

Stone v Bloomberg L.P.
2017 NY Slip Op 32919(U)
May 11, 2017
Supreme Court, Westchester County
Docket Number: 67221/2016
Judge: Lewis J. Lubell
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PCP 6/26/17 @ 9:30 a.m.

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF WESTCHESTER

-----X
AVERY STONE,

Plaintiff,

-against -

BLOOMBERG L.P., TRACY ALLOWAY,
in her professional and personal
capacities, BENJAMIN ROBERTSON,
in his professional and personal
capacities, EFINANCIALCAREERS, INC.,
and PAUL CLARKE, in his professional
and personal capacities,

Defendants.

-----X
LUBELL, J.

DECISION & ORDER

Index No.67221/2016

Sequence No. 1,3,4
& 5

To the extent relevant to the following motions, the following papers were considered in connection with **Motion Sequence #1** by defendant Bloomberg L.P. for an Order pursuant to CPLR 3211(a) (1) and (7) dismissing the complaint in its entirety; **Motion Sequence #3** by defendant Efinancialcareers, Inc. for an Order dismissing plaintiff's amended complaint in its entirety pursuant to CPLR Rule 3211(a) (1) and (7) based upon plaintiff's failure to state a cause of action; **Motion Sequence #4** by plaintiff for an Order: denying defendant Bloomberg's motion to dismiss the amended complaint in its entirety; and granting plaintiff's cross-motion (Motion No. 4) by: (1) vacating the stay of discovery imposed pursuant to 3214(b) and ordering the parties to proceed expeditiously with discovery based on facts unavailable to plaintiff, pursuant to CPLR 3211(d); and (2) converting defendant Bloomberg's motion to dismiss into a summary judgment motion and providing all parties to this action with full disclosure, pursuant to CPLR 3211(c); **Motion Sequence #5** by plaintiff for an Order: denying defendant Bloomberg's motion to dismiss the amended complaint in its entirety; and granting plaintiff's cross-motion (Motion No. 5) by: (1) vacating the stay of discovery imposed pursuant to 3214(b) and ordering the parties

to proceed expeditiously with discovery based on facts unavailable to plaintiff, pursuant to CPLR 3211(d); (2) converting defendant eFinancialCareers, Inc.'s motion to dismiss into a summary judgment motion and providing all parties to this action with full disclosure, pursuant to CPLR 3211(c):¹

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This is an action by plaintiff, Avery Stone, for declaratory, injunctive and equitable relief, and monetary damages against the

¹ Motion Sequence Nos. 2, 6 and 7 were decided by Decision & Order of April 19, 2017.

named defendants to redress alleged acts of defamation and libel per se.

Plaintiff commenced this action upon the November 17, 2016, filing of a Summons and Complaint. Plaintiff has since filed a supplemental Summons and Amended Complaint dated December 12, 2016. Subsequent thereto, plaintiff discontinued the action as against defendant, Bloomberg Inc., and has withdrawn as against all defendants his Second Cause of Action for Intentional Infliction of Emotional Distress.

Among other things, plaintiff avers that he was a "director at a struggling, yet entirely legitimate and law-abiding Hong Kong business - Global Merchant Funding, Ltd. ("GMF")" (Complaint ¶3). As against Bloomberg and two of its reporters, defendants Tracy Alloway and Benjamin Robertson, plaintiff contends that he was defamed in an on-line news article published on October 31, 2016 wherein it was

". . . falsely, maliciously and with reckless disregard for the truth [reported] that: (1) Avery Stone, along with his GMF partners, "duped" his friends into investing \$32 Million Dollars into the business and then "vanished"; (2) Avery Stone and his partners "systematically preyed off [his] friends" in an intentional and illegal Ponzi scheme to make money with no hope of actually realizing a positive return on their investments; (3) GMF's liquidator, accounting firm JLA Asia, itself reported to the Hong Kong Police in April, 2016, that it had suspicions that Stone and his two other directors "may have misappropriated some of the money owed to the investors"; and (4) Avery Stone was a "crook" and a "low-life" who was "lying low" after stealing \$400,000.00 of family possessions from his own father" (Complaint ¶4), [after which he "then "vanished" into thin air like an international fugitive from justice (Complaint ¶5).

The impact of these statements was allegedly "exacerbated by a follow-up article by Paul Clarke that was published online on eFinancialCareers' widely circulated website, on November 2, 2016" (Complaint ¶6). More specifically, plaintiff contends:

The eFinancialCareers Defendants falsely, maliciously and with reckless disregard for the truth, stated as facts in their November 2, 2016 article that: (1) Avery Stone, was a "schmoozing \$32m banker con man"; (2) Avery Stone and his partners "systematically preyed off [his] friends" in an intentional and illegal scheme to make money with no hope of actually realizing a positive return on their investments; (3) Avery Stone was a "crook" and a "low-life" who was "lying low"; (4) that Avery Stone "borrowed \$89k from his 82-year-old father, Richard, to 'get out of Hong Kong very fast' before stealing \$400k of family possessions and disappearing"; and (5) that "Hong Kong Police are investigating" Avery Stone's alleged theft of \$400,000.00 of personal property items from his own father.

(Complaint ¶7).

Plaintiff also avers:

At all material times, each of the Defendants acted in a grossly irresponsible manner without due consideration for the standards on information gathering and dissemination ordinarily followed by responsible parties.

(Complaint ¶165).

[Defendants] had serious doubts about the truth of the disparaging claims that they planned to make against Avery Stone, but intentionally violated commonly accepted journalistic norms and consciously either ignored or failed to investigate sources and information that they believed revealed, or would have revealed, the falsity of the charges that they leveled against Avery Stone.

(Complaint ¶¶ 172 & 176).

