Torati v Hodak
2014 NY Slip Op 31506(U)
June 11, 2014
Supreme Court, New York County
Docket Number: 155979/12
Judge: Ellen M. Coin

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

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HEZI TORATI,

Plaintiff,

-against- Index No. 155979/12

DANIEL HODAK,

Defendant.

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ELLEN M. COIN, J.:

Plaintiff Hezi Torati moves, pursuant to CPLR 602 (a), 1003, 3025, and 6301, for an order: (a) restoring this action to the calendar; (b) adding XCentric Ventures LLC (XCentric), Edward Magedson (Magedson), and John and Jane Does # 1-100 as party defendants; (c) adding NSS Financial Services LLC (NSS), Amerevision Capital LLC, and Amerevision Research LLC as party plaintiffs; (d) granting leave to plaintiff to amend his complaint to add certain causes of action; (e) preliminarily enjoining defendant and the proposed defendants from publishing certain statements concerning plaintiff; (f) consolidating this action with the action bearing index No. 157177/13; and (g) upon consolidation, compelling XCentric to comply with a subpoena issued in the 2013 action. Defendant Daniel Hodak does not oppose the motion insofar as it seeks consolidation and the addition of new plaintiffs and defendants. Nonparty XCentric opposes the motion insofar as it seeks to add XCentric and Magedson as party defendants and to compel compliance with the subpoena.

This action arises from the publication on XCentric's web site, Ripoffreport.com, of comments by Hodak that are critical of plaintiff's role in a failed venture that plaintiff undertook

with Hodak. Magedson is the manager of XCentric and runs the website's day-to-day operations.

That branch of the motion that seeks restoration of this action to the court's trial calendar is moot, because this action has not been on the calendar and no note of issue has been filed. That branch that seeks to add new parties plaintiff is unopposed and is granted. That branch that seeks consolidation is unopposed and is granted. That branch that seeks injunctive relief is denied because prior restraint is, generally, not available solely to enjoin the publication of libel (*Rosenberg Diamond Dev. Corp. v Appel*, 290 AD2d 239 (1st Dept 2002), as distinguished from situations in which property rights are "threatened by tortious conduct in which the words are merely an instrument of and incidental to the conduct." *Trojan Elec. & Mach. Co. v Heusinger*, 162 AD2d 859, 860 (3d Dept 1990) (citations omitted). Plaintiff alleges no injurious conduct, other than the use of words. Moreover, plaintiff has an adequate remedy at law.

The court now turns to the branch of the motion that seeks to add XCentric and Magedson as party defendants. While leave to amend a pleading is to be freely given (CPLR 3025 [b]), a court is not required to grant leave where the proposed pleading is "totally devoid of merit and legally insufficient." *Mosaic Caribe, Ltd. v AllSettled Group, Inc.*, _AD3d_, 2014 WL 1698495 *1 (1st Dept 2014), citing *Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 25 (1st Dept 2003). As an initial matter, plaintiff acknowledges that he failed timely to serve a copy of the moving papers upon Magedson in accordance with the Court's direction in the Order to Show Cause that brought on the instant motion. Plaintiff's reply memorandum at 2, n 2. Thus, the motion is denied as to Magedson, and the following discussion pertains solely to XCentric.

XCentric argues that this court lacks personal jurisdiction over it, and that in any event, adding it as a defendant would be futile because it is immune from liability by virtue of the

Communications Decency Act (CDA), 47 USC § 230 *et seq.*

The CDA provides, in relevant part:

> "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider"

(47 USC § 230 [c] [1]), and

> "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."

47 USC § 230 (e) (3). The CDA defines "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information through the Internet or any other interactive computer service." 47 USC §230 (f) (3).

