

Isaly v Garde

2022 NY Slip Op 32203(U)

July 11, 2022

Supreme Court, New York County

Docket Number: Index No. 160699/2018

Judge: James d'Auguste

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

PRESENT: HON. JAMES D'AUGUSTE PART 55

Justice

-----X

SAMUEL ISALY,

Plaintiff,

- v -

DAMIAN GARDE, DELILAH BURKE,

Defendant.

-----X

INDEX NO. 160699/2018

MOTION DATE _____

MOTION SEQ. NO. 003 004

**DECISION + ORDER
ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 51, 53, 55, 56, 57, 58, 59, 65, 67, 70, 71, 72, 74, 75, 76, 77, 81, 82, 87, 88, 89, 92, 93, 94, 95, 96, 97, 99, 101, 102, 107, 108, 110, 112, 113, 116, 118, 119, 121, 123, 124

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 44, 45, 46, 47, 48, 49, 54, 60, 61, 62, 63, 64, 66, 68, 69, 73, 78, 91, 98, 100, 103, 104, 105, 106, 109, 111, 114, 115, 117, 120, 122, 125, 126

were read on this motion to/for DISMISS.

Motion Sequence Nos. 003 and 004 are consolidated for disposition herein.

Plaintiff Samuel Isaly (Isaly) commenced this defamation action against a journalist, defendant Damian Garde (Garde), and one of his sources, defendant Delilah Burke (Burke), based upon news articles containing accusations of sexual harassment. Defendants separately move for dismissal of the Amended Complaint (the Complaint) [NYSCEF Doc. No. 22] for failure to state a claim under CPLR 3211(a)(7). The motions are granted.

BACKGROUND

The following facts are taken from the Complaint and the article annexed thereto, and the transcript of interviews [NYSCEF Doc. No. 57] conducted by Garde with Isaly and other executives and employees of plaintiff's company. Garde is a reporter for STAT, an online news

service published by Boston Globe Media Partners, LLC. (“the Globe”) Compl., ¶6. Isaly is the founder of OrbiMed, and for many years served as its Managing Partner. *Id.* ¶4.

On April 5, 2017, Garde published an article (the Article) [NYSCEF Doc. No. 23] on the Globe’s website entitled "Biotech hedge fund titan Sam Isaly harassed, demeaned women for years, former employees say."¹ Burke, who served as Isaly's executive assistant at OrbiMed during parts of 2009 and 2010, was the alleged source of some of the Article’s allegations, and the only source who spoke on the record. In addition to the headline, paragraph 12 of the Complaint asserts that the following passages from the Article are “individually false and defamatory per se”:

- a. Five people who once worked at investing giant OrbiMed Advisors said Sam Isaly, the firm's 72-year-old managing partner, kept a set of breast implants on his desk, palpating them like stress balls during idle conversation. He wantonly demeaned and verbally abused female employees, they said.
- b. One woman said on several occasions, she glimpsed hardcore pornography playing on the large screens that dominated the trading room floor of the \$15 billion fund.
- c. Four women said they repeatedly complained about Isaly's behavior to senior executives at OrbiMed, getting sympathy, but no action. Though their jobs paid well and came with many perks, the boorish environment eventually drove each to quit, the women said.
- d. "I'm scarred," Delilah Burke, who was Isaly's assistant for about 18 months beginning in 2009, said in an interview with STAT. "I still have anxiety from that job-now, years later."
- e. And the assistants, young and replaceable compared with investment professionals, said they felt they had no recourse as Isaly routinely sexualized the workplace and harassed them, seeming to delight in their resulting discomfort.
- f. Burke, now 37, said her first jarring experience at OrbiMed came within months of starting. Leaving her desk and entering the firm's hectic trading floor, she found that one of the big-screen monitors had been switched away from financial news and was instead playing hardcore pornography, she said, an apparent prank to the dozen male traders doing their work below it.

"At first I was like, 'Oh, the trading room is just insane," she said. But things quickly escalated.

¹ The parties have submitted a version of the Article as updated after the date of publication.

Two days after this incident, Burke said Isaly called her into his office under the pretense of needing an important document. When she came around his desk, one of his monitors was playing a pornographic video, she said, and he beamed at her stunned reaction.

- g. Dismayed, she [Burke] began chronicling Isaly's behavior by sending notes to herself on her personal email account. In 10 of those contemporaneous emails, shared with STAT, she recounts in terse shorthand indignities including "hooker joke" and "dirty pie."

Isaly would embed pornographic images or videos in seemingly innocent emails on an almost daily basis, she said. Then he'd laugh at her revulsion upon discovering them, she said.

- h. He would sprinkle his to-do lists for her with dirty jokes and cryptic setups that would expose Burke to something lewd on the internet, she said. For example, on April 15, 2010, his daily list of tasks included "look up kit kat shuffle," Burke said. She ignored the command, knowing from experience where it would likely lead. Had she followed Isaly's instructions, she would have found that the phrase is a euphemism for masturbation.
- i. For Burke, the final indignity came on Aug. 12, 2010. She said Isaly called her into his office and asked her to retrieve a file from his briefcase. When she opened it, she found a flesh-colored vibrator sitting atop his effects, she said. The next sound was Isaly's booming laughter from across the office, she said.

"The vibrator thing is when I quit," Burke said. "It was just, 'You're disgusting. I'm leaving. This is it.'"

- j. A former investment professional at OrbiMed said Isaly's behavior-and its effects on women in the workplace-were widely known among the firm's leaders.

"People knew that Sam definitely crossed the line," he said. "There was a lot of cringing, even at the partner level, but not much got done about it."

- k. "No ethical person would work there for more than a few years," Burke said. "You make your money, and then you leave."

The Article also recites that "Isaly denied allegations of sexual harassment and pornography in the workplace" and acknowledges that "[n]one of the five former employees who spoke with STAT alleged that Isaly touched them physically in a sexual way." However, the Article noted that the firm's head of human relations first claimed that there had never been complaints about plaintiff, but later stated that the firm had investigated claims against plaintiff and had

concluded none rose to the level of "sexually egregious behavior." Additionally, the Article contains the following passages added after the original publication:

Moments after this story was published Tuesday evening, OrbiMed issued a statement saying, "The incidents cited are concerning and OrbiMed has retained the services of an outside independent law firm to investigate the matter. OrbiMed takes gender equality seriously and wishes to encourage a supportive work environment and equal opportunity for all employees."

Earlier Tuesday, shortly before the story was published, OrbiMed partner Carter Neild had emailed STAT: "If this article proceeds, I hope that you will be fair and focus on the person responsible, not the entire firm."

Isaly alleges that Burke knew the claims listed in paragraph 12 were false as they had no basis in her actual personal experience with him. Compl. ¶ 7. Isaly further alleges that Garde should have viewed the accusations with great suspicion, and that for a number of reasons it was grossly irresponsible for him to publish the allegations without further investigation.

The Complaint sets forth a single cause of action sounding in defamation against both defendants and seeks punitive damages and attorney's fees. In his motion, Garde argues that the Complaint fails to sufficiently plead that he acted with gross irresponsibility in reporting the allegations against Isaly. Garde further argues that the action should be dismissed under the doctrines of res judicata and collateral estoppel because of a decision in a related federal action that dismissed an identical defamation cause of action against the news publication that published the subject article, which was affirmed by the Second Circuit. *See, Isaly v. Boston Globe Media Partners, LLC*, No 18-CV-9620 (LTS) (GWG) (SDNY, Sept 23, 2020), *aff'd by, Isaly v. Boston Globe Media Partners, LLC*, No 21-CV-1330 (2d Cir., Jan. 13, 2022). Burke's motion papers incorporate by reference all of Garde's factual and legal arguments. Both defendants also seek to avail themselves of the protections of New York's Anti-SLAPP law, as amended in 2020, and move to dismiss Isaly's defamation claim, and to recover attorney's fees, on that basis. Additionally,

defendants claim that the subsidiary meaning and incremental harm doctrines bar any recovery for any defamatory statements alleged to require physical mobility by plaintiff.

DISCUSSION

Motion Sequence Number 001 (Garde)

For purposes of this motion, it appears that the parties do not dispute that Isaly is not a public figure, and also that the Article at issue explored a matter of legitimate “public concern.” Even if this issue was in dispute, the extensive body of New York caselaw supports such a finding. *See, e.g.*, *Albert v. 10 Loksen*, 239 F3d 256, 269 (2d Cir 2001) (New York courts have given an “extremely broad interpretation” to speech of “public concern.”); *Chapadeau v Utica Observer-Dispatch, Inc.*, 38 NY2d 196, 199 (1975) (Speech of public concern includes in any speech “reasonably related to matters warranting public exposition.”); *Huggins v. Moore*, 94 NY2d 296, 303 (1999) (Speech will fit into the category of public concern “so long as some theme of legitimate public concern can reasonably be drawn from their experience.”). As such, “the party defamed must establish by preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.” *Chapadeau*, at 38 NY2d 196, 199 (1975); *Huggins*, at 94 NY2d 296, 302 (1999); *Starlight Rainbow v WPIX, Inc.*, 179 AD3d 561, 561–62 (1st Dept 2020).

For news publications and their journalists, the standard “demands no more than that a publisher utilize methods of verification that are reasonably calculated to produce accurate copy,” *Karaduman v Newsday, Inc.*, 51 NY2d 531, 549 (1980). Such “[a]ccepted standards of journalism require neither exhaustive research nor painstaking judgments.” *Med-Sales Assocs., Inc. v. Lebharr-Friedman, Inc.*, 663 F Supp 908, 913 (SDNY 1987) (quoting *DeLuca v. New York News*, 109 Misc 2d 341, 350 (Sup Ct 1981)).

The decision of the United States District Court for the Southern District of New York, affirmed by the Court of Appeals for the Second Circuit, has res judicata and collateral estoppel effect on the instant action in relation to Garde. In general, courts treat federal court dismissals as adjudications on the merits for res judicata purposes. *See, McLearn*, 48 NY2d at 698-99 (New York Court of Appeals determining that federal court’s dismissal “for failure to state a cause of action” was “on the merits.”); *see also, Giacamazzo v. Moreno*, 94 AD2d 369, 372 (1st Dept 1983) (“[u]nless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19 operates as an adjudication upon the merits.”). Here, the dismissal of Isaly’s federal complaint against the Globe was based on the court’s determination that Isaly’s allegations, accepted as true for purposes of the motion, did not establish that the Globe acted with gross irresponsibility. In reaching that decision, the federal court relied on documents outside Isaly’s Complaint; namely, the allegedly defamatory article itself and the transcript of Garde’s interview of Isaly, which further demonstrates the federal decision was a decision on the merits. In affirming the District Court decision, the Second Circuit also stated that, even “accepting as true all factual allegations and drawing all inferences in the plaintiffs favor,” Isaly’s allegations did not demonstrate “gross irresponsibility” by the Globe. The Second Circuit also rejected Isaly’s argument that, based on his pre-publication interview of Isaly, Garde should have concluded that his sources’ statements (including statements by Ms. Burke) about Isaly’s conduct were impossible in light of Isaly’s physical condition. As defendant Garde in the instant action sits in the exact same shoes as defendant Globe in the federal action (i.e., the journalist and the news publication by which the journalist is employed), dismissal is granted as against Garde under the doctrines of res judicata and collateral estoppel.

Even without the res judicata and collateral estoppel effect of the related federal action, this Court, independent of the federal courts, similarly dismiss the action as against Garde as plaintiff has not alleged facts from which a fact finder could properly infer that defendant Garde was grossly irresponsible in his reporting.

Motion Sequence Number 002 (Burke)

Isaly's failure to sufficiently plead facts supporting gross irresponsibility as against Garde does not shield Burke from liability for defamation. Rather, the question of whether Garde (and the Globe) acted responsibly in believing Burke in relation to their decision to publish the information relayed to them by Burke (and the other sources) is a wholly separate question from whether Burke's accusations were in fact false. In other words, even if Garde's (and the Globe's) trust in Burke's accusations were reasonable, such facts would not necessarily defeat Isaly's claim against Burke if Garde's (and the Globe's) trust proves to have been misplaced.

Regarding the applicability of res judicata and collateral estoppel in relation to Burke, the dismissal in the federal action against the Globe was based solely on the issue of gross irresponsibility on the part of that news publication, and by extension its reporter, Garde, and whether the Globe (and by extension, Garde) was grossly irresponsible for relying on information provided by Burke and the other sources. The federal court determined that there were no facts to support that the news publication (and by extension its journalist employee) acted with gross irresponsibility in relying on the representations of their sources (including Burke) in publishing the article. That is not, however, the same question regarding liability for defamation as against Burke, who is not a journalist and who based her statements on her own alleged firsthand observations. Consequently, the decision on the issue of gross irresponsibility that was before the federal court in relation to the Globe (and by extension, Garde) has no preclusive effect as against Burke. Accordingly, as Burke's liability for alleged defamation is independent of Garde's liability,

the Court must review the specific alleged defamatory statements that Burke allegedly published to Garde in deciding whether dismissal against Burke is warranted.

It appears that the only allegations that attribute specific words published by Burke to Garde is the following:

1. "I'm scarred."
2. "I still have anxiety from that job-now, years later."
3. "At first I was like, 'Oh, the trading room is just insane.'"
4. "The vibrator thing is when I quit." "It was just, 'You're disgusting. I'm leaving. This is it.'"
5. "No ethical person would work there for more than a few years." "You make your money, and then you leave."

None of the specific statements attributed personally to Burke are defamatory. Rather, each of these alleged specific statements are vague, ambiguous, opinion, and/or merely expressions of Burke's own feelings and emotions. As such, Burke is entitled to dismissal of the Complaint.

Application of the Anti-SLAPP Law (Motion Sequence Numbers 003 and 004)

In November 2020, the State's Anti-SLAPP law was amended to expand the protections available to defendants facing lawsuits arising out of constitutionally protected speech on matters of public interest and provides for a non-discretionary award of attorney's fees to prevailing defendants. N.Y. Civ. Rights Law § 76-a(1)(a)(1)–(2). As amended, the statute requires a plaintiff in such a lawsuit to establish "by clear and convincing evidence that any communication which gives rise to the action made with knowledge of the falsity or with reckless disregard of whether it was false." Both defendants assert that Isaly's complaint is nothing more than a strategic lawsuit against public participation (a "SLAPP" suit) and therefore covered under New York's Anti-SLAPP law, as amended. Defendants acknowledge that the speech giving rise to instant action, as

well as the filing of the Amended Complaint, predates the enactment of the Anti-SLAPP law amendments, but they argue that such amendments should be applied retroactively to cases still pending at the time of these amendments. Accordingly, defendants argue, they are entitled not only to dismissal of the action based upon the higher statutory standards applicable to defamation claims involving “issues of public interest,” they also claim they are entitled to recover attorney fees and costs if they prevail in dismissing plaintiff’s complaint.

As an initial matter, the Court finds that the action does arise out of speech on an “issue of public interest” as contemplated by the amended statute. Although the Court, applying common law standards, has dismissed the defamation cause of action against both defendants for the reasons discussed herein, the Court is unable to apply the recently amended Anti-SLAPP Law retroactively. All alleged statements and publications at issue in the instant action took place in 2017, and Isaly commenced his lawsuit in 2018, well before the enactment of the Anti-SLAPP law amendments in November 2020. Notably, the Appellate Division, First Department has held that these amendments do not apply retroactively. *See, Gottwald v. Sebert, et. al.*, 203 AD3d 488 (1st Dept 2022) (finding that “there is insufficient evidence supporting the conclusion that the legislature intended its 2020 amendments to the [anti-SLAPP] law to apply retroactively to pending claims.”). Thus, while it is quite feasible that the defendants’ allegedly defamatory statements might have been otherwise protected under the amended Anti-Slap Law, the Court is currently precluded from applying the new law to any such actions commenced prior to its enactment.²


² The Court notes that there is proposed legislation in the New York State Legislature, sponsored by Senator Brad Hoylman, that would potentially establish retroactivity of the Anti-SLAPP law amendments to pending litigation. *See*, 2022 NY Senate Bill No S9239, a bill “[t]o clarify that chapter 250 of the laws of 2020, enhancing anti-SLAPP protections, applied to cases pending on the effective date of the law, and to make other necessary changes to clarify anti-SLAPP procedures and the substantial basis standard.”

Additional Arguments

Based upon the foregoing, the Court need not address defendants’ reliance on the subsidiary meaning doctrine (*see Herbert v Lando*, 781 F2d 298, 312 (2d Cir. 1986); *Church of Scientology Int'l v Time Warner, Inc.*, 932 F Supp 589 (SDNY 1996) and the overlapping incremental harm doctrine (*Jewell v NYP Holdings, Inc.*, 23 F Supp 2d 348, 387 [SDNY 1998]; *Simmons Ford, Inc. v Consumers Union of the United States, Inc.*, 516 F Supp. 742, 750 [SDNY 1981]; *161 Ludlow Food, LLC v L.E.S. Dwellers, Inc.*, 2018 WL 3910990 [Sup Ct 2018]).

Accordingly, defendants’ motions are granted to the extent of dismissing Isaly’s amended complaint in its entirety and otherwise denied.

This constitutes the decision and order of the Court.

<p><u>7/11/2022</u> DATE</p>		 <hr/> JAMES D'AUGUSTE, J.S.C.																				
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