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

PRESENT: SALIANN SCARPULLA Justice PART 19

Index Number : 100776/2011
RASHADA, MELODY
VS.
NEW YORK POST
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
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 _____

FILED
AUG 17 2011
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

Motion and cross-motion are decided in accordance with accompanying memorandum decision.

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

Dated: 8/12/11

Saliann Scarpulla J.S.C.
SALIANN SCARPULLA

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

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MELODY RASHADA,

Plaintiff,

-against-

THE NEW YORK POST, NYP HOLDINGS, INC. and PATRICK DUNLEAVY,

Defendants.

----------X

Index No. 100776/11
Submission Date: 6/15/2011
Sequence Numbers: 001

DECISION AND ORDER

For Plaintiff:	For Defendants:
John R. Lewis, Esq.	Hogan Lovells US LLP
36 Hemlock Drive	875 Third Avenue
Sleepy Hollow, New York 10591	New York, New York 10022

Papers considered in review of this motion to dismiss:

Notice of Motion..... 1
Mem of Law in Support..... 2
Affs in Support..... 3
Mem of Law in Opp..... 4
Reply Mem of Law 5

HON. SALIANN SCARPULLA, J.:

In this defamation action stemming from a New York Post article (the "article"), defendant Patrick Dunleavy ("Dunleavy") and defendant NYP Holdings Inc., ("NYP") (collectively the "defendants") move to dismiss plaintiff Melody Rashada's ("Rashada") complaint pursuant to CPLR 3211(a)(7) and (8).[1]

On September 2, 2010, the New York Post (the "Post") printed an article written by Dunleavy in the paper's "Post Opinion" section. The article, entitled "Converts to Terror" raised the issue of "how the four accused [of bombing synagogues in the Bronx]

[1] "The New York Post" is also named as a defendant in this action. However, defendants attest that "the New York Post" is named in error.

were radicalized to the point where they'd even *consider* plotting to bomb synagogues in The Bronx and shoot down aircraft with missiles" (emphasis in original).

In his article Dunleavy noted that the four accused men were all former inmates and after release, all four inmates attended a mosque in Newburgh, NY. Rashada was one of three imams at this mosque. Rashada and her two fellow imams also worked for the Department of Corrections. Rashada is neither mentioned by name, nor referred to, at any other point in the article. Dunleavy concludes by recommending that the connection between the prison system, radicalization of inmates, and the Newburgh mosque be investigated further.

Rashada commenced this action on January 20, 2011, alleging two causes of action: (1) libel based on the column itself; and (2) libel by implication. Rashada argues that the article itself is libelous because it is false, defamatory and "leads the reasonable reader to believe that, in her capacity as a Muslim chaplain in the New York prison system, plaintiff 'radicalizes' prison inmates, possibly including the four 'Newburgh defendants,' and encourages inmates to undertake acts of terrorism." In her second cause of action alleging libel by implication, Rashada contends that the entire column, including its title, when read together implies "to a reasonable reader, the patently false accusation that plaintiff engages in the radicalization of prison inmates and encourages them to engage in acts of terrorism."

Dunleavy moves to dismiss the action for lack of personal jurisdiction pursuant to CPLR 3211(a)(8). Dunleavy asserts that CPLR 302(a)(2) and (3) contain defamation exceptions applicable to him and that CPLR 302(a)(1) does not apply because the article

is the only business that he has transacted in New York. Dunleavy further avers that he does not live in New York nor does he own property in New York and therefore there can be no basis for personal jurisdiction. In opposition, Rashada argues that Dunleavy's "single act" of having the article published in New York is a sufficient business transaction to establish jurisdiction pursuant to CPLR 302(a)(1), and that Dunleavy's contacts with New York go beyond the article because he worked in the state for twenty-six years, and his website states that he has been interviewed in New York.

All defendants also move to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7). The defendants argue that the specific language in the article, its appearance and overall connotation show that the article is protected opinion and does not report fact, and as such Rashada may not maintain a defamation cause of action. Rashada argues that the mere placement of the article does not mean that it is an opinion, and not factual, and that the article has a precise meaning which is readily understood. Rashada also contends that the accusation of a crime can be proven true or false and is thus actionable.

Discussion

"On a motion addressed to the sufficiency of the complaint pursuant to CPLR 3211(a)(7), the facts pleaded are presumed to be true and accorded every favorable inference. However, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration." *Franklin v. Winard*, 199 A.D.2d 220, 221 (1st Dep't

1993); *see also Leder v. Spiegel*, 31 A.D.3d 266 (1st Dep't 2006) *affd* 9.N.Y.3d 836 (2007).

In the context of a defamation action, "expressions of opinion, as opposed to assertions of fact, are deemed privileged and no matter how offensive, cannot be the subject of an action for defamation." *Mann v. Abel*, 10 N.Y.3d 271, 276 (2008). The question of whether a statement is fact or opinion is a question of law for the court. *Mann*, 10 N.Y.3d at 276; *Gross v. New York Times Co.*, 82 N.Y.2d 146, 152-153 (1993); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 380-1 (1977).

In *Gross v. New York Times Co.*, 82 N.Y.2d 146 (1993), the Court of Appeals reviewed New York's defamation jurisprudence and iterated the three factors which must be considered when determining if an item, such as the article, is protected 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*, 82 N.Y.2d 146 at 153 (quoting *Steinhilder v. Alphonse*, 68 N.Y.2d 283, 289 (1986)). Under New York law, "instead of parsing out and evaluating the challenged statements in isolation, New York courts look to the immediate context and the broader social context of the statement." *Levin v. McPhee*, 119 F.3d 189, 197 (2d Cir. 1997); *accord Brian v. Richardson*, 87 N.Y. 2d 46, 51-52 (1995).

In this case, both the context of the article itself and its broader social context indicate that it should be treated as non-actionable opinion. The article was printed under the multicolored and bolded heading "POST OPINION," which alerted all readers that the article they were about to read was the opinion of Dunleavy. *Accord Brian*, 87 N.Y.2d at 53; *Mann*, 10 N.Y.3d at 276-277. Moreover, the broader social context of the article – the radicalization of prison inmates, leading them to engage in terrorist activity – is a topic which is intended to create much discussion and debate, and a topic on which a verifiable conclusion is neither expected nor delivered.

Rashada quotes only the following specific language about her as being false and defamatory:

> What stands out is the prison connection. All four defendants were former inmates. More important, all three imams at the mosque in Newburgh that defendants attended after being released from prison had a connection with the prison system. Imams Salahuddan Muhammad, Hamim Rashada and Melody Rashada worked for the Department of Correctional Services. All had been hired by Warith Deen Umar – who for years headed ministerial services for the New York State prison system.

Rashada does not claim that any of the factual statements about her – (1) that she is an imam at the mosque that defendants attended after being released from prison; (2) that she worked for the Department of Correctional Services; and (3) that she was hired by Warith Deen Umar – are false. Instead, she claims that these concededly true factual statements "intend[s] the reader to believe" that she radicalized prison inmates.

Thus, the only specific factual statements about Rashada in the article are not even alleged to be false. Rashada's spin on these statements – that Dunleavy intended to convey that she is part of a group suspected of "the radicalization" of prison inmates – is

not the only interpretation that may be reached from the above-quoted language and the article as a whole. The article is plainly intended to raise issues, rather than convey specific, objective facts about Rashada's role in the radicalization of inmates.

In sum, the article does not make any definitive accusations against Rashada, but rather the article suggests that the connection between the former inmates and the mosque should be investigated. Rashada correctly points out that the article does not contain an explicit request for an investigation. However, the tone of the article is inquiring, not conclusory and shows that Dunleavy is presenting a plausible theory and not a proven fact. Applying the factors used in New York to distinguish actionable, defamatory statements from protected opinion, the Court finds that in the article Dunleavy expresses his opinion, which is protected and may not form the basis of a defamation suit. Accordingly, the defendants' motion to dismiss for failure to state a cause of action is granted.[2]

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[2] Even if the Court did not dismiss the complaint in its entirety against all defendants for failure to state a cause of action, the complaint must be dismissed against Dunleavy individually. Dunleavy is not a resident of New York. Therefore CPLR 302(a), the state long arm statute, applies to him. Under CPLR 302(a) there are three instances in which a court may exercise personal jurisdiction over a non-domiciliary. However, by its terms CPLR 302(a)(2) and (3) do not apply to causes of action for defamation. Thus, in order for Dunleavy to be subject to personal jurisdiction, he must be found to have "transact[ed] any business within the state or contracts anywhere to supply goods or services" in New York. CPLR 302(a)(1). The "transacts business" standard set forth in CPLR 302(a)(1) is more strictly interpreted in defamation cases. *Pontarelli v. Shapero*, 231 A.D.2d 407 (1st Dep't 1996). The single act of distributing a defamatory statement is insufficient to establish personal jurisdiction. *Pontarelli*, 231 A.D.2d at 410; *SPCA of Upstate New York, Inc. v. American Working Collie Association*, 74 A.D.3d 1464, 1465-6 (3d Dep't 2010); *Gary Null & Associates, Inc. v. Phillips*, 906 N.Y.S.2d 449, 451-2 (Sup. Ct. NY Co. 2010). In addition to "transacting business," that business must also have given rise to the action. *Deutsche Bank Securities, Inc. v. Montana Board of Investments*, 7 N.Y.3d 65, 71 (2006); *Realuyo v. Villa Abrille*, 2003 US Dist. LEXIS

In accordance with the foregoing, it is hereby

ORDERED that the motion to dismiss by defendants Patrick Dunleavy and NYP Holdings, Inc. is granted, the complaint is dismissed, and the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and the order of the Court.

Dated: New York, New York
August 11, 2011

ENTER:

Saliann Scarpulla, J.S.C.

11529, *17 (S.D.N.Y. July 8, 2003).

Here, Rashada has failed to establish that this Court has personal jurisdiction over Dunleavy. While Dunleavy may have been interviewed in New York by other entities, the interviews were not in connection to the article at issue and are therefore inapplicable. *See Deutsche Bank*, 7 N.Y.3d at 71; *see also Realuyo*, 2003 US Dist. LEXIS 11529 at *17. Dunleavy's single column is insufficient to meet the "transaction of business" standard in CPLR 302(a)(1), because his only act of business relating to this action is one article. *Pontarelli*, 231 A.D.2d at 410.