "the full context of the communication," as well as the "social context and surrounding circumstances" (*id.* [internal citation and quotation marks omitted]). The court "should look to the over-all context in which the assertions were made and determine on that basis whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff" (*id.* [internal citation and quotation marks omitted]).

Here, contrary to the moving defendants' claim, the Ad was not published as a letter to the editor (*see e.g. Immuno AG. v Moor-Jankowski*, 77 NY2d 235, 239 [1991]), or an Op-Ed piece, or an editorial (*see e.g. Mann*, 10 NY3d at 276-277), all of which usually signal to the reader that the piece is an expression of an opinion. Additionally, the Ad states that (1) the League has had ties to SHAC USA, which the FBI called a "'terrorist' group" and which "was convicted on federal terrorism charges"; (2) the League's "president was convicted of Making Terrorist Threats against an employee of a drug company"; and (3) orders of protection have been issued against the League "in order to

protect biomedical research companies ... from violence, vandalism, stalking, and identity theft" (*id.*). The main message of the Ad is that HSUS, which claims to be a mainstream organization, helps a radical, fringe group, the League, with raising money. The tone and language employed are not hyperbolic, but rather appear to accurately portray facts (*see Immuno AG.*, 77 NY2d at 243 ["courts must ... consider the impression created by the words used as well as the general tenor of the expression ..."]). Accordingly, a reasonable reader, on this basis, would believe that describing the League a "terrorist group" is a statement of fact, not an expression of opinion (*see Mann*, 10 NY3d at 276). Therefore, this statement is actionable.

Next, the moving defendants contend that the "terrorist group" statement and the claim that the League has had ties to SHAC USA are substantially true.

"Truth is an absolute defense to a libel action," and this defense "applies as long as the publication is 'substantially true' ..." (*Matovcik v Times Beacon Record Newspapers*, 46 AD3d at 638 [citation omitted]). "The test of whether a statement is substantially true is whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced" (*id.* [internal quotation marks and citation omitted]).

In support, the moving defendants offer a compilation

of different documents that indicate that: (1) SHAC USA has had a Philadelphia address and that a 2002 group e-mail introduced SHAC Philly as a chapter of SHAC USA (Martosko Aff., exhibit A, at CCF 0007-0009); (2) SHAC USA "has launched a relentless campaign of terror" (*id.* at CCF 0015, 2003 FBI Report) against, and was convicted for its "campaign to terrorize," a laboratory which tests products on animals (*id.*, at CCF 0016-0018 [US Attorney's Office, 03/02/06 press release]); (3) Cooney, the League's president, was found guilty by a Pennsylvania court of, among other charges, making "Terroristic Threats [with intent] To Terrorize Another" (*id.*, CCF 0066, Criminal Docket); (4) in 2006, 2007, and 2008, Pennsylvania and New Jersey courts issued temporary restraining orders and permanent injunctions enjoining Cooney, Lambon, Hugs for Puppies, SHAC USA, and other non-parties from, among other things, protesting on the property of, and harassing individuals associated with, the animal testing laboratory, a pharmaceutical company, an accounting firm, and a Philadelphia restaurant (*id.*, CCF 0026-0054), and the League posted legal notices of those orders on its website (*id.*, CCF 0025).

In opposition, the League provides affidavits of Lambon and Cooney, who claim that: (1) SHAC Philly, founded by Lambon, had no connection to SHAC USA, and the two entities never shared an address (Lambon Aff., ¶¶ 4-6, 9); (2) Hugs for Puppies, *Inc.*

(now, the League), was unrelated to the unincorporated and defunct Hugs for Puppies or SHAC Philly (Lambon Aff., ¶¶ 7-8; Cooney Aff., ¶¶ 5-7); (3) the criminal conviction of SHAC USA and its organizers did not implicate the League or its leaders; (4) the restraining orders were not based on judicial determination that the League actually engaged in acts of violence; (5) Cooney's conviction of making "terroristic threats" allegedly resulted from his chanting and holding a sign at a protest and involved no violence or threats to kill anyone (Cooney Aff., ¶¶ 8-10); and (6) the League's activities have been peaceful, such as encouraging universities and restaurants to use cage-free eggs and to eliminate duck paté from their menus (Cooney Aff., ¶¶ 3, 4).

Accordingly, issues of material fact exist as to whether the League has had ties to SHAC USA, and whether its organizers have been involved in acts of violence. Hence, the court cannot determine whether the statements in the Ad, labeling the League a "terrorist group" and showing ties between it and SHAC USA, are substantially true as a matter of law, and, therefore, the motion is denied in this respect.

B. Cooney's Conviction

The Ad states, in relevant part, that "in 2006, the [League's] president was convicted of Making Terrorist Threats against an employee of a drug company. According to a media

report, he threatened to kill her children" (Martosko Aff., exhibit C).

The League alleges that only one newspaper reported the accusation that Cooney threatened to kill someone, which Cooney denied; Cooney, in fact, never threatened to kill anyone; that the crime of "terroristic threats" for which Cooney was convicted is a disorderly conduct type of offense, and that he received only 18 months of probation (Complaint, ¶¶ 30-32).

The moving defendants argue that the statements about Cooney's conviction are protected under Civil Rights Law § 74, which "exempts from civil action any person, firm or corporation for the publication of a fair and true report of any judicial proceeding ..." (*Leder v Feldman*, 173 AD2d 317, 318 [1st Dept 1991] [internal citation and quotation marks omitted]). "[T]he article need not be a verbatim report, but must be substantially accurate" (*id.* [internal citation and quotation marks omitted]).

The moving defendants provide a copy of a criminal docket of the Municipal Court of Philadelphia County, which states that, in November 2006, Cooney was found guilty of "Terroristic Threats W/ Int to Terrorize Another" (Martosko Aff., exhibit B, Criminal Docket, page 3 of 7), among other charges. They also provide an article printed in The Philadelphia Inquirer on June 7, 2007, which states that Cooney "was sentenced to 18 months probation for harassment and terroristic threats after a

female employee [of a pharmaceutical company] accused him of threatening to kill her children. (He denies that.)" (*id.*, exhibit A, at CCF 0068).

Aside from submitting the docket, the moving defendants do not supply any evidence of the facts surrounding Cooney's conviction in the form of a "report of a judicial proceeding;" i.e. court documents or a descriptive judicial decision. Rather, they supply a newspaper article, written months after Cooney's conviction. The article primarily discussed a protest, organized by Cooney, against restaurants that serve foie-gras. In passing, it referenced, without any cited support that "a female employee accused [Cooney] of threatening to kill her children. (He denies that.)" This reference does not constitute a report of a judicial proceeding as contemplated by Civil Rights Law § 74, and does not enjoy its protection.

Accordingly, the statement in the Ad about Cooney's conviction for "Making Terrorist Threats" is a substantially accurate report of judicial proceedings, and, as such, is privileged (*see Leder*, 173 AD2d at 318). The statement that the media reported that Cooney made a threat to a drug company employee is not protected, and an issue of fact exists as to whether that statement is substantially true.

C. The Photo

The League claims that the Photo (attached to Martosko

Affidavit, Ex. C) depicted individuals, who have not been involved with the League (Complaint, ¶ 29). However, as the moving defendants argue, the League does not allege how the Photo can be viewed by an ordinary reader as disparaging it (*see e.g. Beverley v Choices Women's Med. Ctr.*, 141 AD2d 89, 95 [2d Dept 1988]). Additionally, the depicted individuals are not plaintiffs in this action. Accordingly, the allegation that the Photo is defamatory is dismissed.

CONCLUSION

For the foregoing reasons, its is hereby

ORDERED that the motion of defendants Berman and Company, Center for Consumer Freedom, Richard Berman, David Martosko, and the New York Times for summary judgment is granted to the extent that:

(i) with respect to the first cause of action for defamation, the claim based on the statements that plaintiff's president was convicted of making terrorist threats and claims that the photo is defamatory are severed and dismissed; the portion of the defamation claim based upon the "media report" remains;

(ii) the second cause of action for violation of the New York Civil Rights Law, sections 50 and 51, is severed and dismissed,

and the motion is otherwise denied; and it further is

ORDERED that counsel shall appear for a preliminary conference in Part 55, 60 Centre Street, Room 432, New York, NY, on November 22, 2010 at Noon.

Dated: 11/1/10

ENTER:

J.S.C.

JANE S. SOLOMON