O'Mahony v Whiston
2016 NY Slip Op 31896(U)
October 7, 2016
Supreme Court, New York County
Docket Number: 652621/2014
Judge: Shirley Werner Kornreich

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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ESTHER O'MAHONY, individually and on behalf of Dubcork Inc., a New York Corporation, d/b/a, Smithfield Tavern and Smithfield NYC,

Plaintiff,

-against-

GAVIN WHISTON, THOMAS MCCARTHY, KIERON SLATTERY, MOXY RESTAURANT ASSOCIATES, INC. and DUBCORK INC. d/b/a Smithfield Tavern and Smithfield Hall NYC,

Defendants.

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Index No.: 652621/2014

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

Plaintiff Esther J. O'Mahony moves, pursuant to CPLR 3211, to dismiss the two counterclaims asserted against her by defendants Gavin Whiston, Thomas McCarthy, Kieron Slattery (collectively, the Individual Defendants), Dubcork, Inc. (Dubcork), and Moxy Restaurant Associates, Inc. (Moxy) in their Amended Answer (the Amended Answer) to plaintiff's Second Amended Complaint (the SAC). Defendants oppose the motion. Plaintiff's motion is granted for the reasons that follow.

I. Background

As this is a motion to dismiss defendants' counterclaims, the facts recited are taken from the Amended Answer (*see* Dkt. 58)[1] and the documentary evidence submitted by the parties.

Plaintiff and the Individual Defendants are shareholders of Dubcork, which operated a restaurant and bar located at 215 West 28th Street in Manhattan called the Smithfield (the Old Bar). The Old Bar was closed after litigation with its landlord settled; the settlement resulted in a

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing (NYSCEF) system.

payment to Dubcork of approximately $2 million. This action concerns the opening of a new bar, also called Smithfield, by the Individual Defendants, which is located at 138 West 25th Street (the New Bar). The New Bar is owned by Moxy, a new company formed by the Individual Defendants. The Individual Defendants did not offer plaintiff or Dubcork the opportunity to participate in the New Bar.

Plaintiff commenced this action on August 25, 2014 to recover, *inter alia*, because she and Dubcork were excluded from ownership of the New Bar. Plaintiff's operative pleading, the SAC, which was filed on June 24, 2015, clarifies that this claim is being prosecuted by plaintiff derivatively on behalf of Dubcork under the corporate opportunity doctrine.[2] *See* Dkt. 18. By order dated April 6, 2016, the court denied defendants' motion to dismiss this claim.[3] *See* Dkt. 32; *see also* Dkt. 38 (4/6/16 Tr.). On August 10, 2016, plaintiff filed the instant motion to dismiss defendants' two counterclaims, money had and received and defamation. *See* Dkt. 58.[4]

II. The Counterclaims

A. Money Had and Received

[2] Plaintiff does not allege that Moxy is an alter ego of Dubcork or that she is a shareholder of Moxy.

[3] There are other claims pleaded in the SAC not pertinent to the instant motion (which the court will not discuss in detail), including a claim that the litigation with the Old Bar's landlord was settled by the Individual Defendants for an insufficient amount of money. That claim was dismissed by the court under the business judgment rule. *See* Dkt. 38 (4/6/16 Tr. at 17). It should be noted that the court will not recount the extremely contentious discovery process (which included a motion for a default judgment, which the court denied) and limits its discussion to the straightforward legal issues relevant here.

[4] The counterclaims are unclear as to which defendants are asserting them. For instance, defamation claim appears to concern only the Individual Defendants but Moxy is an alleged claimant. This issue, which would otherwise be problematic, does not warrant extensive discussion because the counterclaims are dismissed on other grounds.

The money had and received counterclaim is based exclusively on the following allegations in the Amended Answer:

> Plaintiff received **certain payments** to which she was not entitled and continued to be paid by Defendant Dubcork after she abandoned her obligations thereto. Plaintiff is indebted to Defendants in an amount to be determined at trial, and defendants are entitled to judgment for the return of such amounts.

Dkt. 58 at 3 (emphasis added; paragraph breaks and numbering omitted); *see Parsa v State*, 64 NY2d 143, 148 (1984) (money had and received claims that "one party possesses money that in equity and good conscience he ought not to retain and that belongs to another [which] allows plaintiff to recover money which has come into the hands of the defendant impressed with a species of trust.") (citations and quotation marks omitted).

Plaintiff argues that this claim is insufficiently pleaded because defendants do not allege a specific amount of money at issue, nor do defendants provide any indication, even conceptually, of what payments are at issue. Plaintiff avers, and defendants do not dispute, that defendants have possession of all of Dubcork's financial records. It also is undisputed that the Individual Defendants operated the Old Bar, so they certainly are capable of explaining what amounts they believe plaintiff wrongfully received and why she was not entitled to such money. Discovery is not necessary to put plaintiff (and the court) on notice of exactly what payments plaintiff wrongfully obtained. *See High Definition MRI, P.C. v Travelers Cos.*, 137 AD3d 602 (1st Dept 2016),[5] quoting CPLR 3013 ("Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."),

[5] While defendants could have remedied their pleading deficiencies by submitting affidavits from the Individuals Defendants in opposition to the motion [*see High Definition*, 137 AD3d at 603], they did not.

In opposition, defendants fail to address these issues. Instead, they concede that their claim is based on "[t]he bare allegation that [plaintiff] received moneys from the defendants," but aver that such a conclusory pleading is legally permissible. *See* Dkt. 72 at 5-6. Defendants are wrong. They possess all of Dubcork's financial records and, therefore, are both capable and required to allege what payments are at issue. The conclusory pleading is not sufficient. *See Lebovits v Bassman*, 120 AD3d 1198, 1199 (2d Dept 2014) (dismissing money had and received claim where "plaintiff did not identify any corpus of funds that belonged to him ... or which was supposed to be paid to him ... but was instead paid to [defendant]."). This claim is dismissed without prejudice and with leave to replead. The court, however, will only afford defendants one, final opportunity to do so since this is the second time this claim has been pleaded in boilerplate fashion. *See* Dkt. 41 at 3.

B. Defamation

"Defamation is the making of a false statement about a person that '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.'" *Frechtman v Gutterman*, 115 AD3d 102, 104 (1st Dept 2014), quoting *Rinaldi v Holt, Rinehart & Winston, Inc.*, 42 NY2d 369, 379 (1977). "To prove a claim for defamation, a plaintiff must show: (1) a false statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm, unless the statement is one of the types of publications actionable regardless of harm [i.e., defamation per se]." *Stepanov v Dow Jones & Co.*, 120 AD3d 28, 41-42 (1st Dept 2014), citing *Dillon v City of New York*, 261 AD2d 34, 38 (1st Dept 1999). "A statement is defamatory on its face when it suggests improper performance of one's professional duties or unprofessional conduct." *Frechtman*, 115 AD3d at

104, citing *Chiavarelli v Williams*, 256 AD2d 111, 113 (1st Dept 1998). "Whether the contested statements are reasonably susceptible of a defamatory connotation is in the first instance a legal determination for the court. In analyzing the words in order to make that threshold decision, the court must not isolate them, but consider them in context, and give the language a natural reading rather than strain to read it as mildly as possible at one extreme, or to find defamatory innuendo at the other." *Weiner v Doubleday & Co.*, 74 NY2d 586, 592 (1989). "Of course, 'only statements of fact can be defamatory because statements of pure opinion cannot be proven untrue.'" *Martin v Daily News L.P.*, 121 AD3d 90, 100 (1st Dept 2014), quoting *Thomas H. v Paul B.*, 18 NY3d 580, 584 (2012); *see Mann v Abel*, 10 NY3d 271, 276 (2008) ("Expressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation"); *see generally Gross v N.Y. Times Co.*, 82 NY2d 146 (1993). A claim for defamation, moreover, must be pleaded with particularity pursuant to CPLR 3016(a). *See BCRE 230 Riverside LLC v Fuchs*, 59 AD3d 282, 283 (1st Dept 2009).

The Amended Answer does not allege that plaintiff herself actually made any defamatory statements about defendants. Rather, the subject defamatory statements were allegedly published by non-party Ken Foley, who the Amended Answer alleges is plaintiff's domestic partner. *See* Dkt. 58 at 3. In early June 2014, Foley allegedly sent the following text message (a private communication that cannot support a defamation claim) to defendants[6]:

> This is how Gavin Whiston takes out the trash!!!! Are you really that [f******] stupid?? I'm so tired of low lifes like you in this world. Mutton dressed up at [sic] lamb...Sounds very hitler like....I'm never ever going away. Bullies like you have become my reason for living. Give me my money. I'm never ever going away. You're a coward and a crook.

[6] The Amended Answer does not indicate which defendants received the text message.

See Dkt. 58 at 4 (punctuation, grammar, and "[sic]" in original; profanity redacted).

Then, on June 12, 2014, Foley, allegedly acting as plaintiff's agent,[7] published the following statement on Facebook: "Smithfield the whole disgusting truth. How these 'men' stole my child's money. And how they used my illegal status to try and shut me up. Coming soon."[8] *See id.* Foley then wrote "They can steal my money but I get the story" and called defendants "crooks". *See id.* at 5. This post, as alleged in the Amended Answer, does not specifically name any of the individual defendants.[9] However, the following day, on June 13, 2014, Foley allegedly referred to two of the Individual Defendants by calling "McCarthy and Slattery as 'low lifes' on Facebook" and "accused defendants [no specific defendant is identified] of 'stabbing me in the back' and referred to his own 'illegal status'." *See id.*

These allegations do not state a claim for defamation. As plaintiff correctly contends, and as defendants concede,[10] the majority of the posts constitute inactionable expressions of opinion. Perjoratives and insults cannot give rise to defamation liability because they are opinions and not falsifiable. *See Sandals Resorts Int'l Ltd. v Google, Inc.*, 86 AD3d 32, 38 (1st Dept 2011) ("**Since falsity is a sine qua non of a libel claim** and since only assertions of fact

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[7] The court need not opine if agency is properly pleaded since, as explained herein, the subject statements are not defamatory.

[8] The Amended Answer indicates this post was on a "public" forum, but no further specification is provided. It, therefore, is impossible to ascertain how many people could have viewed this post (e.g., only "friends", members of the forum, or others depending on the applicable privacy settings).

[9] It is unclear if the Individual Defendants are publicly known (or at least known to the readers of the posts) as the owners and proprietors of the New Bar. The Amended Answer claims that this post was read and commented upon, but neither the identity of those who commented nor the substance of the comments are alleged.

[10] *See* Dkt. 72 at 7 ("Certain of the words are admittedly only vituperative and therefore not actionable.").

are capable of being proven false, ... a libel action cannot be maintained unless it is premised on published assertions of fact," rather than on assertions of opinion.") (emphasis added), quoting *Brian v Richardson*, 87 NY2d 46, 49 (1995); *see also id.* at 52 (noting that "a medium that is typically regarded by the public as a vehicle for the expression of individual opinion [such as Facebook][11] rather than the rigorous and comprehensive presentation of factual matter" suggest that a reader would not understand the statements to be anything but "vigorous expressions of personal opinion") (citations and quotation marks omitted); *see also Woodbridge Structured Funding, LLC v Pissed Consumer*, 125 AD3d 508, 509 (1st Dept 2015) ("the disgruntled tone, anonymous posting, and predominant use of statements that cannot be definitively proven true or false, supports the finding that the challenged statements are only susceptible of a non-defamatory meaning, grounded in opinion."); *Konig v WordPress.com*, 112 AD3d 936, 937 (2d Dept 2013) ("given the context in which the challenged statements were made, on an Internet blog ... a reasonable reader would have believed that the generalized reference to 'downright criminal actions' ... was not a factual accusation of criminal conduct."); *Polish Am. Immigration Relief Comm., Inc. v Relax*, 189 AD2d 370, 374 (1st Dept 1993) ("No reasonable person would conclude that ... that actual criminality is charged by the epithet 'thieves'".)

The only arguably specific statement of fact, the allegation of theft, is not attributed to any specific individual. In any event, this allegation is made within the context of the discussed perjoratives, and, therefore, would "signal to any reasonable reader that the writer's purpose" is conveying opinion, not fact. *Sandals*, 86 AD3d at 45; *see Galasso v Saltzman*, 42 AD3d 310, 311 (1st Dept 2007) ("Given the subjective context and the stated facts underlying [defendant's]

[11] The First Department in *Sandals* discusses the "imperative that courts learn to view libel allegations within the unique context of the Internet." *See id.* at 44.

statements, they constitute opinion and are not actionable as a matter of law.").[12] None of the specific allegations regarding defendants' malfeasance that are the subject of this action are alleged in the Amended Answer to have been posted by Foley on Facebook.[13] The defamation counterclaim based on these statements, therefore, is dismissed with prejudice. Accordingly, it is

ORDERED that plaintiffs' motion to dismiss defendants' counterclaims is granted, the money had and received counterclaim is dismissed without prejudice and with leave to replead in accordance with this decision, and the defamation counterclaim is dismissed with prejudice

Dated: October 7, 2016

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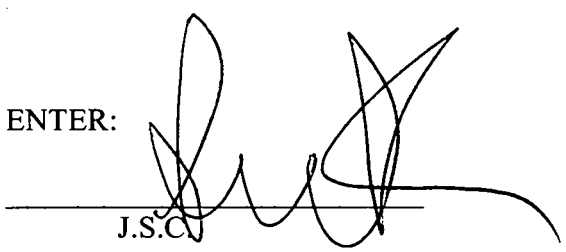

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C

[12] The cases cited herein refute defendants' argument that "language [that] amounts to accusations of theft ... [is] actionable per se." *See* Dkt. 72 at 7.

[13] Of course, had defendants stated a claim for defamation, "the truth or substantial truth of" Foley's posts would be "a complete defense." *See Panghat v N.Y. Downtown Hosp.*, 85 AD3d 473 (1st Dept 2011).