

Seldon v Lembeck

2014 NY Slip Op 30483(U)

February 28, 2014

Sup Ct, New York County

Docket Number: 154064/13

Judge: Saliann Scarpulla

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

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PHILIP SELDON

Index Number: 154064/13
Submission Date: 10/30/13

Plaintiff,

- against -

DECISION and ORDER

HARRIET LEMBECK,

Defendant.

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For Defendant:
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Papers considered in review of the defendant’s motion to dismiss (motion seq. no. 001):

- Notice of Motion 1
- Opposition 2
- Aff in Reply 3

HON. SALIANN SCARPULLA, J.:

In this action arising from a dispute between two professional wine experts, defendant Harriet Lembeck (“Lembeck”) moves to dismiss plaintiff Philip Seldon’s (“Seldon”) complaint pursuant to CPLR §§ 3211(a)(1) and (a)(7).

This action is related to two pending actions before the Court concerning an alleged breach of a contract that Lembeck entered into with Smart Guide Publications, Inc. (“SGP”) to author a wine book titled “The Smart Guide To Deciphering A Wine Label” (“the contract”). *See Seldon v. Lembeck*, New York Supreme Court, New York County, Index No. 651547/13; *Pen and Pencil Publications, Inc. v. Lembeck*, New York

Supreme Court, New York County, Index No. 154063/13. Prior to the commencement of this action, the parties appear to have exchanged several communications about the contract, which are the subject of this lawsuit.

In the complaint, Seldon asserts two causes of action against Lembeck for libel and one cause of action for negligent infliction of emotional distress. In the first cause of action, Seldon alleges that, on March 27, 2013, Lembeck published a letter, through her agent Henry J. Wasserstein (“Wasserstein”), to SGP’s vice president Cathy Barker, which contained defamatory statements about Seldon (“the March 27 letter”). In the letter, Wasserstein allegedly stated to Seldon: “[i]f you persist in your unlawful actions, Ms. Lembeck will take all necessary and appropriate action to seek redress for such actions.” Seldon claims that this statement was defamatory because he did not take any unlawful actions against Lembeck.

In the second cause of action, Seldon alleges that Lembeck published a defamatory statement about him in an email to Wasserstein on April 3, 2013 (“the April 3 email”). Lembeck allegedly made a defamatory statement when she stated in her email that an attorney named Nancy Sills “asked me to call her if he [Seldon] did any more harassing. That was right after the DA (or asst. DA Emily Becker) sentenced him to a week in Rikers’ Island.” Seldon asserts that Lembeck’s statements are defamatory because he never harassed her, and he was never sentenced to Riker’s Island.

Seldon further asserts, in the third cause of action, that Lembeck negligently inflicted emotional distress on him by sending the April 3 email to Wasserstein.¹ Seldon alleges that the statements in the email “brought up painful memories of a gross miscarriage of justice” inflicted on him, and that he suffered extreme emotional distress as a result.

In the motion to dismiss, Lembeck argues that the first cause of action for libel should be dismissed because the alleged defamatory statement in the March 23 letter is protected by the absolute privilege for communications made in the course of a judicial proceeding.

Lembeck also argues that the second cause of action for libel should be dismissed because: (1) the alleged defamatory statements in the April 3 email are not reasonably susceptible to a defamatory meaning; (2) the statements are substantially true because Seldon was held on Riker’s Island; and (3) the statements are absolutely privileged because they were made in a communication between Lembeck and her attorney. Further, Lembeck contends that the third cause of action for negligent infliction of

¹ Seldon alleges that the April 3 email states: “[t]hese two letters are scary. I scrolled through the Judge Wooten letter, and only read the part about my friend John Bruno, owner of the restaurant Pen & Pencil (recognize the name)? I saw the name of the attorney Nancy Sills. She is the one who called me after the Barbara Katz suit, gave me her phone number, and asked me to call her if he did any more harassing. That was right after the DA (or asst. DA Emily Becker) sentenced him to a week in Rikers’ Island.”

emotional distress should be dismissed because Seldon failed to allege that he feared for his safety, and Lembeck's conduct was not outrageous.

In opposition, Seldon argues that his first and second causes of action for libel should not be dismissed because the statements in the March 27 letter and April 3 email are not protected by absolute privilege as they were made prior to the commencement of any litigation. In addition, Seldon argues that he adequately stated a claim for negligent infliction of emotional distress because Lembeck's conduct was outrageous, and consequently, he suffered emotional and psychological injuries.

Discussion

“On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction.” *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). Under CPLR § 3211(a)(1), a dismissal is “warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” *Leon*, 84 N.Y.2d at 88.

Under CPLR § 3211(a)(7), a defendant may move for judgment dismissing the complaint on the grounds that “the pleading fails to state a cause of action.” In determining whether to grant a motion to dismiss based on a failure to state a cause of action, the “court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged,

fit within any cognizable legal theory.” *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118, 121 (1st Dep’t 2002).

However, where the parties submit extrinsic evidence in connection with a CPLR § 3211(a)(7) motion to dismiss, the appropriate standard of review is “whether the proponent of the pleading has a cause of action, not whether he has stated one.” *IIG Capital LLC v. Archipelago, L.L.C.*, 36 A.D.3d 401, 402 (1st Dep’t 2007) (internal quotations omitted).

1. First Cause of Action for Libel

In a defamation action, the plaintiff must show: (1) a defamatory false statement; (2) published without privilege or authorization to a third party; (3) constituting fault as judged by, at a minimum, a negligence standard; and (4) it must either cause special harm or constitute defamation *per se*. *Foster v. Churchill*, 87 N.Y.2d 744, 751 (1996); *Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dep’t 1999).

Based on the allegations in the complaint, I grant Lembeck’s motion to dismiss Seldon’s first cause of action for libel. Seldon alleges that Lembeck made a defamatory statement when her agent, Wasserstein, stated in a letter that Seldon’s actions were “unlawful.” This statement is not defamatory in nature because it clearly expressed an opinion on the legality of Seldon’s conduct, and the statement was not an assertion of fact. To be actionable, the alleged defamatory statement must be an assertion of fact, not

an expression of opinion which cannot form the basis of a defamation claim. *Mann v. Abel*, 10 N.Y.3d 271, 276 (2008).

Because Seldon failed to allege that Lembeck made a defamatory statement, Seldon failed to state a libel claim against Lembeck based on the March 27 letter. Accordingly, I grant Lembeck's motion to dismiss the first cause of action for libel.

2. Second Cause of Action for Libel

In the second cause of action, Seldon alleges that Lembeck published a defamatory statement when she stated in her April 3, 2013 email to Wasserstein that Seldon harassed her, and that he had been sentenced to a week at Riker's Island by the district attorney. Lembeck contends that this libel cause of action should be dismissed because her statements are not susceptible to any defamatory meaning.

The determination of whether a particular statement constitutes a factual assertion or non-actionable opinion is a question of law, and is tested by the standard of whether a reasonable reader could have concluded that the statement was conveying facts about plaintiff. *Mann v. Abel*, 10 N.Y.3d 271, 276 (2008); *Gross v. New York Times Co.*, 82 N.Y.2d 146, 152-153 (1993). In determining whether a statement is non-actionable opinion, the court must consider: (1) whether the specific language in issue has a precise meaning that is readily understood; (2) whether the statement is capable of being proven true or false; and (3) whether the full context of the statement or broader social context signals that it is likely to be opinion. *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 289 (1986); *Dillon v. City of New York*, 261 A.D.2d 34, 39 (1st Dep't 1999).

First, I find that Lembeck's statement that Seldon "harassed" her is non-actionable opinion that does not give rise to a defamation claim. However, Lembeck's statement that Seldon was sentenced to a week at Riker's Island constitutes an assertion of fact when viewed in the context in which it was made. Although Lembeck incorrectly stated that the district attorney "sentenced" her, the statement was clearly intended to convey a factual assertion that Seldon spent time in jail at Riker's Island. Because this statement has a meaning that can readily be understood and can be proven either true or false, I conclude that it is a factual assertion.

While Seldon sufficiently pleads that Lembeck made a defamatory statement about him – i.e., that he spent time in jail at Riker's Island – Seldon does not have a cause of action for libel because Lembeck demonstrated that this statement was substantially true. *Silverman v. Clark*, 35 A.D.3d 1, 12 (1st Dep't 2006); *Kehm v. Murtha*, 286 A.D.2d 421, 421 (2d Dep't 2001) ("truth is a complete defense to an action to recover for damages for libel or slander, and this defense may apply as long as the statement is substantially true").

Through an affirmation of her attorney, Lembeck submitted a copy of an email that Seldon wrote to her, in which he stated "I was not sentenced – I was there only because I could not make bail." With this evidence, Lembeck demonstrated the substantial truth of her statement that Seldon spent time at Riker's Island, as he admitted that he was there because he could not post bail. In opposition to this motion, Seldon did not submit any evidence, through his affidavit or otherwise, to show that Lembeck's statement was false.

For the above stated reasons, Seldon does not have a libel claim against Lembeck based on the April 3 email. Accordingly, I grant Lembeck's motion to dismiss the second cause of action for libel.

3. Third Cause of Action for Negligent Infliction of Emotional Distress

A cause of action for negligent infliction of emotional distress must be premised upon the breach of a duty owed to plaintiff that unreasonably endangers the plaintiff's physical safety, or causes the plaintiff to fear for his or her own safety. *Bernstein v. East 51st St. Dev. Co., LLC*, 78 A.D.3d 590, 591 (1st Dep't 2010). Further, the plaintiff must allege conduct by the defendant that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency." *Sheila v. Povich*, 11 A.D.3d 120, 130-31 (1st Dep't 2004) (internal quotations omitted).

Seldon fails to sufficiently plead a claim for negligent infliction of emotional distress. In the complaint, Seldon fails to allege that Lembeck's conduct unreasonably endangered his physical safety, or that he feared for his own safety as a result the April 3 email sent by Lembeck. Moreover, Lembeck's statements about Seldon do not amount to outrageous or extreme conduct. *164 Mulberry Street Corp. v. Columbia Univ.*, 4 A.D.3d 49, 56 (1st Dep't 2004) (finding that outrageous conduct "must consist of more than mere insults, indignities and annoyances"); *Dillon*, 261 A.D.2d at 41 (disparagement of a plaintiff's character is not extreme and outrageous conduct).

Accordingly, I grant Lembeck's motion to dismiss the third cause of action for negligent infliction of emotional distress.

In accordance with the foregoing, it is

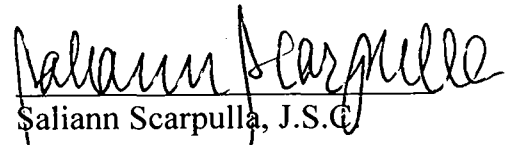
ORDERED that defendant Harriet Lembeck's motion to dismiss the complaint pursuant to CPLR §§ 3211(a)(1) and (a)(7) is granted, and the complaint is dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: New York, New York
February 28, 2014

ENTER:


Saliann Scarpulla, J.S.C.

HON. SALIANN SCARPULLA