Rowbotham v Wachenfeld
2020 NY Slip Op 32109(U)
June 29, 2020
Supreme Court, New York County
Docket Number: 152281/2018
Judge: David Benjamin Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN — *Justice*

PART IAS MOTION 58EFM

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JIM ROWBOTHAM,

Plaintiff,

- v -

JEFF WACHENFELD, NUTS & BOLTZ WORKS, INC. D/B/A WESTHAMPTON TRUE VALUE HARDWARE, TRUE VALUE COMPANY

Defendant.

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INDEX NO. 152281/2018

MOTION DATE 12/05/2019

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff's motion for summary judgment is denied and defendant Westhampton's cross motion for summary judgment is granted.

Plaintiff Jim Rowbotham brought a defamation action against Jeff Wachenfeld and Wachenfeld's employer, West Hampton True Value hardware store ("WHTV"). The Amended Complaint alleges that on April 10, 2017 defendant Wachenfeld posted a false comment on the Facebook page of advertising agency Fifteen Degrees, with whom plaintiff Rowbotham is professionally affiliated. The post read, "Jim is a crook. Worst company to do business with." As a result, Rowbotham claims the comment damaged his professional affiliation with Fifteen Degrees.

Sometime in May 2017, following a written request from plaintiff's attorney for the post to be removed, Wachenfeld removed the post and replaced it with a five-star review. Wachenfeld maintains that all ten computers at WHTV were logged into his personal Facebook account,

making it available to anyone, and insists he did not post the review. Rowbotham also claims that the interaction stems from a negative Yelp review the plaintiff posted about WHTV and therefore this retaliatory action is within the scope of Wachenfeld's employment, making WHTV liable under the doctrine of respondeat superior.

Plaintiff moved for summary judgment on December 5, 2019, arguing there were no material facts in dispute and that the statement, "Jim is a crook. Worst company to do business with" is defamation per se. In support of the motion, plaintiff attached his own affidavit and the affidavit of Fifteen Degrees President and CEO, Richard Clarke. In his affidavit Mr. Clarke states that after reading the post he decided to remove Rowbotham's photos from Fifteen Degrees' website and significantly lessen Rowbotham's association by limiting his activities within Fifteen Degrees and excluding him from new business proposals.

Defendant Wachenfeld opposed and stated that he did not post the statement and argues that this discrepancy is a material fact, making summary judgment inappropriate. Defendant WHTV cross-moved for summary judgment, arguing there is no evidence to connect Wachenfeld's post to the scope of his employment with WHTV.

Summary judgment is a drastic remedy that should not be granted where there exists a triable issue of fact (*Ratner v Elovitz*, 198 AD2d 184 [1st Dept 1993]; *Integrated Logistics Consultants v Fidata Corp.*, 131 AD2d 338 [1st Dept 1987]). The moving party must establish a prima facie case showing that it is entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). This burden is a heavy one, and all facts must be viewed in a light most favorable to the non-moving party (*Jennack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470 [2013]). The proponent of a summary judgment motion makes a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient

evidence to eliminate any material issues of fact from the case (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). After the moving party has demonstrated its *prima facie* entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial (*Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824 [2014]; *Alvarez*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

To state a cause of action for defamation, plaintiff must allege the defendant made (1) a false statement, (2) published without privilege or authorization to a third party, (3) constituting fault as judged by, at a minimum, a negligence standard, and (4) it must either cause special harm or constitute defamation *per se* (*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]). A statement is not actionable if it constitutes an opinion. To determine if a statement is a nonactionable opinion, the following elements must be 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"

(*Kaplan v Central Conference of Am. Rabbis*, 65 Misc.3d 1227(A), 4 [Sup Ct, New York 2019], *quoting Brian v Richardson*, 87 NY2d 46, 51 [1995], *Gross v New York Times Co.*, 82 NY2d 146, 153 [1993], and *Steinhilber v Alphonse*, 68 NY2d 283, 282 [1986] [internal quotation marks omitted]). Hyperbole and imprecise words or phrases are generally not actionable as the language "signal[s] to the reasonable observer that no actual facts were being conveyed about an individual" (*Immuno AG v Moor-Jankowski*, 77 NY2d 235 [1991]; *Ciezkowski v Baldwin*, 66 Misc.3d 1206(A), 2 [Sup Ct 2019]). "Loose, figurative or hyperbolic statements, even if

deprecating the plaintiff, are not actionable." (*Dillon*, 261 AD2d 34 at 38). The statement "worst company to do business with" is not defamatory as it is an exertion of opinion and hyperbole.

In order for plaintiff to be successful, "Jim is a crook. Worst company to do business with," must be defamatory. "Crook" and "worst company to do business with" are not sufficient defamatory phrases as they are imprecise and hyperbolic. New York courts have already determined a variety of words and insults insufficient for a cause of action (see *Cardali v Slater*, 167 AD3d 476, 477 [1st Dept 2018] [where referring to the plaintiff as "really nothing more than a common criminal" was a nonactionable statement of opinion because the phrase had an imprecise meaning that a reasonable reader would not understand to mean the plaintiff had been charged with or convicted of an actual crime]; *Galasso v Saltzman*, 42 AD3d 310, 311 [1st Dept 2007] [stating someone is "no good" and a "criminal" reflects an opinion and is not actionable]; *Villemin v Brown*, 193 AD 777, 778 [1st Dept 1920] [the word "crook" is not defamation per se because it does not suggest an indictable crime]; *Privitera v Phelps*, 79 AD2d 1, 4 [4th Dept 1981] citing *Klein v McGauley*, 29 AD2d 418, 421 [2nd Dept 1968] [charging that one is a "bad man", "criminal", or "crook" is too general to be actionable]; *Seldon v Grapes, The Wine Co.*, 43 Misc.3d 1208(A) at 3 [calling someone a "disgusting human being" is considered opinion]). Here, "crook" and "worst company to do business with" are not actionable as they are too imprecise and are hyperbolic. A reasonable reader would not understand the plaintiff to have been charged with or convicted of an actual crime or think they are the "worst."

Further, when analyzing the text within the context of internet usage, the court is further convinced imprecise, vague and hyperbolic language is not sufficient to constitute a cause of action (*Sandals Resorts Int. Ltd. v Google, Inc.*, 86 AD3d 32, 43 [1st Dept 2011] [stating that

internet communication "encourage[es] a 'freewheeling, anything goes-writing style' and 'it is imperative that courts learn to view libel allegations within the unique context of the internet"]).

Similarly, a successful defamatory claim must be "of and concerning" the plaintiff (*Winklevoss v Steinberg*, 2018 NY Slip Op 32304(U) [Sup Ct 2018] *affd on other grounds* 170 AD3d 618 [1st Dept 2019] *citing Three Amigos SJL Rest., Inc. v CBS News Inc.*, 132 AD3d 82, 88 [1st Dept 2015]). Here, the post refers to "Jim" and does not specify a last name, a position in Fifteen Degrees or even a service performed, making it unlikely the reasonable reader would identify "Jim" as Jim Rowbotham. This is buttressed by Rowbotham himself, who stated in his affidavit, "Wachenfeld [would have had] to do a substantial amount of research and leg work to track down my affiliation with Fifteen Degrees." If it would be a tremendous amount of work for someone to intentionally track down Jim Rowbotham's affiliation with Fifteen Degrees, it stands to reason that it would be even more difficult for an individual user on Fifteen Degrees' Facebook page to determine that the "Jim" mentioned in the comment referred to the plaintiff, much less expose the plaintiff to public ridicule or disgrace. The affidavit from the President and CEO of Fifteen Degrees stating that a singular, vague Facebook comment prompted Fifteen Degrees to change the nature of their relationship with Rowbotham, without any further investigation, and despite the post being changed shortly thereafter and replaced with a five star review, does not alter this outcome. The nature of the relationship between Rowbotham and Fifteen Degrees is not evident or apparent from the affidavit, nor does the affidavit explain the connection between Fifteen Degrees and the relationship between Rowbotham, Wachenfeld, and WHTV. As such, the affidavit does not raise a factual issue as to how a reasonable reader could identify the subject of the post as the plaintiff.

As a matter of law, the words posted are not actionable defamation since they are imprecise, opinion, hyperbole, and are not an apparent reference to plaintiff. Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendant WHTV motion for summary judgment is granted, and upon a search of the record, this action is dismissed as against all defendants.

6/29/2020
DATE

DAVID BENJAMIN COHEN, 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