SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

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KEN ANTONELLI,

Plaintiff,

- against -

TRANS WORLD ENTERTAINMENT CORPORATION, ROBERT HIGGINS AND JOHN SULLIVAN,

Defendants.

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Index No. 112160/09
Motion Seq. Nos. 002 & 003

DECISION AND ORDER

HON. SALIANN SCARPULLA, J.:

In this action, *inter alia*, to recover damages for breach of contract, plaintiff Ken Antonelli ("Antonelli") moves for summary judgment on his first cause of action asserted against defendant Trans World Entertainment Corporation ("Trans World") and Trans World cross-moves for summary judgment dismissing the first cause of action (motion sequence number 002). Defendant John Sullivan ("Sullivan") moves for summary judgment dismissing the second and third causes of action (motion sequence number 003). Motion sequence numbers 002 and 003 are consolidated for disposition.

Antonelli was employed as president and chief executive officer of non-party Icon Entertainment LLC ("Icon"), a recording label and record distributor, pursuant to an employment agreement dated September 1, 2005. Icon was 80% owned by Trans World and 20% owned by Antonelli. Trans World signed the employment agreement, "but only to the extent of guaranteeing the obligations in Paragraph 4.2(c)." Paragraph 4.2(c) provided that

if Antonelli's "employment . . . is terminated for 'Failure of Funding'," Antonelli would be entitled to: "(i) all monies due to and/or accrued thru the date of 'Failure of Funding' termination, and (ii) . . . Base Salary, . . . and all Health Benefits, through the end of the Term [August 31, 2010]." Paragraph 4.1 (c) defined "Failure of Funding" of Icon by Trans World as, "during the period ending August 31, 2008 only, the winding up, dissolution or liquidation of [Icon] for any reason."

In 2007, Icon became unable to fund its operations. According to Antonelli, by January 2008, Trans World had already elected to wind-up the affairs of Icon and to wind down its operations, but Trans World took nine months to finally close Icon down. Antonelli claimed that the delay in winding up Icon's affairs was undertaken to defeat Antonelli's rights to severance under the severance agreement. He claimed that no funds were made available to develop new talent or to fund the existing talent, his proposals regarding new artists were rejected, and no business transactions which would have rendered Icon an ongoing business were approved. According to Trans World, no winding up steps were taken at any time prior to October 2008, and in fact, Trans World decided to continue to fund Icon in hopes that the business would turn around. Further, it was only in October 2008, when Antonelli presented his proposed 2009 budget to the executive committee, showing that Icon would continue to suffer losses through 2009, that the executive committee took action to begin to wind up Icon. Icon's vendors were unpaid, the existing talent was not funded,

and royalties and other payment obligations were not met. Icon did not pay Antonelli severance.

Antonelli commenced an arbitration proceeding pursuant to an arbitration provision contained in the employment agreement. Antonelli's demand for arbitration named Trans World and Icon as respondents. Trans World moved for, and was granted, a permanent stay of the arbitration proceeding against Trans World, based upon this Court's determination (Fried, J.) that Trans World did not explicitly agree to arbitrate.

The arbitration proceeded against Icon, however Icon did not appear in the arbitration proceeding. At the conclusion of arbitration, the arbitrator found that Icon "effectively commenced the process of 'winding up' Icon in or about January 2008" and "at that time Icon started closing down and, as a practical matter, began the process of ceasing to be an ongoing business concern." Consequently, the arbitrator found that Icon breached the agreement by failing to pay Antonelli. The arbitrator awarded Antonelli $713,773.27 against Icon, on default. The arbitration award was confirmed in October 2009, on default, and judgment was entered against Icon.

Antonelli then commenced this action, alleging that Trans World breached the employment agreement by failing to satisfy its obligations as guarantor of the severance provision therein. Antonelli also asserted causes of action for defamation and prima facie tort against Sullivan, Trans World's chief financial officer.[1] Antonelli's defamation claim

[1] The third cause of action for prima facie tort was also asserted against Robert Higgins, but the parties stipulated to discontinue the action against Higgins in June 2012.

is based upon statements made during a February 25, 2009 telephone call between Sullivan and nonparty Alex Brahl ("Brahl"), a creditor of Icon. During this phone call, Sullivan allegedly told Brahl that Antonelli was the "sole owner" of Icon, suggesting that Antonelli alone was responsible for Icon's failure to pay creditors. Antonelli alleges that this false statement is defamatory and injured his reputation in the music industry.

The claim for prima facie tort is based upon allegations that the manner in which Icon was being "wound up" caused serious damage to the talent, record labels and vendors with which Icon had business relationships in an effort to "injure [Antonelli] in his business activities and relationships and [] impair and damage his reputation and name in the music industry." Antonelli claimed that the wrongful scheme orchestrated by Sullivan resulted in the vendors and record labels being left without representation, which generated animosity toward Antonelli and damage to his business relationships and reputation.

Discussion

Breach of Contract Against Trans World

Antonelli argues that he is entitled to summary judgment on his claim asserted against Trans World because of collateral estoppel or res judicata, based on the arbitrator's determination that Icon commenced winding up prior to August 31, 2008, thus triggering Antonelli's entitlement to severance under section 4(c) of the agreement, which Trans World guaranteed. Trans World argues that it is not bound by collateral estoppel or res judicata because it was not a party to the arbitration and because the arbitrator's determination was

made on default. The parties also dispute whether Icon's winding up occurred within the required time frame under the plain language of the severance agreement, and thus whether Trans World is obligated, as guarantor, to pay Antonelli severance payments under the agreement.

The doctrines of res judicata and collateral estoppel are applicable to arbitration awards. *Waverly Mews Corp. v. Waverly Stores Assocs.*, 294 A.D.2d 130 (1st Dept. 2002). "[R]es judicata precludes relitigation of issues actually litigated and resolved in a prior proceeding," and, therefore, "the party seeking to invoke the doctrine of res judicata must demonstrate that the critical issue in a subsequent action was decided in the prior action and that the party against whom estoppel is sought was afforded a full and fair opportunity to contest such issue." *Gomez v. Brill Sec., Inc.*, 95 A.D.3d 32, 35 (1st Dept. 2012).

Collateral estoppel applies when (1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits. *Calder v. 731 Bergan, LLC*, 83 A.D.3d 758, 759 (2nd Dept. 2011). The party to be estopped must have been either a party to the prior proceeding or in privity with a party to that proceeding. *See D'Arata v. New York Cent. Mut. Fire Ins. Co.*, 76 N.Y.2d 659 (1990).

Here, the matter was not "actually litigated and decided" and therefore, the doctrines of res judicata and collateral estoppel can not be invoked. *See Kaufman v. Eli Lilly & Co.,*

65 N.Y.2d 449 (1985); *Stumpf AG v. Dynegy Inc.*, 32 A.D.3d 232 (1st Dept. 2006). Trans World was not a party to the arbitration, because it moved for, and was granted, a permanent stay of the arbitration proceeding against it. Although Trans World was in privity with Icon, and the arbitrator reached a determination against Icon, that determination was reached on default. A default occurs whenever a party fails to take a necessary step within a proper time. *S.D.I. Corp. v. Fireman's Fund Ins. Cos.*, 208 A.D.2d 706, 708 (2nd Dept. 1994). Icon did not appear or present any evidence at the arbitration proceeding, and the arbitration award was confirmed on default as well. Therefore, the matter was not "actually litigated and decided" and collateral estoppel and res judicata do not apply.

Antonelli's reliance on *NPS Corp. v. Continental Group, Inc.* (183 A.D.2d 666, 667 [1st Dept. 1992]) is inapposite. In support of his argument, he refers to the statement from *NPS Corp.*: "even if the guarantor...did not agree to arbitrate, by guaranteeing the liability of a principal...who has done so, the guarantor implicitly agrees, for purposes of later determining its liability, to be bound by the resolution reached in arbitration." However, that language was from a prior decision in the case in which the court had considered whether NPS should be required to arbitrate, not whether a default arbitration award should be enforced against a guarantor that was exempt from arbitration. NPS, the principal and opposing parties then all participated in the arbitration. The court found that the arbitration award was enforceable against NPS even though it did not agree to arbitrate, in the context of NPS's motion to stay arbitration having been denied and NPS having actually participated

in the arbitration. Here, Trans World's motion to stay arbitration was granted, and neither Icon nor Trans World appeared in the arbitration.

Nevertheless, the court finds that based on the evidence presented, including the agreement, the operating agreement, deposition testimony, internal letters, emails and memoranda, and minutes of Icon committee meetings, issues of fact exist as to whether Icon's winding up occurred within the required time frame under the plain language of the severance agreement, and thus whether Trans World is obligated, as guarantor, to pay Antonelli severance payments under the agreement. As such, Antonelli's motion for summary judgment is denied, and Trans World's cross motion for summary judgment dismissing Antonelli's first cause of action is denied.

Defamation and Prima Facie Tort Against Sullivan

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." *Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dept 1999). "[T]he 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.*

"[T]he truth or substantial truth of the statements is a complete defense to the claim of defamation." *Panghat v. New York Downtown Hosp.*, 85 A.D.3d 473, 473 (1st Dept 2011).

The test of whether a statement is substantially true is whether the statement as published would have a different effect on the mind from that which the pleaded truth would have produced. *Love v. William Morrow & Co.*, 193 A.D.2d 586, 588 (2nd Dept. 1993). "[M]inor inaccuracies are acceptable." *Shulman v. Hunderfund*, 12 N.Y.3d 143, 150 (2009) ("the Constitution follows the common law of libel which, as the United States Supreme Court has observed, 'overlooks minor inaccuracies and concentrates upon substantial truth' [citation omitted]").

