Magdy v Awad
2018 NY Slip Op 31209(U)
June 8, 2018
Supreme Court, New York County
Docket Number: 157836/2017
Judge: Kathryn E. Freed
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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. 157836/2017

MOHAMED MAGDY,

Plaintiff,

MOTION SEQ. NO. 001

- v -

ABED AWAD and AWAD & KHOURY LLP,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for DISMISSAL.

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

In this action sounding in defamation, tortious interference with business relations, and intentional infliction of emotional distress, defendants Abed Awad (Awad) and Awad & Khoury, LLP (the firm) move, pursuant to CPLR 3211 (a) (1) and (7), for dismissal of the complaint. Plaintiff Mohamed Magdy (Magdy) cross-moves, pursuant to CPLR 3025 (b), for leave to amend the complaint. 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.**

Defendants represent Magdy's wife, Dina Fouad (Fouad) in a pending divorce action against him entitled *Fouad v Magdy* (Sup Ct, NY County, Index No. 312366/15) (the matrimonial action). In August 2016, the trial court in the matrimonial action dismissed Fouad's complaint on the ground that Magdy had obtained an Egyptian divorce and Fouad appealed the

decision. The First Department reversed and reinstated Fouad's complaint holding, inter alia, that the matrimonial action was commenced by Fouad before Magdy sought a revocable divorce under Egyptian law, and thus the New York trial court had jurisdiction (*Fouad v Magdy*, 147 AD3d 436 [1st Dept 2017]) (the Appellate Division decision). Awad subsequently wrote an article commenting on the Appellate Division decision, entitled "NY Court Ruling Against a Muslim Man's Attempt to Unilaterally Divorce His Wife" (the article), which was published on Harvard Law's School ShariaSource blog on March 6, 2016.

Magdy then commenced the instant action alleging three causes of action: (1) defamation; (2) tortious interference with business relations; and (3) intentional infliction of emotional distress, all relating to statements made by Awad in the article.

Defendants now move to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7). "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory" (*id.* at 87-88). "[W]here . . . the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration" (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

With respect to the first cause of action in defamation, defendants argue, inter alia, that Magdy fails to plead with specificity the actual words from Awad's article that are purportedly defamatory, as required by CPLR 3016 (a), and that the factual statements contained therein about Magdy were true, as demonstrated by, inter alia, the Appellate Division decision, and a

temporary child support order issued by New York Family Court (Ex. I to Defendants' moving papers, *Tizhanin v Magdy*, Family Court, New York County, docket # F-08256-17 [the Family Court Order]). With respect to the remaining causes of action, they argue that they fail to state claims.

Magdy opposes the motion, and cross-moves, pursuant to CPLR 3025 (b), for an order granting him leave to amend the complaint to comply with CPLR 3016 (a). He asserts that he has the right to amend his complaint during the pendency of defendants' motion to dismiss (*Nimkoff, Rosenfeld & Schechter, LLP v v O'Flaherty*, 71 AD3d 533, 533 [1st Dept 2010]). Defendants' motion to dismiss the original complaint extends their time to answer until 10 days after service of notice of entry of the order determining the motion (*see* CPLR 3211 [f]) and, similarly, extends the time within which Magdy could serve an amended complaint as of right (*see* CPLR 3025 [a]; *see also Re-Poly Mfg. Corp. v Dragonides*, 109 AD3d 532, 534-535 [2d Dept 2013]). Therefore, Magdy's application for leave to serve the amended complaint is denied as unnecessary (*see, Terrano v Fine*, 17 AD3d 449, 449 [2d Dept 2005]). Further, since the amended pleading supersedes the original complaint (*Nimkoff, Rosenfeld & Schechter, LLP v v O'Flaherty*, 71 AD3d at 533), this Court will consider defendants' dismissal motion as addressed to the amended complaint, as it is clear from their reply papers that they seek a determination under CPLR 3211 as to the new pleading (*49 W. 12 Tenants Corp. v Seidenberg*, 6 AD3d 243, 243 [1st Dept 2004]).

Magdy alleges that the amended complaint complies with CPLR 3016 (a), which requires that defamation claims "set forth 'the particular words complained'" (*see Medina v City of New York*, 102 AD3d 101, 108 [1st Dept 2012]). Specifically, he alleges that the following statements are defamatory: "that [he] 'intended to circumvent the application of the more favorable financial

rights [Fouad] would have under New York family law;' '[he] admitted he was having an extramarital affair;' '[he was] not interested in salvaging their marriage;' '[and he] convinced [Fouad] to return to Egypt'" (amended complaint, at ¶ 17). In his affidavit, Magdy complains that the Article goes into too much detail about his personal life and portrays him as an adulterer.

In reply, defendants argue that the proposed amended complaint should be dismissed because the statements Magdy cites from the article are not defamatory, but rather are true or non-actionable opinions.

A defamatory statement is "a false statement, which tends to expose the plaintiff to public contempt, hatred, ridicule, aversion or disgrace" (*Thomas H. v Paul B.*, 18 NY3d 580, 584 [2012]). To sustain a claim for defamation, the plaintiff must plead: "(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" (*Stephanov v Dow Jones & Co.*, 120 AD3d 28, 34 [1st Dept 2014] [citation omitted]). Because the falsity of the statement is an element of the defamation claim, the statement's truth or substantial truth is an absolute defense (*id.*).

> "In evaluating whether a cause of action for defamation is successfully pleaded, the words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable, and cannot be made so by a strained or artificial construction"

(*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999] [citations omitted]). Additionally, "a complaint alleging defamation must allege the particular spoken or published words on which the claim is based" (*Moreira-Brown v City of New York*, 71 AD3d 530, 530 [1st Dept 2010]).

While Magdy now provides the specific words from the Article which he claims are defamatory, this Court nevertheless dismisses his defamation claim. Magdy principally asserts

that the article's statement that he "admitted that he was having an extramarital affair" is defamatory. While he acknowledges that he had a relationship and a child with another woman, he disputes that it was extramarital. He maintains that the relationship occurred while he was "technically divorced from [Fouad], during a period of time [when] New York did recognize the Egyptian divorce as valid" (Magdy's aff dated 1/4/18 at ¶ 9).

A review of defendants' uncontroverted submissions, however, demonstrates that the aforementioned statement in the article is substantially true (*see Amaranth LLC v J.P. Morgan Chase & Co.*, 100 AD3d 573, 574 [1st Dept 2012], insofar as the factual recitation in the Appellate Division decision reflects that Magdy engaged in an extramarital affair. Further, Fouad's divorce action was dismissed in August 2016 because, among other things, Magdy had procured an Egyptian divorce. A review of the Family Court Order reflects that Magdy is paying child support for a child born on January 17, 2017. Thus, it appears, as argued by defendants, and as Magdy does not dispute, that the child was conceived prior to the dismissal of the matrimonial action, i.e., at a time when the matrimonial judge had not yet addressed the validity of the Egyptian divorce. In view of these undisputed facts, the statement that Magdy was "not interested in salvaging the marriage" is likewise substantially true, and not defamatory (*see Moorhouse v Standard, N.Y.*, 124 AD3d 1, 12 [1st Dept 2014).

There is no proof supporting plaintiff's claim that the statement that Magdy "convinced [Fouad] to return to Egypt" is defamatory. Nor does this Court find that the statement is defamatory on its face. "[C]ourts will not strain to find a defamatory interpretation where none exists" (*Cohn v National Broadcasting Co.*, 50 NY2d 885, 887 [1980]). Furthermore, as recited in the Appellate Division decision and the article, the parties separated in July 2015, at which time the wife and the two children moved to Egypt. Even if a publication is not literally or

technically true in all respects, the absolute defense [of truth] applies as long as the publication is substantially true (*Carter v Visconti,*, 233 AD2d 473, 74 [2d Dept 1996]).

Further, the allegation, that Magdy "intended to circumvent the application of the more favorable financial rights [Fouad] would have had under New York family law" is not defamatory, but expresses an opinion that is accompanied by the recitation of the facts upon which it is based (*Gross v New York Times Co.*, 82 NY2d 146, 153 [1993]). The relevant excerpt of the article states the following:

> A talaq[1] decree in hand, [Magdy] filed a cross motion to dismiss [Fouad's] New York divorce action, [Magdy] intending to circumvent the application of the more favorable financial rights [Fouad] would have under New York family law. Egyptian law, for example, does not recognize the equitable distribution of marital assets or New York-style post-divorce alimony
>
> In distinguishing between opinion and fact, the following factors are considered:
>
> (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal … readers or listeners that what is being read or heard is likely to be opinion, not fact"

(*Mann v Abel*, 10 NY3d 271, 276 [2008]). Applying the foregoing test herein, this Court holds that, in considering the content of the publication as a whole, as well as the context in which the Article was written, i.e., as a legal commentary of the matrimonial action, it is sufficiently apparent that the aforementioned statement complained of by Magdy simply expresses the author's opinion based on the facts presented (*see Mann v Abel*, 10 NY3d at 277).

[1] A type of divorce in Islamic law initiated by the husband in Egypt.

In view of the foregoing, none of the statements in the article that are cited by Magdy are defamatory, and that branch of defendants' motion for dismissal of the defamation claim (the first cause of action) is granted.

The second cause of action, which purports to state a claim for tortious interference with business relations, is also dismissed. To state such a claim, plaintiff must allege:

> "(1) that it had a business relationship with a third party; (2) that the defendant knew of the relationship and intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the relationship with the third party"

(*Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept 2009]). Here, this cause of action fails since plaintiff does not sufficiently allege that defendants used any improper or wrongful means, or acted solely out of malice, towards Magdy (*Wolberg v IAI North America, Inc.*, ___ AD 3d __, 2018 WL 2106726, *2, 2018 NY App Div Lexis 3261, * 3-4 [1st Dept 2018]). While defamation would suffice (*see id.*; *see also Amaranth, LLC v J. P. Morgan Chase & Co.*, 71 AD3d at 47), as noted above, the complaint fails to state a defamation claim based on statements made in the Article. Therefore, that branch of defendants' motion for dismissal of the tortious interference with business relations claim (second cause of action) is also dismissed.

The third cause of action alleges a claim for intentional infliction of emotional distress. To recover for this cause of action, plaintiff must demonstrate that defendants acted in an extreme and outrageous manner with the intent to cause, or in disregard of a substantial probability of causing, plaintiff's emotional distress, and such actions in fact cause plaintiff to suffer severe emotional distress (*see Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]). The standard of outrageous conduct is "strict," "rigorous," and "difficult to satisfy" (*id.* at 122).

Here, plaintiff alleges that he suffered emotional distress due to the alleged defamatory statements in the article. "It is long well settled that publication of a single, purportedly false or defamatory article regarding a person does not constitute "extreme and outrageous conduct as a matter of law" (*Bement v N.Y.P. Holdings, Inc.*, 307 AD2d 86, 92 [1st Dept 2003]). Further, the statements in the Article are not so "extreme and outrageous" so as to support a claim for intentional infliction of emotional distress (*Howell v New York Post Co.*, 81 NY2d at 122; *see Cassini v Advance Publs., Inc.*, 125 AD3d 467, 468 [1st Dept 2015]). Therefore, that branch of defendants' cause of action for dismissal of the intentional infliction of emotion distress claim is granted.

Given the foregoing, defendants' motion for dismissal of the amended complaint is granted.

Accordingly, it is:

ORDERED that plaintiff's cross motion to amend the complaint is denied as unnecessary given that this Court deemed plaintiff's complaint amended as of right; and it is further

ORDERED that defendants' motion to dismiss the amended complaint is granted, and the amended complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

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

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

6/8/2018
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