

New GPC Inc. v Kaieteur Newspaper Inc.

2013 NY Slip Op 32823(U)

October 29, 2013

Supreme Court, New York County

Docket Number: 155301/12

Judge: kenney

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SUPREME COURT OF THE STATE OF NEW YORK

NEW YORK COUNTY

JOAN M. KENNEY

J.S.C.

Index Number : 155301/2012
NEW GPC INC.
vs
KAIETEUR NEWSPAPER INC.
Sequence Number : 001
PARTIAL SUMMARY JUDGMENT

PART 8

INDEX NO. 155301/12

MOTION DATE 8/16/13

MOTION SEQ. NO. 001

The following papers, numbered 1 to 11, were read on this motion to/for partial summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits + Mem of Law No(s) 1-8

Answering Affidavits — Exhibits No(s) 9

Replying Affidavits No(s) 10, 11

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

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

Dated: 10/29/13

JOAN M. KENNEY 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: IAS PART 8

-----X

NEW GPC INC.,
Plaintiff,

DECISION & ORDER
Index No. 155301/12

-against-

KAIETEUR NEWSPAPER INC.,
Defendant.

-----X

KENNEY, J:

In this action, plaintiff New GPC Inc. (New GPC) seeks damages for alleged defamatory statements made by defendant Kaieteur Newspaper Inc. (KNI) in its New York newspaper, the “Kaieteur News.” New GPC now moves, pursuant to CPLR 3212, for partial summary judgment on liability on the portion of its complaint alleging a cause of action for libel against defendant.

New GPC is a corporation of the Republic of Guyana, in the business of manufacturing and supplying pharmaceutical and medical supplies and consumer products. Kaieteur News is allegedly the “sister publication of a daily newspaper of the same name which is published by a Guyana corporation,” nonparty National Media & Publishing Company Limited. Complaint, ¶ 8. New GPC’s libel per se claim is based upon articles published by Kaieteur News on June 22, 2012, the contents of which are undisputed. One article stated, in pertinent part, as follows:

“A Partnership for National Unity (APNU)’s Shadow Minister of Health, Dr. George Norton . . . stated that over the past days, the New Guyana Pharmaceutical Corporation¹ has come under fire, for selling to the government pharmaceutical products at exorbitant prices.
...

“The banner headline of one of the daily independent newspaper screamed; Government pays \$18,000 for \$2,000 “pressure tablets.”

¹ According to the complaint, the published references to “New Guyana Pharmaceutical Corporation,” “New GPC,” and “NGPC” refer to New GPC. Complaint, ¶ 35; Braam aff, ¶ 20.

What is apposite to note here is that the New GPC and the Georgetown Public Hospital Corporation have defended the purchases saying that the prices paid were okay. How can it be okay for the people of Guyana to pay \$8,000 for an injection that costs \$600? How can it be okay for the people of Guyana to pay \$1,800 for one Atenolol (tablet) when the same tablet can be bought at a local pharmacy for \$600 (a 300% difference)? How can it be okay when the taxpayers of this country must pay \$18,000 for something that cost a mere \$2,000? How can it be okay for us to pay \$1,909 for a tube of fungicide cream that retails for only \$80? What must we make of a company that sells us a contraceptive pill that costs \$600 and a government that thinks it's okay to buy that pill for \$8,000? This is not commerce, this is corruption.'

Norton said that the evidence seems quite clear that the GPHC is engaging in seemingly shady procurement practices that have caused Health Minister Dr. Bheri Ramsaran to launch a probe into local drug purchases."

Complaint, ¶ 27 and exhibit C; Braam aff, exhibit E. New GPC's claim is also based upon two similar articles, also published by Kaieteur News on June 22, 2012. Complaint, ¶¶ 29, 31, 33 and exhibits D and E.

The parties dispute who has the burden of proving the truth or falsity of the alleged defamatory statements. New GPC argues that it satisfied the elements of libel per se, and that KNI failed to assert the truth of its statements as an affirmative defense, thereby precluding KNI from raising this defense. KNI counters that New GPC must satisfy its burden of proving the falsity of the alleged defamatory statements, because KNI is a media defendant that made statements of public concern, and that New GPC fails to make a prima facie showing on this element of its claim.

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 (Restatement [Second] of Torts

§ 558).” *Dillon v City of New York*, 261 AD2d 34, 38 (1st Dept 1999). “Truth provides a complete defense to defamation claims,” and “[a]llegations of defamation present, in the first instance, an issue of law for judicial determination.” *Id.* at 39.

Libel per se occurs “where the defamatory statement appears on the face of the communication.” *Ava v NYP Holdings, Inc.*, 64 AD3d 407, 412 (1st Dept 2009). A defamatory statement is libelous per se, and a plaintiff need not plead or prove special damages, if the statement “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.” *Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 379 (internal quotation marks and citation omitted), *cert denied* 434 US 969 (1977); *see also Gjonlekaj v Sot*, 308 AD2d 471, 473 (2d Dept 2003) (same). “In addition, a defamatory statement is libelous per se if it imputes fraud, dishonesty, misconduct, or unfitness in conducting one’s profession.” *Gjonlekaj*, 308 AD2d at 473-474 (citations omitted).

As a preliminary matter, New GPC fails to make any showing that the articles published by KNI “constitut[e] fault as judged by, at a minimum, a negligence standard.” *Dillon*, 261 AD2d at 38. For this reason alone, New GPC fails to make a prima facie showing.

In any event, while New GPC cites to cases stating that “the burden [is] on [the defendant] to prove the statement true, not on [the plaintiff] to prove the statement false” (*Grieco v Galasso*, 297 AD2d 659, 660 [2d Dept 2002]), all of the cases cited by New GPC involved private parties litigating matters of private concern. *See also Garcia v Puccio*, 17 AD3d 199 (1st Dept 2005); *Bounds v Mutual of Omaha Ins. Co.*, 37 AD2d 1008 (3d Dept 1971); *Streips v LTV Corp.*, 216 AD2d 923 (4th Dept 1995, Boehm, J., dissenting). Therefore, these cases are distinguishable on

their facts.

In cases involving a media defendant:

“where the plaintiff is held to be a private figure and the topic of the article is a matter of public concern . . . , the plaintiff is required to prove gross irresponsibility (*see Chapadeau v Utica Observer-Dispatch*, 38 NY2d 196, 199) resulting in a defamatory falsity. Under such circumstances, proof of falsity is again naturally related to the standard of care. Thus, in a case with constitutional implications . . . , the defamed plaintiff must prove falsity, irrespective of his status (*see Wilson v Scripps-Howard Broadcasting Co.*, 642 F2d 371).”

Fairley v Peekskill Star Corp., 83 AD2d 294, 297 (2d Dept 1981). In determining whether the alleged defamatory statement is a matter of “legitimate public concern,” the content of the statement must be “viewed in the context of the writing as a whole, and not as disembodied words, phrases or sentences,” and “Courts must examine their content, form, and context.” *Huggins v Moore*, 94 NY2d 296, 302 (1999) (internal quotation marks and citations omitted). Furthermore, “absent clear abuse,” the court “defer[s] to the news editor’s determination of whether the portions of the article to which plaintiff objects are reasonably related to matters warranting public exposition.” *Id.* at 304 (internal quotation marks and citations omitted).

Here, it is undisputed that KNI is a media defendant, and that Kaieteur News published the statements alleged by New GPC. Corring affirmation, ¶ 2. It is also undisputed that Kaieteur News “is widely circulated and read in the Guyanese immigrant community in New York and elsewhere.” *Id.*, ¶ 5; Complaint, ¶ 7. Moreover, according to the complaint, the overcharging, “price gouging,” and “corrupt[ion]” renders New GPC “an unworthy supplier of pharmaceutical to the Guyanese government.” Complaint, ¶¶ 19-20, 36-37, 40. The articles themselves make several references to the Guyanese “government” and its “corrupt practices,” the government’s collusion with New GPC

in “shady procurement practices,” and the resulting “direct[] threat[to] the health and well-being of the people of Guyana.” Complaint, ¶ 27 and exhibit C. The articles also suggest ties between New GPC’s owner and the former president of Guyana. *Id.*, ¶ 29 and exhibit D.

The defamatory statements alleged by New GPC do not constitute “mere gossip” and they are not “directed only to a limited, private audience,” which would support the conclusion that they involve a “purely private concern.” *Huggins*, 94 NY2d at 302-303 (internal quotation marks and citations omitted). Rather, the statements involve New GPC’s alleged collusion with the Guyanese government, and the use of “taxpayer” funds to subsidize New GPC’s alleged price-gouging scheme (Complaint, ¶ 27 and exhibit C), thereby clearly relating to matters of “political, social, or other concern of the community.” *Huggins*, 94 NY2d at 303 (internal quotation marks and citations omitted); *see also Gaeta v New York News*, 62 NY2d 340, 349 (1984) (article dealt “with a subject of public business and concern,” where it involved “a State program for transfer of some 50,000 patients from public mental hospitals into nursing homes, and the subsequent experience of these individuals”).

Contrary to New GPC’s assertion, the public concern is not limited to the foreign country of Guyana, as New GPC affirmatively alleges that KNI’s New York publication targets “the Guyanese immigrant community in New York” (Complaint, ¶ 7), thereby receiving “public attention because its ramifications will be felt by persons who are not direct participants.” *Fairley*, 83 AD2d at 298 (a “public controversy . . . must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way”). Thus, as the alleged defamatory statements are a matter of public concern, particularly for Guyanese nationals residing in New York, New GPC was required to make a prima facie showing of gross irresponsibility resulting in a defamatory falsity.

New GPC submits the affidavit of its former corporate secretary, Paul Stanislaus Braam (Braam), who claims that the statements published by KNI are “false, fictitious and misleading.” Braam aff, ¶¶ 14, 21. Braam claims that New GPC paid less than the amounts claimed by KNI. Braam identifies specific prices that New GPC allegedly paid for certain pharmaceutical products that are significantly less than the prices paid by the Guyanese government, as reported in KNI’s articles. However, Braam fails to submit any documentary evidence substantiating Braam’s conclusory statements. For instance, New GPC fails to submit invoices, bank statements, or evidence of prevailing market rates for the pharmaceuticals, to support New GPC’s conclusion that KNI’s statements were false. Nor does New GPC make any showing of gross irresponsibility concerning KNI’s published statements. Accordingly, New GPC fails to make a prima facie showing. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985) (movant’s failure to make a prima facie showing “requires denial of the motion, regardless of the sufficiency of the opposing papers”); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980) (a party seeking summary judgment must “establish his cause of action or defense ‘sufficiently to warrant the court as a matter of law in directing judgment’ in his favor . . . , and he must do so by tender of evidentiary proof in admissible form”); *Bartee v D & S Fire Protection Corp.*, 79 AD3d 508, 508 (1st Dept 2010) (conclusory statements insufficient to satisfy prima facie showing).


Accordingly, it is hereby

ORDERED that plaintiff’s motion for partial summary judgment is denied, in its entirety; and it is further

ORDERED that counsel are directed to appear for a preliminary conference at 71 Thomas Street, in Room 304 at 9:30 a.m. on January 9, 2014.

Dated:

ENTER:


JOAN M. KENNEY
 J.S.C.