Biro v Conde Nast
2018 NY Slip Op 31181(U)
June 7, 2018
Supreme Court, New York County
Docket Number: 154663/2017
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2

Justice

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INDEX NO. 154663/2017

PETER PAUL BIRO,

Plaintiff,

MOTION SEQ. NO. 001

- v -

CONDE NAST, A DIVISION OF ADVANCE MAGAZINE PUBLISHERS INC.,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 22

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is ordered that **the motion is granted and the cross motion is denied**.

In this action by plaintiff Peter Paul Biro, sounding in defamation and injurious falsehood, defendant Conde Nast, a division of Advance Magazine Publishers Inc., moves, pursuant to CPLR 3211(a)(5) and (a)(7), to dismiss the complaint. Plaintiff cross-moves, pursuant to CPLR 3214(b), to compel discovery pending the determination of defendant's motion to dismiss. After oral argument, and after a review of the parties' papers and the relevant statutes and case law, **the motion is granted and the cross motion is denied**.

FACTUAL AND PROCEDURAL BACKGROUND:

In its July 12-19, 2010 issue, *The New Yorker* magazine ("the magazine") printed an article ("the article") written by David Grann about plaintiff Peter Paul Biro, who restores and

authenticates art, and is known in the art world for devising scientific methods of authenticating art through fingerprint analysis. Doc. 10, at pars. 2, 16.[1] The article, entitled "The Mark of a Masterpiece: The man who keeps finding famous fingerprints on uncelebrated works of art", was published by defendant Conde Nast, a division of Advance Magazine Publishers Inc. Doc. 10, at par. 2.

In 2011, plaintiff commenced an action for libel and injurious falsehood against defendant in the United States District Court for the Southern District of New York ("SDNY"), styled *Biro v Conde Nast, et al*, Case No. 11-CV-0444. In that action, plaintiff alleged that the article implied that he was a fraud who sells fake art and was incompetent at art authentication. Defendant moved to dismiss the complaint pursuant to FRCP 12(b) and the SDNY granted the motion in part, finding that four passages in the article, which are the subject of the captioned action, were susceptible to defamatory connotation. The SDNY also denied plaintiff's request to conduct discovery.

After defendant filed its answer in the SDNY action, it moved to dismiss the complaint pursuant to FRCP 12(c). By order dated August 1, 2013, the SDNY granted the motion and dismissed the complaint against defendant. *See Biro v Conde Nast*, 963 F Supp 2d 255 (SDNY 2013). Plaintiff appealed to the United States Court of Appeals for the Second Circuit which determined, inter alia, that plaintiff was a public figure for the purposes of his libel claims. *Biro v Conde Nast*, 622 Fed Appx 67 (2d Cir 2015). In a separate opinion, the Second Circuit ruled that plaintiff failed to allege any fact that, if proven, could raise a plausible inference of actual malice on the part of defendant. *Biro v Conde Nast*, 807 F3d 541 (2d Cir 2015).

[1] Unless otherwise noted, all references are to the documents filed with NYSCEF in this matter.

On April 9, 2017, defendant sent an email ("the email") to subscribers of the magazine with the heading "The New Yorker Sunday: A Selection of Stories from [the magazine's] Archive: The World of David Grann." Doc. 10, at par. 5. The email noted a recent release of a film adaptation of one of Grann's books and contained hyperlinks[2] to six pieces written by Grann which had previously appeared in the magazine, one of which was the article. Clicking on the hyperlink directed a subscriber to Grann's article in the magazine's online archive, where it had been available since its original publication.

Plaintiff commenced the captioned action by filing a summons and complaint on May 21, 2017. Doc. 1. In his complaint, plaintiff set forth claims of defamation and injurious falsehood and alleged, inter alia, that on April 9, 2017, defendant "willfully republished the [a]rticle in a different form, directed to and intended for a new audience" and that "[t]he contents of the republished [a]rticle are word-for-word identical to the contents of the original one published in the magazine in July 2010, in all respects." Doc. 10, at par. 4.

On July 14, 2017, defendant filed the instant motion, pursuant to CPLR 3211 (a)(5) and (a)(7), seeking to dismiss the complaint on the ground that plaintiff's claims are barred by the statute of limitations, as well as on the ground that the complaint failed to state a claim. Doc. 7. Defendant further asserts that plaintiff's claim is barred by the doctrines of res judicata and collateral estoppel. Plaintiff opposes the motion mainly on the ground that the 2017 republication of the article tolled the statute of limitations, thereby rendering his claim timely. He also cross-

[2] The Merriam-Webster Dictionary defines a hyperlink as "an electronic link providing direct access from one distinctively marked place in a hypertext or hypermedia document to another in the same or a different document."

moves, pursuant to CPLR 3214(b), for leave to conduct discovery pending the determination of defendant's motion to dismiss. Doc. 14.

LEGAL CONCLUSIONS:

Defendant's Motion to Dismiss

Claims of defamation and injurious falsehood are subject to a one-year statute of limitations. CPLR § 215(3). Defendant argues that these causes of action are time-barred since the claims accrued in 2010, when it initially published the article, and that, contrary to plaintiff's claim, the hyperlink in the email did not constitute a republication of the article.

> Under the "single publication rule," the publication of a defamatory statement in a single issue of a newspaper or magazine, although widely circulated and distributed, constitutes one publication, which gives rise to one cause of action, and the statute of limitations runs from the date of that publication. *Gregoire v Putnam's Sons*, 298 NY 119, 123 (1948). This rule applies to publications on the internet (*Firth v State of New York*, 98 NY2d 365, 369 [2002]), so continuous access to an article posted via hyperlinks to a website is not a republication. *See Haefner v New York Media, LLC*, 82 AD3d 481 (1st Dept 2011).

Martin v Daily News L.P., 121 AD3d 90, 103 (1st Dept 2014).

Republication of a libelous statement may occur, however, when the following factors are present: "the subsequent publication is intended to and actually reaches a new audience, the second publication is made on an occasion distinct from the initial one, the republished statement has been modified in form or in content, and the defendant has control over the decision to republish". *Martin*, 121 AD3d at 90 (internal quotations omitted). "Whether a particular event constitutes a republication giving rise to a new cause of action with a refreshed limitations period must be

analyzed on a case-by-case basis." *Martin v Daily News, L.P.*, 35 Misc 3d 1212(A) (Sup Ct New York County 2012), *aff'd*, *Martin v Daily News, L.P.*, 121 AD3d 90, *supra*.

Assuming, *arguendo*, that one or more of the foregoing factors is present, it is clear that the republished article was not modified in form or in content from that published in 2010. In fact, as noted above, plaintiff concedes that "[t]he contents of the republished [a]rticle are word-for-word identical to the contents of the original one published in the magazine in July 2010, in all respects." Doc. 10, at par. 4. Additionally, plaintiff fails to demonstrate how the republication reached "a new audience". *Ullum v American Kennel Club*, 134 AD3d 416 (1st Dept 2015), citing *Firth*, 98 NY2d, at 371. Indeed, plaintiff alleges that the email was sent to the magazine's subscribers, many of whom are likely to have read the article when it was originally published.[3] The 2017 email was, at most, "a delayed circulation of the original [document]". *Rinaldi v. Viking Penguin*, 52 NY2d 422, 435 (1981).

Since plaintiff failed to establish that the facts of this case fall within an exception to the single publication rule, this Court rejects plaintiff's claim that the one-year statute of limitations on plaintiff's libel claim began to run anew at the time defendant sent the 2017 email containing the hyperlink to the article. The libel claim is thus dismissed as untimely.

Plaintiff's claim for injurious falsehood, also barred by a one-year statute of limitations, is dismissed as well. *See Madison Park Dev. Assoc., LLC v Febbraro*, 2014 NY Slip Op 32932(U),

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[3] Plaintiff does not allege that the 2017 email containing a hyperlink to the article was defamatory in any way, and the hyperlink led to the article in exactly the same form in which it was initially published.

*14 (Sup Ct. NY County 2014), citing CPLR 215 (3); *Riddell Sports Inc. v Brooks*, 872 F Supp 73, 80 (SDNY 1995). A claim for injurious falsehood accrues when the alleged falsehood is first published (*see Nordco A.S. v Ledes*, 1999 US Dist LEXIS 19605, *6 [SDNY 1999]) which, in this case, would have been 2010. Further, the injurious falsehood claim must be deemed a defamation claim where, as here, the "entire injury complained of by plaintiff flows from the [alleged] effect on his reputation." *Goldberg v Sitomer, Sitomer & Porges*, 97 AD2d 114, 116 (1st Dept 1983); *see Morrison v National Broadcasting Company*, 19 NY2d 453 (1967).

Since the libel and injurious falsehood claims are barred by the statute of limitations, this Court need not address whether they otherwise state any cause of action.

Plaintiff's Cross Motion to Compel Discovery

Given the dismissal of the complaint, plaintiff's cross motion seeking to conduct discovery is denied as moot.

Therefore, in light of the foregoing, it is hereby:

ORDERED that defendant's motion to dismiss is granted, and the complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the cross motion by plaintiff is denied as moot; and it is further

ORDERED that this constitutes the decision and order of the court.

6/7/2018
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE