

Lombardo v Lombardo
2015 NY Slip Op 31015(U)
May 27, 2015
Supreme Court, Suffolk County
Docket Number: 10-25825
Judge: Joseph Farneti
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 1-21-14 (#003)
MOTION DATE 3-28-14 (#004)
ADJ. DATE 8-7-14
Mot. Seq. # 003 - MG
004 - MG; CASEDISP

-----X
JAYNEE LOMBARDO,

Plaintiff,

- against -

RUSSELL LOMBARDO, CHARISSE MOORE
a/k/a CHARISSE COMPANO and FREDDY
SALGUERO,

Defendants.
-----X

ROBERT W. DAPELO, ESQ.
Attorney for Plaintiff
110 North Ocean Avenue, Suite A
Patchogue, New York 11772

CRAIG E. MCELWEE, ESQ.
Attorney for Defendant Charisse Moore
1476 Deer Park Avenue, Suite 3
North Babylon, New York 11703

SCOTT LOCKWOOD, ESQ.
Attorney for Defendant Russell Lombardo
1476 Deer Park Avenue, Suite 3
No. Babylon, New York 11703

Upon the following papers numbered 1 to 37 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; 19 - 29; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 11 - 16; 30 - 37; Replying Affidavits and supporting papers 17 - 18; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (seq. #003) by defendant Russell Lombardo and the motion (seq. #004) by defendant Charisse Moore hereby are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendant Russell Lombardo seeking summary judgment dismissing the complaint against him is granted; and it is further

ORDERED that the motion by defendant Charisse Moore seeking summary judgment dismissing the complaint against her is granted.

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This is an action to recover damages for defamation and intentional infliction of emotional distress. By her complaint, plaintiff Jaynee Lombardo alleges that she sustained injuries as a result of a false and defamatory sex advertisement that was posted on the website known as Craig's List by defendants Russell Lombardo, Freddy Salguero, and Charisse Lombardo, s/h/a Charisse Moore, a/k/a Charisse Compano, on February 7, 2010. Plaintiff further alleges that defendant Lombardo conspired with his sister, defendant Moore, and her boyfriend, defendant Salguero, to invade her right to privacy when they posted the advertisement on Craig's List. By Order dated September 22, 2011, this Court issued a default judgment against defendant Freddy Salguero, a/k/a Fred Heigl, for failure to appear in the action.

Defendant Lombardo now moves for summary judgment on the basis that plaintiff is unable to establish a *prima facie* case of defamation against him, because there is no evidence which indicates that he was involved in the subject incident. In support of the motion, defendant Lombardo submits copies of the pleadings, his own affidavit and plaintiff's deposition transcript. Defendant Moore also moves for summary judgment on the same basis as defendant Lombardo. In addition to relying on the same evidence as defendant Lombardo in support of her motion, defendant Moore submits her own affidavit. Plaintiff opposes the motions on the ground that there are triable issues of fact as to whether defendants Lombardo and Moore were involved in the posting of the advertisement on Craig's List. In opposition to the motions, plaintiff submits her own affidavit and deposition transcript.

It is axiomatic that on a motion for summary judgment the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). The court's task on a motion for summary judgment is issue finding rather than issue determination (*see Sillman v Twentieth Century Fox Film Corp.*, *supra*), and it must view the evidence in the light most favorable to the party opposing the motion (*see Boyce v Vazquez*, 249 AD2d 724, 671 NYS2d 815 [3d Dept 1998]). Thus, to obtain summary judgment, the moving party must establish his or her claim or defense by tendering sufficient evidentiary proof, in admissible form, to warrant the court to direct judgment in the movant's favor (*see Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 416 NYS2d 790 [1979]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once such showing has been made, the burden shifts to the nonmoving party to demonstrate the existence of material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). Mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]).

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Defamation is the injury to one's reputation, either by written expression (libel) or oral expression (slander) (*see Morrison v National Broadcasting Co.*, 19 NY2d 453, 280 NYS2d 641 [1967]). A defamatory statement arises when a defendant makes a false statement which tends to "expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him [or her] in the minds of right-thinking persons, and to deprive him [or her] of their friendly intercourse in society" (*Foster v Churchill*, 87 NY2d 744, 751, 642 NYS2d 583 [1996]). A plaintiff alleging defamation must demonstrate that the false statement was published without privilege or authorization, and, with fault as judged, at minimum, by a negligence standard, the defendant published such statement to a third-party (*see El Jamal v Weil*, 116 AD3d 732, 986 NYS2d 146 [2d Dept 2014]; *Dillon v City of New York*, 261 AD2d 34, 704 NYS2d 1 [1st Dept 1999]). Furthermore, unless the defamatory statement constitutes defamation *per se* (*Lieberman v Gelstein*, 80 NY2d 429, 435, 590 NYS2d 857 [1992]), the plaintiff must allege that he or she suffered special damages, such as the loss of something having economic or pecuniary value (*see Epifani v Johnson*, 65 AD3d 224, 233, 882 NYS2d 234 [2d Dept 2009]). Lastly, a complaint alleging defamation must set forth the particular words complained of and include the time, place and manner of the false statements, and specify to whom it was made (*see CPLR 3016 [a]*; *Arsenault v Forquer*, 197 AD2d 554, 602 NYS2d 653 [2d Dept 1993]).

Based upon the adduced evidence, defendants Lombardo and Moore have established their *prima facie* entitlement to judgment as a matter of law dismissing the cause of action for defamation (*see Zapata v Tufenkjian*, 123 AD3d 814, 998 NYS2d 435 [2d Dept 2014]; *Gjonlekaj v Sot*, 308 AD2d 471, 764 NYS2d 278 [2d Dept 2003]). The record before the Court does not contain any evidence which demonstrates that the alleged defamatory posting about plaintiff on Craig's List was published by either defendant Lombardo or defendant Moore, or that plaintiff suffered any special damages in regards to the alleged posting of the advertisement on the website (*see Mangilit-Pradlik v Valvoline Instant Oil Change GE6604-White Plains*, 120 AD3d 774, 991 NYS2d 368 [2d Dept 2014]). Indeed, plaintiff testified that her brother, Scott Levenson, immediately "flagged" and deleted the posting the very same day it was published to the website, and that the last picture or text message she received regarding the posting was the same night of the posting. More importantly, plaintiff testified that, after speaking with defendant Lombardo, who informed her that he did not post the advertisement and was unaware of any posting having been made, she went to the police, and, approximately two days later, was informed by "Lieutenant Nick" that the email address for the Craig's List account belonged to a man named "Freddy," and that the internet protocol ("IP") address had been tracked to a house in Connecticut, which plaintiff believed was defendant Moore and her boyfriend "Freddy's" address. Yet, plaintiff also testified that she had not spoken to or seen defendant Moore since before she and defendant Lombardo divorced in September 2009, and that she did not know a "Freddy."

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Furthermore, defendants Lombardo and Moore established their *prima facie* entitlement to judgment as a matter of law dismissing the cause of action for intentional infliction of emotional distress (*see Raymond v Marchand*, 125 AD3d 835, 4 NYS3d 107 [2d Dept 2015]; *Leonard v Reinhardt*, 20 AD3d 510, 799 NYS2d [2d Dept 2005]). To establish a cause of action for intentional infliction of emotional distress, a plaintiff must show that the defendant's conduct was "extreme and outrageous; intent to cause or disregard of substantial probability of causing, severe emotional distress; a causal connection between the conduct and injury; and severe emotional distress" (*Howell v New York Post Co.*, 81 NY2d 115, 121, 596 NYS2d 350 [1993]). Extreme and outrageous conduct is conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and was utterly intolerable in a civilized community" (*Marlemstein v Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue*, 11 NY3d 15, 22-23, 862 NYS2d 311 [2008]; *see Borawski v Abulafia*, 117 AD3d 662, *Baumann v Hanover Community Bank*, 100 AD3d 814, 957 NYS2d 111 [2d Dept 2012]; *see also Murphy v American Home Prods. Corp.*, 58 NY2d 293, 461 NYS2d 232 [1983]).

The record before the Court does not demonstrate that either defendant Lombardo or defendant Moore engaged in conduct involving plaintiff that was so extreme in nature as to rise to the level of intentional infliction of emotion distress (*see Rodgers v City of New York*, 106 AD3d 1068, 966 NYS2d 466 [2d Dept 2013]; *Cenzon-Decarlo v Mount Sinai Hosp.*, 101 AD3d 924, 957 NYS2d 256 [2d Dept 2012]). In fact, the record does not contain any identifiable conduct that can be attributable to either defendant. Nor does the record reflect any evidence demonstrating that defendants Lombardo and Moore's alleged conduct caused plaintiff to suffer severe emotional distress, since plaintiff's brother was able to immediately remove the alleged posting about plaintiff from the website, and the telephone calls and text messages plaintiff received in answer to the advertisement stopped the same night. In fact, plaintiff testified that she was able to turn off her cell phone to prevent any additional calls or text messages from being received, and that she was never personally approached by anyone in regard to the advertisement.

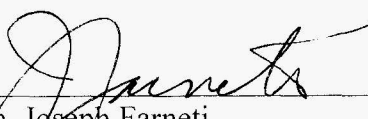
In opposition to the motions, plaintiff failed to raise a triable of issue of fact as to either her claim for defamation or intentional infliction of emotional distress (*see Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]; *Nasca v Sgro*, 101 AD3d 963, 957 NYS2d 246 [2d Dept 2012]). Plaintiff has failed to submit any evidence to show that she sustained any injuries as a result of the alleged posting on Craig's List. Specifically, plaintiff has failed to submit any admissible evidence to demonstrate that she has any viable cause of action against defendants Lombardo and Moore. Despite testifying that she filled out a police report regarding the incident, that "Lieutenant Nick" provided her with "Freddy's" email and IP addresses, and that her brother, Scott Levenson, removed the alleged defamatory advertisement from the website, plaintiff failed to submit an affidavit from any of the aforementioned people or the police report with her opposition papers to substantiate her claims. Instead, plaintiff

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submitted her own self-serving affidavit and unauthenticated copies of excerpts of text messages by someone labeled as “Freddy” in plaintiff’s cell phone, which leaves the Court to speculate as to who this person is, and, as a result, does not overcome defendant Lombardo’s or defendant Moore’s entitlement to judgment as a matter of law (*see Zuckerman v City of New York, supra; Baumblit Constr. Corp. v County of Nassau*, 77 AD3d 865, 909 NYS2d 386 [2d Dept 2010]; *Harris v Hirsh*, 228 AD2d 206, 643 NYS2d 556 [1st Dept 1996]). However, even if the Court were to consider this inadmissible evidence, it would still not defeat defendants’ *prima facie* showing, since the evidence contradicts plaintiff’s sworn testimony that she did not know “Freddy,” and that she did not have any contact with the person known as “Freddy.” Moreover, as stated above, plaintiff testified that the posting immediately was removed from the website, and that, even though she sought some treatment from a counselor after the incident, she already was treating with a psychologist to help her cope with the death of her father in September 2009 when the subject incident occurred. Inasmuch as plaintiff has failed to present competent evidence showing that defendant Lombardo and defendant Moore actually published the subject advertisement to Craig’s List, she has failed to raise a triable issue of fact as to whether the alleged defamatory posting placed her in personal danger, causing her to sustain special damages, or whether defendant Lombardo’s or defendant Moore’s conduct rose to the level of extreme and outrageous conduct (*see Bement v N.Y.P. Holdings, Inc.*, 307 AD2d 86, 760 NYS2d 133 [1st Dept], *lv denied* 100 NY2d 510, 766 NYS2d 164 [2003]; *Nasca v Sgro, supra*).

Finally, there is no recognized common law right of privacy in the State of New York, and, as a result, such cause of action in the complaint is summarily dismissed (*see Nader v General Motors Corp.*, 25 NY2d 560, 307 NYS2d 647 [1970]). Accordingly, the motions by defendants Lombardo and Moore seeking summary judgment dismissing plaintiff’s complaint are granted.

Dated: May 27, 2015



 Hon. Joseph Farneti
 Acting Justice Supreme Court

 X FINAL DISPOSITION _____ NON-FINAL DISPOSITION