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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

JON ADAMS,
Plaintiff,

-against-

ALM MEDIA PROPERTIES, LLC, NATIONAL LAW JOURNAL and NEW YORK LAW JOURNAL,
Defendants.

INDEX NO. 115525/2010

MOTION SEQ. NO. 001

The following papers were read on this motion by defendants to dismiss the complaint pursuant to CPLR 3211 and for sanctions.

PAPERS NUMBERED

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

Answering Affidavits — Exhibits (Memo)

Reply Affidavits — Exhibits (Memo)

Cross-Motion: ☐ Yes ☒ No

ALM Media Properties, LLC (ALM), National Law Journal (NLJ) and New York Law Journal (the Law Journal) move to dismiss plaintiff's complaint pursuant to CLPR 3211 (a)(7) for failure to state a claim and for sanctions. For the reasons set forth below, the complaint is dismissed, but the Court exercises its discretion to decline to impose sanctions.

BACKGROUND

Plaintiff is an attorney who was employed by the law firm of Labaton, Sucharow & Rudoff LLP (the Law Firm) from July 2004 until June 2007 (*Adams v Labaton, Sucharow & Rudoff LLP*, Sup Ct, N.Y. County, Index Number 106045/2009 (the Underlying Action), complaint, ¶ 8). In the Underlying Action, plaintiff alleged that he had "connections to New Mexico's political and government" leaders and that he was hired by the Law Firm due to "his ability to generate business [through these connections] from New Mexico" (*id.*, ¶¶ 17, 35).

Plaintiff further asserted that he was promised 10% of the business that he brought into the Law Firm when he was hired, that New Mexico's Attorney General, Patricia Madrid, was

hiring law firms to represent the state's pension funds (the Pension Funds) and that, as a result of his political connections, the Law Firm received legal work representing the Pension Funds (*id.*, ¶¶ 32, 40-41, 59, 61).

More specifically, he claimed that, while working for the Law Firm, the Law Firm represented the Pension Funds and obtained a settlement in an action entitled *In Re:St. Paul Traders Securities Fraud Litigation* (United States District Court, D. Minn., Docket Number 04-cv-3801) (the St. Paul Action) in the amount of $144,500,000 and the Law Firm was awarded or entitled to fees in the amount of $21,550,000 (*id.*, ¶¶ 61-63). He also states that, while he was working for the Law Firm, the Law Firm represented the Pension Funds and obtained a settlement in an action entitled *In Re:Health South Securities Litigation* (United States District Court, N.D. Ala., Docket Number 03-cv-01500) (the Health South Action) in the amount of $445,000,000, with an anticipated fee to the Law Firm of $66,750,000 (*id.*, ¶ 64).

Plaintiff also states that he brought in eight of the Law Firm's thirteen clients in an action entitled *In Re:Air Cargo Shipping Services Antitrust Litigation* (United States District Court, E.D.N.Y, Docket Number 06-md-01775) (the Air Cargo Action), which was partially settled for $85,000,000 and that the Law Firm's fee was $12,750,000 (*id.*, ¶¶ 66, 69).

Plaintiff contended that the Law Firm reneged on its promise of a 10% fee and the partner who hired him, Dubbs, falsely claimed that he had obtained the New Mexico business, leading plaintiff to resign his employment with the Law Firm (*id.*, ¶¶ 80-86).

On August 6, 2007, plaintiff commenced an action against the Law Firm in the United States District Court for the Southern District of New York (Docket Number 07-civ-7017) (the Federal Action), asserting claims of breach of contract, unjust enrichment, fraud and estoppel. Judge Deborah Batts dismissed the Federal Action by order dated March 30, 2009 (motion, Exhibit A).

On April 29, 2009, plaintiff brought the Underlying Action against the Law Firm, Dubbs and Keller (a partner in the Law Firm), alleging claims of estoppel, fraud, negligent

misrepresentation, conversion and breach of contract. Justice Barbara Kapnick, by order dated January 4, 2010, dismissed the Underlying Action against Dubbs and Keller, denied dismissal of plaintiff's contract cause of action and dismissed all of his other claims.

On March 29, 2010, plaintiff submitted an affidavit (Plaintiff's Affidavit) in connection with the settlement of the Underlying Action. In Plaintiff's Affidavit, he stated that he had reviewed the affidavits of Madrid and Glenn Smith and that he "now better [understood] the process by which [the Law Firm] was selected" to represent New Mexico (¶ 3). While he asserted that he "had a good faith basis" for making the allegations in both the Federal Action and the Underlying Action, he now "appreciate(d) that whatever suggestions or inferences [he had made that] ... contributions made by any [Law Firm attorney] to [New Mexico's] Governor Richardson [caused the Law Firm to be chosen to represent the Pension Funds ... [those claims] are not true" (*id.*, ¶ 3). He further stated that his "prior relationship with the New Mexico Attorney General's office did not cause [the Law Firm] to be selected in any particular case" (*id.*, ¶ 9), that Dubbs had previously contributed to Governor Richardson's political campaigns as early as 1980, more than 20 years prior to plaintiff's coming to work for the Law Firm, and that the Law Firm had been chosen to represent the Pension Funds in March 2004, months before plaintiff started his employment with the Law Firm in July 2004 (*id.*, ¶ 5). These statements conflicted with plaintiff's allegations in the Underlying Action that, as a result of his political connections, the Law Firm was chosen to represent the Pension Funds in the St. Paul Action and the Health South Action and that he was therefore entitled to 10% of the Law Firm's fees in those actions.

On April 14, 2010, the Law Journal published an article (the Article) entitled "Ex-Associate Ends Fee Suit Against Labaton Sucharow" (motion, Exhibit G). The Article stated that plaintiff had sued the Law Firm "for $12 million in fees he claimed were derived from his political connections in New Mexico [but] has agreed to end the suit, saying he was wrong." The Article further stated that, while plaintiff had said that he had a good faith basis for his

allegations, he "now realized that before he began working for [the Law Firm, it] had already been selected ... to represent [the Pension Funds]" and that "any suggestion that [the Law Firm] engaged in a pay-to-play effort were 'not true.'" The Article also noted that "the parties agreed to keep the terms of the resolution confidential."

On April 15, 2010, the Law Journal published an article entitled "Clarification" (the Clarification) (motion, Exhibit H). The Clarification stated that the Article "incorrectly stated that [the plaintiff] said he was 'wrong' [and that] in his affidavit in connection with the settlement of his action against [the Law Firm, he] said that he had 'a good faith basis' for making allegations against [the Law Firm], but that he now has a 'new understanding' and a 'better understanding' of the situation involving the [Law Firm's] representation of New Mexico's pension funds."

On April 19, 2010, NLJ published an article (the NLJ Article) entitled "Ex-Associate now says fee fight was all a big mistake." The NLJ Article stated that plaintiff had "agreed to end [his lawsuit)] claiming he was owed 10 percent of $118 million in fees ... saying that he was wrong [and] that, while he 'had a good faith basis' [for his allegations] he now realized that [the Law Firm] had already been selected ... before he began working [there]."

On November 29, 2010, plaintiff commenced this action by filing a summons with notice. Plaintiff's complaint alleges that the Article, the Clarification and the NLJ Article were "false", since plaintiff "never once used the word 'wrong' ... [or] 'mistake'" (complaint, ¶ 14) and that the "gist of the story was totally incorrect [damaging his] reputation as an attorney (*id.*, ¶¶ 22-23). Plaintiff's complaint asserts causes of action for defamation, injurious falsehood and negligence.

DEFAMATION

The essence of the tort of defamation is "the publication of a statement about an individual that is both false and defamatory [and] ... a libel action cannot be maintained unless it is premised on published assertions of *fact*" (*Brian v Richardson*, 87 NY2d 46, 51 [1995] [italics in original]). Moreover, in distinguishing between factual assertions and nonactionable

statements of opinion, "the courts must consider the content of the communication as a whole ... [and] [r]ather than sifting through a communication for the purpose of isolating and identifying assertions of fact, the court should look to the over-all context" and resolve whether a reasonable reader would believe the statements convey assertions of fact, rather than opinion or rhetoric (*id.* at 51, 53; *see Mann v Abel*, 10 NY3d 271, 276 [2008], *cert denied*, -US-, 129 S.Ct. 1315 [2009]; *Galanos v Cifone*, 84 AD3d 865 [2d Dept 2011]).

CIVIL RIGHTS LAW § 74

Civil Rights Law § 74 provides, in pertinent part,:

> "A civil action cannot be maintained against any person, firm or corporation, for publication of a fair and true report of any judicial proceeding."

In reviewing a newspaper account under this section, "it is enough that the substance of the article be substantially accurate ... [and] [w]hen determining whether an article constitutes a 'fair and true' report, the language used therein should not be dissected and analyzed with a lexicographer's precision [since an article is], by its very nature, a condensed report of events which must, of necessity, reflect in some degree the subjective viewpoint of its author [and should not] ... be thereafter parsed and dissected" (*Holy Spirit Assn. for Unification of World Christianity v New York Times Co.*, 49 NY2d 63, 67-68 [1979] [internal citations omitted]; *Lacher v Engel*, 33 AD3d 10, 17 [1st Dept 2006]).

DISCUSSION

Both in considering whether the Article, the Clarification and the NLJ Article (collectively, the Articles) set forth statements that can constitute defamation and in considering whether the Articles are a fair and true report of the resolution of the Underlying Action, the Court must view the Articles as a whole and not parse and dissect them line by line, hunting for falsity (*see Brian*, 87 NY2d at 53; *Holy Spirit*, 49 NY2d at 67-68).

Viewed from this perspective, plaintiff's complaint cannot stand. The decision to omit some details that plaintiff would have wished included in the Articles improperly intrudes on

editorial decision making (*Sassower v New York Times Co.*, 48 AD3d 440, 441 [2d Dept 2008]). In his complaint in the Underlying Action, plaintiff stated that the principal basis upon which he sought between $8.8 million and $11.75 million was that he was promised 10% of the fees the Law Firm received from New Mexico and that the Law Firm's receipt of business from New Mexico was due to his "crucial connection ... [and that] only happened because of [plaintiff's] introduction" (¶¶ 57, 59). In contrast, Plaintiff's Affidavit states that he now understands that his "prior relationship ... did not cause [the Law Firm] to be selected in any particular case" (¶ 9), and that any "suggestion or inferences" that the Law Firm obtained business from New Mexico as a result of campaign contributions "are not true" (*id.*, ¶ 3).

The Articles summarized plaintiff's statements as an admission that he was wrong. The Articles did not need to be a word-for-word recitation of all the statements in Plaintiff's Affidavit, but merely a substantially accurate account of the substance of the proceeding (*see Holy Spirit*, 48 NY2d at 67; *Saleh v New York Post*, 78 AD3d 1149, 1152 [2d Dept 2010]). Minor inaccuracies in an article are insufficient to set aside the absolute privilege of Civil Rights Law § 74 (*see Posner v New York Law Pub. Co.*, 228 AD2d 318 [1st Dept], *lv denied* 89 NY2d 805 [1996]). Since the Articles were substantially accurate, defendants' motion to dismiss the complaint must be granted.

Moreover, the allegations in the complaint that the Articles were false because they stated that the plaintiff said he was wrong and that it was a mistake, when now plaintiff states in Plaintiff's Affidavit that he understood that his assertions of his crucial status in obtaining New Mexico's business, entitling him to a multi-million fee was "not true" amounts, in the context of the communications as a whole, to nonactionable opinion rather than fact (*Brian*, 87 NY2d at 51; *see GS Plasticos Limitada v Bureau Veritas*, 84 AD3d 518 [1st Dept 2011]). In Plaintiff's Affidavit (¶ 3), he stated that his prior allegations in the Underlying Action that the Law Firm was hired to represent the Pension Funds and that, therefore, he was entitled to 10% of the Law Firm's fees in the St. Paul Action and the Health South Action were "not true." Referring to this

as "wrong" and "a big mistake" cannot be considered false (*Posner*, 228 AD2d at 228).

However, plaintiff's arguments were not frivolous, made in bad faith or wrongful (*see* 22 NYCRR 130-1.1[c]; *Akpinar v Moran*, 83 AD3d 458, 459 [1st Dept 2011]; *see also Costanza v Seinfeld*, 279 AD2d 255 [1st Dept 2001]) and, accordingly, the Court declines to impose sanctions.

CONCLUSION

It is, therefore,

ORDERED that the portion of defendants' motion that seeks to dismiss plaintiff's complaint is granted and the complaint is dismissed, with costs and disbursement to defendants as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the portion of defendants' motion that seeks to impose sanctions is denied.

This constitutes the Decision and Order of the Court.

Dated: 11-14-11

PAUL WOOTEN J.S.C.

Check one: [X] **FINAL DISPOSITION** [ ] **NON-FINAL DISPOSITION**

Check if appropriate: [ ] **DO NOT POST** [ ] **REFERENCE**