Antonelli's defamation cause of action is based upon Sullivan's statement to Brahl that Antonelli was the "sole owner" of Icon. It is undisputed that Antonelli was not the "sole" owner of Icon. Antonelli owned 20% of Icon and Trans World owned 80%, Antonelli served as Icon's president, chief executive officer, and general manager, and he was the "senior executive" with "overall supervision of the affairs of [Icon]." Thus, although Antonelli was not the "sole" owner of Icon, he was one of the owners and served in a senior capacity with respect to Icon's operations.

At his deposition Brahl testified that he "was never under the impression that [Antonelli] was not an owner [of Icon]." Brahl testified that Antonelli's ownership interest in Icon made Brahl "consider [Antonelli] as owing [Brahl] part of th[e] money [owed by Icon]." Brahl testified that "if [Antonelli] was not an owner," he would not "have better feelings for [Antonelli]." Based on Brahl's testimony, it is clear that the nature of Antonelli's ownership interest would not have had "'a different effect on the mind of [Brahl]

from that which the pleaded truth would have produced.'" *Love v. William Morrow & Co.*, 193 A.D.2d 586, 588 (2nd Dept. 1993). Thus, summary judgment dismissing the defamation cause of action is warranted.

Sullivan is entitled to summary judgment dismissing the defamation cause of action for the additional reason that Sullivan's alleged statement neither constituted slander per se nor caused special damage. Slander is not actionable unless the plaintiff suffers special damage. Four established exceptions (collectively "slander per se") consist of statements (i) charging plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman. *Liberman v. Gelstein*, 80 N.Y.2d 429, 435 (1992). Antonelli alleges that Sullivan's statement constituted slander per se in that it injured Antonelli's "trade, business or profession" in the music industry. Simply referring to Antonelli as the "sole" owner of Icon, rather than the owner of a 20% interest, however, could not reasonably have injured Antonelli in his trade, business or profession. *See generally Aronson v. Wiersma*, 65 N.Y.2d 592, 593-594 (1985). Antonelli's argument that the statement is slanderous *per se* fails as a matter of law.[2]

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[2] In his opposition brief, Antonelli's counsel conclusorily argues that Sullivan's statement "permeated throughout the music industry and led other music executives and former peers to believe that [Antonelli] had personally defaulted on payments." Antonelli fails to submit any evidence to support this argument, and other than a former Icon employee, Brahl was unable to identify anyone in the music industry with whom he spoke about Antonelli.

Finally, Antonelli has failed to raise an issue of fact as to special damages. "Special damages contemplate 'the loss of something having economic or pecuniary value.'" *Liberman*, 80 N.Y.2d at 434-435. In an email dated February 13, 2009 to an Icon employee, nearly two weeks before Sullivan's alleged defamatory statement, Brahl had already determined that he would not hire Icon in the future. The only evidence presented establishes that any economic or pecuniary loss resulting from Brahl's refusal to work with Antonelli was established prior to Sullivan's alleged statement. No other evidence has been presented of economic or pecuniary loss. In sum, Sullivan has made out a prima facie case for dismissal of the defamation cause of action and Antonelli has failed to raise an issue of fact requiring a trial on this cause of action.

Antonelli also pleads a cause of action against Sullivan for prima facie tort. The elements of a cause of action for prima facie tort are: (1) intentional infliction of harm; (2) which results in special damages; (3) without any excuse or justification; and (4) by an act or series of acts which would otherwise be lawful. *Golub v Esquire Publ.*, 124 AD2d 528, 529 (1st Dept 1986). The action complained of must have been "solely motivated by malice or 'disinterested malevolence,'" and the plaintiff must have "suffered specific, measurable loss, which requires an allegation of special damages." *Id.*

Antonelli has not submitted any evidence to support the conclusion that Sullivan's sole motivation was malice. Rather, the evidence reflects only that Brahl sought payment of funds owed by Icon, and that Sullivan directed Brahl to Antonelli. As such, Sullivan's

motion for summary judgment dismissing the third cause of action for prima facie tort is granted.

In accordance with the foregoing, it is hereby

ORDERED that plaintiff Ken Antonelli's motion for summary judgment on his first cause of action is denied, and defendant Trans World Entertainment Corp.'s cross motion for summary judgment is denied (motion sequence number 002); and it is further

ORDERED that defendant John Sullivan's motion for summary judgment is granted and the second and third causes of action of the amended complaint are dismissed (motion sequence number 003); and it is further

ORDERED that the first cause of action asserted against defendant Trans World Entertainment Corp. is severed and shall continue.

This constitutes the decision and order of this Court.

Dated: New York, New York
April 25, 2014

ENTER:

Saliann Scarpulla
J.S.C.
HON. SALIANN SCARPULLA