

Comic Strip Promotions, Inc. v Envivo LLC

2023 NY Slip Op 31112(U)

April 11, 2023

Supreme Court, New York County

Docket Number: Index No. 150484/2022

Judge: Lisa S. Headley

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LISA S. HEADLEY PART 28M

Justice

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COMIC STRIP PROMOTIONS, INC.,

Plaintiff,

- v -

ENVIVO LLC, PLANCK, LLC, D/B/A PATCH MEDIA,
MICHAEL AQUILIA, NICK GARBER, JULIE MENIN

Defendant.

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INDEX NO. 150484/2022

MOTION DATE 03/02/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 45, 46, 47, 48, 52, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 75

were read on this motion to/for DISMISSAL

Defendants Envivo LLC ("Envivo") and Michael Aquilia ("Aquila") (collectively, "Defendants") filed this motion, pursuant to CPLR §§3211(a)(1), (a)(7) and (g), to dismiss plaintiff's complaint for failure to state a cause of action for defamation pursuant to the amended Anti-SLAPP statute and to award defendants' costs and fees in this action, including reasonable attorneys' fees. Plaintiff filed opposition and Defendants filed a reply.

In the Complaint, it has been alleged that on or about January 9, 2022, Plaintiff Comic Strip Promotions, Inc., ("Plaintiff"), a comedy club, published a post on Instagram including hashtags related to the anti-vaccine mandate and Nuremberg. It has been alleged that such post offended a Jewish community member because it suggested an equivalency between the vaccine mandate and the persecution of Jews during the Holocaust. Thereafter, defendant, Envivo published an article containing screenshots of plaintiff's Instagram post, which included direct quotes from plaintiff taken from individuals who exchanged direct messages in response to plaintiff's Instagram post. In the published article, the defendants also included plaintiff's denial that the post was anti-vaccine and antisemitic. Defendant Envivo also posted a message on Twitter, Instagram and Facebook stating that plaintiff's post was an offensive false equivalency between the Holocaust and vaccination mandates. Thereafter, New York City Councilmember Julie Menin ("Councilmember Menin") "retweeted" Envivo's post on Twitter regarding plaintiff's Instagram post. Councilmember Menin wrote a letter condoning antisemitism and called for plaintiff to make a public apology. Envivo then published an article that addressed how Councilmember Menin requested a formal apology from plaintiff.

Plaintiff commenced this action against defendants for, inter alia, defamation, defamation per se, and tort of trade libel and/or injurious falsehoods. It should be noted that the action against,

Councilmember Menin has been dismissed pursuant to the Court's Decision and Order dated October 31, 2022. (*See, NYSCEF Doc. No. 78*).

In support of the instant motion, the defendants argue, *inter alia*, that the plaintiff's action should be dismissed for its failure to state a claim under *CPLR* §§3211(a)(1) and (7), as well as the heightened pleading standard imposed by the New York Anti-SLAPP law. Defendants also argue that the alleged defamatory statements are non-actionable opinion since plaintiff failed to prove actual malice. Defendants contend Envivo's statement was an opinion that echoed the views of other individuals, who found the plaintiff's Instagram post to be antisemitic and anti-vaccination. Additionally, defendants argue that their published article is not defamatory in nature because the statements made within the publication are actually true. In addition, the claim for defamation *per se* fails since plaintiff has not pled special damages, and such leave to plead should be denied. Defendants further argue that defendant Envivo is entitled to attorney fees under *Civil Rights Law* §70, and that this action falls under the New York Anti-SLAPP law, pursuant to *Civil Rights Law* §76-a.

More specifically, the defendants argue that Plaintiff does not meet the heightened pleading standard under the New York Anti-SLAPP law, which deters claims on public speech in connection with an issue of public interest. *See, CPLR* §3211(g). Defendants argue the alleged defamatory statements concerned the COVID-19 pandemic, the public health response, and antisemitism, which are all issues of public interest. Defendants further argue that the vaccine mandate, pandemic, antisemitism and hate speech generally are all issues that go beyond a private matter, and into the realm of public concern.

In opposition, plaintiff argues that defendants' statement was defamatory since the defendants compared plaintiff's Instagram posts to an unrelated incident, in which a Chase ATM dispensed currency that had Nazi swastikas stamped on them. Plaintiff further asserts that defendants acted maliciously because the said ATM incident was disparate to plaintiff's Instagram posts, yet defendants published an article depicting the ATM incident to plaintiff's hashtags in the Instagram post. Additionally, plaintiff argues this action does not fall under the New York Anti-SLAPP law because the hashtags in the plaintiff's Instagram post were not a matter of public concern, nor would the public have been concerned if defendants had not publicized their hashtags. Lastly, plaintiff argues that the defendants' statements were factual, yet grossly inaccurate because the hashtag was compared to the holocaust; and even if defendants' publication was of mixed opinion, it must be dismissed because the statement comparing the plaintiff's hashtags within the Instagram post and Nazi swastikas is defamatory *per se*.

In reply, defendants argue plaintiff failed to establish that their publication was not opinion. Defendants contend that the comparison between the swastika incident and plaintiff's hashtags are deemed non-actionable opinion because it lacked precise meaning based upon its context. Defendants argue that the publication is not defamatory because it is actually a true statement. Additionally, defendants contend that the plaintiff's cause of action for trade libel, injurious falsehood, declaratory judgment, and a permanent injunction should be dismissed because plaintiff failed to address those claims in their opposition. Lastly, defendants argue that since plaintiff brought a meritless defamation action, defendants are entitled to recover an award of attorneys' fees under the Anti-SLAPP statute.

Discussion

After oral argument and a review of the submitted motion papers, this Court finds that plaintiff has failed to state a claim for defamation and did not meet the heightened pleading standard as required per the newly amended Anti-SLAPP statutes.

“When deciding a motion to dismiss a complaint pursuant to *CPLR* §3211, the court is required to afford the pleading ‘a liberal construction.’ It must accept the facts alleged in the complaint as true, accord [the] plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory.” *New York Racing Ass’n v. Nassau Regional Off-Track Betting Corp.*, 29 Misc. 3d 539, 545 (Sup. Ct. 2010). Additionally, “when deciding a motion to dismiss made pursuant to *CPLR* §3211(a)(7), the court must determine whether the pleader has a cognizable cause of action, not whether it has been properly plead.” *Sutphin Mgt. Corp. v. Rep 755 Real Estate, LLC*, 20 Misc. 3d 1135(A) (Sup. Ct. 2008), *Order aff’d and remanded*, 73 A.D. 3d 738 (2d Dep’t 2010). Dismissal of a claim is appropriate if the claim is made up of “[a]llegations that consist of bare legal conclusions or factual claims that are flatly contradicted by documentary evidence or are inherently incredible.” *Napoli v. Bern*, 60 Misc. 3d 1221(A) (Sup. Ct. 2018), *aff’d sub nom.*, *Napoli v. New York Post*, 175 A.D. 3d 433 (1st Dep’t 2019).

Under *CPLR* §3211 (a)(1) and (7), “a party may move for judgment dismissing one or more causes of action asserted against him on the ground that: (1) a defense is founded upon documentary evidence; or... (7) the pleading fails to state a cause of action.”

“Defamation is ‘the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion, or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society’.” *Stepanov v. Dow Jones & Co., Inc.*, 120 A.D.3d 28, 34 (1st Dep’t 2014). The two forms of defamation are libel and slander, with the latter described as “defamatory matter addressed to the ear.” *Ava v. NYP Holdings, Inc.*, 64 A.D.3d 407, 411 (1st Dep’t 2009), *lv denied* 14 N.Y.3d 702 (2010). Since only facts can be proven false, statements purporting to assert facts about the plaintiff are the proper subject of a defamation claim. *Davis v. Boenheim*, 24 N.Y.3d 262, 268 (2014). The plaintiff must also plead special damages unless the allegedly defamatory statement falls into one of the following four *per se* exceptions: “(i) charging plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman.” *Lieberman v. Gelstein*, 80 N.Y.2d 429, 435 (1992). Otherwise, the plaintiff must plead the “the loss of something having economic or pecuniary value ... [that] flow[s] directly from the injury to reputation caused by the defamation and not from the effects of the defamation.” *Franklin v. Daily Holdings, Inc.*, 135 A.D.3d 87, 93 (1st Dep’t 2015) [internal quotation marks and citation omitted]. Thus, to state a claim for defamation, the plaintiff must prove: “(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.*, *supra* at 34.

The following New York statutes regarding strategic lawsuits against public also known as anti-SLAPP law, apply in this case:

First, under *New York Civil Rights Law § 76-a*,

[A]n “action involving public petition and participation” is a claim 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. In an action involving public petition and participation, 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.

See, New York Civil Rights Law § 76-a.

Second, under *New York Civil Rights Law § 70-a*

1. A defendant in an action involving public petition and participation, as defined in paragraph (a) of subdivision one of section seventy-six-a of this article, may maintain an action, claim, cross claim or counterclaim to recover damages, including costs and attorney's fees, from any person who commenced or continued such action; provided that:

(a) costs and attorney's fees shall be recovered upon a demonstration, including an adjudication pursuant to subdivision (g) of rule thirty-two hundred eleven or subdivision (h) of rule thirty-two hundred twelve of the civil practice law and rules, that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law;

(b) other compensatory damages may only be recovered upon an additional demonstration that the action involving public petition and participation was commenced or continued for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights; and

(c) punitive damages may only be recovered upon an additional demonstration that the action involving public petition and participation was commenced or continued for the sole purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights.

2. The right to bring an action under this section can be waived only if it is waived specifically.

3. Nothing in this section shall affect or preclude the right of any party to any recovery otherwise authorized by common law, or by statute, law or rule.

See, New York Civil Rights Law § 70-a

Here, the Plaintiff has failed to prove actual malice and to demonstrate that defendants' publications referencing plaintiff's Instagram post and an unrelated incident involving swastikas on currency dispensed from an ATM are not “non-actionable opinion.” This court further finds

that defendants publications are considered to be non-actionable opinion and thus, cannot be shown as evidence of actual malice. Additionally, plaintiff sets forth no evidence to contradict the legal notion that these publications are non-actionable opinion. More specifically, the court finds that the plaintiff failed to submit persuasive evidence that defendant has acted with actual malice, and any evidence set forth by plaintiff merely illustrates, at most, journalistic freedom.

Furthermore, that “the actual malice standard recognizes that falsehoods relating to public figures are inevitable in free debate, and that publishers must have sufficient breathing space so that the First Amendment's commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open will be realized.” *Kipper v. NYP Holdings Co., Inc.*, 12 N.Y. 3d 348, 355 (2009). This Court upholds the importance of the First Amendment in protecting the right to free speech by the press. Here, the plaintiff fails to demonstrate actual malice, and thus, it would be a violation of the First Amendment to permit the plaintiff to proceed with this action against the defendants.

This Court further finds that the defendants meet the heightened pleading standard required pursuant to the amended Anti-SLAPP law, which shifts the traditional burden for a motion to dismiss from the defendant to the plaintiff. *See, CPLR §3211(g)*. A plaintiff is now required to establish by “clear and convincing evidence” that there is a substantial basis in fact and law for its claim. *Id.* The newly amended Anti-SLAPP law permits courts to consider evidence not mentioned in the pleading, including evidence that may not typically be permitted at the motion to dismiss stage. *CPLR §3211(g)(2)*. In this matter, plaintiff has not met the heightened pleading standard required by law because plaintiff failed to establish by “clear and convincing evidence” that a claim for defamation exists. Plaintiff also failed to prove actual malice in this matter and failed to provide any evidence to demonstrate that the alleged defamatory articles were founded in falsity and were not non-actionable opinion. Therefore, plaintiff does not have a claim that has a substantial basis in law and fact and cannot overcome defendant’s motion to dismiss.

Additionally, the Anti-SLAPP law mandates that a defendant be awarded costs and fees if successful. *N.Y. Civ. Rights Law § 70-a(a) (McKinney)*. “Since Defendants’ posts fall under the ambit of the amended anti-SLAPP law, defendant is entitled to seek damages and attorneys’ fees under Civil Rights Law §§ 70-a and 76-a(1)(a)(1).” *Aristocrat Plastic Surgery, P.C. v. Silva*, 206 A.D.3d 26 (1st Dep’t 2022). However, the issue regarding recovery of attorneys’ fees and costs under these circumstances are currently pending in the Court of Appeals. *See, Gottwald v. Sebert*, 203 AD3d 488, 489 (1st Dep’t 2022). Therefore, that portion of the defendants’ motion is denied with leave to renew pending the outcome of the decision regarding *Gottwald v. Sebert, supra*.

Accordingly, it is

ORDERED that the defendants Envivo LLC and Michael Aquilia’s motion to dismiss is GRANTED in its entirety, on the basis that this Court finds plaintiff failed to state a cause of action for defamation and the amended Anti-SLAPP statute compels dismissal of the complaint; and it is further

ORDERED that the within action is dismissed with prejudice against defendants Envivo LLC and Michael Aquila; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendants Envivo LLC and Michael Aquila dismissing the instant matter against it, together with costs and disbursements taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that defendants Envivo LLC and Michael Aquilia’s request for an award of attorney’s fees is denied at this time with leave to renew after a ruling by the Court of Appeals in *Gottwald v. Sebert*, 203 AD3d 488, 489 (1st Dep’t 2022), which decision will have a bearing on the outcome of the award of attorneys’ fees; and it is further

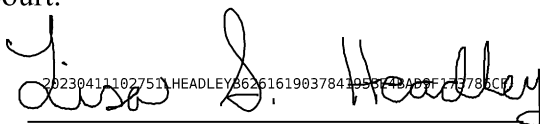
ORDERED that any requested relief sought not expressly addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, defendant shall serve a copy of this Decision/Order upon the plaintiff with notice of entry.

This constitutes the Decision and Order of the Court.

4/11/2023

DATE


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LISA S. HEADLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE