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STATE OF NEW YORK COURT OF CLAIMS

AVRIL NOLAN,

Claimant,

DECISION AND ORDER

-v-

THE STATE OF NEW YORK,[1]

Claim No. 123283
Motion Nos. M-86215
CM-86455

Defendant.

BEFORE: HON. THOMAS H. SCUCCIMARRA
Judge of the Court of Claims

APPEARANCES: For Claimant:
LLOYD PATEL LLP
BY: ERIN LLOYD, ESQ.

For Defendant:
HON. ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL OF THE STATE OF NEW YORK
BY: CHERYL RAMEAU
ASSISTANT ATTORNEY GENERAL

The following papers were read and considered on the pending motions:

1 - 3 Notice of Motion, Affirmation in Support of Claimant's Motion for Summary Judgment by Erin Lloyd, Lloyd Patel LLP, Attorneys for Claimant, and attached exhibits, Memorandum of Law

4, 5 Notice of Cross-Motion for Partial Summary Judgment, Affirmation in Support and Opposition by Cheryl Rameau, Assistant Attorney General, and attached exhibits

6 Affirmation in Opposition to Cross-Motion for Partial Summary Judgment and in further support of Motion for Summary Judgment in favor of Claimant Avril Nolan by Erin Lloyd, Lloyd Patel LLP, Attorneys for Claimant

[1] The caption has been amended to reflect the only properly named defendant.

7, 8 Filed papers: Amended Verified Claim, Verified Answer to Amended Claim

On April 3, 2013 the State, through the New York State Division of Human Rights [NYSDHR], ran a quarter-page advertisement in a free daily newspaper, AM NY, featuring a color photograph of Avril Nolan. [Amended Verified Claim, ¶ 1; Lloyd Affirmation, Exhibit H]. Across the photograph, in all capital letters, were the words " I AM POSITIVE (+)" and "I HAVE RIGHTS." The public is then advised that those who are HIV positive have rights protected by the New York State Human Rights Law, and information on how to contact the agency is provided. Ms. Nolan is not HIV positive, and no disclaimer to the effect that the person depicted is a model appears in the advertisement.

Ms. Nolan stated in deposition testimony that the photograph had been taken by Jena Cumbo in May 2011, in connection with an editorial feature focused on New Yorkers interested in music for publication in Soma Magazine, an on-line magazine. [Lloyd Affirmation, Exhibit J]. She was not paid for the photograph, which was intended solely for publication in Soma. Ms. Cumbo did not obtain Ms. Nolan's permission to use the image for anything else, nor did Ms. Nolan recall executing any formal written permission for even this limited use.

After discovering that her image appeared in the NYSDHR campaign when a friend noticed it on April 3, 2013, Ms. Nolan learned from Ms. Cumbo that Ms. Cumbo sold the photograph to Getty Images (US), Inc. to license as a stock photograph. There was some email colloquy between Ms. Cumbo. Getty and the NYSDHR - all copied to Ms. Nolan [*see* Lloyd Affirmation, Exhibits K, L] - concerning the use of the photograph. To claimant's knowledge, the image was pulled the same day she first learned of its use.

Mannikuttan Kottaram, the NYSDHR employee who had purchased the photograph from Getty, testified that part of his job involves answering the public's questions by telephone, maintaining and working on the agency website, working on and distributing agency publications and a supervisory role over the reception area. [Lloyd Affirmation, Exhibit M]. In 2013, he had been employed by the agency for seven years.

Mr. Kottaram said that the agency had received funding from the New York State Department of Health for education and outreach purposes. He and others at NYSDHR - primarily his supervisor, Leticia Theodore-Greene, and his colleague, Lourdes Centeno - started exploring different ideas for a campaign in February 2013. He saw one campaign on the subway run by another government agency where a nice, healthy looking man was shown in a photograph indicating that he was HIV positive since 2005. From the advertisement he saw, he agreed that it was his understanding that the man depicted was HIV positive. He circulated an email to Ms. Theodore-Greene and Ms. Centeno, with that image and others, as a possible approach to the campaign.

On or about March 26, 2013, the group was told that the ads needed to be created and run by March 31, 2013. Ms. Theodore-Greene decided that rather than hire a model, they would use a stock image to create the ads. The three of them then scanned through images on the Getty website. Mr. Kottaram selected a stock photograph from Getty, called customer service at Getty to get quotes for the selected image, obtained approval of the purchase, and completed the transaction. [*See* Lloyd Affirmation, Exhibit O]. The customer service agent at Getty asked whether it would be used for advertising, for web-only use or print as well, but the subject matter of the advertisement was never discussed with Getty. The series of emails, including a paid

receipt for the photograph, also contain the indication that "the image has a signed model release and that this image is available for commercial use." [Lloyd Affirmation, Exhibit M and O].

When Getty sent the link for obtaining the image, they also provided a link to their eight page license agreement. Mr. Kottaram recalled that the license agreement "was something that I had to click through to download the image" on the website, but he did not read it or print it or save it at the time. [Lloyd Affirmation, Exhibit M]. Later, on April 3rd when he learned of Ms. Nolan's objections to the use, he sent the license agreement to his supervisor, Ms. Theodore-Greene, at her request. [Lloyd Affirmation, Exhibit P].

In terms of the responsibility of the end-user, here the NYSDHR, the Getty licensing agreement provides in pertinent part:

> "2.6 Pornographic, defamatory or otherwise unlawful use of Licensed Material is strictly prohibited, whether directly or in context or juxtaposition with other material or subject matter. Licensee shall also comply with any applicable regulations and/or industry codes.
>
> 2.7 If any Licensed Material featuring a model or property is used in connection with a subject that would be unflattering or controversial to a reasonable person (except for Editorial material used in an editorial manner), Licensee must accompany each such use with a statement that indicates that: (i) the Licensed Material is being used for illustrative purposes only; and (ii) any person depicted in the Licensed material, if any, is a model." [Lloyd Affirmation, Exhibit P[2]].

Mr. Kottaram confirmed that in 2013, to his knowledge, there was no one in their department who had experience purchasing stock images. Prior to the use of the advertisement,

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[2] Of course, the eight page agreement contains some descriptors of Getty's representations and obligations vis a vis model releases, however Getty's role is not before this Court although claimant sued Getty (but not the photographer), in State Supreme Court, New York County. *See* Nolan v Getty Images (US), Inc., Index No. 158540/2013. Records indicate that a stipulation discontinuing the action was filed on January 26, 2015.

it was approved by Ms. Theodore-Greene and the commissioner. He thought it was also reviewed by general counsel Caroline Downey and by John Herrion, Director of Disability Rights for the NYSDHR. He thought Mr. Herrion might have had something to do with creation of the text, but Mr. Kottaram was not involved in writing the text.

In terms of what media outlets were contracted to run the advertisement, Mr. Kottaram said it ran in AM New York once, and in a special section of Newsday once. The advertisement was published in print in Metro, AM New York and Newsday. It was also published online on Metro's website, on the Journal News website LoHud.com, and on capitolconfidential.com, which is affiliated with the Times Union Newspaper. After April 3, 2013, it was his understanding that there was no other publication of the advertisement featuring Ms. Nolan's photograph. He, personally, contacted all the media outlets to pull the advertisement.

Mr. Kottaram said it was never a discussed concern that the advertisement could create the impression that the person in the image was HIV positive.

Between March 31, 2013 and April 3, 2013 Ms. Nolan's image was published in 3 print newspapers and on 3 websites. [Lloyd Affirmation, Exhibit N].

Other than affirmations by Caroline Downey and John Herrion, indicating that they were not involved in reviewing or approving the advertisement, no factual dispute, or, more significantly, no material factual dispute, is presented. [Rameau Affirmation, Exhibits H, I].

Claimant moves for summary judgment on all three causes of action asserted in the amended verified claim, namely, (1) defamation (2) defamation *per se* and (3) violation of Civil Rights Law §§50 and 51, with five, separate violations asserted for each based upon the extent of the publication of the unauthorized image.

In order to prevail on a motion for summary judgment, the claimant must make a *prima facie* showing of entitlement to judgment as a matter of law by proffering sufficient evidence to eliminate any genuine, material, issues of fact. Civil Practice Law and Rules §3212. Affidavits, copies of the pleadings, and any other proof such as depositions or admissions should be included. Assuming movant has satisfied her initial burden, the party in opposition to the motion for summary judgment must tender evidentiary proof in admissible form to establish the existence of material issues which require a trial. Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985); Zuckerman v City of New York, 49 NY2d 557 (1980). The court's job is issue finding, not resolution. As noted, the disputed facts should be meaningful.

As summarized in Dillon v City of New York, 261 AD2d 34, 37-38 (1st Dept 1999):

> "Defamation has long been recognized to arise from 'the making of a false statement which tends to ' " 'expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society.' " ' . . . (*citations omitted*). The elements 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* . . ."

Where defamation *per se* is involved, "the law presumes that damages will result, and special damages need not be alleged or proven." Gatz v Otis Ford, 274 AD2d 449 (2d Dept 2000). The *per se* categories generally involve the following types of declarations: (1) that claimant committed a crime; (2) the statement tends to injure the claimant in his or her trade, business or profession; or (3) the claimant has contracted a loathsome disease. *See e.g.* Matherson v Marchello, 100 AD2d 233 (2d Dept 1984).

That the State was negligent is self-evident. The person directly involved in the purchase of the image failed to read the license document presented by Getty, and no one on the team appears to have thought of the implications of using the image in the context in which it would be used, or to seek legal counsel and advice when presented with terminology they do not appear to have understood (i.e.: release, license, etc.).

Here claimant has not pleaded any special damages[3], and on the evidence submitted no special damages are apparent, merely some discomfort and embarrassment. In the defamation context, "special damages" means injury to or loss of a pecuniary opportunity or advantage [*see* 2A PJI §3.23, p 223 (2015)] not present here. Accordingly, claimant has not established her entitlement to judgment as a matter of law warranting a summary disposition of the standard defamation causes of action asserted in the claim.

It is also apparent that the claimant has readily demonstrated entitlement to judgment as a matter of law on her Civil Rights Law causes of action, because she has established that her photograph was used, within the State of New York, for purposes of advertising or trade, without her written consent, in clear violation of Civil Rights Law §§50 and 51.

A photograph is used for advertising purposes "if it appears in a publication which, taken in its entirety, was distributed for use in, or as part of, an advertisement or solicitation for patronage of a particular product or service." Beverley v Choices Women's Med. Ctr., 78 NY2d 745, 751 (1991); *c.f.* Messenger v Gruner + Jahr Print. & Publ., 94 NY2d 436 (2000).

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[3] "Special damages consist of 'the loss of something having economic or pecuniary value' (Restatement, Torts 2d, § 575, Comment *b*) which 'must flow directly from the injury to reputation caused by the defamation; not from the effects of defamation' . . . (*citation omitted*) and it is settled law that they must be fully and accurately identified 'with sufficient particularity to identify actual losses' . . . (*citation omitted*)." Matherson v Marchello, 100 AD2d at 235.

Defendant's cross-motion for partial summary judgment dismissing the Civil Rights causes of action posits that the gross negligence standard of review applicable to media defendants should apply, since the photograph was used in public service advertisements, rather than in advertisements to profit a private entity. This is not the appropriate standard. *See e.g.* Doe v Merck & Co., Inc., 2001 WL 34133510 (Suffolk Co Sup Ct 2001). As noted by claimant, what was involved here is far from traditional, public service type announcements, whereby publication space is donated by a media entity to a non-profit entity. Here, defendant purchased images to be used in an advertising campaign to advertise a service provided by NYSDHR, and looked for images with model releases appropriate for commercial use. The fact that the services provided might be educational or advocacy-oriented is of no moment. Nothing in the record raises an issue of fact relative to Ms. Nolan's indication that she did not consent to the use of her image beyond its use by the initial photographer.

The thorny question is whether claimant has established entitlement to judgment as a matter of law on her defamation *per se* causes of action, by the false attribution that she is an individual diagnosed as HIV positive in the public service advertising campaign run by NYSDHR. Ironically, of course, the campaign the agency was running was to raise awareness of the legal rights those so diagnosed possess. These laudable purposes are beside the point, however, and actually serve to prove it in part.

While it is true that traditionally the "loathsome disease" at issue in a defamation *per se* case is one that is sexually transmitted - or at least a sexually transmitted disease presents the type of a case that seems the most readily actionable - this is an arcane limitation inappropriate in

modern times.[4] More accurately, what the Court must assess is what the statement presents to the mind of the average person in the *per se* category of defamation. [*See* 14 NY Prac., New York Law of Torts §1:46]. Not just sexually transmitted diseases fall under the loathsome disease category, but any disease that arouses some intense disgust in society, in part because it is viewed as incurable or chronic. Thus, although science knew that leprosy was hereditary, and was not infectious or contagious, in 1900 to falsely impute that someone had leprosy still constituted slander *per se*. *See* Simpson v Press Publ. Co., 33 Misc 228 (Sup Ct Kings Co 1900).[5]

What is more broadly evaluated when *per se* defamation is at issue is whether the statement " 'tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society.' " Rinaldi v Holt, Rinehart & Winston, 42 NY2d 369, 379 (1977) *cert denied* 434 US 969 (1977). As society changes, generally accepted norms change as well.

An example of the evolution of societal thinking would be how being identified as a homosexual in the days of Matherson v Marchello was perceived, and how such a false label was viewed thirty years later in Yonaty v Mincolla, 97 AD3d 141 (3d Dept 2012) *lv to appeal denied* 20 NY3d 855 (2013). In 1984, the Second Department identified the significant burden to

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[4] In 1863 in New York County Supreme Court the actionable slanderous words charged as defamation per se were " 'nothing ails him but the pox; he is rotten with it, he got it.' " Hewit v Mason, 24 How. Pr. 366 (NY Co Sup Ct 1863).

[5] "The defendant contends that it is now scientifically established that leprosy is not infectious or contagious, but only hereditary, and that therefore it is no longer within the definition of slander. When an indictable crime ceases to be such it is no longer slander to charge one with it. When the penal statutes against Catholics and witchcraft existed in England it was slander to say of one that he was a Papist, or went to mass, or that he was a witch, or used witchcraft . . . (*citations omitted*). But I do not think it is a parallel case if the progress of science has revealed that leprosy was erroneously classed as infectious or contagious. It remains a term of slander until the law is changed."

livelihood and societal inclusion of such an identity, and was "constrained" to find that such a label, if untrue, was per se actionable. Matherson v Marchello. In 2012, the Third Department found otherwise. Yonaty v Mincolla.

It would be hoped that an indication that someone is suffering from AIDS or that she has been diagnosed as HIV positive would not be viewed as indicative of some failure of moral fiber, or of some communicable danger, however our society is not so advanced. As pointed out by both parties, no court has found directly that HIV/AIDS is - or is not - a loathsome disease for defamation purposes. And while defendant correctly notes that the New York State Department of Health has not classified HIV/AIDS as a sexually transmitted disease, or a communicable disease in an unrelated context [*see* 10 NYCRR 23.1, 2.1, Matter of New York State Socy. of Surgeons v Axelrod, 77 NY2d 677 (1991)], for defamation purposes, it is not particular logic or science that applies but rather the sensibilities of society as to what disease bears a pejorative stamp. In the recent present, for example, an individual falsely described as having Ebola would surely have a *per se* claim.[6]

Viewed under the current societal lense, then, the asserted defamatory content here, that Ms. Nolan is presently diagnosed as HIV positive, from the perspective of the average person,

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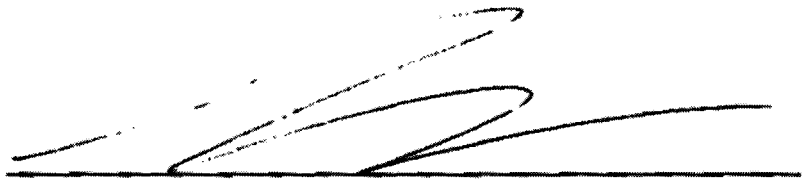
[6] But a publicist wrongly described as having been diagnosed with cancer did not prevail on her *per se* claims, based upon alternative claims that the statement tended to injure her in her profession, and that it implied that she had a loathsome disease. "[P]laintiffs may not prevail on their alternative argument that the published statement is susceptible of imputing a loathsome disease to decedent. Cancer does not fall into the category of a loathsome disease since it 'is neither contagious nor attributed in any way to socially repugnant conduct' (*citation omitted*). Furthermore, the record here supports the conclusion of the Appellate Division that 'it cannot be said that society as a whole views' cancer as directly associated with any disease which might conceivably be characterized as 'loathsome.' " Golub v Enquirer/Star Group, 89 NY2d 1074, 1077 (1997).

clearly subjects her to public contempt, ridicule, aversion or disgrace and constitutes defamation *per se*.

Based on the foregoing, claimant's motion for summary judgment on the issue of liability is granted in part, and denied in part, and defendant's cross-motion for partial summary judgment is denied.

Trial on the issue of damages shall be held as soon as is practicable.

White Plains, New York
June 18, 2015



THOMAS H. SCUCCIMARRA
Judge of the Court of Claims