

Lewis v Schuster

2022 NY Slip Op 30750(U)

April 1, 2022

Supreme Court, New York County

Docket Number: Index No. 157975/2020

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 48EFM

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DONALD LEWIS,		INDEX NO. <u>157975/2020</u>
Plaintiff,		MOTION DATE _____
- v -		MOTION SEQ. NO. <u>001</u>
MITCHELL SCHUSTER,		
Defendant.		DECISION + ORDER ON MOTION

-----X

HON. ANDREA MASLEY:

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, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36 were read on this motion to/for DISMISS.

In motion sequence number 001, defendant Mitchell Schuster moves to dismiss the complaint, pursuant to CPLR 3211(a)(1) and (7), and for sanctions against pro se plaintiff Donald Lewis pursuant to CPLR 8303-a(a) and 22 NYCRR 130-1.

Lewis was a partner at nonparty Pierce Bainbridge Beck Price & Hecht LLP (Pierce Bainbridge). (NYSCEF Doc. No. [NYSCEF] 1, Complaint ¶ 31.) In November 2018, Lewis was terminated from Pierce Bainbridge after he was accused of sexual misconduct by Jane Doe, a former Pierce Bainbridge employee. (*Id.* ¶¶ 33-34, 36-37.) Lewis alleges that these allegations were in retaliation for expressing his concerns about the firm's financial misconduct. (*Id.* ¶ 32.)

In May 2019, Lewis commenced an action against Pierce Bainbridge and several Pierce Bainbridge partners, including David Hecht, for wrongful termination. (*Lewis v Pierce Bainbridge Beck Price & Hecht LLP, et al.*, Index No. 652931/2019 [Lewis Wrongful Termination Action] [commenced May 16, 2019].) Hecht is Schuster's client.

(NYSCEF 1, Complaint ¶ 35.) In June 2019, Lewis commenced a second action against Pierce Bainbridge and others for defamation. (*Lewis v Pierce Bainbridge Beck Price & Hecht LLP, et al.*, Index No. 155686/2019 [Lewis Defamation Action] [commenced June 7, 2019].) In October 2019, Lewis moved to amend the amended complaint in the Lewis Defamation Action to add Hecht, among others, as a defendant. (Lewis Defamation Action, NYSCEF 57, Notice of Motion [Motion. Seq. No. 004]; NYSCEF 61, Redline Proposed Second Amended Complaint.) That motion was denied without prejudice due to the arbitration stay in place. (Lewis Defamation Action, NYSCEF 192, Decision and Order [Motion Seq. No. 004].)

In January 2020, Lewis commenced an action against Jane Doe for defamation. (*Lewis v Doe*, Index No. 650644/2020 [Doe Action].) On August 31, 2020, Lewis filed an amended complaint against Jane Doe. (NYSCEF 1, Complaint ¶ 40). The amended complaint was the subject of an article covered by the *New York Law Journal* (Article). (*Id.*) Specifically, the Article detailed some of the allegations in the amended complaint, including the alleged ties between Doe and Schuster's client, Hecht. (NYSCEF 7, Article at 2.) The Article then goes on to state,

“Hecht's attorney, Meister Seelig & Fein partner Mitchell Schuster, said the filing was nothing more than an ‘attempt to deflect’ [Doe]'s allegations of sexual assault.

‘Instead of simply defending against the allegations in the federal court action as any innocent person would, Mr. Lewis amended his complaint in this action to provide a vehicle to further spread lies about Ms. [Doe] and others in the hope his own conduct would be overlooked,’ Schuster said in an emailed statement.

‘Indeed, Mr. Lewis amended his complaint because he knew that raising these baseless, unfounded allegations in his answer to the federal action would not be tolerated by a federal judge,’ the attorney said.”

(*Id.* at 3.)

To prevail on a CPLR 3211(a)(1) motion to dismiss, the movant has the “burden of showing that the relied upon documentary evidence ‘resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim.’” (*Fortis Fin. Servs. v Filmat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [citation omitted].) “A cause of action may be dismissed under CPLR 3211 (a) (1) ‘only where the documentary evidence utterly refutes [the] plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.’” (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [citation omitted].) “The documents submitted must be explicit and unambiguous.” (*Dixon v 105 West 75th St. LLC*, 148 AD3d 623, 626 [1st Dept 2017] [citation omitted].) Their content must be “essentially undeniable.” (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019] [citation omitted].) The authenticity of documentary evidence must not be subject to genuine dispute, and it must be enough to “support the ground on which the motion is based.” (*Amsterdam Hosp. Grp., LLC v Marshall-Alan Assocs., Inc.*, 120 AD3d 431, 432 [1st Dept 2014] [citation omitted].)

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 within any cognizable legal theory.” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) “[B]are legal conclusions, as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence” cannot survive a motion to dismiss. (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted].)

“The elements of a claim 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. CPLR 3016 (a) requires that in a defamation action, the particular words complained of ... be set forth in the complaint.

In evaluating whether a cause of action for defamation is successfully pleaded, the words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction. [C]ourts will not strain to find defamation where none exists. Loose, figurative or hyperbolic statements, even if deprecating the plaintiff, are not actionable.”

(*Dillon v City of NY*, 261 AD2d 34, 38 [1st Dept 1999] [internal quotation marks and citations omitted].)

Schuster asserts that the statements in the Article are expressions of his opinion, and not assertions of fact, deeming them privileged. “Whether a particular statement constitutes an opinion or an objective fact is a question of law.” (*Mann v Abel*, 10 NY3d 271, 276 [2008] [citation omitted].) When distinguishing fact from opinion, a court should consider the following:

“(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.”

(*Id.* [internal quotation marks and citation omitted].) “A pure opinion may take one of two forms. It may be ‘a statement of opinion which is accompanied by a recitation of the facts upon which it is based,’ or it may be ‘[a]n opinion not accompanied by such a factual recitation’ so long as ‘it does not imply that it is based upon undisclosed facts.’”

(*Davis v Boenheim*, 24 NY3d 262, 269 [2014], quoting *Steinhilber v Alphonse*, 68 NY2d 283, 289 [1986] [citation omitted].)

Schuster's first statement that "the filing was nothing more than an 'attempt to deflect' [Doe]'s allegations of sexual assault" is an expression of opinion speculating why Lewis filed the amended complaint in the Doe Action. Schuster's second statement that "[i]nstead of simply defending against the allegations in the federal court action as any innocent person would, Mr. Lewis amended his complaint in this action to provide a vehicle to further spread lies about Ms. [Doe] and others in the hope his own conduct would be overlooked" is also an opinion clearly speculating as to why Schuster believed Lewis filed the amended complaint. Finally, Schuster's third statement that "[i]ndeed, Mr. Lewis amended his complaint because he knew that raising these baseless, unfounded allegations in his answer to the federal action would not be tolerated by a federal judge" is also an opinion. Once again, Schuster was clearly giving his opinion as to why he believed Lewis amended the complaint.

Looking at the statements in context of the Article as a whole, a reasonable reader would have no reason to believe that the statements at issue were conveying facts about plaintiff. (*Id.* at 270 [citation omitted].) Further, these statements are not mixed opinions, implying that they are "based upon facts which justify the opinion but are unknown to those reading or hearing it." (*Id.* at 269 [internal quotation marks and citation omitted].) No matter how offensive these statements are to Lewis, they are "not 'reasonably susceptible of a defamatory connotation.'" (*Bacon v Nygard*, 189 AD3d 530, 531 [1st Dept 2020] [citation omitted].) All remaining arguments have been considered. Schuster's motion to dismiss is granted.

Schuster also seeks an award of sanctions against Lewis pursuant to CPLR 8303-a(a) and 22 NYCRR 130-1 for costs and reasonable attorneys' fees.

CPLR 8303-a(a) provides that “[i]f in an action to recover damages for personal injury, injury to property or wrongful death, ... and such action or claim is commenced or continued by a plaintiff ... and is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs and reasonable attorney’s fees not exceeding ten thousand dollars.” Personal injury actions include defamation claims. (General Construction Law § 37-a [“Personal injury’ includes libel, slander and malicious prosecution”].) Sanctions are available to a defendant in a defamation action, pursuant to CPLR 8303-a, but the action has to be more than meritless, “it must be brought or continued in bad faith.” (*McGill v Parker*, 179 AD2d 98, 111 [1st Dept 1992], citing CPLR 8303-a[c][ii].)

22 NYCRR 130-1.1(a) provides for similar relief, in that “the court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney’s fees, resulting from frivolous conduct as defined in this Part.” 22 NYCRR 130-1.1(c) defines frivolous conduct as (1) filing an action that is completely without merit and cannot be supported by reasonable argument; (2) delaying or prolonging an action or filing an action to harass or maliciously injure; or (3) asserting factual statements that are false.

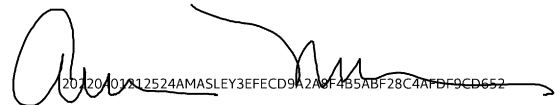
Schuster argues that this defamation action was brought in bad faith to harass him. Specifically, Schuster asserts that this lawsuit was brought in response to a letter Schuster wrote to Lewis, dated September 25, 2020, advising Lewis to cease and desist

from publishing false allegations against Hecht. (NYSCEF 31, Schuster Letter.) The letter stated that, if Lewis continued to make false allegations, Schuster would file suit against Lewis on behalf of Hecht. (*Id.*) Lewis instituted this action on September 28, 2020, three days later.

Although the court is troubled by the timing of this lawsuit, defendant fails to offer sufficient evidence to conclude that this action was brought in bad faith especially when the Article was published on September 2, 2020. The court cannot conclude that it was filed in retaliation to the September 25, 2020 letter.

Accordingly, it is

ORDERED that defendant Schuster’s motion to dismiss is granted, in part, in so far as the complaint is dismissed in its entirety, with costs and disbursements to defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendant.



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4/1/2022
DATE

ANDREA MASLEY, J.S.C.

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