The proposed verified supplemental and amended complaint asserts five causes of action against XCentric, to wit: (1) libel, (2) libel per se, (3) injurious falsehood, (4) interference with contractual relationships and prospective economic advantage, and (5) violation of General Business Law § 349. It is undisputed that XCentric is a provider of an interactive computer service, within the meaning of CDA § 230 (c). Accordingly, all the causes of action alleged against XCentric are clearly barred by the CDA, insofar as they are based upon XCentric's publication of comments posted on its website by Hodak or other individuals. *Shiamili v Real Estate Group of N.Y., Inc.*, 17 NY3d 281, 288-289 (2011); *Ascentive, LLC v Opinion Corp.*, 842 F Supp2d 450, 474 (ED NY 2011).

The verified supplemental and amended complaint alleges, however, that XCentric solicits persons to post complaints on its website, and that because it creates additional matter that it adds to the posted complaints, it is itself an information provider of those complaints and

thus cannot benefit from the immunity provided by CDA § 230 (c). The solicitation of critical statements, alone, cannot subject XCentric to liability. "Creating an open forum for third parties to post content--including negative commentary--is at the core of what section 230 protects." *Shiamili*, 17 NY3d at 290-291. The freedom to create a forum would be hollow without the concomitant freedom to invite participation therein.

The additional material that is allegedly created by XCentric falls into two groups. The first consists of headings that it places at the beginning of a posted complaint, including the logo, "Don't let them get away with it--let the truth be known." The second is the domain name itself, "Ripoff Report," which, plaintiff alleges, defames every person who becomes the target of a report. Complaint, ¶¶ 78-79, and 81. Plaintiff does not allege that the headings added to the postings about him misrepresented the content of those postings. Accordingly, the headings, as well as XCentric's logo, are "well within 'a publisher's traditional editorial functions,'" (*Shiamili*, 17 NY2d at 291, quoting *Zeran v America Online, Inc.*, 129 F3d 327, 330 [4th Cir 1997]), and, therefore, they do not establish XCentric as an "information content provider." *See Batzel v Smith*, 333 F3d 1018, 1031 (9th Cir 2003), *cert denied* 541 US 1085 (2004) (adding head note to material received falls within "the usual prerogative of publishers . . . to edit the material published while retaining its basic form and message"). The domain name itself is clearly not actionable, because it merely discloses that a complaint has been made about the subject of the report.

The other kind of added material, which is alleged to be critical to XCentric's business model, consists of terms embedded in the metadata that accompany every posting, together with the name of the subject of the particular posting. Those terms include "fraud," "complaint,"

"rip-off," and "scam," all of which, like the rest of the metadata, are written in HTML (hyper text markup language), which are read by search engines but are not apparent on the face of XCentric's website, or in an Internet search of the name of the target of a posting. Plaintiff alleges, however, that when the metadata are read by Internet search engines, such as Google's, or Yahoo!'s, they increase the "visibility, searchability and prominence [of the postings] in search engine results" (Verified Supplemental and Amended Complaint ¶ 52), and, thus, increase XCentric's advertising revenue "by ensuring that Internet users who search [the targets of posted complaints] will find the reports and click through to them on Ripoff Report." Complaint ¶ 55. An attempt to promote one's web site by gaming the search rankings of search engines, or, to put it another way, by engaging in "search engine optimization" (*Amerigas Propane, L.P. v Opinion Corp.*, 2012 WL 2327788, *1 n 2,2012 US Dist LEXIS 84679 *3 n 2 (ED Pa 2012), may be grounds for complaints by the search engine companies, but, with regard to defendant, they are no more than an attempt by XCentric to have its postings more widely read. Such an attempt hardly strips XCentric of the immunity extended by the CDA. *See Asia Economic Inst. v XCentric Ventures LLC*, 2011 WL 2469822, *6 2011 US Dist LEXIS 14530, *19 (CD Cal 2011) (increasing the visibility of a statement does not alter its message).

Moreover, it appears that search engines no longer use metatags in determining results lists. "Instead, search engines today primarily use algorithms that rank a website by the number of other sites that link or point to that website." *Ascentive, LLC v Opinion Corp.*, 842 F Supp 2d 450, 467 (ED NY 2011) (citing, among other sources, *Network Automation, Inc. v Advanced Sys.*, 638 F3d 1137, 1146 n 3 [9th Cir 2011]). "Indeed, the algorithm of Google, the leading search engine, does not use metatags to determine its results lists at all." *Id.*, citing Google

Webmaster Central Blog, http:// www.google webmaster central. blogspot.com/2009/09/google-does- not- usekeywords- meta- tag. html; *see also Seikaly & Stewart, P.C. v Fairley*, _F Supp2d_, 2014 WL 1911881 (D Ariz 2014).

This court does not disagree that XCentric's business practices, including its refusal to delete a report (even where, as here, the person who posted it seeks to retract it) and offering the subjects of reports, for large sums of money, the chance to have XCentric investigate the validity of a report and add the results of its investigation to the report, a chance that the complaint does not allege XCentric to have offered to plaintiff, are "appalling." *See Giordano v Romeo*, 76 So3d 1100, 1102 (Fla App 3d Dist 2011). However, as the *Giordano* court also concluded, that is not a reason to strip XCentric of the statutory immunity to which it is entitled. Accordingly, granting this branch of plaintiff's motion would be a futile act.

In view of the foregoing determination, the court need not address the issue of personal jurisdiction.

Plaintiff's motion to compel XCentric's compliance with the subpoena issued in the now-consolidated action is denied. The subpoena was not issued in this Court but in the Superior Court of Arizona. Motions to enforce a subpoena issued, as here, pursuant to the Uniform Interstate Depositions and Discovery Act[1] are to be brought in and governed by the rules in the discovery state. *Hyatt v State Franchise Tax Bd.*, 105 AD3d 186, 201 (2d Dept 2013). Thus, plaintiff must seek enforcement in the State of Arizona.

The court now turns to the proposed additional causes of action against Hodak, to wit: injurious falsehood, and tortious interference with prospective economic advantage.

[1]Arizona became a party to the Act effective January 1, 2013.

A cause of action for injurious falsehood, the elements of which are "essentially identical to [those of] slander of title" (*Casa de Meadows, Inc. [Cayman Is.] v Zaman*, 76 AD3d 917, 922 [1st Dept 2010] [internal quotation marks and citations omitted]), requires an allegation of special damages to "legally protected property interests." *BCRE 230 Riverside LLC v Fuchs*, 59 AD3d 282, 283-284 (1st Dept 2009), citing *Cunningham v Hagedorn*, 72 AD2d 702, 704 (1st Dept 1979) (claim must concern plaintiff's property). The special damages must be stated with particularity (*Rall v Hellman*, 284 AD2d 113, 114 [1st Dept 2001]), and "proved to be the direct and natural result of the [alleged] falsehood." *SRW Assoc. v Bellport Beach Prop. Owners*, 129 AD2d 328, 331 (2d Dept 1987).

The only particularized allegations of damages that plaintiff makes are that: (1) in June 2013, his application for a car loan with Chase Bank was rejected; (2) in December 2012, his application to obtain purchase money financing from a bank headquartered in Florida was denied; and (3) a viable candidate for the position of in-house counsel for plaintiff's companies withdrew from consideration. The first two of these allegations do not suffice, because a unilateral expectation of a favorable disposition of an application does not constitute a cognizable property interest. *Matter of Daxor Corp. v State of N.Y. Dept. of Health*, 90 NY2d 89, 93 (1997), *cert denied* 523 US 1074 (1998); *see also Bower Assoc. v Town of Pleasant Val.*, 2 NY3d 617, 629-630 (2004). As for the third, one has no property interest in having a prospective employee follow through on his application. In his reply affidavit, plaintiff adds that his bank abruptly closed his account and refused to extend further credit to him, thereby jeopardizing his purchase of a commercial property in Manhattan. That averment, too, implicates no property interest, and does not even state that plaintiff suffered any damages.

