

Sackler v American Broadcasting Cos., Inc.

2024 NY Slip Op 33122(U)

September 5, 2024

Supreme Court, New York County

Docket Number: Index No. 155513/2019

Judge: W. Franc Perry

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

PRESENT: HON. W. FRANC PERRY

PART

Justice

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DAVID SACKLER,

Plaintiff,

- v -

AMERICAN BROADCASTING COMPANIES, INC.,HOME
BOX OFFICE, INC.,NYP HOLDINGS, INC.,THOMPSON
REUTERS D/B/A REUTERS AMERICA LLC,HEARST
MAGAZINES A DIVISION OF HEARST
COMMUNICATIONS, INC.

Defendant.

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INDEX NO. 155513/2019

MOTION DATE 05/06/2022

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 101, 102, 103, 104, 109, 126, 132

were read on this motion to/for JUDGMENT - SUMMARY.

Defendant, Hearst Communications, Inc. (“Hearst”) moves this Court for summary judgment in this action for libel per se/slander per se and defamation per/se. *See* NYSCEF Doc. No. 77. This motion was transferred to this Court by the Honorable Eric Schumacher before whom this matter was pending. *See* NYSCEF Doc. No. 126.

The action is based on the defendants’ use of a photograph and sketch of the plaintiff, David Sackler, while reporting on the OxyContin epidemic. The plaintiff is not the David Sackler of the Sackler family and Purdue Pharma.

Hearst published a photograph of the plaintiff misidentifying him as the David Sackler of the Sackler family and Purdue Pharma in its Summer 2019 issue of “Town & Country” magazine. *See* NYSCEF Doc. No. 6 ¶¶ 133-39.

The plaintiff alleges that the defendant purchased or licensed the image of the plaintiff from Getty Images. *See Id.* ¶ 140. The plaintiff also alleges that Hearst “did no research, insufficient research or research that was not reasonably calculated to determine if the photograph of the plaintiff depicted the David Sackler of Purdue Pharma. *See Id.* ¶ 141.

The defendant provides the affidavit of one of its employees who obtained the photograph of the plaintiff prior to publication of the Hearst article. *See* NYSCEF Doc. No. 87. The affidavit provides that the employee obtained the photograph of the plaintiff from “an online database of editorial photography maintained by Getty Images” and only saw photographs of what appeared to be the same person. *See Id.* ¶¶ 8-9. The employee also provides that she had never met David Sackler of Purdue Pharma or recalled seeing a photograph of him and did not have any doubt prior to the publication of the Hearst article that the photo at issue depicted the David Sackler who was the subject of the article concerning the Sackler family of Purdue Pharma. *See Id.* ¶¶ 10, 15. The employee also did an internet search to confirm that the man in the photograph was the David Sackler of Purdue Pharma who was the subject of the article. *See Id.* ¶ 11. Among other entries, the employee found an article published by “The Guardian” entitled “Meet the Sacklers” that included a photo of the plaintiff and was concerning the Sackler family of Purdue Pharma. *Id.*

When deciding a motion for summary judgment this Court “must view the evidence in the light most favorable to the nonmoving party.” *See Stukas v. Streiter*, 83 A.D.3d 18 (App. Div. 2nd Dept. 2011) (citing *Pearson v. Dix McBride*, 63 A.D.3d 895 (App. Div. 2nd Dept. 2009)).

"The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist" *Kolivas v Kirchoff*, 14 AD3d 493 (App. Div. 2nd Dept. 2005).

A motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" (See CPLR §3212[b]; *see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (N.Y. Court of Appeals 1986). To make a prima facie showing, the moving party must "demonstrate its entitlement to summary judgment by submission of proof in admissible form" *See Viviane Etienne Med. Care, P.C. v Country-Wide Ins. Co.*, 25 NY3d 498, 507 (N.Y. Court of Appeals 2015); *see also Zuckerman v City of New York*, 49 NY2d 557, 562 (N.Y. Court of Appeals 1980). Admissible evidence may include "affidavits by persons having knowledge of the facts [and] reciting the material facts". *See Viviane Etienne Med. Care, P.C. v Country-Wide Ins. Co.*, 25 NY3d at 508 (citing *GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 967 (N.Y. Court of Appeals 1985)); *see* CPLR § 3212[b]. Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *See Alvarez v Prospect Hosp.*, 68 NY2d at 324.

The Court previously determined that New Jersey's actual malice standard for a defamation action applies to this case. *See* NYSCEF Doc. No. 136. Thus, the plaintiff must show the defendant acted with actual malice in publishing the plaintiff's photograph. *See Turf Lawnmower Repair v. Bergen Record Corp.*, 139 N.J. 392, 423-24 (1995) (requiring a plaintiff "to establish by clear and convincing evidence that the defendants published the article either

with the knowledge that the statements were false or with reckless disregard of whether they were false” to survive a motion for summary judgment).

The plaintiff has not plead nor alleged any actual malice on the part of Hearst. Plaintiff’s sole allegation is that the defendant did “no research, insufficient research, or research that was not reasonably calculated to determine if the David Sackler in the photograph was the David Sackler of Purdue Pharma”. *See* NYSCEF Doc. No. 6 ¶ 141. It is well settled that a “failure to investigate will not alone support a finding of actual malice.” *See Sackler v American Broadcasting Cos., Inc.*, at 700-01 (citing *Harte-Hanks Communications, Inc. v. Connaughton*, 491 US 657 (1989); *St. Amant v Thompson*, 390 US 727,731 (1968); *Kipper v NYP Holdings Co.*, 12 NY 3d 348, 355 (2009); *Rivera v. Time Warner Inc.*, 56 AD 3d 298 (1st Dept. 2008) (finding the plaintiff failed to plead actual malice nor could actual malice “be inferred from factual allegations merely suggesting that Time Warner [defendant] had reason to question the accuracy of the information at issue”). As this Court previously found “further discovery will not rectify plaintiff’s legally insufficient allegations, as a failure to adequately research whether the published photographs were of the ‘correct’ David Sackler does not, as a matter of law, constitute actual malice.” *See Sackler* at 701.

In view of the foregoing, the Court finds that the defendant has established a prima facie case for summary judgment based upon the submissions. The plaintiff has provided zero evidence of actual malice by the defendant or its employees and only alleges that the defendant and its employees conducted no research or inadequate research before publishing the plaintiff’s photograph. Thus, the plaintiff has not provided any evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of this action. *Alvarez v Prospect Hosp.*, 68 NY2d at 324.

The defendant's motion for summary judgment is granted and it is hereby:

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

09/05/2024

DATE



W. FRANC PERRY, 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