SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

----------X

JOHN B. WENDER,

Plaintiff,

-against- Index No. 160505/13

LOUISE SILBERLING,

Defendant.

----------X

HON. ANIL C. SINGH, J.:

Defendant in this defamation action moves pursuant to CPLR 3211(a)(5) and (7) for an order dismissing the complaint and quashing certain non-party subpoenas that plaintiff has served. Plaintiff opposes the motion.

The complaint alleges that plaintiff John Wender and defendant Louise Silberling met through the Internet. They had a brief personal relationship that ended in January 2012. In March 2012, defendant wrote a "poem" on her Facebook page, in which she expressed a scathing view of plaintiff.

Commencing sometime in 2013, numerous highly unfavorable statements were made about plaintiff on anonymous Internet blogs, and in emails anonymously sent to plaintiff or members of his immediate family. Defendant argues that all of the statements about which plaintiff complains are expressions of opinion, and that, as to most of them, the complaint is untimely. Defendant also argues that plaintiff has no basis for his belief that she is the source of the statements in issue.

The court turns first to the issue of timeliness, and then to whether the complaint states a cause of action.

The statute of limitations governing a cause of action for defamation is one year. CPLR 215. Except in regard to defendant's Facebook "poem," summarized in paragraph 9 of the complaint, that branch of defendant's motion that is based upon CPLR 3211 (a) (5) is being denied, because defendant has failed to make a prima facie showing that the subsequent blog postings were posted more than a year prior to the commencement of this action on November 12, 2013. Untimeliness is an affirmative defense, and defendant has the burden of making a prima facie case that plaintiff's time to sue has expired. (Benn v Benn, 82 A.D.3d 548, 549 [1st Dept 2011]). Defendant has not done so.

On a motion to dismiss for failure to state a cause of action, the court accepts all factual allegations pleaded in plaintiff's complaint as true, and gives plaintiff the benefit of every favorable inference (CPLR 3211(a)(7); Sheila C. v. Povich, 11 A.D.3d 120 [1st Dept 2004]). The court must determine whether "from the [complaint's] four corners[,] factual allegations are discerned which taken together manifest any cause of action cognizable at law" (Gorelik v. Mount Sinai Hosp. Ctr., 19 A.D.3d 319 [1st Dept 2005], quoting Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 [1977]). Vague and conclusory allegations are not sufficient to sustain a cause of action (Fowler v. American Lawyer Media, Inc., 306 A.D.2d 113 [1st Dept 2003]).

Plaintiff has attached 31 exhibits to his complaint and, in the body of the complaint, quotes more than 50 words and phrases from those exhibits, that he alleges to be

defamatory. Of those, many are not falsifiable and, hence, qualify as opinion, and many others, although they are vituperative, do not constitute libel per se.

A statement is defamatory if it is false and "tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace." (Sandals Resorts Intl. Ltd. v Google, Inc., 86 AD3d 32, 38 [1st Dept 2011], quoting Rinaldi v Holt, Rinehart & Winston, 42 NY2d 369, 379 [1977]). Opinions cannot be proven untrue (Thomas H. v Paul B., 18 NY3d 580, 584 [2012]), and they are constitutionally protected. (Rinaldi v Holt, Rinehart & Winston, 42 NY2d 369, 380, cert denied 434 US 969 [1977]; Jaszai v Christie's, 279 AD2d 186, 188 [1st Dept 2001]). Accordingly, in order to be actionable, a statement must be factual, and thus, capable of being shown to be false. The determination of whether a statement is one of fact is for the court. (Steinhilber v Alphonse, 68 NY2d 283, 290 [1986]).

In addition to ascertaining whether the challenged statement can be proven true or false, the court must determine "whether the specific language in issue has a precise meaning which is readily understood" and "whether either 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.'" (Brian v Richardson, 87 N.Y.2d 46, 51 [1995], quoting Gross v New York Times Co., 82 N.Y.2d 146, 153 [1993], quoting Steinhilber v Alphonse, 68 N.Y.2d at 292. "Loose, figurative or hyperbolic statements, even if deprecating the plaintiff, are not actionable." (Dillon v City of New York, 261 A.D.2d 34, 38 [1st Dept 1999]).

Inasmuch as plaintiff has not alleged that he suffered special damages, that is, "something having economic or pecuniary value" (Liberman v Gelstein, 80 N.Y.2d 429, 434-435 [1992], quoting Restatement [Second] of Torts § 575), only such statements that he complains of as constitute libel per se are actionable. (Glazier v Harris, 99 A.D.3d 403, 404 [1st Dept 2012]). Statements constitute libel per se if they falsely: (1) charge the plaintiff with a serious crime; (2) tend to injure the plaintiff in his or her business, trade, or profession; (3) impute a loathsome disease to the plaintiff (Liberman v Gelstein, 80 N.Y.2d at 435); or (4) falsely impute unchastity to a man or a woman. (Rejent v Liberation Publs., 197 AD2d 240, 245 [1st Dept 1994]). In addition, a written statement falsely accusing a person of lying in a matter of public interest is libelous per se. (Divet v Reinisch, 169 AD2d 416, 417 [1st Dept 1991], quoting Mase v Reilly, 206 App Div 434, 436 (1st Dept 1923).

In the instant matter, we will rely on three cases exploring the parameters of defamation on the Internet.

In Sandals Resort International Limited v. Google, Inc., 86 A.D.3d 32 [1st Dept., 2011], a corporation operating multiple resorts in Jamaica petitioned for pre-action discovery of information and materials that would enable it to bring a libel claim against the account holder of an e-mail account from which an e-mail was sent that implicitly criticized the corporation's treatment of native Jamaicans. The First Department held that the corporation failed to demonstrate a meritorious cause of action for defamation.

In Sandals, the Court engaged in a broad inquiry to determine whether the published

material was actionable. The Court wrote:

> The question of whether a defamation claim may be maintained does not turn on whether the writing contains assertions that may be understood to state facts. Even apparent statements of fact may assume the character of statements of opinion, and thus be privileged, when made in public debate, heated labor dispute, or other circumstances in which an audience may anticipate the use of epithets, fiery rhetoric or hyperbole. Moreover, sifting through a communication for the purpose of isolating and identifying assertions of fact should not be the central inquiry. Rather, it is necessary to consider the writing as a whole, as well as the over-all context of the publication, to determine whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff. Courts must consider the content of the communication as a whole, as well as its tone and apparent purpose.

(Sandals, 86 A.D.3d at 41-42 (internal quotation marks and citations omitted)).

The Court noted that "the culture of Internet communications, as distinct from that of print media such as newspapers and magazines, has been characterized as encouraging a 'freewheeling, anything-goes writing style'" (Sandals, 86 A.D.3d at 43). The Court concluded that readers give less credence to allegedly defamatory remarks published on blogs than to similar remarks made in other contexts (id.).

The Second Department reached a similar conclusion in LeBlanc v. Skinner, 103 A.D.3d 202 [2d Dept 2012]). Citing Sandals, the Court wrote:

> Internet forums are venues where citizens may participate and be heard in free debate involving civic concerns. It may be said that such forums are the newest form of the town meeting. We recognize that, although they are engaging in debate, persons posting to these sites assume aliases that conceal their identities or "blog profiles." Nonetheless, falsity remains a necessary element in a defamation claim and, accordingly, only statements alleging facts can properly be the subject of a defamation action. Within this ambit, the Supreme Court correctly determined that the accusation on the newspaper site that the plaintiff was a "terrorist" was not actionable. Such a statement was likely to be perceived as rhetorical hyperbole, a vigorous epithet. This

> conclusion is especially apt in the digital age, where it has been commented that readers give less credence to allegedly defamatory Internet communications than they would to statements made in other milieus.

(LeBlanc, 103 A.D.3d at 400 (internal quotation marks and citations ommitted)).

The third case we rely on is Lunney v. Prodigy Servs. Co., 94 N.Y.2d 242 [1999]. There, the Court of Appeals explored alleged defamation arising out of an unknown imposter using plaintiff's name to send threatening and profane e-mail to third parties. The Court wrote:

> As a threshold matter, there is the question of whether the messages were defamatory. The Appellate Division expressed doubt on the point, considering that defamation cases typically involve communications that directly impugn plaintiff. Here, the messages were not about plaintiff, but were ascribed to him. In Ben-Oliel v. Press Publ. Co. (251 NY 250), this Court held that a scholar stated a cause of action for libel based on the publication of a flawed article written by someone else, but improperly attributed to her (see also, Clevenger v. Baker Voorhis & Co., 8 NY2d 187). For purposes of this opinion, we will assume that although he was not directly attacked, [plaintiff] was defamed by being portrayed as the author of the foul material.

(Lunney, 94 N.Y.2d at 248).

Exhibit 2 of plaintiff's complaint is a website that states as follows:

> My name is John Wender[.]
>
> Here is a little about me, if you already have not read the truth about me. Read on.
>
> I am a sociopath and a narcissist. My past is a horror story littered with abusive behaviors, criminal acts and pathological lying. I cheated whenever I could, lied constantly, delighted in abusing women especially my wife Elena Sigman who I lied to for a good 20 years, I abused drugs (cocaine is my drug of choice) and alcohol for many years, was and still am very promiscuous and most of this was to alleviate boredom as my life is so boring I have no real

interests.

In short, I'm a freight train of destruction.

My sex life is violent, devoid of affection and deviant. I find sex wherever I can get it and use several hook up sites for that under false names. I never have any desire to 'make love' and am completely depraved. I enjoy abusing women in the bedroom and out of it too.

I make myself the victim always. If you date me, John Wender, you will hear stories about this stalker, that stalker; I will always be the victim. Stop to think about why someone would go to the trouble to post the truth about me. Forewarned is forearmed. I will chew you up and spit you out. Unless you play me at my own game better but you'd have to be a sociopath also to be better than me at this game.

In some ways, I cherish my dark hole. My concealed life. Often, I am tempted to shut off my emotions (I rarely have any) and guilt I do experience which is admittedly shallow. I have experienced moments of repentance but upon reflection, these consist more of an intellectual understanding that I have wronged someone as opposed to feeling profound remorse.

In short, the twisted inner landscape of my mind is immoral and without any conscience. I have a predisposition for emotional callousness.

You see, I don't want to be evil, but the truth is I can't change. I remain hedonistic and attracted to what is dark and sleazy. I can silence my conscience at will. I can numb my emotions because I rarely feel any.

I use my children. I don't love or show them love. I use them. Usually as an excuse for when I'm cheating or contacting other women. I am violent and full of rage. My special needs son attacked his mother with a baseball bat. Did he inherit violence from me?

If you do decide to date me, make sure you test me for all kinds of STDS because I won't be honest about that and I'm too cheap to take a test. I've been spreading these around for some time with no remorse.

Finally, the icing on the cake, one of my whores just gave birth to my bastard child. I'm still married and engaging in unprotected sex! As Homer Simpson would say 'doh'! Guess what! I'm too irresponsible to even take responsibility for that too. I dumped her when she wouldn't abort it.

I am a really good guy, right?

(Complaint, exhibit 2).

Based on the court's reasoning in Lunney, a literary impersonation that imputes facts to the person impersonated is sufficient to state a cause of action for defamation. Here, plaintiff alleges that defendant published the false, confessional autobiography attributed to plaintiff. "A communication that states or implies that a person is promiscuous is defamatory" (Ava v. NYP Holdings, Inc., 64 A.D.3d 407, 413 [1st Dept., 2009]). "Statements imputing that the plaintiff has some loathsome disease are considered libelous per se, since such a charge, if believed, would wholly or partially exclude such person from good society" (43A N.Y.Jur.2d Defamation and Privacy, section 41). "Thus, it is actionable per se to publish a statement imputing that a person has ... a venereal disease" (id.). "An imputation of sexual immorality is defamatory per se, as to both men and women" (43A N.Y.Jur.2d Defamation and Privacy, section 32). "Thus, written words which, by charging acts of unchastity, impute immoral conduct to a man, are actionable per se" (id.). Accordingly, the website impersonating plaintiff is clearly sufficient to form the basis of a cause of action for defamation.