Moreover, plaintiff can only speculate that the actions, here summarized, were directly caused by defendant's remarks in Ripoffreport. The court takes judicial notice that, leaving aside other possible explanations of those actions, plaintiff and the companies that he controls have been the subject of at least two other sets of unflattering comments on Ripoffreport, or other Internet sites. *See Hezi Torati and NSS Fin. Servs., LLC v Ron Kutas*, NY County Index No. 155253/12 and *Hezi Torati and NSS Fin. Servs., LLC v Veeda Vahabzadeh*, NY County Index No. 155252/12. In addition, Torati and his companies have had a number of judgments entered against them. *See e.g. Amir Levin v Hezi Torati*, New York County Index No. 114268/08 and *201 West 134 St., LLC v NSS Fin. Serv. LLC and Hezi Torati*, New York County Index No. 115503/ 10; *see Oakes v Muka*, 56 AD3d 1057, 1059 (3d Dept 2008); *Casson v Casson*, 107 AD2d 342, 344 (1st Dept 1985) (a court may take judicial notice of its own records). In sum, the proposed injurious falsehood claim is totally devoid of merit.

While defamation is a predicate act for a claim of tortious interference with prospective economic advantage (*Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept 2009]), it does not suffice as the basis for such a claim. "To prevail on a claim for tortious interference with business relations . . . a party must prove[, among other things,] (1) that it had a business relationship with a third party; [and] (2) that the defendant knew of that relationship and intentionally interfered with it." *Id.*, citing, among other cases, *Carvel Corp. v Noonan*, 3 NY3d 182, 189 (2004) and *NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614 (1996). Plaintiff does not allege that Hodak knew about plaintiff's attempts to hire in-house counsel, or his attempts to obtain a car loan and a purchase money loan. *See e.g. Sambrotto v Bond New York Properties Brokerage, LLC*, 2013 WL 685223 (Sup Ct, New York County 2013). One cannot

intentionally interfere with a prospective business relationship that one does not know about.

Accordingly, it is hereby

ORDERED that plaintiff Hezi Torati's motion is granted to the extent that (1) leave is granted to add NSS Financial Services, LLC, Amerevision Capital LLC, and Amerevision Research LLC as party plaintiffs; and (2) this action is consolidated with the action bearing Index No. 157177/2013; and the motion is otherwise denied; and it is further

ORDERED that the above-captioned action is consolidated in this Court with the action entitled Hezi Torati, NSS Financial Services LLC, Amerevision Capital LLC, and Amerevision Research LLC v Daniel Hodak, John Doe 1-100 and Jane Doe 1-100, Index No. 157177/2013, under Index No. 155979/2012, and the consolidated action shall bear the following caption:

Hezi Torati, NSS Financial Services LLC, Amerevision Capital LLC and Amerevision Research LLC,

Plaintiffs,

-against-

Daniel Hodak, John Doe 1-100 and Jane Doe 1-100,

Defendants,

and it is further

ORDERED that plaintiff is directed to file an amended complaint consistent with this decision and order within 20 days of entry hereof; and it is further

ORDERED that upon plaintiff's filing of the amended complaint in accordance with this decision and order, the pleadings in the actions hereby consolidated shall stand as the pleadings

in the consolidated action; and it is further

ORDERED that movant is directed to serve a copy of this order with notice of entry on the County Clerk, who shall consolidate the papers in the actions hereby consolidated and shall mark his records to reflect the consolidation; and it is further

ORDERED that movant is directed to serve a copy of this order with notice of entry on the Clerk of the Trial Support Office, who is hereby directed to mark the court's records to reflect the consolidation; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 311, 71 Thomas Street, on August 8, 2014.

Dated: June 11, 2014

ENTER:

A.J.S.C.