Kosmdes v Sine
2020 NY Slip Op 31057(U)
April 27, 2020
Supreme Court, New York County
Docket Number: 151683/2018
Judge: Louis L. Nock

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 38

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KATHRYN KOSMDES, : Index No. 151683/2018

Plaintiff, : DECISION AND ORDER

-against- :

DEREK SINE, :

Defendant. :

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LOUIS L. NOCK, J.

Plaintiff moves (seq. no. 004) to dismiss the third through seventh and ninth through twelfth counterclaims in this defamation action, for failure to state a claim (CPLR 3211 [a] [7]). The motion is opposed.

BACKGROUND

The verified complaint alleges that the defendant engaged in a campaign of defamatory statements about plaintiff subsequent to the deterioration of their intimate relationship of slightly over one year in duration. The claims-in-chief seek compensatory and punitive damages in amounts to be determined at trial. No motion has been made by defendant to dismiss those claims.

The amended verified answer asserts twelve counterclaims which counter-allege that plaintiff has engaged in a campaign of defamatory statements about *him* subsequent to the deterioration of their aforementioned one-year-plus relationship. All of those alleged defamatory statements purport that defendant committed crimes against plaintiff which he did not commit, including stalking; assault and treats thereof; and attempted murder. The statements are alleged to be seven in number. In addition to alleging them as criminal in nature, defendant asserts, as

an independent *per se* defamatory ground, that they are injurious to his vocation as a business management professional and investor, as they were allegedly published to members of his industry, causing him economic loss.

Plaintiff is not seeking to dismiss the first, second, and eighth counterclaims, conceding that they set forth alleged claims for defamation *per se*, as they allege the commission of crimes. Plaintiff is, however, seeking to dismiss the remaining counterclaims; i.e., the third counterclaim (special damages stemming from defamation), fourth counterclaim (aiding and abetting defamation), fifth counterclaim (special damages stemming from aiding and abetting defamation), sixth counterclaim (intentional infliction of emotional distress), seventh counterclaim (tortious interference with actual and prospective business relations), ninth counterclaim (a re-publication of defamation), tenth counterclaim (an injunction to remove defamatory postings from certain media), eleventh counterclaim (punitive damages), and twelfth counterclaim (a re-publication of defamation).

DISCUSSION

In asserting a claim for defamation *per se* based upon inferences affecting one's business, trade, and/or profession, it is not necessary for there to be an explicit reference to the victim's particular profession. Rather, "[i]t is enough if the statement is of a character to be particularly disparaging of one engaged in such an occupation" (Restatement [Second] of Torts § 573). That is, of course, so where the alleged communication was published to members of the victim's trade, profession, or business (*see, Public Relations Society of America., Inc. v Road Runner High Speed Online*, 8 Misc 3d 820 [Sup Ct NY County 2005]). When alleged defamatory statements are reasonably susceptible to a defamatory connotation, a motion to dismiss must be denied, and the issue whether or the not the statements constitute defamation *per*

se must be decided by the trier of fact (*e.g.*, *People v. Grasso*, 21 AD3d 851 [1st Dept 2005]). The subject statements underlying the counterclaims purport that defendant committed crimes, directed against plaintiff. Defendant posits, not unreasonably, that statements accusing a person of abusive conduct toward his or her domestic partner will tend to have the effect of injuring that person, reputationally, in his or her profession, business, or trade, especially in today's age of widespread, instantaneous, dissemination of information.

The Alleged Publication of Defamatory Statements

As alleged in the counterclaims, plaintiff published the subject statements to people in plaintiff's business network. One statement was directed to defendant's business partner at Vander Group (a company which specializes in investing in healthcare products and services) – one, Van Tucker – consisting of a phone call to Mr. Tucker to the effect that defendant was threatening to hurt plaintiff physically and that defendant was threatening to kill her, and that she was in fear for her life because of him (Amended Answer ¶¶ 26, 108). Another statement was allegedly communicated by plaintiff during a phone call to certain officers and employees at a technology company called Summit Employees, advising them that "Derek was physically beating and choking me" and that he "was threatening to kill me" (*id.*, ¶ 129). It is further alleged that plaintiff sent an email to the same officers and employees, claiming that "Derek Sine was physically beating and choking me," "Derek Sine was threatening to kill me," and "Derek Sine was stalking me" (*id.*, ¶ 132). As alleged in the Amended Answer, all of those officers and employees were members of defendant's professional network, and defendant had been considering an investment in the technology company Summit Employees prior to the plaintiff's publication of her alleged statements to them (*id.*, ¶ 178).

Plaintiff is also alleged to have published defamatory statements regarding defendant to certain key people at the Entrepreneurial Roundtable Accelerator (the "ERA") – a networking and investing group in New York City – advising them that "Derek Sine was physically beating and physically injuring me," that "Derek Sine was choking me," that "Derek Sine was threatening to kill me and said he would kill me," and that "Derek Sine was stalking me" (Amended Answer ¶ 134). An email containing similar language was allegedly also sent by plaintiff to the same people (*id.*, ¶ 137). The investors at the ERA to whom such statements were published were alleged to be in defendant's networking group, and defendant was allegedly actively seeking to become a participating investor in the ERA before plaintiff had communicated the foregoing statements (*id.*, ¶ 179).

Another alleged statement claimed physical abuse of plaintiff by defendant, directed to principals of a start-up company called "Elliot," specializing in cross-border commerce, which defendant had allegedly recently partnered with (Amended Answer ¶¶ 138-39, 180). Yet another statement was in the form of a message which plaintiff allegedly posted on her Facebook Page, stating that defendant had choked her and spit on her, and referred to defendant as an "abuser" (*id.*, ¶ 143). The parties are assertedly in the same professional network, so people who defendant does business with, or could potentially do business with, will be able to read the Facebook posting, causing adverse professional consequences for defendant (*id.*, ¶ 181).

Additionally, plaintiff is alleged to have advised an online marketing and strategy professional, David Cooperstein, that "Derek Sine had physically abused me," "Derek Sine had stalked me," and that as a result, she was a "victim of domestic violence" (Amended Answer ¶ 156). As alleged in the counterclaims, Mr. Cooperstein is a person in defendant's professional

network, which means that the alleged publication to him could cause severe repercussions to defendant's reputation within the technology and marketing industries (Amended Answer ¶ 182).

Yet another statement concerns a posting which plaintiff had allegedly posted on her Twitter account in which she writes about defendant's alleged abuse of her. Plaintiff's Twitter account is assertedly followed by people who are in both parties' professional network (Amended Answer ¶ 159). As such, people that do business, or prospectively would have done business, with defendant were able to see the posting, that could cause defendant severe professional prejudice (*id.*, ¶ 183).

Additional statements consist of allegations of abuse by defendant which plaintiff published on blogs and websites which are assertedly followed by people who are in both parties' professional networks. As such, people that do business, or prospectively would have done business, with defendant were able to see them, causing defendant severe professional prejudice (Amended Answer ¶¶ 162-65, 184).

Additional statements concern allegations of abuse of plaintiff by defendant which had been communicated by plaintiff to members of the NY Tech Meetup, which have been allegedly recorded on a video posted on a website known as vimeo-dot-com. The NY Tech Meetup was allegedly attended by people who are in both parties' professional networks (Amended Answer ¶ 168). Moreover, the video of the NY Tech Meetup event is assertedly watched by people who are in both parties' professional networks. As such, people that do business with defendant, or prospectively would have done business, with defendant would have been able to hear the statements, causing defendant severe professional prejudice (*id.*, ¶ 185).

If proven at trial to have been made – falsely – the foregoing statements would sustain counterclaims for defamation *per se* based on their tendency to injure defendant in his business,

trade, or profession. At a bare minimum, the statements would be susceptible to defamatory connotations, requiring a trier of fact to determine whether they caused injury to defendant. Under such circumstances, dismissal of the counterclaims would be improper at this pre-trial stage.

Special Damages

Defendant has pled special damages with sufficient specificity. He specifically alleges that he lost out on a "potential investment deal with Summit," which was "completely foreclosed upon" as a result of the alleged defamatory statements (Amended Answer ¶¶ 178, 212), as well as "investment deals with the ERA," which ceased all communication with defendant and blocked defendant's LinkedIn account as a result of the statements (*id.*, ¶ 212). Defendant sets forth a specific amount of damages which he allegedly sustained on account of the loss of those deals, being "stock compensation in the amount of $1,750,000.00" (*id.*, ¶212).

As defendant further alleges in his third counterclaim, "Elliot and their principals Villasenor and Paige terminated their partnership with Defendant solely as a result of the Subject Libelous Statements and Subject Slanderous Statements" and that such termination resulted in a "loss of profits" in an amount of "no less than $425,000.00" and "stock compensation in an amount of no less than $3,250.000.00" (Amended Answer ¶¶ 180, 213). Defendant further alleges in his third counterclaim that, as a result of the alleged statements, defendant is no longer the "Managing Director at the Vander Group" and that, on an account thereof, he "has experienced lost profits to date in an amount of no less than $125,000""(*id.*, ¶ 214). Contrary to plaintiff's assertions on this motion, the fact that the twelfth cause of action also claims that plaintiff lost his position as Managing Director as a result of the dissemination of the verified

complaint to the New York Post does not form any substantive basis for dismissing any portion of the third counterclaim.

Defendant's position as the Managing Director at the Vander Group, and the specific amount of damage incurred because of the loss of such position, are stated, as alleged. The total amount of damages alleged to have been incurred by defendant, stated at $5,550,000.00, is the result of defendant's calculation of such variables as the lost stock compensation in the amount of $1,750,000.00 due to the loss of the deals with Summit Employees and the ERA; lost profits of $425,000.00 and lost stock compensation of $3,250,000.00 as a result of the termination of the partnership with Elliot and its principals; and $125,000.00 which defendant allegedly lost on account of losing his position as a Managing Director at Vander Group. Naturally, the claims must be proven; and defendant will be put to that proof at trial. Depriving defendant of that trial opportunity via summary dismissal at this time would be improper.

Contrary to plaintiff's assertions on this motion, the recited damages in the amended answer are actual damages; albeit, subject to proof. Plaintiff's citation to cases involving the distinct tort of injurious falsehood are inapposite to defendant's counterclaim, which sounds in defamation. Defamation is predicated upon statements directly injurious to reputation which, in turn, cause economic harm – all elements found in the counterclaim. Injurious falsehood is predicated upon statements, not necessarily bearing on reputation, but having the effect of falsely motivating others to take action that happen to be detrimental to the claimant (*see*, *Lucci v Engel*, 73 NYS2d 78 [Sup Ct NY County 1947]).

Accordingly, no grounds exist to dismiss the third counterclaim.

Aiding and Abetting Defamation[1]

Contrary to plaintiff's assertions on this motion, a cause of action for aiding and abetting defamation has been recognized, and there is no requirement that the offender actually publish the defamatory statement to be liable under this cause of action (*see*, *Long v Marubeni America Corp.*, 406 F Supp 2d 285 [SDNY 2005]). Here, the counterclaims specifically allege the active role which plaintiff had in the publication of the statements; that she acted with malice; and that she knew that the statements were false, alleging that plaintiff requested that her mother send the email (Amended Answer ¶ 217); plaintiff herself drafted the email which contained the statement and asked her mother to send it so that it would not appear that it was coming from her (*id.*, ¶ 218); and, in so doing, plaintiff aided and abetted the publication of the statements (*id.*, ¶ 219); plaintiff knew that the statements were false (*id.*, ¶ 220); and, in aiding and abetting the publication of the statements, plaintiff was acting with malice (*id.*, ¶ 221).

The fourth counterclaim seeks general damages in connection with the foregoing, and the fifth counterclaim seeks special damages therefor. Cognizable causes of action have been stated. Therefore, they cannot be summarily dismissed.

Tortious Interference

The elements of a cause of action for tortious interference with business relations (whether present or prospective business relations) are as follows: (1) the existence of a business relationship between the complainant and a third party (or in the case of a claim for tortious interference with a prospective business relation, there is the existence of a prospective business relationship); (2) the offender, knowing of that relationship, intentionally interfered with it; (3) the offender acts with the sole purpose of harming the complainant; and (4) injury to the

[1] Plaintiff acknowledges the existence of such a cause of action, generally (*see*, NYSCEF Doc. No. 69 at 5).

business relationship (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413 [1996]).

Here, all the necessary elements have been alleged. Defendant alleges an actual business relationship regarding Vander Group and Elliot and a prospective business relationship regarding Summit Employees and the ERA (Amended Answer ¶ 235). Moreover, defendant alleges that "[b]y publishing the Subject Slanderous Statement Defendant intentionally interfered with Defendant's business relations with Vander Group and Elliot and interfered with its prospective business relations with ERA, Summit, and other individuals and that focus primarily on the ecommerce, healthcare and technology industries" (*id.*, ¶ 236). Moreover, defendant alleges that plaintiff "acted with the sole purpose of causing harm to Defendant" and that as a result of such interference with business relations Defendant has been injured in "an amount to be determined at trial but which is no less than $750,000.00" (*id.*, ¶¶ 237-38).

Moreover, there is no prohibition against defendant setting forth counterclaims for defamation as well as a counterclaim for tortious interference with business relations. The cases which plaintiff relies upon to the contrary are inapposite. In both *Morrison v Natl. Broadcasting Co., Inc.* (19 NY2d 453 [1967]) and *Lesesne v Brimecome* (918 F Supp 2d 221 [SDNY 2013]) the issue was that the complainant was attempting to assert claims for tortious interference with business relations which sounded in defamation after the one-year statute of limitations had expired. The courts in both cases dismissed both the claims for defamation and claims for tortious interference with business relations as they determined that the complainant was attempting to do an end-run around the statute of limitations by asserting a claim for tortious interference with business relations, which enjoys a three-year statute of limitations. Here, however, the statute of limitations is not at issue. In *Morsy v Pal-Tech, Inc.* (2008 WL 3200165 [SDNY 2008]), the issue was whether the court had personal jurisdiction over the defendant

where the claims at issue were for defamation and tortious interference with contract. No such issue exists in this case.

Therefore, the seventh counterclaim cannot be dismissed at this time.

Intentional Infliction of Emotional Distress

The elements of a claim for intentional infliction of emotional distress are: (i) extreme and outrageous conduct; (ii) intent to cause severe emotional distress; (iii) a causal connection between the conduct and the injury; and (iv) severe emotional distress (*Howell v New York Post, Inc.*, 81 NY2d 115 [1993]). Here, all the elements for a claim of intentional infliction of emotional distress have been pled (*see*, Amended Answer ¶¶ 227-33). There is no prohibition in maintaining a cause of action for both defamation and intentional infliction of emotional distress, and the cases cited by plaintiff to the contrary are inapposite. In *Rich v Fox News Network, LLC* (322 F Supp 3d 487 [SDNY 2018], *vacated* 939 F3d 112 [2d Cir 2019]), the court refused to allow the plaintiff to do an end-run around the prohibition of asserting a defamation claim on behalf of a deceased person by disguising such a claim as one for intentional infliction of emotional distress. In the present matter, there is no such issue. In *Hirschfeld v Daily News, L.P.* (269 AD2d 248, *lv denied* 271 AD2d 386 [1st Dept 2000]), the court granted summary judgment dismissing the claim for defamation on the grounds that the statement complained of was, in fact, true, and further dismissed the claim for intentional infliction of emotional distress on the grounds that it was based on the legally defective claim for defamation.

Therefore, the sixth counterclaim cannot be dismissed at this time.

Injurious Falsehood

Injurious falsehood has been defined as a statement that injures a person by leading other persons into action that is detrimental, as compared to a statement injuring a party's reputation,

which would fall into the classification of defamation. The tort of injurious false is committed when a person utters a false and misleading statement harmful to the interest of another if the statement is uttered or published maliciously and with intent to harm another or done recklessly and without regard to its consequences, and a reasonably prudent person would or should anticipate that damage to another will naturally flow therefrom (*L.W.C. Agency, Inc. v St. Paul Fire & Marine Ins. Co.*, 125 AD2d 371 [2d Dept 1986]). Here, defendant specifically alleges that plaintiff published the statements so as to encourage others to take action that was harmful to defendant with the expectation it would lead defendant to suffer a loss of business in his industry, particularly the technology and health care industries, and that such statements were uttered with malice (Amended Answer ¶¶ 249-52). A reasonably prudent person could conclude that the publication of such statements would lead to defendant suffering a loss of business within his business community. Moreover, the ninth counterclaim specifically incorporates by reference all allegations previously made in the amended answer, which set forth in detail the alleged loss of business sustained by defendant as a result of the statements. Therefore, the ninth counterclaim will not be summarily dismissed.

Injunctive Relief

Injunctive relief is appropriate in instances where remedies at law will be ineffective to prevent irreparable and wrongful harm (*e.g., Chicago Research & Trading v N.Y. Futures Exchange, Inc.*, 84 AD2d 413 [1st Dept 1982]). Regardless of a damage remedy for any past defamation, defendant is seeking prospective injunctive relief in the form of a removal of the alleged defamatory statements existing in media postings by the plaintiff (*see,* Amended Answer ¶¶ 258-60). The tenth counterclaim incorporates all the preceding allegations set forth in

the amended answer, which set forth in detail the type of ongoing harm which defendant could incur with regard to his reputation, professional development, economic well-being, and emotional health. Plaintiff's citation to the case of *Mini Mint Inc. v Citigroup, Inc.* (83 AD3d 596 [1st Dept 2011]) is completely distinguishable, as it involved repairs to a bathroom as to which monetary relief would have sufficed in making the plaintiff whole. Thus, the tenth counterclaim will not be summarily dismissed.

Punitive Damages

Punitive damages are available in a defamation action (*e.g.*, *Strader v Ashley*, 61 AD3d 1244 [3d Dept], *appeal dismissed* 13 NY3d 756 [2009]). The eleventh counterclaim incorporates by reference all of the prior allegations set forth in the amended answer (¶ 265). As such, to the extent that a trier of fact concludes that the alleged statements are defamatory, and actionable as such, and, in addition, shock the conscience, then that trier of fact is free to consider the question of punitive damages (*Steinberg v Monasch*, 85 AD2d 403, 406 [1st Dept 1982] ["The complaint is deemed to demand punitive damages which are recoverable only if proof establishes there was 'such gross, wanton, or willful fraud or other morally culpable conduct to a degree sufficient to justify an award of punitive damages.'"]). Therefore, it would be improper to remove the eleventh counterclaim from the purview of the trier of fact for consideration, should the case reach that point after a possible finding of liability and compensable injury.

Defamation via Re-Publication of a Pleading in Litigation

The twelfth counterclaim seeks damages on account of plaintiff's alleged notification to media outlets of her instant lawsuit against defendant. The court acknowledges section 74 of the New York Civil Rights Law, which provides that: "A civil action cannot be maintained against

any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published." However, that general rule is tempered by the Court of Appeals' qualification that "it was never the intention of the Legislature in enacting section 74 to allow 'any person' to maliciously institute a judicial proceeding alleging false and defamatory charges, and to then circulate a press release or other communication based thereon and escape liability by invoking the statute" (*Williams v Williams*, 23 NY2d 592, 599 [1969]).

The twelfth counterclaim (Amended Answer ¶¶ 256-90) alleges that plaintiff "commenced this litigation for the sole purpose of maliciously publishing false and defamatory statements regarding Defendant so that they could be disseminated in the media" (*id.*, ¶ 273), and further alleges that plaintiff or her agents deliberately forwarded a copy of the complaint to the New York Post (*id.*, ¶¶ 273-80).

Naturally, defendant must be put to his proof at trial in trying to sustain those allegations to the point of verdict or final judgment. But, having proffered allegations falling within the Court of Appeals' above-quoted exception to section 74 of the New York Civil Rights Law, this court has no grounds to dismiss it at this time.

Accordingly, it is

ORDERED that plaintiff's motion to dismiss the third through seventh and ninth through twelfth counterclaims in this action, for failure to state a claim (CPLR 3211 [a] [7]), is denied in all respects.

This will constitute the decision and order of the court.

Dated: New York, New York
April 27, 2020

ENTER:

Hon. Louis L. Nock, J.S.C.