[Defendants] deliberately and maliciously ignored, obscured, buried, and failed to investigate, a plethora of information and sources that demonstrated the abject falsity of that narrative.

(Complaints ¶¶ 172 & 177).

By Decision & Order of April 19, 2017, the Court granted applications for the admission of two attorneys, pro hac vice, struck from the caption Bloomberg, Inc. as a named defendant, and denied preliminary injunctive relief against eFinancialCareers, Inc.

The Court will now address the remaining motions.

To the extent that defendants seek dismissal based upon qualified privilege, the motion is denied as premature.

A claim of qualified privilege is an affirmative defense to be raised in defendants' answer and "does not lend itself to a preanswer motion to dismiss pursuant to CPLR 3211 (a)" (Demas v. Levitsky, 291 AD2d 653, 661 [2002], lv dismissed 98 NY2d 728 [2002]). Rather, defendants must plead the privilege as an affirmative defense and thereafter move for summary judgment on that defense, supporting the motion with competent evidence establishing a prima facie showing of qualified privilege (see id.).

(Wilcox v. Newark Val. Cent. School Dist., 74 AD3d 1558, 1562 [3d Dept 2010]).

In any event, upon plaintiff's own admission and articulated interpretation of the Amended Complaint, plaintiff does not allege that the Bloomberg article's statements regarding the existence of the Hong Kong and Pound Ridge, New York, police investigations are in any way false or defamatory. Thus, the Amended Complaint will be construed accordingly.

Upon doing so, New York Civil Rights Law §74 is deemed inapplicable and the Court rejects any attempt by Bloomberg to characterize the alleged defamatory statements as mere "background materials" to what might otherwise be deemed privileged statements under the Civil Right Law.

Furthermore, while section 74 of the New York Civil Rights Law constitutes a potential privilege to statements reporting about the Pound Ridge, New York, police investigation (see Rodriguez v. Daily News, L.P., 37 N.Y.S.3d 613, 615 [2d Dept 2016]), it does not apply to Bloomberg's report of the Hong Kong Police Investigation of GMF (see Stepanov v. Dow Jones & Co., Inc., 2013 WL 1727123

[N.Y.Sup.], aff'd on other grounds 120 AD3d 28 [1st Dept 2014]; see Lee v. Dong-A Ilbo, 849 F2d 876, 879 [4th Cir 1988]).

Upon accepting the allegations as true and according plaintiff the benefit of every favorable inference, and determining only if the factual allegations fall within any cognizable legal theory (see Leon v. Martinez, 84 N.Y.2d 83, 87), the Court finds the complaint adequately pleads (1) that the defendant[s] published a false statement, (2) about the plaintiff, (3) without privilege or authorization, (4) to a third party (5) made with the requisite level of fault and (6) "either cause[d] special harm or constitute[d] defamation per se (Rosner v. Amazon.com, 132 AD3d 835, 836 [2d Dept 2015] lv denied 26 NY3d 917 [2016]).

Any deficiencies at this pleading stage with respect to the allegation that defendants "acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties" (Chapadeau v. Utica Observer-Dispatch, 38 NY2d 196, 199 [1975]) will have to await discovery. "At the pleading stage and prior to discovery, the plaintiffs have no knowledge of, and cannot possibly plead, any factual allegations concerning [defendants'] methods for gathering information, researching, writing and editing the subject article" (Knutt v. Metro Intern., S.A., 91 AD3d 915, 916-17 [2d Dept 2012]). Thus, upon a liberal construction of the complaint, accepting the facts alleged as true and according plaintiff the benefit of every favorable inference possible, as it must, the Court finds that plaintiff has adequately advanced the element of gross irresponsibility.

Defendants' 3211(a)(1) motion is denied as well. Even assuming, without so finding, that the evidence submitted upon these motions is "documentary" within the meaning of the statute (see Cives Corp. v. George A. Fuller Co., Inc., 97 A.D.3d 713, 714, 948 N.Y.S.2d 658, quoting Fontanetta v. John Doe 1, 73 A.D.3d 78, 84, 898 N.Y.S.2d 569 [internal quotation marks omitted]; see Rodolico v. Rubin & Licatesi, P.C., 112 A.D.3d at 610, 977 N.Y.S.2d 264), dismissal of the complaint is not now warranted. The Court is not persuaded that the proffered "documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim[s]" (Fontanetta v Doe, 73 AD3d 78, 83-84 [2d Dept 2010] citing Fortis Fin. Servs. v. Fimat Futures USA, 290 A.D.2d 383, 383).

Contrary to eFinancialCareers position, the Court finds that its article contains statements of fact susceptible of defamatory meaning.

[The Court of Appeals] held in Rinaldi v. Holt, Rinehart & Winston (42 NY2d 369, 383), that a company or concern which simply republishes a work is entitled to place its reliance upon the research of the original publisher, absent a showing that the republisher "had, or should have had, substantial reasons to question the accuracy of the articles or the bona fides of [the] reporter".

(Karaduman v. Newsday, Inc., 51 NY2d 531, 550 [1980]). Here, however, the Court agrees with plaintiff's position that its article goes beyond the threshold of "simply republishing."

There being no merit to any other arguments advanced in support of the respective 3211(a)(1) and (7) motions, same are denied.

Having ruled as such, plaintiff's cross-motion is denied as moot.


Based upon the foregoing, it is hereby

ORDERED, that defendants' motions and plaintiffs' cross-motions are denied; and, it is further

ORDERED, that defendants are directed to serve and file their answers accordingly and the parties are directed to appear on Monday, June 26, 2017, at 9:30 a.m. in the Preliminary Conference Part, Courtroom 811, Westchester County Supreme Court, 111 Dr. Martin Luther King, Jr. Boulevard, White Plains, New York, prepared to conduct a preliminary conference.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: White Plains, New York
May 11, 2017



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