

Solanki v Baria
2023 NY Slip Op 34059(U)
November 17, 2023
Supreme Court, New York County
Docket Number: Index No. 156730/2020
Judge: James E. d'Auguste
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. James E. d'Auguste

PART 55

Justice

KISHORE KUMAR SOLANKI,

Plaintiff,

- v -

SURESH KUMAR BARIA,

Defendant.

INDEX NO. 156730/2020MOTION DATE 04/24/2023MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 3, 4, 5, 6, 7, 13, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37

were read on this motion to/for

ENFORCE/EXEC JUDGMENT OR ORDER

In this defamation action, plaintiff, who is pro se, alleges that defendant defamed him by posting several comments about him on Facebook. The Summons with Notice (Notice), which plaintiff e-filed on August 24, 2020, (NYSCEF Doc. No. 1) specifies that, among other things, defendant accused plaintiff of the following: 1) being a “fucking pizza delivery bastard,” 2) improperly using the title of “captain,” 3) beating his alcoholic father, 4) being a “son of a bitch,” and 5) staying at defendant’s house or apartment for three months.¹ The Notice further states:

“The relief sought is As a resident of USA I am entitled to live my life with full dignity and honor. I demand that unless he proves all defamatory statement he published on Face book are true otherwise he should apologize on the same platform for each false allegations by posting on FB for at least 30 days (underlined portion is the language that is included in the form plaintiff used)” (emphasis in original).

¹ In addition, plaintiff accuses defendant of abusing plaintiff’s mother and mother-in-law.

In further support of the Notice, plaintiff filed an income verification statement from Domino's (NYSCEF Doc. No. 3), a copy of undated Facebook posts in which defendant made the allegedly defamatory statements (NYSCEF Doc. No. 4), documents purportedly showing that eight days after he and his family moved in with defendants they relocated to their own apartment (NYSCEF Doc. No. 5), and a letter to the County Clerk explaining plaintiff's complaints against defendant (NYSCEF Doc. No. 6).

On October 13, 2020, plaintiff filed the current motion. The motion asks the Court to direct defendant to apologize on Facebook with respect to each of the alleged defamatory statements and to keep the detailed apology on the site for at least 30 days. The motion does not seek monetary relief, although the Notice states that in the event of a default, plaintiff seeks \$150,000 as damages.

When plaintiff made this motion, defendant had not appeared in the lawsuit. On October 15, 2020, however, defendant appeared via counsel (NYSCEF Doc. No. 15). The following day, October 16, 2020, defendant's attorney wrote to the Court requesting the adjournment of the motion so the attorney could read the motion papers and respond accordingly (NYSCEF Doc. No. 16). The motion was scheduled for virtual argument for December 15, 2020.

Plaintiff continued to file papers with the Court in connection with this motion – on July 18, 2021, September 21, 2021, September 29, 2021, and October 20, 2021 (NYSCEF Doc. Nos. 23-25, 27). On February 8, 2022, this Court denied plaintiff's motion based on 1) lack of service and 2) the complaint seeks monetary relief, but the motion seeks equitable relief (Doc. No. 29). However, the Court vacated the order on February 24, 2022, because it had overlooked plaintiff's affidavit of service, and the Court agreed to conduct a new review of the request for preliminary injunction (NYSCEF Doc. No. 36).

The Court denies the motion. For plaintiff to prevail, he must establish a prima facie case that supports his application – that is, he must provide enough evidence to show his right to the relief he requests (*see AMEC Constr. Mgt., Inc. v City of New York*, 132 A.D.3d 547, 549 [1st Dep’t 2015]). If plaintiff does not meet this prima facie burden, he cannot prevail on the motion, and, therefore, the burden of proof does not shift to defendant to show that a triable issue of fact exists (*see Shandong Yuyuan Logistics Co., Ltd. v Soleil Chartered Bank*, 209 A.D.3d 457, 458 [1st Dep’t 2022]).

Here, plaintiff alleges that defendant defamed him. “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] [internal quotation marks and citation omitted]). To succeed on a defamation claim, a plaintiff must show that the defendant published a false statement to a third party, that the publication was unauthorized, and that the publication has caused the plaintiff harm (*id.*). As part of this burden, the plaintiff also must show damages (*see Matter of Woodbridge Structured Funding, LLC v Pissed Consumer*, 125 A.D.3d 508, 509 [1st Dep’t 2015]). As the standard suggests, it is critical that “the statements, considered in the context of the entire publication, are reasonably susceptible of a defamatory connotation” (*3P-733, LLC v Davis*, 187 A.D.3d 626, 628 [1st Dep’t 2020] [internal quotation marks and citation omitted]). It is for the Court to decide whether the words set forth in the complaint are defamatory (*Golub v Enquirer/Star Group*, 89 N.Y.2d 1074, 1076 [1997]). Finally, “[r]eaders give less credence to allegedly defamatory remarks published on the Internet than to similar remarks made in other contexts” (*DeRicco v Maidman*, 209 A.D.3d 560, 561 [1st Dep’t 2022], quoting *Torati v Hodak*, 147

A.D.3d 502, 503 [1st Dep't 2017] [additional citation omitted]). Moreover, like all allegedly defamatory statements, online posts are not actionable where they have a "loose, figurative or hyperbolic tone" (*Torati*, 147 A.D.3d at 503 [internal quotation marks and citation omitted]).

There are many problems with plaintiff's motion. He has not provided an adequate context for the allegedly defamatory statements. The posts that he has submitted are undated, so it is not clear when defendant put them on his Facebook page. Further, defendant was responding to posts made by plaintiff as part of a larger argument between the two, but plaintiff does not submit his comments or any other portions of the conversation. Thus, it is not clear whether these are exaggerated insults exchanged between the parties.

In addition, the Court notes that several of the statements, such as the reference to plaintiff as a "son of a bitch," do not appear to be actionable. Though name-calling can be upsetting, it is not defamatory because it is opinion rather than the assertion of a fact. For example, in *Wahrendorf v City of Oswego* (72 A.D.3d 1604, 1605 [4th Dep't 2010]), the Court found that the defendant's characterization of the plaintiffs as slumlords and sociopaths, among other things, was not defamation. In *Joo Tae Yoo v Choi* (210 A.D.3d 1062, 1064 [2d Dep't 2022]), the Court determined that allegedly defamatory statements in a chat group were nothing "more than mere insults, threats, annoyances, or indignities," and, therefore, were not actionable.

In addition, to establish his right to relief, plaintiff also must show special damages (*see Franklin v Daily Holdings, Inc.*, 135 A.D.3d 87, 92-93 [1st Dep't 2015]).² "Special damages

² It is not necessary to show special damages where a plaintiff establishes defamation per se, such as injury to the plaintiff in his profession or trade (*see Keeling v Salvo*, 188 A.D.3d 463, 463-464 [1st Dep't 2020] [statements suggesting that the plaintiff was dismissed from her position because of misconduct were defamatory per se]). However, plaintiff here has not shown that defendant's statements about his job at Domino's was injurious to his career – on the contrary, he retained his job as assistant manager and then went on to a high-paying position in the merchant marines – or explained how the mischaracterization of his job could have caused him damage.

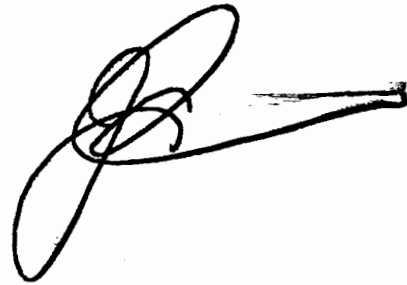
consist of the loss of something having economic or pecuniary value, which must flow directly from the injury to his reputation caused by the defamation and not from the effects of the defamation” (*id.* at 93 [internal quotation marks and citation omitted]). In *Cedeno v Pacelli* (192 A.D.3d 533, 534 [1st Dep’t 2021]), the First Department found that the plaintiffs’ belief that they lost business based on the alleged defamatory statements on the defendants’ websites, and their contention that they paid attorneys and online reputation management resources to protect their reputation, was insufficient. In addition, the damages must be specific. Thus, in *Franklin*, the First Department stated that although the plaintiff gave specific information regarding the alleged damage to his career, he did not give concrete evidence of his financial injury, but instead provided a round number – in that case, \$3 million – and this was inadequate (135 A.D.3d at 93; *see also France v St. Clares Hosp. & Health Ctr.*, 82 AD2d 1, 5-6 [1st Dep’t 1981] [emotional trauma, anguish, and embarrassment are not compensable without financial loss, physical damage, or other actual injury]).

Further, the Court notes that neither party has followed his formal procedural obligations. Defendant did not cross-move or oppose the motion at hand. On the other hand, plaintiff did not move for a default judgment against defendant within the prescribed limitations period. However, a finding of default or a dismissal of this action is unwarranted. Both plaintiff and defendant have actively litigated this lawsuit – by appearing virtually at several conferences with the Court, and the parties and the Court have treated plaintiff and defendant as active participants in the case. Accordingly, in the exercise of its discretion, the Court allows defendant 45 days from the date of this order to serve and file an answer to the complaint.

Accordingly, it is

ORDERED that the motion is denied; and it is further

ORDERED that defendant has 45 days from the date of this order to serve and file an answer to the complaint.

11/17/2023

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

☒

DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐

OTHER

☐

REFERENCE

James d'Auguste, J.S.C.