Dugan v Berini
2022 NY Slip Op 33774(U)
October 28, 2022
Supreme Court, Kings County
Docket Number: Index No. 525698/21
Judge: Karen B. Rothenberg
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At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 28th day of October 2022.

P R E S E N T:

HON. KAREN B. ROTHENBERG,
Justice.

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SEAN DUGAN,
Plaintiff,

-against- Index No.: 525698/21

ANTHONY BERINI,
Defendant,

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The following e-filed papers read herein:	NYSCEF Doc. Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	3, 6-8
Opposing Affidavits (Affirmations)	
Affidavits/ Affirmations in Reply	25-26

Upon the foregoing papers, defendant Anthony Berini moves for an order, pursuant to CPLR 3211 (a) (7) and 3211 (g), dismissing the complaint (M.S. 1). Plaintiff Sean Dugan cross-moves for an order, pursuant to CPLR 3025, granting him leave to amend the complaint (M.S. 2).

Defendant's motion is granted to the extent that the second cause of action for intentional infliction of emotional distress, the third cause of action for false

impersonation, and the fourth cause of action for an injunction are dismissed. The motion is otherwise denied.

Plaintiff's cross motion is granted to the extent that he is granted leave to amend the complaint with respect to the first cause of action for defamation and is otherwise denied.

Background

Plaintiff, alleges that he was a student at Adelphi University who graduated in May 2021. Although he did not know defendant personally, he "knew of defendant" as a member of some clubs at Adelphi. In the fall of 2020, plaintiff began to receive messages from defendant on a social media platform known as "GroupMe," to which defendant repeatedly asked plaintiff for a response. Plaintiff did not respond. In or about 2021, defendant created an Instagram account entitled "secretadelphiaconfessions," and, among other things, posted a photograph of what is identified as plaintiff's room. In June 2021, defendant changed the name of the account to "seanduganadelphi" (the Account) and changed the photograph associated with the Account to one of plaintiff.

Using the Account defendant, masquerading as plaintiff, posted comments in June 2021 that addressed issues faced by students of color at Adelphi. These comments included: "If y'all are really complaining about Adelphi then just move, you staying there is only giving them money," in response to a another poster saying that he or she had graduated, "shoot you not then why you complaining," and "Not everything is about race," and one in which he referred to Black people as "colored people". On June 5, 2021, in another post using the Account, defendant posted a screen shot of Instagram

messages in which the other person said "I have his dick picture," to which defendant said, "that's disgusting don't send me that . . . wait why would he send it" and the person responded by saying "Because he's disgusting. He send it to a group with 14 year olds." Defendant, still masquerading as plaintiff, commented on the post "you gotta do something about @seanyyy.d".

Plaintiff represents that, on or about June 3, 2021, he reported defendant's activities to the Adelphi Public Safety Office, where plaintiff was informed they were already aware of defendant's online harassment of other students, and the officers took a report from plaintiff. The Adelphi Public Safety Office referred plaintiff to the New York City Police Department (NYPD) as plaintiff was no longer a student at Adelphi. After making a report to his local NYPD precinct, plaintiff was informed that detectives from Computer Crimes had spoken to defendant at his home on or about June 8, 2021, and directed that defendant remove the "defamatory" statements and cease and desist in impersonating plaintiff. Plaintiff also asserts that the detectives informed him that they contacted the person who sent the text messages and he had admitted that he invented the allegations. In response to the police directives the Account was apparently deactivated from June 9, 2021, through July 3, 2021, however it was reactivated again in plaintiff's name, on July 4, 2021 along with the posts at issue. The account was again deactivated on or about July 9, 2021 after detectives once again contacted plaintiff and/or his parents. On or about October 23, 2021, defendant reactivated the Account as a "private" account under the name secretadelphiaconfessions containing the same posts as the prior Account.

Discussion

In considering a motion to dismiss a complaint 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" (*Mawere v Landau*, 130 AD3d 986, 988 [2015] [internal quotation marks omitted]; *see J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334 [2013]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). A court may also freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*see Leon*, 84 NY2d at 88). Where such evidentiary material has been submitted and considered on the motion to dismiss and the motion has not been converted into one for summary judgment, "'the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one'" (*U.S. Bank N.A. v Herman*, 174 AD3d 831, 832 [2019], *quoting Rabos v R&R Bagels & Bakery, Inc.*, 100 AD3d 849, 852 [2012]; *see Leon*, 84 NY2d at 88).

Defendants contend, inter alia, that plaintiff's action is a strategic lawsuit against public participation (hereinafter SLAPP) (*see* Civil Rights Law § 76-a) and that the motions are thus governed by the standard of review contained in CPLR 3211 (g) and the requirements of Civil Rights Law § 76-a (2). An action falls within the protections of 76-a when it is based upon, "any communication in a place open to the public or a public forum in connection with an issue of public interest" or is based upon "any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition" (Civil Rights Law § 76-a [1] [a]; L 2020, c 250, § 2; L

1992, c 767, § 3; *see Mable Assets, LLC v Rachmanov*, 192 AD3d 998, 999-1000 [2d Dept 2021]). Under section 76-a, the term "public interest" is to "be construed broadly, and shall mean any subject other than a purely private matter" (Civil Rights Law § 76-a [1] [d]; *see Aristocrat Plastic Surgery, P.C. v Silva*, 206 AD3d 26, 29-31 [1st Dept 2022]).

Plaintiff alleges that defendant's activities were undertaken as part of a harassment campaign and that defendant made his statements while masquerading as plaintiff.[1] Defendant's alleged activity would not fall within the protections of the First Amendment, since "[t]he First Amendment protects the right to criticize another person, but it does not permit anyone to give an intentionally false impression that the source of the message is that other person" (*see People v Golb*, 102 AD3d 601, 603 [1st Dept 2013], *reversed in part on other grounds* 23 NY3d 455 [2014]; *see also United We Stand America, Inc. v United We Stand, America New York, Inc.*, 128 F3d 86, 93 [2d Cir 1997]). Moreover, there is no suggestion that plaintiff is a public figure (*see Gottwald v Sebert*, 193 AD3d 573, 576-579 [1st Dept 2021]) or that this lawsuit is brought to intimidate and silence citizen participants (*see Felis v Downs Rachlin Martin PLLC*, 200 Vt 465, 487, 133 A3d 836, 853 [2015]; *see also Sandals Resorts Intl. Ltd. v Google, Inc.*, 86 AD3d 32, 45 [1st Dept 2011]). Accordingly, this court does not find that this action constitutes a communication involving a matter of public interest within the purview of Civil Rights Law § 76-a.

[1] The court emphasizes that defendant relies only on plaintiff's assertions in arguing that Civil Rights Law § 76-a is applicable. Defendant, has presented no affidavit or other evidence addressing plaintiff's assertions.

Relatedly, the stay of proceedings governed by Civil Rights Law § 76-a that is required by CPLR 3211 (g) (4) would have no appreciable effect on the issues before the court. Namely, the court's finding below that plaintiff has a defamation cause of action is based on the affidavits and appended exhibits submitted by plaintiff that he would be entitled to submit in opposition to defendant's motion regardless of the existence of the cross motion or any stay. Based on these papers, plaintiff would also be entitled to leave to replead in order to conform the complaint to the causes of action that he has shown he has.[2]

Under Civil Rights Law § 76-a, "damages may only be recovered if the plaintiff, in addition to all other necessary elements, shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue" (Civil Rights Law § 76-a [2]). It thereby imposes the same "actual malice" standard required by the First Amendment for defamation cases involving public figures (*see Singh v Sukhram*, 56 AD3d 187, 194 [2d Dept 2008]; *Guerrero v Carva*, 10 AD3d 105, 116 [1st Dept 2004]; *see also New York Times Co. v Sullivan*, 376 US 254, 285-288 [1964]; *Prozeralik v Capital Cities Communications, Inc.*, 82 NY2d 466, 474 [1993]). In addition, on a

[2] If section 76-a is inapplicable, there would be no stay, and plaintiff would not be barred from making the cross motion to amend the complaint. Indeed, in the absence of the stay, the plaintiff would be entitled to amend the complaint as of right (*see Roam Capital, Inc. v Asia Alternative Mgt. LLC*, 194 AD3d 585, 585-586 [1st Dept 2021]) and the court would simply deem the motion to dismiss as addressed to the amended complaint (*see Rodriguez v Dickard Widder Indus.*, 150 AD3d 1169, 1170 [2d Dept 2017]).

defendant's motion pursuant to CPLR 3211 (a) (7) and (g), the plaintiff is obligated to demonstrate that "the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law" (CPLR 3211 [g] [1]; *Mable Assets, LLC*, 192 AD3d at 999; *Singh*, 56 AD3d at 194).

Although Civil Rights Law § 76-a and CPLR 3211(g) impose heightened standards for reviewing a CPLR 3211 (a)(7) dismissal motion, determination of a defamation claim thereunder on a pre-answer motion to dismiss still turns on whether the plaintiff, in the complaint or supporting papers, has alleged malice and facts that indicate that the defendants knew that the statements were false or were made with reckless disregard to whether the statements were true of false (*see Mable Assets, LLC*, 192 AD3d at 1001; *Singh*, 56 AD3d at 195). In other words, while the "substantial basis" standard of CPLR 3211 (g)(1) requires that the pleading or supporting papers be examined closely to determine if the plaintiff has a substantial basis for the claim, and requires, in conjunction with section 76-a (2), that the pleadings or supporting papers allege facts showing "actual malice" (in effect, eliminating the requirement of CPLR 3026 that the pleadings be liberally construed), section 3211 (g) (1) does not impose a requirement that a plaintiff "show evidentiary facts to support [his or her] allegations of malice on a motion to dismiss pursuant to CPLR 3211 (a) (7)" (*Greenberg v Spitzer*, 155 AD3d 27, 55-56 [2d Dept 2017]; *see Mable Assets, LLC*, 192 AD3d at 1001; *Crime Victims Ctr., Inc. v Logue*, 181 AD3d 556, 557 [2d Dept 2020]; *Krusen v Moss*, 174 AD3d 1180, 1182 [3d Dept 2019]; *Kotowski v Hadley*, 38 AD3d 499, 500 [2d Dept 2007]; *see also* Mark C.

Dillon, 2021 Supplementary Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:69 [online version]).[3]

Defamation

"The elements of a cause of action for defamation are (a) a false statement that tends to expose a person to public contempt, hatred, ridicule, aversion, or disgrace, (b) published without privilege or authorization to a third party, (c) amounting to fault as judged by, at a minimum, a negligence standard, and (d) either causing special harm or constituting defamation per se" (*Greenberg*, 155 AD3d at 41; *see Emby Hosiery Corp. v Tawil*, 196 AD3d 462, 463-464 [2d Dept 2021]; *Rosner v Amazon.com*, 132 AD3d 835, 836-837 [2d Dept 2015], *lv denied* 26 NY3d 917 [2016]; *see also Davis v Boeheim*, 24 NY3d 262, 268 [2014]). In addition, as discussed above, if Civil Rights Law § 76-a is applicable, plaintiff must also plead actual malice.

Here, although the court finds that the complaint fails to adequately allege the words used and the time and place in which the statements were made, plaintiff's affidavits and the appended screenshots of the Instagram posts at issue correct this

[3] This court also finds that the "clear and convincing evidence" burden imposed by section 76-a (2) is a trial and summary judgment burden, and is not the burden for a CPLR 3211 (g) pre-answer motion to dismiss (Mark C. Dillon, 2021 Supplementary Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:69 [online version]; *see Kipper v NYP Holdings Co.*, 12 NY3d 348, 353-354 [2009]; *see also Ostad v Nehmadi*, 167 AD3d 490, 490 [2d Dept 2018]; *Lanza v State of New York*, 130 AD2d 872, 872-873 [3d Dept 1987]; *Davis v Lancaster*, 30 Misc 3d 885, 888 [Sup Ct, Bronx County 2010]; *but see Zeitlin*, 2022 NY Slip Op 32878, *7). Applying the "clear and convincing" evidence standard at the summary judgment stage rests, in part, on the assumption that a plaintiff has had a full opportunity to conduct discovery (*see Kipper*, 12 NY3d at 357; *Anderson v Liberty Lobby, Inc.*, 477 US 242, 257 [1986]), an assumption that does not apply to a pre-answer motion to dismiss.

deficiency (*see Emby Hosiery Corp.*, 196 AD3d at 464; *Mees v Buiter*, 186 AD3d 1670, 1671 [2d Dept 2020], *lv denied* 37 NY3d 908 [2021]).

A false accusation that plaintiff sent "dick pictures" to minors constitutes libel per se because it likely constitutes a crime, or at the very least, is the kind of sexual misconduct that would undoubtedly be injurious to plaintiff's business reputation or tend to expose plaintiff to public contempt, ridicule, or disgrace (*see Chiavarelli v Williams*, 256 AD3d 111, 113 [1st Dept 1998]; *see also Leser v Penido*, 62 AD3d 510, 510 [1st Dept 2009]; *Alianza Dominicana, Inc. v Luna*, 229 AD2d 328, 329-330 [1st Dept 1996]; *Barbato v Giacin*, 2019 NY Slip Op 33407, *15-17 [U] [Sup Ct, New York County 2019], *reversed on other grounds* 188 AD3d 556 [1st Dept 2020]; *Monroe-Trice v Unum Employee Short-Term Disability Plan*, 2002 WL 483312[U], *7 [SDNY 2002]).

Defendant, in opposition asserts that the posts must be deemed non-actionable opinion, however, the fact that a statement is posted on social media does not immunize it from being deemed factual (*see Zuckerbrot v Lande*, 75 Misc 3d 269, 291-292 [Sup Ct, New York County 2022]; *Solstein v Mirra*, 488 F Supp3d 86, 100-101 [SDNY 2020]; *see also Sandals Resorts Intl. Ltd.*, 86 AD3d at 45). In this same vein, a defendant does not escape liability because he or she is repeating someone else's assertions (*see Weiner v Doubleday & Co., Inc.*, 74 NY2d 586, 594 [1989]; *Zuckerbrot*, 75 Misc 3d at 294-295; *Watson v NY Doe 1*, 439 F Supp3d 152, 161 [SDNY 2020]; *Goldman v Reddington*, 417 F Supp3d 163, 175-176 [EDNY 2019]). Contrary to defendant's contention, the court finds that defendant's comment that "you gotta do something about [plaintiff]" suggests that defendant agreed with the accusation and wanted Adelphi to take action against

plaintiff (*see Watson*, 439 F Supp3d at 162; *see also Partridge v State of New York*, 173 AD3d 86, 91-92 [3d Dept 2019]). Even if the statement could possibly be interpreted as pure opinion "the communication at issue, taking the words in their ordinary meaning and in context, is also susceptible to a defamatory connotation" (*Davis*, 24 NY3d at 272).

With respect to actual malice, this court finds that plaintiff's assertions in his affidavits along with the screenshots of the various posts, are sufficient to make out actual malice at this stage. Most notably, plaintiff asserts that defendant restored the post even after the police had informed defendant that the story had been fabricated. None the less, defendant continued to publish the accusation even after learning of its falsity sufficiently alleges actual malice (*see Greenberg*, 155 AD3d at 55-56; *see also Prozeralik*, 82 NY2d at 477-478; *Crowley*, 2022 WL 624949, *6-8; *cf. Kipper v NYP Holdings Co.*, 12 NY3d 348, 353-354 [2009]). The fact that plaintiff's assertions in this respect are based on hearsay conversations with police is not a bar to their consideration, as the allegations of the complaint are deemed to be true on a motion to dismiss.

Plaintiff's opposition papers also demonstrate that he has a defamation cause of action based on the comments referring to Blacks as "colored people" and using stereotypical African American dialect. Defamation may be accomplished through a defendant's acts of impersonation that impute false facts to a plaintiff (*see Ben-Oliel v Press Publ. Co.*, 251 NY 250, 255-256 [1929]; *Rall v Hellman*, 284 AD2d 113, 113 [1st Dept 2001]). These comments cast plaintiff as a racist, since the use of "colored people" for Blacks or African Americans and mimicking stereotypical Black speech is undoubtedly pejorative (*see Chandler v La-Z-Boy, Inc.*, 2022 WL 348169[U], *3-4 [ED

Pa 2022]; *U.S. Equal Employment Opportunity Commn. v Lindsey Ford LLC*, 2021 WL 5087851[U], *6 [D Md 2021]; *Madison v Avery*, 2021 WL 4947239[U], *12 [D Col 2021]; *Barrow v Church*, 2016 WL 2619754[U], *4 [SD Oh 2016]; *Doerge v Crum's Enterprises, Inc.*, 2007 WL 1586024[U], *6 [D Kan 2007]). Identifying plaintiff as a racist also makes out libel per se (*see Sheridan v Carter*, 48 AD3d 444, 446-447 [2d Dept 2008]; *Como v Riley*, 287 AD2d 416, 416-417 [1st Dept 2001]; *Herlihy v Metropolitan Museum of Art*, 214 AD2d 250, 261 [1st Dept 1995]; *Schermerhorn v Rosenberg*, 73 AD2d 276, 283-285 [2d Dept 1980]; *Block v Tanenhaus*, 867 F3d 585, 592 [5th Cir 2017]). Although plaintiff does not specifically tie the racist comments to damage to his profession or business it constitutes libel per se.(*Rinaldi v Holt, Rinehart & Winston, Inc.*, 42 NY2d 369, 379 [1977]; *Alianza Dominicana, Inc.*, 229 AD2d at 329-330; *Schermerhorn*, 73 AD2d at 283-285; *Sweeney v Schenectady Union Pub. Co.*, 122 F2d 288, 290-291 [2d Cir 1941]). Furthermore, since defendant was masquerading as plaintiff knew that the impression he was creating was false (*see Schermerhorn*, 73 AD2d at 285; *St. Amant v Thompson*, 390 US 727, 732 [1968]; *Biro v Conde Nast*, 807 F3d 541, 545 [2d Cir 2015], *cert denied* 578 US 976 [2016]).

Intentional Infliction of Emotional Distress

Plaintiff's fails to demonstrate a cause of action for intentional infliction of emotional distress. The alleged conduct is simply not so extreme and outrageous as to satisfy the high legal standard for such a claim (*see Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 57-58 [2016]; *Conklin v Laxen*, 180 AD3d 1358, 1361-1362 [4th Dept 2020]; *Herlihy*, 214 AD2d at 262-263; *cf. Waterbury v New York City Ballet, Inc.*,

205 AD3d 154, 165 [1st Dept 2022]), and in any event even if the conduct was deemed sufficiently extreme and outrageous, the claim is duplicative of the defamation cause of action (*see Mees*, 186 AD3d at 1672; *Napoli v New York Post*, 175 AD3d 433, 434 [1st Dept 2019], *lv denied* 35 NY3d 906 [2020]; *Segall v Sanders*, 129 AD3d 819, 821 [2d Dept 2015]).

False Impersonation

Plaintiff has no cause of action for false impersonation because Penal Law § 190.23 does not, expressly or impliedly, create a private right of action (*see Konkur v Utica Academy of Science Charter Sch.*, 38 NY3d 38, 41-44 [2022]; *Golden v Diocese of Buffalo, N.Y.*, 184 AD3d 1176, 1177-1178 [4th Dept 2020]; *Monaghan v Roman Catholic Diocese of Rockville Ctr.*, 165 AD3d 650, 652 [2d Dept 2018], *lv dismissed* 32 NY3d 1192 [2019]; *Troy v City of New York*, 160 AD3d 410, 411 [1st Dept 2018]).

Injunction

Plaintiff also fails to allege sufficient facts that would warrant a permanent injunction. While equity may intervene where restraint becomes essential to the preservation of a business or other property right equity will not intervene to restrain the publication of words on a mere showing of falsity (*see Trojan Elec. & Mach. Co. v Heusinger*, 162 AD2d 859, 860 [3d Dept 1990]). This is because an injunction in a defamation action generally cannot be issued as it constitutes an improper prior restraint on speech (*see Rombom v Weberman*, 309 AD2d 844, 845 [2d Dept 2003]; *Trojan Elec. & Mach. Co.*, 162 AD2d at 860; *Metropolitan Opera Ass'n, Inc. v Local 100 Hotel Employees & Restaurant Intern. Union*, 239 F3d 172, 176-179 [2d Cir 2001]).

Importantly, in the later regard, the papers contain no assertion that defendant has continued to impersonate plaintiff. Although plaintiff alleges that the defamatory material is still available on an Instagram account related to defendant, albeit one with a "private" setting, the account does not purport to be plaintiff's account since the account's name is secretadelphiaconfessions (*see Paravas*, 2022 WL 718842, *9-10; *Elements Behavioral Health, Inc.*, 2014 WL 12769048, *2]).

Costs and Sanctions

In view of these findings, defendant is not, at this juncture, entitled to costs and attorney's fees under Civil Rights Law 70-a (*see Singh v Suckhram*, 56 AD3d at 195), nor can plaintiff's action cannot be deemed frivolous under CPLR 8303-a (*see Colantonio v Mercy Med. Ctr.*, 73 AD3d 966, 969-970 [2d Dept 2010]; *Wedgewood Care Ctr., Inc. v Sassouni*, 68 AD3d 979, 981 [2d Dept 2009]).

This constitutes the decision and order of the court.

E N T E R

Hon. Karen B. Rothenberg
J.S.C.