

Hilsaca v Dau

2019 NY Slip Op 30105(U)

January 14, 2019

Supreme Court, New York County

Docket Number: 153109/2018

Judge: Barbara Jaffe

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

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INDEX NO. 153109/2018

ALFONSO HILSACA,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 001

- v -

WILLIAM DAU,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11 were read on this motion to/for _____ dismiss _____.

By verified complaint, plaintiff, self-described as a resident and private business person of Cartagena, Colombia, also known as "Turkish Hilsaca," brings this action seeking an order enforcing a foreign order, a judgment declaring that defendant, an American citizen residing in Manhattan, defamed him and carelessly or recklessly thereby caused him severe emotional distress, and an order enjoining defendant to remove libelous material from any social network accounts that accuse him of criminal or offensive conduct, to refrain from future publications, and to retract past publications. He also seeks compensatory and punitive damages. (NYSCEF 2).

Defendant moves pursuant to CPLR 3211(a)(7) for an order dismissing the complaint for failure to state a cause of action. (NYSCEF 5).

I. COMPLAINT (NYSCEF 2)

Plaintiff alleges that on or before June 30, 2017, defendant commenced posting inflammatory comments about him on his social media pages. The comments, translated from Spanish, follow:

a. I am a Cartagena's son and that's why [plaintiff] has serious problems with me. . . . Let's see what he has done. 1. Attempts to assassinate witnesses and a prosecutor . . . 2. Theft of prosecutor police's computer . . . [plaintiff] tried to put microphones in the Vice Prosecutor's office . . . Defendant made specific, factual allegations of each of these claims, but did not provide any authority or evidence to support any of the claims. From these allegations, Defendant stated the conclusion that "[plaintiff] is scared (and therefore dangerous).

b. I am going to free the city of Cartagena from corruption and corruption (sic). As the snake is killed by the head, the first name on my list is: [plaintiff].

c. Statement given to the prosecutor by a paramilitary assassin: . . . "[plaintiff] . . . is a big fish that has bought all Cartagena . . . because he buys, rather he is the owner of all Cartagena from the prosecutor's office, police and everything, you have to be careful Doctor, because he is a person with much influence." The post does not reveal any information as to who the "paramilitary assassin" is.

d. Defendant published that [plaintiff] was "charged with the crimes of aggravated homicide, conspiracy to commit crimes and terrorist financing (paramilitaries)" but evaded capture by rigging hearings and fixing the judges and prosecutors. Defendant further published that three judges, two prosecutors, and two officials were arrested in connection with helping release [plaintiff] from prison."

e. Defendant published that [plaintiff] ordered the assassination of four prostitutes for damaging the image of a bar owned by [plaintiff]. Defendant states that this incident was reported by the Defendant in his application for asylum in the United States.

f. From a letter the Defendant penned to the Prosecutor General of Colombia and published online: "[Plaintiff] is a nefarious person, who for the last 20 years has had my city enslaved, being the main person responsible for the misery and hunger suffered by the majority of our population. Such is the terror injected by [plaintiff] in Cartagena that people no longer dare utter his name, such as in the Harry Potter novels. [Plaintiff] became the absolute owner of Cartagena and the Department of Bolivar by means of the financing of electoral campaigns, purchase of officials, murders, threats of murder and an endless number of other crimes."

By order dated September 8, 2017, the Second Municipal Civil Court of the Republic of Colombia granted plaintiff the injunctive relief sought here, as reflected in a copy of the decision affirming it by the Eight Circuit Civil Court (Cartagena, Bolivar), dated October 23, 2017. (NYSCEF 3). On September 15, 2017, defendant posted on Instagram his disregard of the

September 8 order and again referred to plaintiff as a criminal who intimidated Cartagena for 20 years.

Based on the foregoing, plaintiff advances causes of action for enforcement of the Colombian order, defamation *per se*, and negligent infliction of emotional distress, and seeks the aforementioned injunctive relief and damages.

II. ANALYSIS

In considering a motion to dismiss pursuant to CPLR 3211(a) (7) for a failure to state a cause of action, the court must construe the pleading liberally, accept the facts alleged to be true, and afford the plaintiff “the benefit of every possible favorable inference.” (*JP Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334 [2013] [citation omitted]; *AG Cap. Funding Partners, LP v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). “The motion must be denied if from the four corners of the pleadings ‘factual allegations are discerned which taken together manifest any cause of action cognizable at law.’” (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002], quoting *Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001]; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

A. Enforceability of the Colombian order

Defendant, the self-described executive director and founder of an organization that combats corruption and defends the rule of law in Cartagena, argues that the Colombian order is not properly authenticated, that its enforcement is barred by 28 USC § 4102(a)(1), and that even if not so barred, having concluded that plaintiff’s right to a “good name” is paramount, the court reached a result that is not in accord with the first amendment to the United States Constitution (NYSCEF 5, 6).

In opposition, plaintiff asserts that defendant's motion is premature absent discovery and an opportunity to prove the foreign order. He otherwise contends that although defendant argues for dismissal pursuant to subsection A of 28 USC § 4102(a)(1), he does not show that dismissal is appropriate under subsection B. (NYSCEF 9).

Defendant fails to offer any authority for the proposition that plaintiff must offer a certified copy of the order with his complaint.

B. Specificity of the complaint

“In an action for libel or slander, the particular words complained of shall be set forth in the complaint . . .” (CPLR 3016[a]). The plaintiff must also detail “the time, place and manner of publication.” (*Khan v Duane Reade*, 7 AD3d 311, 312 [1st Dept 2004]).

As the complaint contains no indication of the dates on which the statements were published, defendant maintains that the complaint is insufficient. (NYSCEF 5, 6). Absent the time of publication, the complaint affords insufficient notice.

C. Sufficiency of the cause of action for defamation

1. Legal standards

Whether a statement is defamatory constitutes “a legal question to be resolved by the court in the first instance.” (*Golub v Enquirer/Star Group, Inc.*, 89 NY2d 1074, 1076 [1997]; *Armstrong v Simon & Schuster*, 85 NY2d 373, 380 [1995]; *Aronson v Wiersma*, 65 NY2d 592, 593 [1985]; *James v Gannet Co.*, 40 NY2d 415, 419 [1976]).

The elements of a cause of action for defamation are 1) a false statement, and 2) publication of it to a third party, 3) absent privilege or authorization, which 4) causes harm, unless the statement is defamatory per se, in which case harm is presumed. (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014]; *Frechtman v Gutterman*, 115 AD3d 102,

104 [1st Dept 2014], citing *Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]; see *Franklin v Daily Holdings, Inc.*, 135 AD3d 87, 91 [1st Dept 2015]).

a. I am a Cartagena's son and that's why [plaintiff] has serious problems with me. . . .

Defendant argues that these statements were previously “publicly reported on in press articles” that were “widely available before [he] made any of his statements online,” and thus, he cannot be held liable for them. Rather, the statements constitute “reportage” about plaintiff. In support, defendant provides links to various publications and websites, all in Spanish. (NYSCEF 5, 6).

Although defendant moves pursuant to CPLR 3211(a)(7) only, to the extent he seeks to offer documentary evidence in support of his argument that the complaint should be dismissed, he only offers links to Spanish language websites and articles, which do not constitute documentary evidence within the meaning of the statute, and he does not otherwise prove that this statement is not defamatory on its face.

Defendant also maintains that in his capacity as one who combats corruption and defends the rule of law in Cartagena, he is entitled under the first amendment of the United States Constitution to report on matters concerning plaintiff whom he claims is a public figure, based solely on an alleged google search yielding photographs of him being arrested. (NYSCEF 5, 6).

Absent any authority offered by defendant for the proposition that such google results form a sufficient basis for finding that plaintiff is a public figure, there is an insufficient basis for finding at this point of the litigation that plaintiff is a public figure. That there is public interest in crime reporting does not convert a private citizen accused of crimes into a public figure who may be freely disparaged by anyone with a computer, which includes at this point, defendant who is only self-described as a crusader against corruption and for the rule of law in Cartagena. While

the internet has spawned innumerable public fora, it does not protect from liability those who defame private citizens.

b. I am going to free the city of Cartagena from corruption . . .

