LaBarbera v Center for Union Facts
2019 NY Slip Op 30059(U)
January 7, 2019
Supreme Court, New York County
Docket Number: 15A36A/2018
Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C. PART 8

GARY LABARBERA INDEX NO. 154364/2018

MOT. DATE

- v -

THE CENTER FOR UNION FACTS MOT. SEQ. NO. 001

The following papers were read on this motion to/for dismiss

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s)._____

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s)._____

Replying Affidavits NYSCEF DOC No(s)._____

This is an action for defamation. Plaintiff is the President of the Building and Construction Trades Council of Greater New York ("BCTC"). BCTC is comprised of local affiliates of 15 national and international building and construction trade unions that are affiliated with the AFL-CIO and the North American Building Trades Unions. Although BCTC represents approximately 100,000 construction workers in New York City, plaintiff alleges in his complaint that he "has no control over the terms and conditions of employment or wage raises for MTA workers or construction workers staffing MTA projects."

Defendant characterizes itself as "a union 'watchdog' that documents waste, fraud and abuse by organized labor." Defendant now moves to dismiss plaintiff's complaint based upon documentary evidence (CPLR § 3211[a][1]), for failure to state a cause of action (CPLR § 3211[a][7]) and based upon Civil Rights Law §§ 50 and 51. Plaintiff opposes the motion. The motion is decided as follows:

This action arises from an article which appeared in the New York Times on December 28, 2017 titled "The Most Expensive Mile of Subway Track on Earth" (Brian M. Rosenthal, The Most Expensive Mile of Subway Track on Earth, N.Y. TIMES [https://www.nytimes.com/2017/12/28/nyregion/new-york-subway-construction-costs.html] [the "NYTimes Article"]). The subject of the NYTimes Article is "[h]ow excessive staffing, little competition, generous contracts and archaic rules dramatically inflate capital costs for transit in New York." The article discuses "[t]rade unions, which have closely aligned themselves with [New York's governor] and other politicians [and] have secured deals requiring underground construction work to be staffed by as many as four times more laborers than elsewhere in the world." Plaintiff was quoted in the article saying: "Construction workers deserve every penny they make, and more," Plaintiff also defended work rules by stating: "the work rules are there to make sure we stay alive."

Ultimately, the parties dispute the gist and conclusions of the NYTimes Article. Plaintiff argues that the "article determined that a 'host of factors', including trade unions, was to blame for the high costs of recent subway work. Meanwhile, defendant maintains that the NYTimes Article leaves readers with the

Dated: 1/7/19

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER

3. Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

inescapable conclusion that New York unions lead to increased transit project costs with no relation to worker safety or construction speed as compared to projects in other areas like Paris.

As is relevant to his defamation claim, plaintiff alleges that in March 2018, defendant "launched a smear campaign against [him] across multiple mediums." The facts alleged in his complaint are as follows: On March 22, 2018, defendant purchased and published identical, full-page print advertisements in each of the New York Post, the New York Daily News, and amNY. These print ads feature a magnified portrait of plaintiff yelling into a microphone occupying about a quarter of the full newspaper page and labeled as "Union Boss." The headline of the print ads read: "Know Why NYC's Subway Is Dirty, Delayed and Dangerous?" Beneath the headline was the following text:

> Over 70% of subway riders believe the system is dirty, delayed, or dangerous. Thanks to construction union boss Gary LaBarbera, expensive work rules and cost overruns take valuable resources away from repairs and upgrades.

The print ads then direct readers to "subwayscam.com" for more information. The Print Ads also, in small print at the bottom, note that they were "Paid for by the Center for Union Facts."

Defendant purchased an additional print ad on April 5, 2018, in the New York Post. The 4/5/18 print ad features an image of rats on a subway platform and reads:

> Governor Cuomo is best buddies with union boss Gary LaBarbera. Instead of properly funding the New York subway so it's not dirty, delayed, and dangerous, Cuomo supports outrageously expensive construction union contracts with taxpayer money.

The 4/5/18 print ad also directs readers to "subwayscam.com" and states that it was "Paid for by the Center for Union Facts."

Defendant also purchased two large billboards which were prominently displayed at heavily trafficked locations in Midtown, Manhattan. The billboards featured graphics representing symbols of the subway and the phrases "Dirty," "Delayed," "Dangerous," and "Construction Unions are screwing with your commute." The billboards also directed viewers to "Subwayscam.com" and stated that they were "Paid for by the Center for Union Facts."

Defendant also published a video entitled "Subway Scam - New York, New York." At the time the Complaint was filed, plaintiff alleges that the YouTube Video had over 900,000 views on YouTube, and an additional 3.7 million views on Facebook. The YouTube video is approximately two minutes long and combines parody lyrics of Frank Sinatra's "New York, New York" with video clips of rats, homeless riders, delays, and other problems with the New York City subway system. In one frame, the video shows an image of [plaintiff] with blinking, glowing green eyes and the caption "Gary LaBarbera Union Boss" while the lyrics "The unions stuff their bank$" are sung and displayed at the bottom of the screen. The video also displays images of Mr. LaBarbera with Governor Cuomo and Mayor Bill de Blasio alongside the lyrics "They're all to blame."

Finally, defendant maintained a website, www.subwayscam.com, which allegedly contains additional articles and materials defaming plaintiff. The website's homepage features a large image of Mr. LaBarbera and the prominent headline "Meet the union boss making the subway suck." The homepage further reads:

> His name is Gary LaBarbera and his labor group, the Building and Construction Trades Council of Greater New York, is making New York's subway system a global embarrassment. Known for their expensive work rules and cost overruns, LaBarbera's cash hungry unions take valuable resources away from subway repairs and upgrades. Delays are the direct result of antiquated switching equip-

> ment that needs hundreds of millions to be upgraded. But the only upgrades are to LaBarbera's unions, which keep profiting while New York's subway keeps sucking.

Plaintiff asserts that defendant made other similar defamatory statements on other media.

Plaintiff brings four causes of action against the defendant: [1] defamation *per se*; [2] defamation; [3] defamation by implication; and [4] invasion of privacy in violation of Civil Rights Law §§ 50 and 51. Defendant contends that the views expressed in its Subway Campaign are constitutionally protected opinion, that plaintiff cannot establish that defendant's comments are false statements of fact, that plaintiff's claims are refuted by documentary evidence, that accusations of using political influence to gain a benefit are not defamatory as a matter of law, that plaintiff has not alleged defamation by implication, and that plaintiff has otherwise failed to demonstrate actual malice.

Discussion

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). The court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*id.* citing *Morone v. Morone*, 50 NY2d 481 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]).

Under CPLR § 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v. Martinez, supra* at 88).

Defamation is "the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society" (*Stepanov v. Dow Jones & Co., Inc.*, 120 AD3d 28 [1st Dept 2014] citing *Foster v. Churchill*, 87 NY2d 744, [1996]). Whether the statements constitute fact or opinion is a question of law for the court to decide (*Silsdorf v. Levine*, 59 NY2d 8 [1983] *cert denied* 464 US 831).

The elements of a defamation claim are: [1] a false statement; [2] publication of the statement without privilege or authorization to a third party; [3] constituting fault as judged by, at a minimum, a negligence standard; and [4] the statement must either cause special harm or constitute defamation *per se* (*Dillon v. City of New York*, 261 AD2d 34 [1st Dept 1999] citing Restatement of Torts, Second § 558). A defamation claim must be pled with particularity, so that a plaintiff must allege the particular words complained of as well as the time, place and manner of the statement and to whom the statement was made (CPLR 3016[a]; *Dillon*, *supra* at 38).

In evaluating the viability of a defamation claim, the words must be construed in the context of the entire statement before an ordinary audience, and if the statement is not reasonably susceptible to a defamatory meaning, the claim is not actionable (*Silsdorf*, *supra*; see also *Stepanov, supra*). "Courts will not strain to find defamation where none exists" (*Dillon, supra* at 38 [internal quotation omitted]).

Plaintiff is indisputably a public figure and therefore must also allege actual malice (*Freeman v. Johnston*, 84 NY2d 52 [1994]). To demonstrate actual malice, plaintiff must show by clear and convincing evidence that defendant "entertained serious doubts as to the truth of his publication or acted with a high degree of awareness of... probable falsity" (*Kipper v. NYP Holdings Co., Inc.*, 12 NY3d 348 [2009] quoting *Masson v. New Yorker Magazine, Inc.*, 501 US 496, 510 [1991]). Stated another way, plaintiff must demonstrate that defendant made the defamatory statements with "knowledge that it was false or with reckless disregard of whether it was false or not" (*Masson, supra* at 510, quoting *New York Times Co. v. Sullivan*, 376 US 254 [1964]).

Defendant argues that plaintiff's express defamation claims must be dismissed because the allegedly defamatory statements are not susceptible to a defamatory meaning. Plaintiff does not contend that the NYTimes Article itself is defamatory. However, plaintiff's claims go beyond the statements made in the NYTimes Article. Indeed, defendant has made a number of factual claims about plaintiff's role in driving up labor costs, plaintiff's individual role in labor and trade agreements, plaintiff's relationships with the mayor and governor, and generally making the subway "suck." Defendant calls plaintiff "the engineer of New York City's subway scam," blames plaintiff for "making New York's subway system a global embarrassment," and posits that "thanks to ... [plaintiff], expensive work rules and cost overruns take valuable resources away from repairs and upgrades."

Meanwhile, as plaintiff points out, the NYTimes Article did not place blame upon plaintiff and/or BCTC specifically for the underlying problems with the New York City subway system. At this juncture, plaintiff has alleged sufficient facts to survive the motion.

Relatedly, the "documentary evidence" which defendant points to is unavailing. In short, defendant maintains that documentary evidence establishes that plaintiff and the BCTC "have extensive involvement with the subway system, including LaBarbera's service on the MTA's Transportation Reinvention Commission, his acknowledgment that he has discussed labor issues with MTA executives, and the numerous BCTC unions working on subway projects." To the extent that the motion is even based upon documentary evidence, such proof does not establish the truth of defendant's claims, i.e., that plaintiff has a role in driving up labor costs on NYC subway projects. In any event, the subject "proof" is not documentary evidence within the meaning of CPLR § 3211[a][1], since it is not unassailable nor does it undeniably refute plaintiff's allegations, namely, that neither he nor BCTC have any role in setting the terms and conditions of employment or wages for MTA workers or construction workers staffing MTA projects (see i.e. *Kolchins v. Evolution Markets, Inc.*, 128 AD3d 47 [1st Dept 2015]).

Indeed, defendant acknowledges that the there is no "formal project labor agreement between BCTC and the MTA" and that the labor deal cited in the NYTimes Article as the example of inefficient union tactics concerns "a union that is not a member of BCTC." Accordingly, defendant has failed to show that the challenged statements largely center on true facts and therefore are not capable of a defamatory meaning.

Relatedly, the court rejects defendant's argument that plaintiff has not sufficiently alleged actual malice. Indeed, plaintiff has come forward with proof that it does not play the role that defendant ascribed to him in terms of the conditions of the New York City subway, and further, that there is no basis in fact for defendant to draw such a conclusion. At this juncture of the litigation, these allegations are sufficient to establish actual malice.

Defendant next argues that the challenged statements constitute nothing more than a mere expression of opinion and is therefore not actionable. Defendant maintains that its subway campaign is nothing more than "zealous advocacy concerning pressing labor issues viewed through the prism of the controversy surrounding New York's deteriorating subway system." This argument is also unavailing.

Defendant's subway campaign clearly seeks to place blame upon plaintiff for increased labor costs which take funds away from other aspects of the subway system. While statements that are not provably false, "however pernicious [they] may seem," are constitutionally protected where they relate to a matter of public concern (*Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 NY2d 369, 380 [1977]; see also *Gross v. N.Y. Times Co.*, 82 N.Y.2d 146, 152 [1993]), reading plaintiff's allegations in the most favorable light, he easily survives this motion to dismiss. Here, the challenged statements go beyond mere opinion and convey certain facts as part of a "smear" campaign which plaintiff alleges are false. These allegations are sufficient to establish that the challenged statements are more than just advocacy and/or opinion.

Accordingly, the motion to dismiss the second cause of action for defamation is denied.

Next, defendant argues the defamation *per se* claim must be dismissed because it is only based upon the allegation that plaintiff "pay[ed] politicians for personal gain" and lacks the assertion of criminality. The court agrees. The only difference between ordinary defamation and defamation *per se* is the requirement to plead special damages. In the latter category, a plaintiff need not. There are four categories of defamation *per se*, [1] statements that charge a plaintiff with a crime; [2] statements that tend to injure a plaintiff in his or her trade, business or profession; [3] statements that impute to plaintiff a "loathsome disease"; and [4] statements that impute unchastity to a woman (*Nolan v. State*, 158 AD3d 186 [1st Dept 2018]).

Here, even when reading the allegations in a most favorable light, none of the challenged statements specifically charge plaintiff with a crime. At most, there is an implication of a special relationship between plaintiff and certain political leaders which enables plaintiff to exert political influence and/or curry political favor. That imputation, however, is too vague and conclusory to state a *prima facie* cause of action for defamation *per se* (see i.e. *T.S. Haulers, Inc. v. Kaplan*, 295 AD2d 595, 598 [2d Dept 2002]; *Suozzi v. Parente*, 202 AD2d 94 [1st Dept 1994]; see also *Miness v. Alter*, 262 AD2d 374 [2d Dept 1999]). Accordingly, plaintiff's first cause of action for defamation *per se* is severed and dismissed.

As for plaintiff's defamation by implication claim, the court finds that it also survives the motion. Defamation by implication is a cause of action for defamation that is not based upon direct statements, but rather, "false suggestions, impressions and implications arising from otherwise truthful statements" (*Stepanov, supra*). The court agrees with plaintiff that defendant's "subway smear campaign", when taken as a whole, implies that plaintiff himself is largely responsible for the condition and other problems relating to the New York City subway system. Indeed, defendant's literature and website, emblazoned with large depictions of plaintiff, coupled with many of the aforementioned statements, leave a reasonable reader/viewer with such a conclusion. These are not vague and conclusory statements (*cf. Dillon v. City of New York*, 261 AD2d 34 [1st Dept 1999]). Accordingly, the motion to dismiss that cause of action is also denied.

Lastly, the court finds that defendant's motion must be granted as to plaintiff's Civil Rights Law §§ 50 and 51. Civil Rights Law § 51 provides in pertinent part that "[a]ny person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained... may maintain an equitable action in supreme court..." While plaintiff argues that the subway campaign was used for advertising purposes, the court disagrees. "Use for 'advertising purposes' is defined as solicitation for patronage, intended to promote the sale of some collateral commodity or service (*Davis v. High Soc. Magazine, Inc.*, 90 AD2d 374 [2d Dept 1982]). Here there are no allegations that the subway campaign was intended to promote sales or services. Therefore, this category does not apply. The court notes that plaintiff's argument that discovery might reveal an advertising purpose is unavailing, since plaintiff misapprehends his burden on this motion which is to allege sufficient facts to support every element of his cause of action.

The Second Department explained in *Davis*, *supra*, that the purposes of trade category under Civil Rights Law § 51 is either "the lack of a reasonable connection between the use and a matter of public interest, or on a finding that the use contained substantial fictionalization or falsification." The fact remains, however, that the statute was designed to provide redress for commercial misappropriation. Absent a connection between the subway campaign and any business or other undertaking intended for profit, plaintiff has not alleged a *prima facie* cause of action under the civil rights law (*cf. Spahn v. Julian Messner, Inc.*, 18 NY2d 325 [1966], on rearg 21 NY2d 124 [biography could fall within ambit of the statute]).

Accordingly, the motion is granted only to the extent that the fourth cause of action is severed and dismissed.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion is granted only to the extent that the first and fourth causes of action are severed and dismissed; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that defendant is directed to serve and file an answer within 20 days from the date of service of this decision/order with notice of entry; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on February 21, 2019 at 9:30am in Part 8, 80 Centre Street, Room 278.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order and Judgment of the court.

Dated: 1/7/19
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.