

Kerns v Ishida

2021 NY Slip Op 32152(U)

October 25, 2021

Supreme Court, New York County

Docket Number: Index No. 161364/2020

Judge: William Perry

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. WILLIAM PERRY PART 23

Justice

-----X

ROXANA KERNS,

Plaintiff,

- v -

MIMI ISHIDA, POLA HAM

Defendant.

-----X

INDEX NO. 161364/2020
MOTION DATE 06/08/2021
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 were read on this motion to/for DISMISSAL

Plaintiff Roxana Kerns brings this defamation action against Defendants Mimi Ishida and Pola Ham, alleging that they made malicious statements on the internet regarding treatment they received at Plaintiff's Orchid Aesthetics Medical Spa. In motion sequence 001, Defendants move to dismiss the complaint, arguing that it is barred by the statute of limitations and that it fails to state a cause of action. The motion has been fully submitted.

Background

Plaintiff alleges that on or about September 1, 2019, Ishida posted an online review of her June 2019 visit to Plaintiff's spa on Yelp.com. (NYSCEF Doc No. 2, Complaint, at ¶ 4.) Plaintiff alleges that the review¹ contains, inter alia, the following defamatory statements:

Last month, I paid cash upfront to buy the special for 2 vials of Kybella for \$800. I got one vial last month and this week, I went there to get my 2nd vial. ...

There's an English Bulldog in the office. ... I bought him 10 AUTHENTIC BEEF RIB BONES. Very expensive! I washed them very clean about 10 times, wrapped them carefully & kept them overnight in the fridge for freshness. Last time, I asked

¹ The Yelp.com review was posted on June 25, 2019 by "Honest R." (NYSCEF Doc No. 10, Yelp Review.)

Kern if I can bring him bones and she said I can bring him "ANYTHING." He was even playing with a BONE last time we were there!

So I brought the bones for [Plaintiff's] dog and Kern did not even look at them, just flicked her hand & condescendingly said "NO NO! Don't give them to him. He's ALLERGIC." Told me to throw them away! She did NOT even say a simple thank you after how thoughtful I have been. I told her I was happy to bring bones for her dog and traveled a LONG way, transferred 2 times on subway while holding the bag of heavy 10 BIG BONES just for her dog. I was surprised but calmly said, why don't you say thank you? Why tell me a different story because you never said he was allergic before. I was just being thoughtful...

Suddenly, she started frowning at me condescendingly, rudely told me that I NEEDED BOTOX in between my eyes! I said I'm old and I do not have much wrinkle in between my eyes and I don't want botox.

... she said there was NO such promotion and SCREAMED AT US! She also got in my DAUGHTER'S face up close as if she was about to HIT her, face red, eyes huge, & told her to SHUT UP! I was EXTREMELY shocked!

... **This is sign of a psychotic woman. How dare she yell at my baby?** She even told ME to shut up several times! She ABUSED us.

I said I want my money back and she said she WILL NOT give me my money back. **In my HONEST OPINION, she acts like a psychotic nutcase. If you see her, you will notice that she does NOT look like she is in her right mind.**

Also, the dog barks SO loudly NONSTOP! She does not even put him away & lets him stay in the EXAM ROOM when we're there. That place is run amok! Extremely unprofessional, unsanitary to say the least. It is illegal to keep animals running around like this freely in a doctor's office with patient's around. The dog scratched my daughter & me a couple times, ripped my daughter's pants, but we didn't say anything.

They need to be INVESTIGATED. I don't think Kern even has her doctor's license. She is a fraud. She does not know how to say 'thank you,' 'you're welcome,' 'please,'. This woman is ill-mannered and has NO class.

I was very happy to bring the bones for the dog. No idea it would turn out like this. Now I cannot trust medspas anymore. It is so sad that some people like Kern cannot truly understand and appreciate people's good hearts & intentions. **They are greedy & only care about money.** SO dry, cold at heart. ... **Honest opinion, she needs to shut down her office and get treatment for her mental problems.** ...

(Yelp Review; Complaint at ¶¶ 4-9 [emphasis added].)

Plaintiff further alleges that Ishida posted a second review on Google Reviews, which states, in full:

Daughter and I had a horrendous, nightmarish experience here. We almost ended up calling the the cops on the owner, Roxana Kerns, due to her aggressive, belligerent behavior and screaming expletives at us up close to our faces while her face becomes red. That woman needs help instead of running this business. **She has been reported for her threatening behavior and unethical, fraudulent practice of injecting an empty syringe and charging beforehand for the full price.** Avoid this place if you don't want to get scammed and harassed.

(NYSCEF Doc No. 11, Google Review; Complaint at ¶ 10.) This review was published by “Honest Reviewer” and contains the same profile picture as “Honest R.” on Yelp.

On September 11, 2020, Plaintiff’s counsel sent a cease and desist letter to Ishida threatening to commence legal action against the Defendants if the posts were not removed within two weeks. (NYSCEF Doc No. 26.) Plaintiff then commenced this action on December 30, 2020 with the filing of the summons and complaint, setting forth two causes of action for defamation and tortious interference with prospective business relations.

Discussion

On a pre-answer motion to dismiss a complaint for failure to state a cause of action, pursuant to CPLR 3211 [a] [7], “the court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory.” (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 121 [1st Dept 2002].) However, “factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration.” (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003].)

“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, 41-42 [1st Dept 2014].) “On a motion to dismiss a defamation claim, 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.” (*Id.*, at 42.) However, “[e]xpressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation.” (*Mann v Abel*, 10 NY3d 271, 276 [2008].) Courts rely upon the following factors in delineating between statements of fact and opinion:

- (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.

(*Brian v Richardson*, 87 NY2d 46, 51 [1995] [internal quotation marks and citations omitted].)

“The culture of Internet communications, as distinct from that of print media such as newspapers and magazines, has been characterized as encouraging a ‘freewheeling, anything-goes writing style.’” (*Sandals Resorts Int’l Ltd. v Google, Inc.*, 86 AD3d 32, 43 [1st Dept 2011].) “Consequently, New York courts have consistently protected statements made in online forums as statements of opinion rather than fact.” (*Vendemia v Oncu*, 2017 WL 1161743, at *5 [Sup Ct, NY County 2017] [cause of action for defamation based on Yelp review wherein defendant stated that she did “not recommend” plaintiff and that he was “incompetent as a physician, motivated only by

profit, and untrustworthy” dismissed with court noting that Yelp is “an internet forum where people typically solicit and express opinions for the purpose of reviewing local businesses”].)

Here, the online reviews are clearly nonactionable expressions of opinion. Notably, many of the allegedly defamatory statements are prefaced with language expressly stating such. (See Yelp Review [“In my HONEST OPINION, she acts like a psychotic nutcase”; “I don't *think* Kern even has her doctor's license”; “Honest opinion, she needs to shut down her office and get treatment for her mental problems”] [emphasis added].) “While the use of words such as ‘misconduct’ and ‘malpractice’ may, viewed in isolation, seem to be assertions of provable fact, or claims supported by unstated facts, viewed in their context, these statements amount to the opinions and beliefs of dissatisfied clients about” the Plaintiff. (*Frechtman v Gutterman*, 115 AD3d 102, 106 [1st Dept 2014]; see also *P.D. & Associates v Richardson*, 2019 WL 4239227, at *5 [Sup Ct, NY County 2019] [“in the context of on-line sites such as Yelp, Facebook, and pissedconsumer.com, where users post criticisms of professional services, even such assertions as calling a person a thief, a liar, dishonest, corrupt and a scam artist may be found to amount to the opinions and beliefs of dissatisfied clients”].)

Finally, regarding Defendants’ statement that Plaintiff “has been reported for her threatening behavior and unethical, fraudulent practice of injecting an empty syringe,” that statement was actually true, as Defendants did report Plaintiff to the New York State Department of Health, which conducted and closed a malpractice investigation based on insufficient evidence. (NYSCEF Doc No. 12.) The alleged “unethical, fraudulent practice,” would be understood by a reasonable reader to be “mere *allegations* to be investigated rather than *facts*.” (*Brian v. Richardson*, 87 NY2d 46, 53 [1995].) Accordingly, the cause of action for defamation is dismissed.

Relatedly, the cause of action for tortious interference with prospective business relations is dismissed as duplicative, as it alleges no new facts and seeks no distinct damages from the defamation claim. (*Perez v Violence Intervention Program*, 116 AD3d 601, 602 [1st Dept 2014].)

Thus it is hereby

ORDERED that Defendants' motion sequence 001 to dismiss is granted and the complaint is dismissed in its entirety against Defendants, with costs and disbursements as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly.

10/25/2021

DATE

WILLIAM PERRY, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE