

Fox v Albanese

2011 NY Slip Op 30678(U)

March 24, 2011

Supreme Court, New York County

Docket Number: 108169/2010

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON
Justice

PART 55

Index Number : 108169/2010

FOX, DICK

vs.

ALBANESE, ROBERT

SEQUENCE NUMBER : 001

DISMISS

INDEX NO. _____

MOTION DATE 11/22/10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for DISMISS

PAPERS NUMBERED

1-3

4

-/5-6

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 by the annexed memorandum decision and order*

FILED

MAR 23 2011

NEW YORK COUNTY CLERK'S OFFICE

Note

PC on 4/18/11 in part 55

Dated: 3/22/11

J.S.
JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

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

-----X

DICK FOX and DICK FOX ENTERTAINMENT
CO., INC. d/b/a FOX ENTERTAINMENT
COMPANY,
Plaintiffs,

Index No. 108169/2010
DECISION & ORDER

-against-

ROBERT ALBANESE, LAURA ALBANESE, and
LAR ENTERPRISES, INC.,
Defendants.

-----X

FILED

MAR 23 2011

NEW YORK
COUNTY CLERK'S OFFICE

JANE S. SOLOMON, J.:

Plaintiff Dick Fox (Fox) and Dick Fox Entertainment Co., Inc. (Fox Entertainment, collectively Plaintiffs) sue defendants Robert and Laura Albanese and LAR Enterprises, Inc. (LAR) for defamation and breach of contract. The defamation cause of action arises from a series of email postings on LAR's website. The breach of contract cause of action arises from LAR's failure to pay "kill fees" following the cancellation of an event that included an artist that Plaintiffs manage. Defendants move to dismiss the first cause of action for defamation on the ground that they are immune from liability under 47 USC § 230, the Federal Communications Decency Act of 1996 (CDA), and, in the alternative, to convert this motion to one for summary judgment. The motion is decided as follows.

FACTS

Fox is a music manager and producer, and the owner of Fox Entertainment, a music management and production company that represents several notable "oldies" artists and produces in

excess of fifty concerts per year. Robert and Laura Albanese, through their company, LAR, also produce "oldies" music events, in direct competition with Fox Entertainment. Part of defendants' business includes the hosting of a website (www.larentr.com, the Website) that is open to public viewing.

Fox alleges that defendants schemed to damage his reputation to the public at large and within the entertainment community by publishing on the Website false statements that he had threatened defendants in order to prevent LAR from supporting a fundraiser concert hosted by Jon "Bowzer" Bauman, of the Doo-wop band Sha Na Na.

The following statement was published on the Website on May 18, 2010:

As unbelievable as this would sound, another threat was made this past weekend stopping LAR Enterprises from supporting a fundraiser Doo-wop show for women's heart disease The reality of this is if you continue to support these shameless greedy producers/promoters who are making these threats, this will continue and our MUSIC WILL DIE FOREVER. . . .

(Complaint, ¶ 14).

The statement alone is benign. Directly underneath it the following appears:

OUR CUSTOMERS SOUND OFF
THE OPINIONS BELOW ARE THOSE OF STRICTLY OF THE SENDER
AND HAVE BEEN ALTERED FOR LENGTH, IDENTITY PURPOSES AND
IN SOME CASES CONTENT DUE TO THE NATURE OF EMAIL

Beneath this disclaimer, the text of several emails is set forth, including the following:

What has this world come to when people stoop so low as to hurt fundraisers for their own personal gain. We heard that is what Dick Fox . . . [is] doing to the show No one has a right to do that we will spread the word wherever they do business -DW

Rob is it true that . . . Dick Fox tried to hurt the fundraiser . . . Why would anyone hurt a FUNDRAISER? . . . -Z

My husband and I were talking at intermission with another couple and we couldn't believe what they told us. They said that they heard that Dick Fox was mad at LAR because LAR tried to help promote a fundraiser . . . If this is the way these people do business then they can forget our business and all our friends as well. . . . -Maryann M

[F]inally someone stands up and does something for the customer. We know who [sic] you are talking about 'Dick Fox' and he will never see our faces again for any Doo-wop shows and we hope everyone follows along. . . . -Mike

Let me know who that promoter is so I don't go to any of his shows, I think it may be that guy Dick Fox, I've heard a lot of people complain about him. . . . -Larry and Kathy d

(Complaint, ¶ 15; text of the emails is also found in an email chain attached as Ex. A to the Atlas affidavit in further support). Asserting he never made such a threat, Fox sues on the grounds that he is defamed by the emails from which he appears to be identified as the person who made the threat. Not only that, Plaintiffs allege, upon information and belief, that the emails are attributed to fictitious persons and were written by the defendants.

Unlike a typical website message board, where blank fields are available for users to post their comments directly

and immediately on the page, visitors to the LAR Website are directed to email their responses to LAR at its email address. Robert Albanese then reads, edits and formats these emails before posting them to the Website.

DISCUSSION

Defendants argue that the defamation claim should be dismissed because documentary evidence shows that they were not the authors of the emails and, that, as a result, the CDA completely shields them from liability. Plaintiffs counter that, although LAR did not name Fox as the one who made the threat, the publication of the emails below the text about the threat implies LAR's agreement with the commentators who identify Fox. Defendants contend that LAR's editing and placement of the material constitutes "development of information," which is outside the scope of the CDA and when viewed as a whole, is defamatory.

Section 230 of the CDA provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider," (CDA § 230[c][1]), and that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section" (id., § 230[e][3]).

"Interactive computer service" is defined as "any information service, system or access software provider that

provides or enables computer access by multiple users to a computer server . . ." (CDA § 230[f][2]). An "information content provider" is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the internet or any other information computer service" (CDA § 230[f][3]).

Through the CDA, Congress granted interactive computer services immunity from liability for publishing false or defamatory material so long as the information was provided by another party. Similarly, "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions--such as deciding whether to publish, withdraw, postpone or alter content--are barred" (*Shiamili v. Real Estate Group of New York, Inc.*, 68 AD3d 581, 582 [1st Dept., 2009] citing *Zeran v America Online, Inc.*, 129 F3d 327, 330 [4th Cir 1997], cert denied 524 US 937 [1998]). However, an internet computer service is liable for its own speech, or for its material contribution to the content of a third party's statement (*Id.* at 583).

The first question before this court is whether the procedure of having messages sent to an email address for review and potential editing before being posted, instead of having authors post messages directly, changes the status of LAR from an internet computer service to an information content provider.

The *Shiamili* court noted that "development of

information," a core component in exposing a party to internet-defamation liability, "means something more substantial than merely editing portions of an e-mail and selecting material for publication" (*Shiamili*, at 582 [citing *Batzel v Smith*, 333 F3d 1018, 1031 [9th Cir 2003], cert denied 541 US 1085 [2004]]). Accordingly, Plaintiffs' first argument does not remove the emails at issue herein from the CDA.

However, Plaintiffs next argue that the individual defendants wrote the emails and attributed them to fictitious people; if true, they claim a prima-facie case for defamation is made that is not barred by the CDA. Defendants respond with the unedited emails, including the senders' addresses, and affidavits from the individual defendants denying authorship, denying having used the senders' addresses as their own, (Defendants Affidavits, attached to Coleman Affirmation, Ex. C; Emails, attached to Coleman Affirmation, Ex. B). They argue that, in any event, when viewing the chain as whole no reasonable reader would understand the comments in it to be defamatory.

Plaintiffs seek discovery to prove that the emails are fake. They would be entitled to it if the statements could be held to be defamatory.¹ Therefore, the next question that must be determined is whether the Webpage is defamatory.

¹ In *Shiamili*, the plaintiff did not allege that the defendant authored the defamatory statements. Because of this omission, the court did not entertain plaintiff's argument that it needed discovery to determine if a cause of action existed.

The elements of a defamation claim 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 A.D.2d 34, 38 [1st Dept 1999]). Statements that express opinion are not actionable, no matter how offensive they may be (see, *Immuno AG. v. Moor-Jankowski*, 77 NY2d 235 [1991]). The court's role is to determine whether a reasonable reader would have believed that the statements were conveying facts about the plaintiff (*Millus v. Newsday*, 89 NY2d 840, 842 [1996]; *Silverman v. Clark*, 35 AD3d 1, 14 [1st Dept., 2006]).

On a motion to dismiss, the court must deem all allegations contained in the pleadings as true, and give the pleader every favorable inference (*Halperin v. Salvan*, 117 AD2d 544 [1st Dept., 1986]).

The "Our Customers Sound Off" section of the Website is not defamatory as a matter of law, even when the separate messages on the Website are read as a single statement. The only concrete factual statement written is that a "threat was made this past weekend stopping LAR Enterprises from supporting a fundraiser" (Complaint, ¶ 14). The nature of the "threat" (whether it was economic/business-related or physical) is not revealed; nor are any specifics stated. Moreover, it does not directly make reference to the Plaintiffs. As previously

mentioned, this "factual statement," in and of itself, is not defamatory. In the subsequent email responses, the letter writers either pose questions asking if Fox or Fox Entertainment is the entity in question, opine that Fox or Fox Entertainment is the entity, or state that he or she heard from others that Fox was "mad" at the defendants. When viewed within the context of the "opinion page," a reasonable reader would understand each email as opinion.

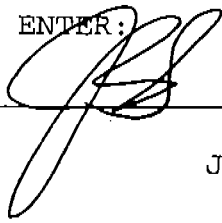
Plaintiffs' claim is that the emails, allegedly written by the defendants themselves, serve the purpose of informing the reader that Fox or Fox Entertainment, in fact, made the threat that derailed the defendants expected support for a fundraiser--creating a screen for the defendants to defame Plaintiffs by proxy. This complicated argument is unpersuasive. A reasonable reader of a website would not assume that the comments in the opinion section, attributed to other individuals, are those of the defendants. Such a reader would see that other individuals have opined or believe that Plaintiffs made the threat, but could not ascertain that it was made by a plaintiff. Accordingly, because a reader would not have believed that the statements were conveying facts about the Plaintiffs (*Millus*, 89 NY2d at 842), the defamation cause of action must be dismissed.

In light of the foregoing, it hereby is

ORDERED that the Defendants' motion to dismiss the first count of the complaint is granted; 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 April 18, 2011, at 11 AM, with regards solely to the second cause of action.

Dated: 3/27/11

ENTER: 

J.S.C.

JANE S. SOLOMON

FILED

MAR 23 2011

**NEW YORK
COUNTY CLERK'S OFFICE**