Having determined that the first exhibit (the "poem") is time-barred and that the second exhibit (the "autobiography") is actionable, we will now address the twenty-nine remaining exhibits to the complaint.

Exhibit 3 ("John Wender's Weiner") is a non-actionable opinion blog.

Exhibit 4 ("John Wender Sleazy Cheater") is a non-actionable opinion blog.

Exhibit 5 ("johnwenderarchitect") is a non-actionable opinion blog.

Exhibit 6 ("John Wender Liar") is a non-actionable opinion blog.

Exhibit 7 ("50 Shades of John Wender") is a non-actionable opinion blog.

The first paragraph of exhibit 8 impersonates John Wender. It states:

> I am a sociopath and a narcissist. My past is a horror story littered with abusive behaviors, criminal acts and pathological lying. I cheated whenever I could, lied constantly, delighted in abusing women especially my wife Elena Sigman who I lied to for a good 20 years, I abused drugs (cocaine is my drug of choice) and alcohol for many years, was and still am very promiscuous and most of this was to alleviate boredom as my life is so boring and I have no real interests.

As we noted above, such impersonation is actionable. The remainder of exhibit 8 is hyperbole which cannot be given any credence by a reasonable reader of the comments.

Exhibit 9 ("50 Shades of John Wender Architect") is a non-actionable opinion blog.

Exhibit 10 ("John Wender's Yellow Teeth") is a non-actionable opinion blog.

Exhibit 11 ("One comment to 'John Wender'") is a non-actionable opinion blog.

Exhibit 12 ("John Wender Bio") is a non-actionable opinion blog.

Exhibit 13 ("Any woman that had the misfortune of f*cking this diseased dirty old man will recognize this figure") is a non-actionable opinion blog.

Exhibit 14 ("John Wender Sex Addict") is a non-actionable opinion blog.

Exhibit 15 ("John Wender's baby bundle") is a non-actionable opinion blog.

Exhibit 16 ("John Benjamin Wender") is a non-actionable opinion blog.

Exhibit 17 ("John Wender Architect by anonymousme10") is a non-actionable opinion blog.

Exhibit 18 ("John Wender architect and his active (and smellie) Weiner") is a non-actionable opinion blog.

Exhibit 19 ("A blog about the narcissist architect John Wender") is a non-actionable opinion blog.

Exhibit 20 ("The Truth About John Wender by anonymousme10") is a non-actionable opinion blog.

Exhibit 21, a posting on LiarsCheatersRUs.com, states:

> He is still married and yet now has impregnated one of his sluts who is keeping his bastard child! ... During this he's continuing his seedy BDSM lifestyle, drug abuse and quest to f'ck and f'ck over every woman in NYC with that tiny STD infested weiner.

No reasonable reader of these perfervid postings would construe the statements, that plaintiff is a violent rapist, as statements of fact. As one court stated about comments posted on the LiarsCheaters website, "[t]he average reader would know that the comments are 'emotionally charged rhetoric' and the 'opinions of disappointed lovers.'" *Couloute v Ryncarz*, 2012 WL 541089 *6, 2012 US Dist LEXIS 20534, *19 (SD NY 2012, Baer, J.). Accordingly, exhibit 21 is a non-actionable opinion blog.

Exhibit 22 ("dating psychos") is a non-actionable opinion blog.

Exhibit 23 ("dating psychos") is a non-actionable opinion blog.

Exhibit 24 ("Psycho Profile") is a non-actionable opinion blog.

