SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

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JOYCI BOROVSKY and HOUSE OF KAVA INC.,

Plaintiffs,

-against-

VANESSA LOPEZ,

Defendant.

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DECISION / ORDER

Index No. 516318/2019
Motion Seq. No. 2
Date Submitted: 10/05/2020

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of defendant's motion to dismiss.

Papers	NYSCEF Doc.
Notice of Motion, Affirmations, Affidavits, and Exhibits Annexed.....	40-42
Affirmation in Opposition and Exhibits Annexed.....	44-45

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

Plaintiff House of Kava Inc. ("HOK") is a New York corporation which operated a bar that served "kava-derived products as a health alternative to alcoholic beverages" in Brooklyn, New York. Plaintiff Borovsky allegedly formed, owned and operated HOK in 2016 with her partner, non-party Grant Roberts. In December 2017, Borovsky and defendant Lopez met at HOK and became friends. In early 2018, defendant invested with plaintiff, purchasing a 20% ownership stake in a new business venture, a kava bar to be opened in Miami ("HOK Miami").[1]

[1] According to the Florida Division of Corporations' public website, non-party House of Kava Miami Inc. was established February 6, 2018. Roberts is identified as its president, vice president, and agent; Borovsky is listed as its president and secretary and Lopez is listed as the chairman and secretary.

Shortly thereafter, in April 2018, defendant was hired to serve as the general manager of the Brooklyn HOK. Annexed as Exhibit A to the amended complaint (E-File Doc 33) is a "NON-DISCLOSURE AGREEMENT/Employment Contract" ("NDA"), dated March 27, 2018, which was purportedly executed by defendant Lopez (as the employee), Borovsky (as the "Owner" of HOK and HOK Miami), and Roberts (as the "Witness").

In June 2019, Borovsky allegedly received a phone call from HOK's landlord (Brooklyn) indicating that the City of New York had issued a violation for "the amount of trash and rats discovered" during an inspection. Borovsky then reported this to defendant, who allegedly responded, "that is not my job" and she then asked for a raise, "especially if Borovsky wanted defendant to clean up the garbage." Defendant ultimately "resigned" from her position as manager of HOK [Brooklyn] on Tuesday, July 2, 2019.

When defendant Lopez resigned as general manager of HOK Brooklyn, "Borovsky determined . . . to temporarily close HOK . . . so that [she] could" open HOK Miami before returning to New York. HOK [Brooklyn] then allegedly laid off the entire staff, who Borovsky claims were all defendant's "friends and roommates." Defendant Lopez then allegedly "created a fake business Instagram account, which made a purported parody of Borovsky and HOK," for the "sole purpose of diminishing HOK's customer base and tarnish[ing][Borovsky's] reputation in the community." Plaintiffs allege that defendant used this fake social media account to "spread lies and derision about Plaintiffs" and to "commit copyright infringement" which was a breach of the NDA.

Plaintiffs assert four causes of action, only the first two of which are at issue in this pre-answer motion for partial dismissal of the amended complaint. The first cause of action, for libel *per se*, asserts that defendant created the fake account, which appears to the public to be an official HOK account, and posted: "If you're Joyci, you . . . fire all your staff and tell the community to [expletive] off". Further, the post, "using a witch-type character to mock [Borovsky], as if [Borovsky] were saying [sic], 'I'm finally free to fire my entire staff and shut down [HOK].' " (E-File Doc 32 [amended complaint]; *see also* E-File Doc 35 [purported screenshots of defendant's allegedly fake HOK account], and Doc 39 [other allegedly disparaging comments on social media]). Plaintiffs allege their "reputation continues to be harmed by Defendant's false statements because members of community post negative social media posts based on the desultory remarks of Defendant."

In plaintiff's second cause of action, they allege that defendant infringed plaintiff's copyright, pursuant to 17 USC §§ 501 (b) and 106 (5). Plaintiffs argue that they are the legal owner of the exclusive right, under a copyright, of "that certain photograph, which [defendant] has used as part of her profile on social media platforms" in violation of § 106 (5).

Defendant now moves (pre-answer) to dismiss the first and second causes of action in plaintiffs' amended complaint pursuant to CPLR §§ 3211 (a) (2) and (a) (7). Defendant does not move to dismiss the third or fourth causes of action (unfair competition and breach of the NDA) in the amended complaint.

Defendant argues that plaintiffs have not demonstrated a claim for libel/defamation, as a matter of law, because the complaint does not allege statements that a reasonable person would believe are factual, as opposed to opinion, given that

the statements were made in the context of internet/social media communications, and because plaintiffs "fail[] to allege statements which a reasonable person would believe to be fact" because the plaintiffs themselves characterize the Instagram account as a "parody account."

With regard to the cause of action for copyright infringement, defendant argues that the "exclusive privilege of first publishing any original material product of intellectual labor" terminates on publication, and that plaintiffs published the photograph at issue prior to defendant's using the same photo "as part of her profile on social media platforms."

Discussion

1. Defamation

"The elements of a cause of action for defamation are (a) a false statement that tends to expose a person to public contempt, hatred, ridicule, aversion, or disgrace, (b) published without privilege or authorization to a third party, (c) amounting to fault as judged by, at a minimum, a negligence standard, and (d) either causing special harm or constituting defamation *per se*" (*Udell v NYP Holdings, Inc.*, 169 AD3d 954, 955 [2d Dept 2019] [internal quotation marks omitted]). "A libel action will fail even where a substantially true statement contains minor inaccuracies. As only statements alleging facts can be the subject of a defamation action, [a]n expression of pure opinion is not actionable, . . . no matter how vituperative or unreasonable it may be" (*id.* [internal citations and quotation marks omitted]).

"Whether a particular statement constitutes an opinion, or an objective fact is a question of law" (*Kasavana v Vela*, 172 AD3d 1042, 1045 [2d Dept 2019] [internal citations omitted]). "In distinguishing between facts and opinion, the factors the court

must consider are (1) whether the specific language has a precise meaning that is readily understood, (2) whether the statements are capable of being proven true or false, and (3) whether the context in which the statement appears signals to readers [or listeners] that the statement is likely to be opinion, not fact" (*id.* [internal citations and quotation marks omitted]). "The essential task is to decide whether the words complained of, considered in the context of the entire communication and of the circumstances in which they were spoken or written, may be reasonably understood as implying the assertion of undisclosed facts justifying the opinion" (*id.*). "Loose, figurative or hyperbolic statements, even if deprecating the plaintiff, are not actionable" (*Jacobus v Trump*, 55 Misc 3d 470, 475 [Sup Ct 2017], *affd* 156 AD3d 452 [1st Dept 2017]).

In considering defamation claims involving the internet and social media, New York Courts have noted that "[t]he culture of Internet communications[] . . . has been characterized as encouraging a freewheeling, anything-goes writing style" (*id.* [internal quotation marks omitted]; *see e.g. LeBlanc v Skinner,* 103 AD3d 202, 213 [2d Dept 2012]). Therefore, "epithets, fiery rhetoric or hyperbole advanced on social media have been held to warrant an understanding that the statements contained therein are vigorous expressions of personal opinion, rather than the rigorous and comprehensive presentation of factual matter" (*Jacobus*, 55 Misc 3d at 475 [internal quotation marks and citations omitted]). Thus, "New York courts have consistently protected statements made in online forums as statements of opinion rather than fact" (*Bellavia Blatt & Crossett, P.C. v Kel & Partners LLC*, 151 F Supp 3d 287, 295 [ED NY 2015] [citations omitted]; *see also Matter of Woodbridge Structured Funding, LLC v Pissed Consumer,* 125 AD3d 508, 509 [1st Dept 2015] [finding that disgruntled tone and use of statements on consumer grievance website that cannot be definitively proven true or

false, support finding [that] challenged statements constitute nonactionable opinion]). "[R]eaders give less credence to allegedly defamatory remarks published on the Internet than to similar remarks made in other contexts" (*Sandals Resorts Intl. Ltd. v Google, Inc.*, 86 AD3d 32, 44 [1st Dept 2011] [noting that "bulletin boards and chat rooms are often the repository of a wide range of casual, emotive, and imprecise speech"]).

In deciding a motion to dismiss a claim of defamation, the court must decide whether the statements, considered in the context of the entire publication, are reasonably susceptible of a defamatory connotation such that the issue is worthy of submission to a jury (*Konig v WordPress.com*, 112 AD3d 936, 937 [2d Dept 2013] ["to survive a motion to dismiss, a defamation plaintiff need only meet the minimal standard of pointing to any reasonable view of the stated facts that would permit recovery"]).

The allegations in the amended complaint and annexed exhibits assert that defendant said, in online social media posts and comments, that Borovsky is unprofessional, fired her entire staff, and was disrespectful to HOK's "community." Such statements are either clearly statements of opinion or statements of admitted facts and are not actionable as a matter of law. First, Borovsky admits that HOK fired its entire staff in Brooklyn, and truth is an absolute defense to a claim of libel. Further, viewing the alleged statements in the context in which they were made, a reasonable person would understand that defendant was asserting her opinion of Borovsky and/or parodying Borovsky and HOK. The statements defendant Lopez allegedly made constitute, at most, "epithets, fiery rhetoric or hyperbole advanced on social media . . . [and] the statements contained therein are vigorous expressions of personal opinion,

rather than the rigorous and comprehensive presentation of factual matter" (*Jacobus*, 55 Misc 3d at 475 [internal quotation marks and citations omitted]).

Additionally, HOK (the corporation) does not state a claim for libel *per se*.[2] While a corporation can have a cause of action for defamation (*see e.g. 600 West 115th Street Corp. v Von Gutfeld*, 169 AD2d 56 [1st Dept 1991], *revd on other grounds*, 80 NY2d 130 [1992]), the amended complaint asserts that HOK is a defunct business that Borovsky closed when defendant resigned as its manager (E-File Doc 32, ¶¶ 37-39).

Accordingly, the first cause of action asserted by the plaintiffs, for libel *per se,* is dismissed.

2. Copyright Infringement

Defendant argues that the copyright infringement claim, involving a "certain photograph [Borovsky] has published on social media platforms," must be dismissed because it asserts common law copyright infringement for which the "exclusive privilege of first publishing any original material product of intellectual labor" terminates upon publication (*see A. J. Sandy, Inc. v Jr. City, Inc.*, 17 AD2d 407, 409 [1st Dept 1962]). Defendant argues that, under the common law, plaintiffs no longer have copyright privileges because they admittedly previously published the image.

While plaintiffs allege that a "certain photograph" was created by Borovsky and unauthorizedly used by defendant in connection with the "parody" HOK social media account, plaintiffs do not clarify which photograph they refer to. Presumably it is the HOK logo image that, seemingly, both the real (now defunct) and "parody" social media accounts used as their profile picture (E-File Docs 35 and 36, a drawing of a pineapple,

[2] In any event, the amended complaint appears to make a defamation claim only on behalf of Borovsky.

with "House of Kava" written across it). This is not a photograph, nor is it a work of art; rather it is, if anything, a business trade name, which might have been entitled to be trademarked, and a logo design, which also might have been able to have been trademarked, if it had been registered with the United States Office of Patents and Trademarks. Plaintiffs do not assert that they have a wordmark or trademark interest in the item and, thus they are not entitled to relief pursuant to their second cause of action for copyright infringement.

Accordingly, it is **ORDERED** that defendant's motion to dismiss the first and second causes of action in the complaint is granted.

IT IS FURTHER ORDERED that the defendant shall serve an answer to the amended complaint within 30 days.

Any other relief requested is denied. This shall constitute the decision and order of the court.

Dated: December 21, 2020

ENTER:

Hon. Debra Silber, J.S.C.