

West v Action Network, Inc.

2020 NY Slip Op 32242(U)

July 8, 2020

Supreme Court, New York County

Docket Number: 160250/2019

Judge: John J. Kelley

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

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JOSEPH H. WEST,
Plaintiff,

- v -

THE ACTION NETWORK, INC., and PAUL LO DUCA,
Defendants.

INDEX NO. 160250/2019
MOTION DATE 07/06/2020
MOTION SEQ. NO. 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 21, 22, 23, 24, 25, and 26 (Motion 002)

were read on this motion to/for DEFAULT JUDGMENT/AMEND CAPTION

In this action to recover damages for defamation, the plaintiff moves pursuant to CPLR 3215 for leave to enter a default judgment against the defendant Paul Lo Duca, and to amend the caption to delete therefrom the defendant The Action Network, Inc. The motion is granted without opposition, and the matter is set down for an inquest to assess damages against Lo Duca.

Where a plaintiff moves for leave to enter a default judgment, it must submit proof of service of the summons and complaint upon the defaulting defendant, proof of the facts constituting the claim, and proof of the defendant's default (see CPLR 3215[f]; Woodson v Mendon Leasing Corp., 100 NY2d 62, 70-71 [2003]; Gray v Doyle, 170 AD3d 969, 971 [2d Dept 2019]; Rivera v Correction Officer L. Banks, 135 AD3d 621 [1st Dept 2016]; Atlantic Cas. Ins. Co. v RJNJ Services, Inc. 89 AD3d 649 [2d Dept 2011]; Allstate Ins. Co. v Austin, 48 AD3d 720, 720 [2d Dept 2008]; see also Manhattan Telecom. Corp. v H & A Locksmith, Inc., 21 NY3d 200 [2013]).

By order dated January 27, 2020, this court granted the plaintiff's motion pursuant to CPLR 308(5) for leave to employ expedient service of the summons and complaint upon Lo

Duca, as it diligently had made numerous unsuccessful attempts to locate his actual place of business, dwelling place, or usual place of abode in order to serve him pursuant to CPLR 308(1), (2), or (4). Thus, the court permitted the plaintiff to serve process upon Lo Duca by transmitting the summons and complaint to an active e-mail address that he had made public through his Twitter social media account. The plaintiff's affidavit of service establishes that the plaintiff completed service on January 29, 2020 in accordance with this court's order. The affirmation of the plaintiff's attorney establishes that Lo Duca failed to appear in the action or answer the complaint within the statutorily prescribed period after service of process was completed.

With respect to the proof of the facts constituting the claim,

“CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action (see, 4 Weinstein-Korn-Miller, NY Civ Prac paras. 3215.22-3215.27). The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts”

(*Joosten v Gale*, 129 AD2d 531, 535 [1st Dept 1987]; see *Martinez v Reiner*, 104 AD3d 477, 478 [1st Dept 2013]; *Beltre v Babu*, 32 AD3d 722, 723 [1st Dept 2006]). Stated another way, while the “quantum of proof necessary to support an application for a default judgment is not exacting . . . some firsthand confirmation of the facts forming the basis of the claim must be proffered” (*Guzetti v City of New York*, 32 AD3d 234, 236 [1st Dept 2006]). In other words, the proof submitted must establish a prima facie case (see *id.*; *Silberstein v Presbyterian Hosp.*, 95 AD2d 773 [2d Dept 1983]).

Proof that the plaintiff has submitted “enough facts to enable [the] court to determine that a viable” cause of action exists (*Woodson v Mendon Leasing Corp.*, 100 NY2d at 71; see *Gray v Doyle*, 170 AD3d at 917) may be established by an affidavit of a party or someone with knowledge, authenticated documentary proof, or by complaint verified by the plaintiff that sufficiently details the facts and the basis for the defendant's liability (see CPLR 105[u] [verified

pleading may constitute an affidavit]; *Woodson v Mendon Leasing Corp.*, 100 NY2d at 71; *Gray v Doyle*, 170 AD3d at 971; *Voelker v Bodum USA, Inc.*, 149 AD3d 587, 587 [1st Dept 2017]; *Al Fayed v Barak*, 39 AD3d 371, 371 [1st Dept 2007]; see also *Michael v Atlas Restoration Corp.*, 159 AD3d 980, 982 [2d Dept 2018]; *Zino v Joab Taxi, Inc.*, 20 AD3d 521, 522 [2d Dept 2005]; see generally *Mitrani Plasterers Co., Inc. v SCG Contr. Corp.*, 97 A.D.3d 552, 553 [2d Dept 2012]). The plaintiff's verified complaint in this action satisfies this requirement.

The plaintiff is a veteran umpire who works for the National League of Major League Baseball. Lo Duca is a former Major League catcher who played for, among other teams, the New York Mets. In his verified complaint, the plaintiff asserts that, in a podcast streamed and distributed to thousands of listeners, Lo Duca falsely asserted that: "I've probably been thrown out of fifteen games in my life and eight or nine of them were Joe. That's true." In his complaint, the plaintiff further recounted a statement made by Lo Duca on the podcast, in which Lo Duca related occurrences and conversations that allegedly transpired during a game between the Mets and the Philadelphia Phillies in 2006 or 2007, in which Lo Duca was the catcher, Billy Wagner was the pitcher, and Joe West was the home plate umpire. According to the plaintiff's account, Lo Duca told his podcast audience that "Joe West called three batters out on strikes and walked off the field and that the following occurred when the players returned to the clubhouse:

"We get back into the clubhouse and I'm like, 'What the f**k just happened just right now?' and Wagner just winks at me.

"I'm like, 'What's the secret?'

"He's like, 'Joe loves antique cars.

"I'm like, 'really?'

"He goes, 'Yeah, so every time he comes in town, I lend him my '57 Chevy so he can drive it around.'

"And I'm like, 'What?'

"He goes, 'Yeah, so then he opens up the strike zone for me.'

"I'm like, 'This guy's been throwing me out for the last 10 years of my life and all I needed to do was rent him a '57 Chevy?'"

According to the complaint, Lo Duca's podcast co-host then remarked that "Major League Baseball should launch an investigation."

In his complaint, the plaintiff asserted that

"in reality, Lo Duca was ejected eight times in his Major League Baseball career and only once by Joe West. In reality, during 2006 and 2007, the two years that Lo Duca played for the New York Mets with Billy Wagner, Joe West was the home plate umpire for a game between the Philadelphia Phillies and the Mets only once, Billy Wagner did not pitch at all, and the game ended on a home run, not on called strikes. At no time did Billy Wagner lend Joe West any car of any kind. Joe West never 'opened up the strike zone' for Billy Wagner in exchange for the use of a car or any other favor. At the time the subject statements were made, Lo Duca knew the statements were false, or at a minimum, made with a reckless disregard for their truth or falsity. At the time the subject statements were published, The Action Network knew or should have known the statements were false, or at a minimum, made with a reckless disregard for their truth or falsity."

"The elements of a cause of action [to recover] for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se" (*Gaccione v Scarpinato*, 137 AD3d 857, 859 [2d Dept 2016], quoting *Epifani v Johnson*, 65 AD3d 224, 233 [2d Dept 2009]). "To establish actionable defamation, it must be shown that the facts are false and," depending on whether the plaintiff is or is not a public figure, "that their publication was generated by actual malice, i.e. with a purpose to inflict injury upon the party defamed, or in a grossly irresponsible manner" (*Kuan Sing Enterprises, Inc. v T.W. Wang, Inc.*, 86 AD2d 549, 550 [1st Dept 1982], *affd* 58 NY2d 708 [1982]).

To succeed on a defamation cause of action, person who is not a public figure "must establish, by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties" (*Chapadeau v Utica Observer-Dispatch*, 38 NY2d 196, 199 [1975]; *see Huggins v Moore*, 94 NY2d 296 [1999]; *Farber v*

Jefferys, 103 AD3d 514 [1st Dept 2013]). Where the plaintiff is a public figure, he or she must show by clear and convincing evidence that the defendant published the allegedly offending statements with actual malice, i.e., with knowledge of the statements' falsity or a reckless disregard as to whether the statements were true or false (see *Gertz v Robert Welch, Inc.*, 418 US 323 [1974]; *Huggins v Moore*, 94 NY2d at 301-302; *James v Gannett Co.*, 40 NY2d 415 [1976]; see also *Kipper v NYP Holdings Co.*, 12 NY3d 348 [2009]).

Public figures are generally defined as persons who "have assumed roles of especial prominence in the affairs of society," "occupy positions of . . . persuasive power and influence," and have achieved "general fame or notoriety in the community" (*Gertz v Robert Welch, Inc.*, 418 US at 345, 352; see *Yiamouyiannis v Consumers Union of U.S.*, 619 F2d 932 [2d Cir 1980]). The critical consideration is whether the evidence demonstrates that plaintiff had taken affirmative steps to attract personal attention or had strived to achieve a measure of public acclaim (see *Maule v NYM Corp.*, 54 NY2d 880, 882 [1981]; *James v Gannett Co.*, 40 NY2d at 422). The issue of whether a plaintiff is or is not a public figure is generally a question of fact (see *Perez v Violence Intervention Program*, 116 AD3d 601 [1st Dept 2014]), although it can be determined as a matter of law where, as here, the plaintiff is well known in the world of professional sports (see *Maule v NYM Corp.*, 54 NY2d at 882-883; *James v Gannett Co.*, 40 NY2d at 422), and he essentially concedes that he must prove the defendant evinced actual malice or a reckless disregard for the truth.

The allegations in the verified complaint here constitute proof of the facts of the plaintiff's claim of defamation, as the plaintiff alleges therein that Lo Duca knowingly, or with reckless disregard for the truth, made false statements that the plaintiff essentially accepted bribes from a Major League Baseball player in return for favorable treatment on the field. Lo Duca's story, if believed by those who heard it, would damage any reputation that the plaintiff had for integrity, and could also be construed as an allegation that the plaintiff committed the crime of commercial bribery (see Penal Law § 180.03). False allegations that a person has committed a

crime or that tend to injure another in his or her trade, business, or profession, constitute slander per se, which relieves the plaintiff of the requirement that he or she demonstrate special damages (see *Lieberman v Gelstein*, 80 NY2d 429, 435 [1992]).

Consequently, the plaintiff is entitled to enter a default judgment against Lo Duca on the issue of liability, and an inquest shall be scheduled to assess damages.

As set forth in the affirmation of the plaintiff's counsel, and as revealed in the docket of this action, the plaintiff discontinued the action against The Action Network, Inc., on February 28, 2020. Hence, the court grants his application to amend the caption to delete The Action Network, Inc., therefrom.

The court notes that the complaint was executed, verified, and notarized in Florida, but does not include the certificate of conformity required by CPLR 2309, which is a written instrument pursuant to which a person qualified by the laws of the country or state in which an affidavit or pleading is executed and notarized, or by the laws of New York, certifies that the out-of-state affidavit or pleading has indeed been drafted, executed, and notarized in conformity with the laws of that country or state. This defect does not require the court to disregard the complaint or deny relief to the plaintiff, as the defect may be cured by the submission of the proper certificate nunc pro tunc (see *Bank of New York v Singh*, 139 AD3d 486 [1st Dept 2016]).

Accordingly, it is

ORDERED that the plaintiff's motion for leave to enter a default judgment against the defendant Paul Lo Duca on the issue of liability, to set the matter down for an inquest, and to amend the caption is granted, without opposition; and it is further,

ORDERED that the matter is set down for an inquest to assess damages before this court on September 15, 2020, at 9:30 a.m., or on any adjourned date fixed by the court, at 71 Thomas Street, Room 311, New York, New York, or via Skype for Business should the court so direct; and it is further,

ORDERED that the caption of this action is amended to read as follows:

JOSEPH H. WEST, Plaintiff, v PAUL LO DUCA, Defendant.

and it is further,

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon the defendant Paul Lo Duca within 15 days of its entry, by transmitting those documents to him via email at Loduca@barstoolsports.com; and it is further,

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon the trial support clerk, and shall file the notice required by CPLR 8019(c) and a completed Form EF-22 with the County Clerk, and the trial support clerk shall thereupon amend the court records accordingly.

This constitutes the Decision and Order of the court.

7/8/2020 DATE

Handwritten signature of John J. Kelley, J.S.C.

CHECK ONE: CASE DISPOSED, GRANTED, DENIED, NON-FINAL DISPOSITION, GRANTED IN PART, SUBMIT ORDER, FIDUCIARY APPOINTMENT, OTHER, REFERENCE.