

Steadman v Zappin
2018 NY Slip Op 30425(U)
March 13, 2018
Supreme Court, New York County
Docket Number: 150591/2017
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Amy Steadman,

Index No.: 150591/2017

Plaintiff,

DECISION/ORDER

-against-

Motion Sequence 001, 002, 003

Anthony Zappin and Jeffrey Zappin,

Defendants.

PAUL A. GOETZ, J.S.C.:

Plaintiff Amy Steadman brings this action seeking a permanent injunction and damages arising from statements allegedly posted by defendants on the website amysteadman.net, which plaintiff alleges was owned and operated by defendant Anthony Zappin and his father, defendant Jeffrey Zappin. In motion sequence 001, plaintiff seeks leave to file a second amended complaint to include, as a basis for her defamation claims, certain statements defendant Anthony Zappin made about plaintiff in his answer to the first amended complaint and counterclaims. In motion sequence 002, defendant Anthony Zappin, appearing *pro se*, moves to dismiss the first amended complaint and the proposed second amended complaint and to compel plaintiff to respond to defendant Anthony Zappin's discovery demands. In motion sequence 003, defendant Anthony Zappin seeks a court order sanctioning plaintiff and her counsel based on their failure to promptly serve defendant with copies of a subpoena and responses thereto and to preclude plaintiff from introducing the documents they received in response to the subpoena. All three motions are consolidated for purposes of disposition in this decision and order.

Motion to Amend

Plaintiff moves pursuant to CPLR 3025(b) to amend her first amended complaint to add as a basis for her defamation claims certain statements defendant Anthony Zappin made in his

answer and counterclaims filed in response to the first amended complaint. Defendant Anthony Zappin argues that these statements are privileged because they were made in the context of judicial proceedings and thus are not actionable.

It is well-established “that relevant statements made in judicial or quasi-judicial proceedings are afforded absolute protection [and that this] privilege attaches . . . irrespective of an attorney’s motive for making them” (*Front. Inc. v. Khalil*, 24 N.Y.3d 713, 718 [2015] [internal citations and quotations omitted]). “Further, the test to determine whether a statement is pertinent to litigation is extremely liberal, such that the offending statement, to be actionable, must have been outrageously out of context” (*Flomenhaft v. Finkelstein*, 127 A.D.3d 634 [1st Dep’t 2015] [internal citations and quotations omitted]). Here, the statements at issue are pertinent to defendant Anthony Zappin’s defense and are asserted to rebut plaintiff’s allegations regarding the nature of the parties’ relationship. Moreover, plaintiff does not assert that defendant’s defenses and counterclaims are a “sham”, brought solely to defame the plaintiff (*Id.* at 638 [discussing “sham” exception to litigation privilege]). Accordingly, these statements are non-actionable and plaintiff’s motion to amend must be denied.

Motion to Dismiss

Defendant Anthony Zappin moves pursuant to CPLR 3211 to dismiss the first amended complaint and the proposed second amended complaint. Because plaintiff’s motion to file the second amended complaint is being denied, defendant’s motion to dismiss the second amended complaint is moot and the Court will only consider defendant’s motion to dismiss the first amended complaint.

With respect to the first cause of action for defamation *per se*, defendant argues that this cause of action should be dismissed because plaintiff has failed to sufficiently demonstrate any

link between defendants and the website, amysteadman.net, on which the allegedly defamatory statements were published. Defendant also argues that the statements published on the website are substantially true, as evidenced by videos and audio recordings of plaintiff, and thus defendants have presented a complete defense to the defamation claim.

On a motion to dismiss under CPLR 3211(a)(7), the court is limited to examining the complaint to determine whether the complaint states a cause of action (*Greystone Funding Corp. v. Kutner*, 121 A.D.3d 581, 583 (1st Dep’t 2014)). It is well settled that “in assessing the adequacy of a complaint under CPLR 3211(a)(7), the court must give the pleading a liberal construction, accept the facts as alleged in the complaint to be true and afford the plaintiff the benefit of every possible inference” (*Id.*). Further, “[w]hether the plaintiff will ultimately be successful in establishing its allegations is not part of the calculus” (*Id.*).

Here, plaintiff specifically alleges that “[d]efendants Anthony Zappin and Jeffrey Zappin registered the domain name Amysteadman.net” and that defendants published the alleged defamatory statements on Amysteadman.net. First Verified Amended Complaint, ¶ 72, 100-106. Given these allegations and according plaintiff the benefit of every favorable inference, the plaintiff has sufficiently established a “nexus” between defendants and the publication of the allegedly defamatory statements on the website. To the extent that defendant seeks to assert a defense to the defamation *per se* claim based on the “substantial truth” of these statements, this defense fails as the videos they submit do not constitute “documentary evidence” under the stringent standards of CPLR 3211(a)(1) and thus cannot be considered (*Fontanetta v. Doe*, 73 A.D.3d 78, 84-87 [2d Dep’t 2010]). Accordingly, defendant’s motion to dismiss the defamation *per se* claim must be denied.

With respect to the second cause of action for defamation, defendant argues that this claim should be dismissed based on plaintiff's failure to plead special damages. In order to state a claim for defamation, plaintiff must allege special harm or the statements must constitute defamation *per se*" (*Dillon v. City of New York*, 261 A.D.2d 34, 38 [1st Dep't 1999]). "Special damages consist of the loss of something having economic or pecuniary value, which must flow directly from the injury to reputation caused by the defamation and not from the effects of the defamation" (*Franklin v. Daily Holdings, Inc.*, 135 A.D.3d 87, 93 [1st Dep't 2015] [internal citations and quotations omitted]). Here, plaintiff does not allege, much less with the requisite specificity, the pecuniary damage caused by the alleged defamatory statements. Accordingly, plaintiff's second cause of action for defamation must be dismissed.

With respect to the third cause of action for intentional infliction of emotional distress, defendant argues that this cause of action is based entirely on defendants allegedly posting a single, one-page statement online, which clearly does not rise to the level of "extreme and outrageous conduct" necessary to support this cause of action. In support of this argument, defendant cites to *Bement v. N.Y.P. Holdings*, 307 A.D.2d 86 (1st Dep't 2003), which holds that the publication of a single, purportedly false and defamatory article about a person does not constitute extreme and outrageous conduct as a matter of law. However, unlike *Bement*, plaintiff is not relying on the publication of a single statement online but alleges that defendants created a website specifically dedicated to defame her and to destroy her personal and professional reputation. Plaintiff also alleges that defendant Anthony Zappin repeatedly posted videos of plaintiff on Youtube in violation of their bullying policy and that defendants sent threatening texts and emails to plaintiff. Taken together, these allegations establish that defendants engaged in a deliberate and malicious campaign of harassment and intimidation which was sufficiently

“extreme and outrageous conduct” so as to withstand a motion to dismiss (*Dennis v. Napoli*, 148 A.D.3d 446, 446 [1st Dep’t 2017]; *Eves v. Ray*, 42 A.D.3d 481, 483 [2d Dep’t 2007]).

Defendant seeks to dismiss the fourth cause of action for breach of contract based on plaintiff’s failure to plead damages. It is well-established that damages are an essential element of a breach of contract claim (*Milan Music Inc. v. Emmel Comm. Booking*, 37 A.D.3d 206 [1st Dep’t 2007]). Without a clear demonstration of damages, there can be no claim for breach of contract (*Id.*). Here, plaintiff alleges that she suffered damages in the form of reputational harm as a result of defendants’ alleged defamatory statements. However, it is well-established that a claim for damages for loss of reputation arising from a breach of contract is not actionable (*Rather v. CBS Corp.*, 68 A.D.3d 49, 55 [1st Dep’t 2009]). Accordingly, this cause of action must be dismissed.

Although defendant seeks dismissal of the complaint in its entirety, he does not assert any arguments in support of dismissing the fifth cause of action for a permanent injunction. Accordingly, this cause of action will not be dismissed.

Finally, defendant’s motion to compel plaintiff’s responses to their discovery demands dated March 16, 2017 will be addressed at the preliminary conference in this action.

Motion for Sanctions

Defendant Anthony Zappin moves for sanctions and to preclude plaintiff from introducing the documents produced by Namescheap, Inc. in response to a subpoena served by plaintiff on March 11, 2017. Defendant argues that sanctions are warranted because plaintiff’s counsel did not serve defendants with notice of the subpoena until March 17, 2017, six days after it was served on Namescheap, and because plaintiff’s counsel failed to notify defendants that he received documents in response to the subpoena, in contravention of CPLR 3120.

Defendant fails to show that plaintiff's counsel's conduct in failing to notify defendants about the subpoena or the production of the documents was intentional or rose to the level of frivolousness so as to warrant sanctions (22 NYCRR 130-1.1; *Highland Capital Mgmt. v. Stern*, 157 A.D.3d 501 [1st Dep't 2018]). Moreover, defendant does not contend that the subpoena itself was improper. Thus, this motion must be denied.

Accordingly, it is

ORDERED that plaintiff's motion to file a second amended complaint (#001) is denied; and it is further

ORDERED that defendant's motion to dismiss the first amended complaint (#002) is granted to the extent of dismissing the second and fourth causes of action and is otherwise denied; and it is further

ORDERED that defendant's motion for sanctions (#003) is denied; and it is further

ORDERED that defendants Anthony Zappin and Jeffrey Zappin shall file and serve their answer to the first amended complaint within twenty days of entry of this order; and it is further

ORDERED that the parties shall appear for a preliminary conference on April 19, 2018 at 2:30 p.m. The conference will be conducted telephonically before a court reporter. The parties are directed to first join together on a conference call and then jointly call Part 47 at 646-386-3743 with all parties on the line.

Dated: March 13, 2018


HON. PAUL A. GOETZ