Defendant describes this statements as comprising a nonactionable statement of purpose, an epithet, and a loose, figurative or hyperbolic statement or opinion. (NYSCEF 5, 6).

The privilege protecting the expression of an opinion is rooted in the preference that ideas be fully aired. (*Davis v Boenheim*, 24 NY3d 262, 269 [2014], citing *Steinhilber v Alphonse*, 68 NY2d 283, 289 [1986], and *Gertz v Robert Welch, Inc.*, 418 US 323, 339-340 [1974]). It is, thus, well-settled that “[e]xpressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation.” (*Davis*, 24 NY3d at 269; *Mann v Abel*, 10 NY3d 271, 276 [2008]; see *Steinhilber*, 68 NY2d at 289; *Rinaldi v Holt, Rinehart & Winston, Inc.*, 42 NY2d at 380; *Martin*, 121 AD3d at 100). Moreover, an opinion cannot be proved false. (*Mann*, 10 NY3d at 276).

As this statement, on its face, communicates only that defendant intends to free Cartagena of corruption beginning with plaintiff, he thereby communicates his opinion that plaintiff is corrupt. Thus, the statement is not defamatory on its face.

c. Statement given to the prosecutor by a paramilitary assassin: . . . “[plaintiff] . . . is a big fish that has bought all Cartagena . . .”

Defendant alleges that this statement “appears in substance in a publicly available indictment of [plaintiff] which includes his “rap sheet” and testimony against him made available by the Columbian (sic) court.” (NYSCEF 5, 6). He does not thereby demonstrate that the statement is not defamatory on its face.

d. Defendant published that [plaintiff] was “charged with the crimes of aggravated homicide . . .”

Defendant fails to demonstrate that this statement is not defamatory on its face.

e. Defendant published that [plaintiff] ordered the assassination of four prostitutes . . .

The statement that plaintiff had ordered the assassination of four prostitutes, defendant claims, is included in his own application for asylum in the United States. (NYSCEF 5, 6).

Defendant fails to demonstrate that this statement is not defamatory on its face.

f. From a letter the Defendant penned to the Prosecutor General of Colombia and published online: “[Plaintiff] is a nefarious person, . . .”

Defendant fails to demonstrate that this statement is not defamatory on its face.

D. Sufficiency of the cause of action for negligent infliction of emotional distress

Contrary to the parties’ papers, the complaint contains a cause of action for negligent infliction of emotional distress only.

Defendant asserts that this cause of action fails absent an allegation of outrageous conduct, which he claims cannot be outrageous given previously published articles about plaintiff. (NYSCEF 5, 6). Plaintiff argues that the sufficiency of his cause of action for negligent infliction of emotional distress presents a factual question that cannot be decided as a matter of law. (NYSCEF 9).

Given the essentially factual nature of this cause of action, dismissal at this stage of the action is inappropriate. Again, defendant’s reliance on Spanish language media constitutes an insufficient basis for his motion in this regard.

III. CONCLUSION

Absent sufficient reason to deny plaintiff’s request for leave to replead and based on the foregoing, it is hereby


ORDERED, that defendant’s motion to dismiss is decided as follows:

- (1) The statement in plaintiff’s second cause of action - “I am going to free the city of Cartagena from corruption and corruption (sic). As the snake is killed by the head, the first name on my list is: [plaintiff]” is dismissed; and
- (2) the remaining statements in plaintiff’s second cause of action are dismissed with leave to serve and file an amended complaint in which the second cause of action alleging defamation is repleaded in compliance with the case law requirement that it reflect the date of publication;

it is further

ORDERED, that the amended complaint shall be served and filed within 20 days after service on plaintiff’s attorney of a copy of this order with notice of entry; and it is further

ORDERED, that in the event that plaintiff fails to serve and file and amended complaint in conformity with the deadline set forth herein, leave to replead shall be deemed denied and the second cause of action shall be dismissed.


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BARBARA JAFFE, J.S.C.

1/14/2019

DATE

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> SETTLE ORDER	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> SUBMIT ORDER	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE