

<b>Lewis v Doe</b>
2022 NY Slip Op 31071(U)
April 1, 2022
Supreme Court, New York County
Docket Number: Index No. 650644/2020
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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DONALD LEWIS,		INDEX NO. <u>650644/2020</u>
Plaintiff,		MOTION DATE _____
- v -		MOTION SEQ. NO. <u>003</u>
JANE DOE,		
Defendant.		<b>DECISION + ORDER ON MOTION</b>

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 54, 55, 56, 57, 58, 59, 60  
 were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

In motion sequence number 003, defendant Jane Doe moves, pursuant to CPLR 3211(a)(1) and (7), for dismissal of plaintiff Donald Lewis's amended complaint, or alternatively, pursuant to CPLR 3024, to strike portions of the amended complaint. Defendant also requests that, if the motion to dismiss is denied, that defendant be granted ten days after service of Notice of Entry to file an answer and any counterclaims.

This dispute arises out of a series of interrelated lawsuits filed by and against Lewis. The following facts are alleged in the amended complaint unless noted otherwise, and for purposes of this motion, are accepted as true.

Doe was employed at Lewis's former employer, Pierce Bainbridge Beck Price & Hecht LLP (Pierce Bainbridge). (NYSCEF Doc No. [NYSCEF] 38, Amended Complaint [AC] ¶ 2.) In May and June 2019, Lewis commenced two actions against Pierce

Bainbridge and others. (*Lewis v Pierce Bainbridge Beck Price & Hecht LLP, et al.*, Index No. 652931/2019 [Lewis Wrongful Termination Action] [commenced May 16, 2019]; *Lewis v Pierce Bainbridge Beck Price & Hecht LLP, et al.*, Index No. 155686/2019 [Lewis Defamation Action] [commenced June 7, 2019].) Doe was not named in either lawsuit. (*Id.*; see also NYSCEF 38, AC ¶ 2.) Both of these actions were assigned to this court.

On May 15, 2019, Pierce Bainbridge commenced an action against Lewis and his counsel. (*Pierce Bainbridge Beck Price & Hecht LLP v Lewis, et al.*, Index No. 154910/2019 [Pierce Action].) This action was assigned to the Hon. Doris Ling-Cohan and later assigned to the Hon. Verna Saunders upon Justice Ling-Cohan's retirement. (*See id.*)

When Pierce Bainbridge initiated the Pierce Action, it also filed an ex parte Order to Show Cause (OSC), requesting that the action be sealed. (Pierce Action, NYSCEF 5, OSC [motion seq. no. 001].) The Ex Parte Judge signed the OSC to permit the action to be filed under seal pending argument on the seal motion. (*Id.*) Pierce Bainbridge discontinued the Pierce Action in August 2019 without the OSC having been heard. (Pierce Action, NYSCEF 7, Notice of Discontinuance.) After the discontinuance was filed, the OSC was deemed abandoned and denied; however, the docket remained under seal. (Pierce Action, NYSCEF 8, Decision and Order [motion seq. no. 001]; Pierce Action, NYSCEF 37, Decision and Order [motion seq. no. 002].) On March 16,

2021, Justice Saunders, upon a post-disposition motion, unsealed the docket. (Pierce Action, NYSCEF 37, Decision and Order [motion seq. no. 002].)<sup>1</sup>

In November 2019, Lewis moved in the Lewis Defamation Action, by OSC, to obtain certain discovery and unseal the Pierce Action. (Lewis Defamation Action, NYSCEF 74, OSC [motion seq. no. 005].) In January 2020, Doe, as a nonparty, filed an OSC in response to Lewis's OSC, requesting that the Pierce Action remain sealed and the Confidential Investigation Report also remain sealed, or in the alternative, issue a protective order limiting plaintiff's viewing of the Report. (Lewis Defamation Action, NYSCEF 126, OSC [motion seq. no. 006].) Doe's affidavit, dated December 23, 2019, filed in support of her OSC is the subject of this action. (Lewis Defamation Action, NYSCEF 133, Doe Aff.; see also NYSCEF 38, AC ¶¶ 1, 33; NYSCEF 39, Doe Aff.) In her affidavit, Doe states that she was sexually assaulted by Lewis in July 2018. (NYSCEF 39, Doe Aff. ¶ 6.) Lewis asserts that Doe's statement that she was sexually assaulted by Lewis is false, and the sole purpose of the Doe affidavit was to defame and malign him.

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

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<sup>1</sup> Lewis's counsel e-filed notice of the decision to the County Clerk on June 28, 2021. (Pierce Action, NYSCEF 41.)

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.’”

(*Dillon v City of NY*, 261 AD2d 34, 38 [1st Dept 1999] [citations omitted].) “[T]he legal question for the court on a motion to dismiss is whether the contested statements are reasonably susceptible of a defamatory connotation.” (*Equinox Mgt. Group, Inc. v Guardian Life Ins. Co. of Am.*, 28 AD3d 246, 247 [1st Dept 2006] [citation omitted].)

Here, Doe argues that the statement, made during litigation, is privileged, and therefore, Lewis cannot demonstrate the element “published without privilege.” Where a statement is made during litigation, if it “is pertinent to litigation[,] [it] is absolutely privileged and cannot form the basis of a defamation action.” (*Flomenhaft v Finkelstein*, 127 AD3d 634, 637 [1st Dept 2015].) The privilege extends “to all pertinent communications among the parties, counsel, witnesses, and the court.” (*Frechtman v Gutterman*, 115 AD3d 102, 107 [1st Dept 2014] [internal quotation marks and citation omitted].) There is a public policy interest in this privilege as “to allow [pertinent] statements to be a basis for a defamation action would be an impediment to justice, because it would hamper the search for truth and prevent making inquiries with that freedom and boldness which the welfare of society requires.” (*Front, Inc. v Khalil*, 24 NY3d 713, 718 [2015] [internal quotation marks and citation omitted].) In determining whether statements are pertinent to litigation, the court applies an “extremely liberal test,” evaluating whether the offending statement is “outrageously out of context.” (*Flomenhaft*, 127 AD3d at 637 [internal quotation marks and citations omitted].)

Doe’s statement that she was sexually assaulted was pertinent to the Lewis Defamation Action in so far as Lewis had moved to unseal the Pierce Action and obtain the Confidential Investigation Report, containing identifying personal information potentially revealing Doe’s identity. Doe made the statement in connection with her OSC to maintain the seal status of the Pierce Action and a Confidential Investigation Report. Doe’s statement was part of her account as to why she did not want these documents unsealed. Doe’s affidavit outlined the basic facts around the events underlying the Lewis Defamation Action and the potential harm faced if the information

were to be released to the public. Doe's statement is by no means "outrageously out of context" and was central to the issue presented by Lewis's OSC to unseal. Thus, this statement is afforded absolute privilege.

Lewis presents several arguments in response to Doe's motion to dismiss. First, he argues that Doe's OSC and an affidavit were impertinent since the court had already ruled on the sealing issue. The court, on the record, denied the portion of Lewis's motion seeking to unseal the Pierce Action, which was not before this court. There is no indication that Doe, a nonparty, was present for that argument and the transcript does not appear on the docket of the Lewis Defamation Action.<sup>2</sup> On May, 11, 2020, the court issued a written decision, ruling on the remaining issue of disclosure of the Confidential Investigation Report finding that the motion was premature and mentioned its decision on the unsealing of the Pierce Action in a footnote. (Lewis Defamation Action, NYSCEF 193, Decision and Order [motion seq. no. 005].) This decision was issued months after Doe's January 2020 OSC. Further, the court clearly did not find Doe's OSC impertinent as it partially granted her requested relief. (Lewis Defamation Action, NYSCEF 173, Decision and Order [motion seq. no. 006].)

Next, Lewis argues that the affidavit and OSC were impertinent given he had voluntarily agreed not to disclose the information. In his complaint, Lewis alleges that "[t]he Defamatory Affidavit could have been rendered unnecessary with a phone call or an e-mail." (NYSCEF 38, AC ¶ 22.) This is speculative. Further, Lewis's "agreement" not to disclose the information is irrelevant as to unsealing the Pierce Action which Doe

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<sup>2</sup> Lewis shall e-file the Transcript for Motion Seq. No. 005 immediately in the Lewis Defamation Action.

was also trying to prevent. (See *Mosallem v Berenson*, 76 AD3d 345, 350-351 [1st Dept 2010] [citations omitted] [parties cannot consent to seal].) When an action is unsealed, it becomes publicly available and there can be no agreement otherwise.

Lewis also argues that Doe's filing amounts to sham litigation. This court disagrees. When considering if an action constitutes a "sham litigation," courts consider the context around the action, including whether the party continues to pursue after the initial filing. (*Peck v Peck*, 2018 NY Slip Op 30990[U], \* 19 [Sup Ct, NY County 2018].) Here, Doe filed, and this court partially granted the seal order. Lewis also focuses on the fact that Doe's requested relief was only partially granted. "[T]hat a proceeding is ultimately unsuccessful, however, does not negate the privilege as such a limitation would 'substantially contravene the policy that underlies the privilege.'" (*Peck*, 2018 NY Slip Op 30990[U], \*14.)

Lewis cites *Williams v Williams*, 23 NY2d 592 [1969], among others, to support his argument that this was a sham litigation. However, as the *Williams* Court states, "[o]ur holding today in no way infringes upon the right of a person to bring an action or to say or write material pertinent to a suit within the confines of that action." (*Id.* at 599.) In other words, while motive and context matter, the first step of the inquiry is to determine if the statements were pertinent.

Lewis also asserts that Doe's actions preceding the filing her affidavit evidence the abusive nature of her affidavit. Specifically, Lewis argues that Doe publicized her name and posted other personal identifying information on the internet and also acknowledged that her anonymity had been lost prior to January 2020 when Pierce Bainbridge publicized it in a California action.

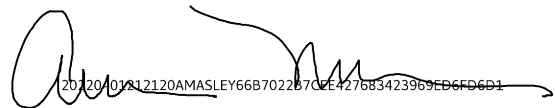
The amended complaint focuses on the fact that Doe’s August 2020 SDNY complaint in an action filed against Lewis identifies her. This does not indicate an ulterior motive when Doe filed her affidavit several months prior. In fact, Lewis alleges that, in the SDNY complaint, Doe alleges that Lewis and Pierce Bainbridge had exposed her identity and/or identifying information. (NYSCEF 38, AC ¶¶ 16-17.) In January 2020, even if Doe’s identity was previously exposed, she still had a right to seek protection of her privacy and avoid further exposure. This attempt to manufacture an ulterior motive must fail.

Finally, Lewis argues that Doe’s OSC, in a matter where she was not a party, was procedurally improper, and therefore, the motion to dismiss should be denied. Any alleged procedural deficiencies in a separate action should have been raised in that separate action at the time the motion was made.

All remaining arguments have been considered and are without merit.

Accordingly, it is

ORDERED that Jane Doe’s motion to dismiss the complaint is granted, and the complaint is dismissed in its entirety as against defendant, 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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<u>4/1/2022</u> DATE					<u>ANDREA MASLEY, J.S.C.</u>
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 <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE