SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN J.S.C. Justice PART _____

Index Number : 155808/2012
SABHARWAL & FINKEL, LLC
vs
SORRELL, SIR MARTIN
Sequence Number : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

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

Dated: 5/9/13

CK
CYNTHIA S. KERN, J.S.C.
J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

----------x,

SABHARWAL & FINKEL, LLC, ADAM FINKEL
AND ROHIT SABHARWAL

Plaintiffs,

Index No. 155808/2012

-against-

DECISION/ORDER

SIR MARTIN SORRELL,

Defendant.

----------x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affirmations in Opposition.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiffs Sabharwal & Finkel ("S & F"), Adam Finkel and Rohit Sabharwal initially brought this action against defendant Sir Martin Sorrell for libel per se and slander per se based on five statements he made in an interview. After defendant moved to dismiss the complaint and the motion was fully briefed, plaintiffs amended their original complaint to include additional statements made in a follow up interview by defendant. Defendant has brought the present motion to dismiss the amended complaint. For the reasons that follow, the amended complaint is dismissed in its entirety.

The relevant facts are as follows. Plaintiffs Sabharwal and Finkel are the two

members of the law firm S&F. S&F represents New Delhi Television Limited ("NDTV"). In July of 2012, S&F brought a lawsuit on behalf of NDTV against 32 defendants, alleging that it suffered low television audience ratings in India as a result of defendants' alleged manipulation and corruption of the Indian television ratings system. Defendant Sorrell is the chief executive officer of one of the defendants in the NDTV action. Various defendants in that action, including defendant's company, moved to dismiss the NDTV action on various grounds. After the motion to dismiss was made, NDTV filed an amended complaint. The amended complaint was brought by Pepper and Hamilton, another law firm, as well as S&F.

Shortly after S&F filed the NDTV original complaint, Sorrell gave an interview to a journalist in India, which was published online by livemint.com, an Indian online financial publication, about the NDTV lawsuit. In responding to the questions from the reporter, Sorrell made the following statements regarding the NDTV action:

> Nothing has been served properly. Nothing at all, that is why we call it a hypothetical lawsuit. The two-lawyer firm (engaged by NDTV) is based in Florida...
>
> [Plaintiffs] specialize in restaurant law. This is an Indian issue, not American. It is a bit of mischief on their part.
>
> Their lawyers called us and asked if we would discuss a settlement. I said there is no question of settlement. This whole thing is mischievous, designed to elicit some financial response from us.
>
> We waited three-four weeks to see what was going to happen. But nothing happened. They are issuing illegitimate proceedings in the US with lawyers working on a contingency basis, where they do not get a fee, but a percentage of

> the settlement; and
>
> That is why they rang up. We will do everything to improve the system, but not with gun being held to our head in a inexpert way. We have not got the proceedings in the right way. This is to extort money from us.

In their original complaint, plaintiffs alleged that the foregoing statements were false because plaintiff S&F is not based in Florida but in New York, S&F does not specialize in restaurant law but in complex commercial litigation, S&F never called defendant or his company directly but have only spoken with the lawyers for defendant's company and that the conversation was not really about settlement, that they are not working on a contingency basis in the NDTV litigation and that the lawsuit was not brought to extort money. After defendant made a motion to dismiss the original complaint, plaintiff has brought an amended complaint. In the amended complaint, plaintiffs continue to allege that the original five statements are defamatory. They now allege that the portion of the fifth statement which uses the term "inexpert" is defamatory. They also allege that defendant has made an additional defamatory statement which was published on Livemint, as follows: "NDTV doesn't just have their restaurant lawyers involved, they have others as well now. They have upgraded." Plaintiffs allege that defendant knew the additional statement was false as this was made known to him from the original complaint and the plaintiffs' opposition to the motion to dismiss. They also allege in the amended complaint that they have been damaged by another law firm being added to represent NDTV in the NDTV action as the addition of another law firm by NDTV as counsel for

NDTV in the NDTV action has significantly reduced the fees payable to the plaintiffs in the NDTV action and the publicity resulting from the addition of a law firm has had and will continue to have a damaging impact on their client relationships, reputation, good will and flow of business.

Defamation arises from "the making of a false statement which tends to 'expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society.'" *Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dept 1999), citing to *Foster v. Churchill*, 87 N.Y.2d 744, 751 (1996). To state a claim for defamation, a plaintiff must plead "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,* 261A.D.2d at 38. A statement constitutes defamation per se if, inter alia, it tends to injure another in his or her trade, business or profession. *Liberman v. Gelstein*, 80 N.Y.2d 429 (1992). This exception is "'limited to defamation of a kind incompatible with the proper conduct of the business, trade, profession or office itself. The statement must be made with reference to a matter of significance and importance for that purpose, rather than a more general reflection upon the plaintiff's character or qualities.'" *Id.* at 435. *See also Aronson v. Wiersma,* 65 N.Y.2d 592 (1985).

It is a legal question for the court to determine in the first instance whether

particular words are defamatory. *Aronson,* 65 N.Y.2d at 593. The "words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction." *Id.* at 594. *See also Golub v Enquirer,* 89 N.Y.2d 1074 (1997). "Loose, figurative or hyperbolic statements, even if deprecating the plaintiff, are not actionable." *Dillon,* 261 A.D.2d at 38.

In the present motion, the parties spend an enormous amount of time arguing about whether the court is permitted to look at extrinsic facts to determine whether the statements are defamatory per se. The general rule is that "statements cannot be slanderous per se if reference to extrinsic facts is necessary to give them a defamatory import." *Aronson,* 65 N.Y.2d at 594-595. *See also Newsday, Inc. v. Peck Contr.,* 87 A.D.2d 326 (1st Dept 1982) (statement cannot be slanderous per se where reference to extrinsic facts necessary to even understand the nature of the allegations). However, the courts have made it clear that there is an exception to this rule in cases where libel per se is asserted. *Hindsale v. Orange County Publications, Inc.,* 17 N.Y.2d 284 (1966). Extrinsic facts may be considered in determining whether a writing is libelous per se where the extrinsic facts are presumably known to the readers, based on the "common-sense idea that a fact not expressed in the newspaper but presumably known to its readers is part of the libel." Id. at 290.

In the present case, the court finds that the first four statements made by defendant are not actionable as they are not defamatory, whether or not the court looks to extrinsic facts presumably known to the readers of these interviews. Plaintiffs argue that these statements convey that plaintiff law firm is inexpert, incompetent and unfit to represent clients in commercial litigation, arbitration and banking law matters in New York. However, the court finds that these four statements are not reasonably susceptible of a defamatory connotation as they do not convey that plaintiff law firm is inexpert, unfit or incompetent to represent clients in commercial litigation, arbitration and banking matters in New York.

The statement made by defendant that plaintiffs are based in Florida is not defamatory. There is nothing defamatory about the statement that a law firm is located in Florida as many respected law firms are located in Florida and the statement does not reflect poorly on plaintiffs' character or abilities as lawyers and a law firm. Nor does the mere fact that the plaintiff law firm is a Florida law firm mean that it is not capable of handling New York litigation matters. Moreover, even if the reasonable reader knew the extrinsic fact that the plaintiff law firm is a New York firm, rather than a Florida firm, it would not make the statement that they are a Florida law firm defamatory. Moreover, there is no reason that a reasonable reader would assume that lawyers in a Florida law firm are not also licensed to practice law in New York.

Similarly, the statement made by defendant that plaintiffs specialize in restaurant

law is not defamatory as many well respected attorneys and law firms specialize in restaurant law. This statement does not in any way suggest that plaintiffs were unprofessional or improperly performed their duties as lawyers. Nor does the fact that the plaintiffs may have specialized in restaurant law mean that they are incompetent, unfit or inexpert in handling New York commercial litigation, arbitration and banking matters. Finally, even if the reasonable reader knew that the firm did not specialize in restaurant law, the fact that the statement was made that they did specialize in restaurant law would not be defamatory.

Defendant's statement that plaintiffs "called us and asked us if we would discuss a settlement" is also not defamatory as there is nothing improper about contacting the other side in a litigation and broaching the topic of settlement. There is no reason that a reasonable reader would assume that defendant was referring to direct conversations between defendant and plaintiff law firm or that defendant was involved in conversations without his lawyer present. Even if the statement was construed to mean that the law firm had contacted the defendant directly without his lawyers being present, which is not what the statement says on its face, the reasonable reader of this statement which is published in a financial publication for an Indian audience, would not reasonably be aware that this violated any New York or worldwide professional rule of conduct for lawyers practicing in New York.

The statement made by defendant that plaintiffs were hired on a contingency fee

basis is also not defamatory as there is nothing improper or derogatory in a law firm handling a case on a contingency fee basis. The mere fact that the law firm handled contingency matters does not mean that the law firm is inexpert, incompetent and unfit to represent clients in commercial litigation, arbitration and banking law matters in New York.

Plaintiffs' argument that the foregoing statements would cause the average reader to believe that they are incompetent, unfit and inexpert to handle commercial litigation, banking and arbitration matters in New York and to handle the NDTV litigation is without basis. This is not what any of the statements say on their face and reference to extrinsic facts which would presumably be known to the readers of this statement would nor render these statements susceptible of a defamatory connotation. No reasonable reader would conclude that a law firm or lawyers are incompetent, unfit or unethical or that they could not handle a complex commercial litigation in New York merely because the firm practices in Florida, specializes in restaurant law or accepts contingency fee cases. Similarly, a reasonable reader of the statement defendant made regarding settlement would not make the conclusion from the statement that plaintiffs contacted defendant directly or that the lawyers did anything unethical.

With respect to the other extrinsic facts which plaintiffs rely upon to establish that the challenged statements are defamatory, either the facts do not render the statements susceptible of a defamatory connotation or they are not "facts". The fact that the reader

of the statements might identify plaintiff law firm as the lawyers for NDTV in the NDTV action does not make the statements defamatory. The issue is not whether the statements are made about plaintiff law firm or another law firm–the issue is whether the statements are defamatory if made about any New York law firm that does not specialize in restaurant law. Plaintiffs' contention that the reasonable reader of the statements rely on the plaintiff law firm as "(a) being ethical lawyers (b) based in New York and (c) practicing litigation, arbitration and banking law to (d) competently represent them in New York in these areas of the law" are arguments by plaintiffs rather than facts that would be known to a reasonable reader. Plaintiffs' contention that a two lawyer law firm located in Florida cannot effectively represent clients in New York litigation is also an argument rather than a fact.

With respect to the statements made by defendant that this lawsuit was brought to extort money and the statement that NDTV has upgraded with respect to their attorneys, the statements are not actionable as they are expressions of opinion as opposed to statements of fact. Under New York law, an expression of opinion, as opposed to an assertion of fact, is not actionable and cannot be the subject of a defamation action. *Mann v. Abel*, 10 N.Y.3d 271, 276 (2008). *See also Gross v. New York Times Co.*, 82 N.Y.2d 146, 152-153 (1993). In determining whether a statement is an opinion as opposed to a fact, the following factors are to be considered: " (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 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." *Mann,* 10 N.Y.3d at 276.

Upon considering the foregoing factors, the court holds that the statement made by defendant that the lawsuit was brought to extort money is a non-actionable opinion. Based on the language in the statement and the overall context of the interview, a reasonable reader would conclude that the statement was conveying an opinion about the merits of the lawsuit brought by NDTV and the motivation of the attorneys who filed the lawsuit, rather than an assertion of fact that the lawsuit was an actual attempt to commit extortion. The statement appears in an interview regarding the lawsuit brought by plaintiff law firm against defendant's company in which plaintiffs allege numerous causes of action against defendant's company. Given the content of the interview, a reasonable reader or listener would understand that defendant's statement was an opinion about the merits of the lawsuit. *See Pecile v. Titan Capital Group, LLC*, 96 A.D.3d 543, 544 (1st Dept 2012) (finding that "the use of the term 'shakedown' did not 'convey the specificity'" that would suggest that defendants were seriously accusing the plaintiff of committing extortion); *Galasso v. Saltzman*, 42 A.D.3d 310, 311 (1st Dept 2007) (finding that an alleged defamatory statement was non-actionable opinion because issues were clearly in dispute and the statement was made when respective sides were presenting their

positions).

Similarly, the statement that NDTV does not just have its restaurant lawyers involved and that it has upgraded is also a statement of opinion rather than one of fact. Based on the language in the statement and the overall context of the interview and the ongoing litigation between defendant's company and plaintiffs' client NDTV, a reasonable reader would conclude that the statement was conveying an opinion about plaintiff law firm and lawyers rather than as assertion of fact. The statement is made in a follow up interview regarding the lawsuit brought by plaintiff law firm against defendant's company. Given the context of the two interviews, a reasonable reader would understand that defendant's statement was an opinion about the law firm. *See Steinhilber v. Alphonse,* 68 N.Y.2d 283, 293 (1986)(statement that plaintiff lacked "talent, ambition and initiative" was non-actionable opinion").

The statement made by defendant at the end of the initial interview that uses the word inexpert is also not actionable. Initially, a reasonable reader would not assume from reading the statement that it was even referring to plaintiff law firm or its lawyers. The question and answer are as follows:

> Question: Tam recently offered a six point agenda to improve its system in a meeting with advertisers. Isn't that an admission that there is a problem?
>
> Answer: It is not an admission. It is an attempt to improve the system. Panels change over time as population changes. New viewers come and India will change as digitation happens, the growth of OOH (out of home) and mobile will change things. The system has to be continuously updated. We have been in India for 14 years. We are not amateurs in this business. WWP through kantar does tv ratings

> in 40 countries. And Nielsen independently does it on other markets, including in the US. We will do everything to improve the system, but not with the gun being held to our head in an inexpert way. We have not got the proceedings in the right way.

The reasonable reader reading this statement would not understand it to mean that plaintiffs are incompetent to handle commercial litigation, banking and arbitration matters in New York or even read it to mean that it is referring to plaintiffs in any fashion. The statement appears, instead, to be referring to the commencement by NDTV of the NDTV lawsuit to challenge the ratings system in India -that defendant would not change the way that ratings are given by being sued in a lawsuit. However, even if this statement could be construed as referring to plaintiffs as incompetent lawyers, it would still not be actionable as it is an opinion rather than a statement of fact, given the context of the entire interview.

Based on this court's finding that the statements do not constitute actionable defamation, the court need not address defendants's argument that the statements in question are true. The court also need not reach the issue of whether the special damages asserted by plaintiffs are pleaded with sufficient particularity. However, the court finds that plaintiff's special damages are not sufficiently pled as plaintiffs never allege, even in a conclusory fashion, that the decision by its client, NDTV, to add a second law firm was caused in any way by any alleged defamatory statement by defendant.

Finally, plaintiff's amended complaint fails to state a claim for tortious interference with prospective economic advantage and contractual relations. To "state a

cause of action for tortious interference with prospective business advantage, it must be alleged that the conduct by defendant that allegedly interfered with plaintiff's prospects either was undertaken for the sole purpose of harming plaintiff, or that such conduct was wrongful or improper independent of the interference allegedly caused thereby." *Jacobs v. Continuum Health Partners,* 7 A.D.3d 312, 313 (1st Dept 2004). *See also Phillips v Carter,* 58 A.D.3d 528 (1st Dept 2009) (claim of tortious interference with prospective economic advantage is insufficient as a matter of law because allegations in complaint establish that "defendant was advancing her own self-interest" and plaintiff has failed to establish that defendant's actions were otherwise unlawful).

In the instant case, plaintiffs fail to state a cause of action for tortious interference with prospective economic advantage and contractual relations because they fail to sufficiently allege that the statements were made by defendant for the sole purpose of harming plaintiffs and fail to sufficiently allege that defendant's conduct was otherwise unlawful. In plaintiffs' original complaint, plaintiffs specifically allege that defendant "acted with malice..so as to wrongfully gain favorable public opinion for himself and /or the WPP Parties with regard to the pending NDTV Action." Original Complaint paragraph 24. Based on this statement, plaintiffs concede that defendant was advancing his own self-interest and the interest of the WPP parties in the pending action with respect to the statements he made. Thus, plaintiffs cannot establish that defendant was acting solely to harm plaintiffs in making the statements in the two interviews. Moreover, the

amended complaint does not establish that the defendant's conduct was otherwise unlawful based on this court's determination that the amended complaint fails to state a valid claim for actionable defamation.

Based on the foregoing, this action is dismissed in its entirety. The clerk is directed to enter judgment accordingly. This constitutes the decision and order of the court.

Dated: 5/9/13

J.S.C.