The statements that allegedly libel plaintiff in his profession appear in exhibits 25 through 28. Exhibit 25, which is designed to appear as the entry for plaintiff's firm

Bartolone Wender Architects on www.yellowpages.com, contains "Reviews and Recommendations," purportedly written by former customers of the firm. The anonymous reviews cast aspersions on plaintiff's reliability and trustworthiness in his profession. None of the reviews are positive. Many of the reviews assert facts.

For example, one review asserts that plaintiff "is not a man you can trust in business...." JonC62 states that plaintiff is "sloppy." RichardCK asserts a "terrible experience with Bartolone Wender. Avoid." CroccRock states that plaintiff is a "lousy architect."

UnHappy Client49 is more effusive, asserting:

> The work John Wender and his contractors performed on my property was atrocious. Deadlines were late and he was full of excuses. I would steer clear of this company as they do not practice sound business and their work was sub par at best.
>
> John Wender is someone I would never hire again.

(Exhibit 25, p. 2.)

Exhibit 26 (www.yellowpages.com) contains additional negative factual statements about plaintiff's ability as an architect. For example, Frank G. wrote, "John Wender is immoral and an unprincipled businessman. His business should be investigated." JonC62 wrote, "It's hard to imagine why John Wender is still at the Dakota. He's so sloppy and full of what I would call horsesh*t. The previous reviewer got it right. Glorified janitor at best." Unhappy client10 asserted, "Deadlines are never met. Did not take the project seriously."

In contrast to the comments posted on "truthaboutjohnwender.wordpress.com" and the LiarsCheaters website, the comments that appear in exhibits 25 through 28 appear to come from former clients and to have been posted on bona fide business web sites. Thus, even if readers discount the ad hominem remarks, they may well take the remarks bearing on Wender's professional competence, which appear to have been entered by other persons, as factual. Accordingly, exhibit 26 is actionable since it impugns plaintiff's profession.

Exhibit 29 ("Cauldrons and Broomsticks") is a "poem" about plaintiff's ex-wife. Plaintiff lacks standing to assert a cause of action on behalf of his former spouse.

Exhibit 30 ("Rainman Isaiah") is a website about plaintiff's disabled son. Because the website does not target plaintiff, he lacks standing to assert a claim based on that website.

Exhibit 31 is a series of emails that were allegedly sent by defendant. In short, the Court finds that the emails assert only opinions, not facts; accordingly, they cannot support a cause of action for defamation.

Finally, defendant strenuously argues that plaintiff lacks any basis for believing that she is the author of the statements that are the basis of this action. It is certainly true that plaintiff could have sought pre-action discovery, or brought this action against an unnamed defendant. However, that he did not do so is not a ground for dismissing the action, as this Court must assume for the purposes of the motion that Silberling is the person making the postings. Defendant's remedy, if it turns out that she was wrongly named, will be to seek sanctions against plaintiff.

Accordingly, it is hereby

ORDERED that that branch of defendant's motion which seeks dismissal of the complaint is denied except as to the allegations of libel found herein to be untimely or to constitute non-actionable opinion; and it is further

ORDERED that that branch of defendant's motion which seeks to quash the non-party subpoenas served by plaintiff is denied except as to those subpoenas that seek the identity of the maker, or makers, of those statements found herein to be non-actionable opinions; and it is further

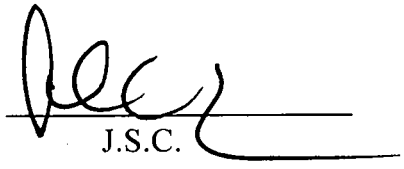
ORDERED that defendant shall serve her answer to the remaining complaint within 20 days of service of a copy of this order with notice of entry upon her; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 320, 80 Centre Street, on October 1, 2014, at 9:30 AM.

Dated: July 8, 2014

JUL 0 8 2014

ENTER:



J.S.C.

HON. ANIL C. SINGH
SUPREME COURT JUSTICE