

Woodward v Levine
2021 NY Slip Op 31056(U)
March 17, 2021
Supreme Court, New York County
Docket Number: 655709/2016
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

-----X

JOHN WOODWARD, KRISTINE WOODWARD and G.O.L.A. d/b/a WOODWARD GALLERY,

Plaintiffs,

- v -

NIRA LEVINE and NRL UNLIMITED, INC.,

Defendants.

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INDEX NO. 655709/2016

MOTION DATE

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180

were read on this motion to DISMISS

In this action for defamation in connection with alleged statements made by defendants regarding artwork purchased from the plaintiff art gallery, defendants move for an order (i) dismissing the complaint pursuant to CPLR 3211(a)(7) and CPLR 3016(a), or alternatively, CPLR 3212, for failure to state a cause of action, and (ii) awarding them costs and attorneys' fee pursuant to CPLR 8303-a. Plaintiffs/counterclaim-defendants John Woodward, Kristine Woodward and G.O.L.A. d/b/a Woodward Gallery (together "the Woodwards" or "plaintiffs") oppose the motion.

Background

Unless otherwise noted, the following facts are based on the allegations in the complaint (NYSCEF # 2). Plaintiff Woodward Gallery ("the Gallery") is a prominent Manhattan art gallery; John Woodward is the Gallery's director, and his spouse, plaintiff Kristine Woodward, is its Vice President (id., ¶¶ 1-3). Defendant NRL Limited ("NRL") is involved in art related business, and defendant Nira Levine is NRL's agent and spokesperson (id., ¶¶ 4, 5). In 2008, defendants purchased forty-five Andy Warhol Spacefruit prints and other art from the Gallery (id., ¶ 7).

On or about June 30, 2016, defendant commenced a special proceeding for pre-action discovery ("the judicial proceeding"), which made allegations regarding various art purchased from the Gallery, including the Warhol Spacefruit prints, even though Levine admitted that defendants were in possession of Certificates of Authenticity for each print issued by the Andy Warhol Art Authentication Board ("AWAAB") (id., ¶ 8). On July 1, 2016, Levine, individually and as spokesperson for

NLR, was interviewed for a New York Post article (“the Post Article”) by Julia Marsh (*id.*, ¶ 9). As the result of the interview, the New York Post “published in its print and online editions, ‘false and a false and defamatory headline in large, bold letters regarding the plaintiffs that falsely stated, ‘Gallery sold Warhol prints with doctored documents: lawsuit’” (*id.*). In particular, the Post article falsely states: “‘An 85-year-old Oregon woman says a prominent Manhattan art gallery doctored authenticity documents to dupe her into overpaying for 90 Andy Warhol prints –and now she’s suing the Lower East Side dealers to find out if she was fleeced on another 50 pieces by modern masters like Pablo Picasso and Keith Haring’” (*id.*, ¶ 9). The article identifies the 85-year-old women as Levine and the gallery involved as the Woodward Gallery and Kristine Woodward as a principal of the gallery (*id.*). The complaint alleges that “these false statements constituted libel *per se* committed against the [Woodwards]” (*id.*).

Additional articles on defendants’ claims were published in three on-line art-world publications (together “Art Publications”) (*id.*, ¶¶ 10-12). Specifically, (i) “on or July 4, 2016,... Artforum published an article... which falsely stated ‘[t]he Warhol Authentication Board ... informed [Levine] that sixty-three of the works she had copurchased were fakes’” (*id.*, ¶ 10); (ii) “[o]n July 4, 2016... artnetnews... published a false and defamatory headline in large, bold letters regarding the plaintiffs that stated, ‘Manhattan Gallery Faces Lawsuit Over Fake Warhol Prints’” (*id.*, ¶ 11); and (iii) “[o]n July 5, 2016, ... Art Review, ... published a false and defamatory headline in large, bold letters regarding the plaintiffs that stated, ‘Collector sues Woodward Gallery over Andy Warhol fakes’” (*id.*, ¶ 12). “Since [Levine] was in possession of the genuine Certificates of Authenticity pertaining to her prints, which were issued by the AWAAB, at the time she made the above-mentioned statements, she knew or should have known [that] these statements were false before they were published” (*id.*, ¶ 13). It is alleged that the “false statement[s]” made in the Art Publications “constituted libel *per se* against the [Woodwards]” (*id.*, ¶¶ 9-12).

“[D]efendants instituted a judicial proceeding alleging false and defamatory charges and then circulated communications based thereon maliciously calculated to damage [Woodwards’] business and ... professional reputations [and] [t]herefore the privilege pursuant to Civil Rights Law § 74 is inapplicable here” (*id.*, ¶ 14).

The complaint seeks compensatory and punitive damages, and alleges that “defendants’ conduct was knowing, malicious, willful and wanton and/or showed reckless disregard for the truth, and continues to cause, the plaintiffs damage their business, disgrace and humiliation and permanent harm to their professional and personal reputations” (*id.*, ¶ 15).

Defendants move to dismiss the complaint for failure to state a cause of action, asserting that neither the complaint nor the Post Article contain the

particular defamatory words attributable to Levine as required by CPLR 3016 (a). As for the Art Publications, defendants assert that the allegations as to these publications do not state a claim as they do not refer to the particular words complained of, or even allege that defendants spoke to the publications. Defendants further argue that documentary evidence, including the Post Article and the Art Publications establish that Levine was never interviewed or quoted in the articles and declined to comment. Moreover, defendants argue that as the statements in the articles summarized or repeated the allegations in the judicial proceeding, they are protected by Civil Rights Law § 74.

Plaintiffs oppose the motion, arguing that the allegations in the complaint which, for the purposes of this motion, must be must be accepted as true, are sufficient to state a claim for defamation, and that Levine's statements for the Post Article and the Art Publications constitute libel *per se* as the false statements have caused damage to them in their trade and business. Plaintiffs also argue that the complaint sufficiently alleges the words with which Levine libeled them, and that the statements are not protected by the privilege provided under Civil Rights Law § 74 since the judicial proceeding sought discovery concerning 70 works of art but did seek to determine the art's authenticity. Moreover, plaintiffs argue that as Ms. Levine was in possession of conclusive documentary proof, in the form of Certificates of Authenticity, that the prints purchased at the Gallery were authentic, Levine's statements to the New York Post that they were fake was for the sole purpose of maligning the plaintiffs, and therefore the statements are not protected under Civil Rights Law § 74.

In support of their opposition, plaintiffs submit the affidavit of Kristine Woodward (NYSCEF # 174). Ms. Woodward avers that on July 1, 2016, she responded to New York Post reporter Julia Marsh's telephone call and learned from Marsh that Levine "had informed [Marsh] that [Levine] has serious concerns about the authenticity of Warhol prints she had purchased from the Gallery" (*id.* ¶ 3). Ms. Woodward further avers that while the Post Article "charges that the Gallery 'doctored authenticity documents,' the petition in the judicial proceeding "claims that the Gallery 'doctored' a condition report from the ACA Paper Restoration ...[and that] there is a vast difference between authenticity documents such as the Certificates of Authenticity, which were issued by the [AWAAB], the ultimate authority on the authenticity of works of art by Andy Warhol... and a restorer's condition report" (*id.*, ¶ 5).

Ms. Woodward also states that "Levine was in possession of those Certificates of Authenticity when she made her false and malicious charges, questioning the Authenticity of the Warhol prints she had purchased from the Gallery" (*id.*). In this connection, Ms. Woodward avers that in October 2014, she sent to Levine via FedEx as per Levine's instructions three envelopes each containing fifteen Certificates of

Authenticity issued by the AWAAB and pertaining to the forty-five Spacefruit prints purchased by defendants which were received on October 24, 2014 (*id.*, ¶ 8).

As for allegations in the judicial proceeding that the prints had “denied stamps,” as proof that they are not authentic, Ms. Woodward states that when the prints were originally submitted to the AWAAB, some were denied at first but that after the Gallery submitted further proof of the prints’ authenticity, the AWAAB “rescinded its earlier designation of ‘denied,’ authenticated all the Spacefruits prints and issued Certificates of Authenticity pertaining to all of the Spacefruits prints” (*id.*, ¶ 9). Moreover, she states that “the AWAAB then instructed the Gallery that we could remove the ‘denied’ stamp on those prints [and that] ... it was part of the work the Gallery was considering having the restorer perform [but] due to the cost and conservation issues associated with removal of the ink stamp was opted against it” (*id.*, ¶ 10).

Plaintiffs argue that given the discrepancy between the allegations in the judicial proceeding and the statements in the Post article, and because Levine was aware of the authenticity of the prints based on the Certificates of Authenticity provided to her but nonetheless maliciously commenced the judicial proceeding, the statements in the Post article are not protected by the Civil Rights Law § 74.

In reply, defendants assert that the statements in Ms. Woodward’s affidavit are insufficient to rectify the insufficiencies of the complaint.¹ In addition, defendants argue that Levine’s alleged statement to Marsh that she had “serious concerns” about the artwork she purchased from the Gallery are not her exact words and, in any event, are statements of nonactionable opinion. Furthermore, with regard to Civil Rights Law § 74, defendants assert that statute is applicable as the statements in the articles are derived from the allegations in the judicial proceeding, which are not refuted by the Certificates of Authenticity relied on in Ms. Woodward’s affidavit.

Discussion

On a motion to dismiss pursuant to CPLR 3211 (a)(7), the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference,” and “determine only whether the facts as alleged fit into any cognizable legal theory” (*Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]). At the same time, “[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by

¹ Defendants also assert that they have consistently denied that Levine spoke with Marsh, including before the Post Article was published, and that since answering the complaint four years ago, defendants have repeatedly demanded that plaintiffs provide discovery supporting their claim that Levine was interviewed by Marsh, but plaintiffs have not done so.

documentary evidence they are not presumed to be true or accorded every favorable inference” (*Morgenthau & Latham v Bank of New York Company, Inc.*, 305 AD2d 74, 78 [1st Dept 2003][internal citation and quotation omitted]). However, dismissal based on documentary evidence may result “only when it has been shown that a material fact as claimed by the pleader is not a fact at all and no significant dispute exists regarding it” (*Acquista v New York Life Ins. Co.*, 285 AD2d 73, 76 [1st Dept 2001]), quoting, *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]).

To prove a claim 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]). CPLR 3016 (a) further requires that that “the particular words complained of shall be set forth in the complaint,” or papers annexed to the complaint (*Mitchell v New York University*, 129 AD3d 542, 543 [1st Dept], *lv denied* 26 NY3d 908 [2015] [affirming trial court’s dismissal of student’s defamation claim as complaint failed to set forth words complained of, and did not submit mental health evaluations containing the allegedly defamatory statements]).

Civil Rights Law § 74 provides immunity for “the publication of a fair and true report of any judicial proceeding.” Under the statute, “substantially accurate” statements are absolutely privileged if the statements are “at all pertinent to the litigation” (*See Lechter v Engel*, 33 AD3d 10, 17 [1st Dept 2006]). Pertinency is a question of law for the court, and any doubt shall be resolved in favor of relevancy and pertinency (*see Mosesson v The Jacob D. Fuchsberg Law Firm*, 257 AD2d 381, 382 [1st Dept], *lv denied* 93 NY2d 808 [1999]). The immunity provided under Civil Rights § 74 protects both the newspapers and other media outlets which have published a “substantially accurate report” about a lawsuit, and the individuals who communicate publicly about a lawsuit, either to the media or through another public forum (*see e.g Fishof v Abady*, 280 AD2d 417 [1st Dept 2001][statements at press conference]; *Mulder v Donaldson, Lufkin & Jenrette*, 208 AD2d 310 [1st Dept 1995][statement to the Wall Street Journal]).

In this case, with regard to the articles in the Art Publications, the court finds that as the neither the complaint nor the publications contain the particular words providing the basis for the defamation claim against defendants, the requirements of CPLR 3016(a) have not been met. Moreover, the statements at issue in the articles are protected under Civil Rights Law § 74 as they pertain to the judicial proceeding and its allegations against the Woodward (*Lechter v Engel*, 33 AD3d at 17).

As for the Post Article, the court finds that the allegations in the complaint regarding the article, even as amplified by the statements in Ms. Woodward’s affidavit, are insufficient to state a claim for defamation as the statements

attributed to Levine are not quoted and, at best, constitute a paraphrased version of Levine's purported statement (*see Smalley v Dreyfus Corp.*, 40 AD3d 99, 107 [1st Dept 2007] *revd on other grounds*, 10 NY3d 55 [2008] [stating that where statements on which plaintiffs base their claim are paraphrased they do not meet the minimum requirements of CPLR 3016[a]]). Moreover, Ms. Woodward's affidavit does not cure this defect as her description of Levine's statement regarding "her serious concerns about the authenticity of Warhol prints she had purchased from the Gallery" is based on her summary of a conversation with Marsh and thus does not reflect the exact words stated by Levine.

In any event, any statements purportedly made by Levine that were reported in the Post Article would be protected by the privilege under Civil Rights Law § 74 (*Hudson v Goldman Sachs & Co., Inc.*, 304 AD2d 315 [1st Dept 2003], *lv denied* NY3d 707 [2004] [defamation claim against employee based on statements he made to a newspaper regarding his termination, which were the subject of a pending action, were subject to dismissal under Civil Rights Law § 74]). And, contrary to plaintiffs' assertions, the statements in the Post Article are sufficiently pertinent to the proceeding to be protected under the statute (*Mosesson*, 257 AD2d at 382 ["[A]ll that is required for a statement to be privileged is a minimal possibility of pertinence or the simplest rationality"]; *Rufeh v Schwartz*, 50 AD3d 1002 [2d Dept 2008] [statements made by defendants were privileged where they had "at least some marginal relevance to the fraud theory defendants were advancing"]). In this connection, the artworks specifically mentioned in the Post Article, that is the 90 Warhol prints, and the Picasso and Haring, are the subject of the judicial proceeding (NYSCEF # 81, ¶¶ 16-27).

Next, as the Civil Rights Law's privilege prohibiting a claim for injury for the publication of a fair and true reporting of a civil proceeding is absolute, allegations of malice or bad faith, such as those asserted by plaintiffs, are insufficient to overcome the privilege (*Panghat v New York State Div. of Human Rights*, 89 AD3d 597, 597-598 [1st Dept 2011], *lv denied* 19 NY3d 839, *cert denied* 568 US 943 [2012]). And, while there exists a narrow exception to the immunity afforded under Civil Rights Law § 74 where a litigation is commenced for the sole purpose of disseminating defamatory information (*Halcyon Jets, Inc. v Jet One Group, Inc.*, 69 AD3d 534 [1st Dept 2010]), the complaint is devoid of allegations from which it could be inferred that this exception applies here (*see e.g. Emergency Enclosures, Inc v National Fire Adjustment Co., Inc.*, 68 AD3d 1658 [4th Dept 2009]) [defamation counterclaim does not sufficiently allege that the action was commenced for the sole purpose of defaming defendant and therefore did not fit within the exception to the application of Civil Rights Law § 74]). Nor are the statements in Ms. Woodward's affidavit regarding the Certificates of Authenticity and her explanation for the "denied" stamps on the Warhol prints sufficient to meet this standard.

In view of the above, the complaint must be dismissed.

That said, however, as the court does not find that the allegations in the complaint are frivolous, defendants' request for costs and attorneys' fees under CPLR 8303-a is denied.

Conclusion

Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint is granted, and the Clerk of the Court is directed to enter judgment accordingly; it is further

ORDERED that defendants' motion for costs and attorneys' fees under CPLR 8303-a sanctions is denied; and it is further

ORDERED that the defendants' counterclaims shall continue.

3/17/21

DATE



MARGARET A. CHAN, J.S.C.

MARGARET A. CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: