Masin v Linaldi
2019 NY Slip Op 31896(U)
June 20, 2019
Supreme Court, New York County
Docket Number: 150514/2018
Judge: Alexander M. Tisch

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER M. TISCH **PART** IAS MOTION 18EFM

Justice

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GEORGE MASIN,

Plaintiff,

- v -

ANDRES LINALDI, PATRICK DURKAN

Defendants.

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INDEX NO. 150514/2018

MOTION DATE 03/27/2019

MOTION SEQ. NO. 001

DECISION AND ORDER

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

were read on this motion to/for DISMISS.

Upon the foregoing papers, defendants move to dismiss the complaint pursuant to CPLR 3211 (a)(1) and (a)(7).

This action arises out of statements made about plaintiff in a letter allegedly written and published by defendants Andres Linaldi and Patrick Durkan. The letter stated that plaintiff had been giving nude massages to athletes, some of whom are underage, for years while part of the New York Athletic Club's (NYAC) fencing program. Plaintiff denies the allegations leveled against him and commenced this action on January 15, 2018 seeking damages for defamation and intentional infliction of emotional distress.

On a motion to dismiss pursuant to CPLR 3211, the court must accept each and every allegation in the complaint as true, and liberally construe those allegations in the light most favorable to the pleading party (Leon v Martinez, 84 NY2d 83, 87 [1994]). The court must simply determine "whether the facts as alleged fit within any cognizable legal theory" (id. at 87-88). However, "allegations consisting of bare legal conclusion...are not entitled to such consideration" (Roberts v Pollack, 92 AD2d 440, 444 [1st Dept 1983]).

Defendant Durkan

As an initial matter, the motion to dismiss the complaint against defendant Durkan is granted. Plaintiff's complaint with respect to Durkan is largely premised on conclusory statements and deductions, which the Court is not bound to accept as true (see In re NYSe Specialists Securities Litigation, 503 F3d 89 [2007]). Plaintiff merely alleges that Durkan published or wrote the letter in conjunction with Linaldi. The only basis plaintiff provides in support of that allegation, which was made in opposition to this motion, is that perhaps defendants redacted Durkan's signature. Per the Court's request, defendants submitted a full and unredacted copy of the subject letter. The Court found that the letter contained neither any mention of Durkan nor his signature. Plaintiff does not plead any facts supporting an inference that Durkan was involved in the publication and/or distribution of the letter. If there was something about Durkan, and his relationship with Linaldi, that plaintiff knew it should have been in the complaint. Durkan cannot be said to have taken the actions the complaint alleges when the letter clearly demonstrates that Durkan did not sign the letter nor is mentioned therein (Lapine v Seinfield, 31 Misc 3d 736, 734 [Sup Ct New York County 2011] ["Nor could plaintiff prevail on a defamation claim based on such allegations, as the transcripts and recordings of the programs on which Seinfeld appeared clearly demonstrate that he did not make the statements that the complaint attributes to him"]). Accordingly, that part of defendants' motion seeking dismissal of plaintiff's complaint as against Durkan is granted.

Defendant Linaldi

To prove a cause of action for defamation, a plaintiff must show: "(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" (Stepanov v Dow Jones & Co., Inc., 120 AD3d 28, 34 [1st Dept 2014]). On a motion to dismiss a defamation claim, the court must determine "whether the contested statements are reasonably susceptible of a defamatory connotation"

(Davis v Boeheim, 24 NY3d 262, 268 [2014]). When a defamatory statement is allegedly made about a public figure, the plaintiff has a heightened burden and must prove that the statement was published with "actual malice" (Curtis Publ'g Co. v Butts, 388 US 130, 155 [1967]).

In moving to dismiss the claim of defamation, defendant Linaldi presents four arguments. First, Linaldi argues that he is protected by Social Services Law § 419, or in the alternative, a qualified privilege under New York common law. Such privileges shield individuals from civil liability unless plaintiffs demonstrate malice. Linaldi also argues that regardless of any immunity or privilege, plaintiff must plead actual malice because he is a public figure or limited-purpose public figure. Next, Linaldi argues that plaintiff failed to plead any bad faith or actual malice. Finally, Linaldi contends that plaintiff failed to plead special damages or defamation per se. In opposition, plaintiff argues that the privileges are inapplicable, that he is a private citizen, and that the statements in the letter did constitute defamation per se.

Social Services Law § 419 shields those who report child abuse or maltreatment in accordance with Social Services law from criminal and civil liability so long as it does not result from willful misconduct or gross negligence. This statutory presumption of good faith only applies when persons act "in the discharge of their duties and within the scope of their employment" (Social Services Law § 419). At this stage, it is not clear whether Linaldi qualifies as a child-care worker and is therefore entitled to a presumption of good faith. In any event, Linaldi does not fall within the immunity created by § 419 as he did not he file a report with the proper agency. Additionally, the law applies to those who report abuse or maltreatment by the child's "parent, guardian, custodian or other person legally responsible"; plaintiff does not fall into those categories.

Linaldi is similarly not entitled to any qualified privilege. A qualified privilege arises when a person makes a bona fide communication upon a subject in which he or she has an interest, or a legal, moral, or social duty to speak, and the communication is made to a person having a corresponding interest or duty

(Santavicca v City of Yonkers, 132 AD2d 656, 657 [2d Dept 1987]). While the NYAC's Board may be considered an interested party, Linaldi copied the New York Times and the New York Post in his letter as well, thereby destroying any corresponding interest.

Linaldi's contention that plaintiff is a public figure or a limited-purpose public figure lacks merit. "Whether or not a person or an organization is a public figure for purposes of defamation claim under New York law is a question of law for the court to decide, and where the question whether a plaintiff is a public figure can be determined based upon the pleadings alone, the court may deem a plaintiff a public figure at the motion to dismiss stage" (Biro v Conde Nast, 963 F Supp 2d 255 [SDNY 2013], affd, 807 F3d 541 [2d Cir 2015], and affd, 622 Fed Appx 67 [2d Cir 2015]). The Court evaluates whether a party is a public figure based on "clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society" (Gertz v Robert Welch, Inc., 418 US 323, 352 [1974]). "[P]ublic figures [are] persons who 'have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed pubic figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved" (James v Gannett Co., Inc., 40 NY2d 415, 421 [1976] quoting Gertz, 418 US at 345).

Here, in support of his motion, Linaldi submits a copy of plaintiff's Wikipedia page, along with a copy of plaintiff's page on the US Fencing Hall of Fame website and documents reflecting plaintiff's accomplishments. However, this information does not arise to "clear evidence" of plaintiff's general fame, notoriety, or pervasive involvement in the affairs of society to warrant public-figure status for all purposes. As the Gertz Court explained, while one "may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts" it is more common that otherwise private individuals are considered public figures "for a limited range of issues" (Gertz, 418 US at 351; see also Wolston v.

Reader's Digest Assn., Inc., 443 US 157, 167 [1979] ["A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention"]).

With respect to Linaldi's argument that plaintiff is a limited-purpose public figure, the Court is not persuaded. Linaldi argues that an amateur athlete is considered, at a minimum, a limited-purpose public figure. The Second Circuit has set forth a four-part test for determining whether an individual is a limited-purpose public figure. A defendant must demonstrate that a plaintiff has: "(1) successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily injected himself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing access to the media" (Lerman v Flynt Distrib. Co., Inc., 745 F2d 123, 136–37 [2d Cir 1984]).

Plaintiff maintains that he is not a limited-purpose public figure because he has not fenced in any competition in over ten years, is no longer on the Board of any fencing organizations, and has never sought out the media. Even though plaintiff is an accomplished fencer, success alone does not satisfy the four-part test. Linaldi relies on cases that are notably distinct from the present case. First, in those cases the subjects of the lawsuits were related to the context in which they were a public figure (see Davis v High Soc. Magazine, Inc., 90 AD2d 374, 384 [2d Dept 1982] [where the plaintiff was a prominent female boxer, "[since] the photos and captions are related to female boxing and are the subjects of this lawsuit, plaintiff must be considered a limited-purpose public figure"); see also Wilsey v Saratoga Harness Racing, Inc., 140 AD2d 857 [3d Dept 1988] [famed harness driver's complaint of defamation arose out of a press release discussing his termination as a harness driver from defendant's race track]).

Here, in contrast, the subject of the lawsuit is the alleged misconduct by plaintiff with minor children. This has no apparent connection to his successful fencing career. Additionally, and perhaps more

significantly, in both Davis and Wilsey, plaintiffs maintained regular and continuing access to the media. In Davis, the plaintiff was a "radio and television personality" (90 AD2d at 374-375). Similarly, in Wilsey, the Court noted the significance that plaintiff had commented for newspaper articles and television regarding the subject of the lawsuit (140 AD2d at 858-859). In opposing the motion, plaintiff submits an affidavit stating that he has never appeared on television, radio, or a news broadcast. Further he has never given an interview pertaining to his career or the instant controversy. The only relationship plaintiff has with the media is a few articles he wrote about 20 years ago. Plaintiff does not maintain regular access to the media and therefore, need not plead actual malice.

Finally, the Court considers Linaldi's argument that no special damages or defamation per se were pled. Defamation is not actionable unless the plaintiff suffers special damages or the claims fall within one of the exceptions to the rule (Liberman v Gelstein, 80 NY2d 429, 434-35 [1992]). The four established exceptions (collectively "defamation per se") consists of statements: "(i) charging plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman" (id.).

The exception relevant in the present case is a statement that charges plaintiff with a "serious crime." Plaintiff argues that the statements impute to him "sexual misconduct with minors" and exposed him to "public contempt, ridicule, aversion, and disgrace" (NYSCEF Doc. No. 1, ¶ 34-35). Defendants assert that the underlying conduct is not a serious crime because under the New York Penal Law, the definition of sexual misconduct does not encompass plaintiff's alleged behavior (NY Pen. L. § 130.20). However, such conduct is a crime under other sections of the New York Penal Law and sexual misconduct with minors is substantially harmful to the reputation of a person falsely accused (see Liberman, 80 NY2d 429, 436). Accordingly, defendant's motion seeking to dismiss the claim of defamation as against defendant Linaldi is denied.

Plaintiffs cause of action for intentional infliction of emotional distress must fail because it falls within "the ambit of other traditional tort liability which, in this case, is reflected in plaintiff's causes of action sounding in defamation" (Herlihy v Metropolitan Museum of Art, 214 AD2d 250, 263 [2000]; see Bacon v Nygard, 140 AD3d 577, 578 [1st Dept 2016]; see also Fleisher v NYP Holdings, Inc., 104 AD3d 536, 538-39 [holding that a cause of action for intentional infliction of emotional distress was duplicative of the cause of action for defamation]). To the extent that plaintiff asserts claims for defamation per se and punitive damages, the motion to dismiss is granted as punitive damages is not an independent cause of action.

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted as against Defendant Durkan, and the second, third, and fourth causes of action of the complaint are dismissed; and it is further

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

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 623, 111 Centre Street, New York, New York, on July 31, 2019, at 9:30 AM.

6/20/2019
DATE

ALEXANDER M. TISCH, J.S.C.

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