

Revealed Enters. LLC v Virtuoso Ltd

2025 NY Slip Op 31377(U)

April 5, 2025

Supreme Court, New York County

Docket Number: Index No. 656244/2019

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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REVEALED ENTERPRISES LLC D/B/A REVEALED CALIFORNIA D/B/A REVEALED AMERICA, and HERITAGE TOURS USA LLC

Plaintiffs,

- v -

VIRTUOSO LTD and MATTHEW D. UPCHURCH,

Defendants.

INDEX NO. 656244/2019

MOTION DATE -

MOTION SEQ. NO. 011 012

DECISION + ORDER ON MOTION

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 011) 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 415, 479, 482, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510

were read on this motion to/for SUMMARY JUDGMENT (BEFORE JOIND)

The following e-filed documents, listed by NYSCEF document number (Motion 012) 411, 412, 413, 414, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 480, 481, 483, 484, 485, 511, 512, 513

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

In motion sequence numbers 011 and 012, defendants Virtuoso Ltd (Virtuoso) and Matthew D. Upchurch, respectively, move pursuant to CPLR 3212 for summary judgment dismissing the fourth amended complaint.

Upchurch is the owner, Chairman, and CEO of Virtuoso. (NYSCEF 388, tr at 4: 13-25 [Upchurch depo].) Virtuoso is a travel network comprised of members who are either member agencies¹ or preferred partners.² (NYSCEF 478, Plaintiffs' Response to Virtuoso's 19-A Statement ¶ 10(a) [undisputed].)

Plaintiffs Heritage Tours USA LLC (Heritage) and Revealed Enterprises LLC (Revealed) are tour operator companies that were Virtuoso preferred partners. (*Id.* ¶¶ 10(g), 11 [undisputed]; NYSCEF 405, Bunker³ aff ¶ 19.) As preferred partners of Virtuoso, Heritage and Revealed entered into Preferred Supplier Agreements, which authorized Virtuoso, in its sole discretion, to place Heritage and Revealed on probationary status if it found them to be "problematic" due to, among other things, financial instability, and to notify its members of such issues.⁴ (NYSCEF 54, Tour Operator Preferred Supplier Agreement ¶ 4.6[2].)

Starting in 2018, other Virtuoso preferred partners expressed concerns to Virtuoso regarding "large sums outstanding in commissions/payments from Heritage

¹ Member agencies are travel agencies. (NYSCEF 478, Gardner Response ¶ 10(a) [undisputed].)

² Preferred partners consist of "travel business providers, including tour operators, hotels, cruise lines, destination management companies, insurances companies, and other similar providers of services to travel agencies and travelers." (*Id.*)

³ Cheryl Cheney Bunker is the Vice President of Global Membership Relations for Virtuoso. (NYSCEF 405, Bunker aff ¶ 1.)

⁴ Section 4.6[2] states that "if Virtuoso determines that a member is problematic due to... outstanding commission payments, outstanding fee payments, operational problems, financial instability, service issues, or other problems determined by Virtuoso... then Virtuoso, in its sole discretion, may place [Heritage or Revealed] on 'probation.' [Heritage or Revealed] specifically consents to Virtuoso's notification to its Member Agencies of any change in status of [Heritage or Revealed] to 'probationary' as set forth herein. In such instances, Virtuoso reserves the right to advise its Member Agency base via Virtuoso.com and/or by other appropriate means." (NYSCEF 54, Tour Operator Preferred Supplier Agreement ¶ 4.6[2].)

and Revealed.” (NYSCEF 405, Bunker aff ¶ 33.) Virtuoso documented those and other complaints that it received. (NYSCEF 450, Spreadsheet.) As a result, Virtuoso published two online articles to its members, which are the subject of the claims at issue here (Notifications). First, on February 6, 2019, Virtuoso wrote:

“In response to recent issues experienced with Heritage Tours related to late commission payments, service issues and non-responsiveness, Virtuoso has made the decision to place them on probation and suppress their profile from the network.

We greatly appreciate you letting us know if you are currently experiencing any issues so we can evaluate the best way to help our member agencies.

Please direct all inquiries to your Virtuoso Regional Director or manager or the Virtuoso Service Center at help@virtuoso.com.” (NYSCEF 448, February 6, 2019 Notification.)

Then, on February 15, 2019, Virtuoso wrote:

“In response to recent issues experienced with related party companies, including issues of late commission payments, service issues and non-responsiveness, Virtuoso has made the decision to place both Revealed America - National Parks and Revealed America - California on probation from the network. These profiles on Virtuoso.com will be suppressed during the probationary period.

We greatly appreciate you letting us know if you are currently experiencing any issues so we can evaluate the best way to help our member agencies.

Please direct all inquiries to your Virtuoso Regional Director or manager or the Virtuoso Service Center at help@virtuoso.com.” (NYSCEF 449, February 15, 2019 Notification.)

Defamation

“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. To prove a claim for defamation, a plaintiff must show: (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. Because the falsity of the statement is an element of

the defamation claim, the statement's truth or substantial truth is an absolute defense." (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014] [internal quotation marks and citations omitted].)

Virtuoso argues that the Notifications are substantially true, and thus, are not defamatory. "A statement is substantially true if the statement would not have a different effect on the mind of the reader from that which the pleaded truth would have produced." (*Franklin v Daily Holdings, Inc.*, 135 AD3d 87, 94 [1st Dept 2015] [internal quotation and citation omitted].) "Even if a publication is not literally or technically true in all respects, the defense of truth applies as long as the publication is 'substantially true,' and minor inaccuracies are acceptable." (*Matovcik v Times Beacon Record Newspapers*, 46 AD3d 636, 638 [2d Dept 2007] [citations omitted].)

The documentary evidence submitted by Virtuoso establishes, prima facie as a matter of law, the truth of certain facts set forth in the Notifications. The Notifications state that there have been issues with late commission payments, service issues and non-responsiveness by Heritage and Revealed. To support the truthfulness of these statements, Virtuoso submits the following:

1. Testimony of Heritage's former president, Neil Weidberg, that Heritage made late commission payments to travel agents. (NYSCEF 383, tr at 23:10-17);
2. Email from Four Season to Virtuoso informing it that Revealed owes Four Seasons \$38,850.13 and that Revealed has stopped responding. (NYSCEF 226, Four Season Email Chain at 3);
3. 2018 Email from Virgin Limited Edition that Heritage owes payment for 2017 bookings. (NYSCEF 228, Virgin Email Chain at 2);

4. Email from Virtuoso to Heritage and Revealed containing overdue invoices and notice that if such were not paid by November 2, 2018 the companies would be put on probation. (NYSCEF 230, Virtuoso Email and Invoices);
5. Email from Travelex regarding only a partial payment by Revealed and expressing a hesitance to book with them again. (NYSCEF 231, Travelex Email Chain at 3-4);
6. Email from Travel and Transport regarding late refund check and commission payment owed from Revealed. (NYSCEF 232, Travel and Transport Email at 3);
7. Second email from Four Seasons stating that Revealed owes it \$79,000. (NYSCEF 233, Second Four Season Email Chain at 3);
8. Email from Avenue Two Travel complaining of Heritage's failure to pay "\$32,000+ on commissions that are way past due." (NYSCEF 235, Avenue Two Travel Chain at 3);
9. Email from TWIL Travel Corp stating it "still have not been paid" by Heritage" and it has "been emailing and that is simply not good enough." (NYSCEF 236 TWIL Travel Corp Email Chain at 13);
10. Email from Largay Travel concerning Heritage stating, "commission are late" and "this shows that they either have a HUGE mismanagement issue or are having cash flow issues, which is a big problem." (NYSCEF 238, Largay Travel Email Chain at 2);
11. Email from Tzell Travel stating "Between Tzell, Travel Leaders and Protravel we've had numerous cases of late payments on commission and servicing of clients in general." (NYSCEF 240, Tzell Email Chain at 2);

12. Email from SmartFlyer stating that commission check from Revealed bounced. (NYSCEF 241, SmartFlyer Email Chain at 3);
13. Email from Morocco Private Travel stating that it has ended its collaboration with Heritage for nonpayment of invoices. (NYSCEF 247, Morocco Private Travel Email at 3); and
14. Testimony of Angela Sipe, former Operations Specialist at Revealed, that “[i]t was not unusual for [travel agent commissions] to be paid late. (NYSCEF 384, tr at 61:16-17.)

In opposition, plaintiffs argue that the statements in the Notifications were false as plaintiffs never experienced (1) issues making late payments, (2) negative service issues, or (3) non-responsiveness outside the normal course of accepted practices at Virtuoso and industry standards. To support their argument, they cite to the affidavit of Jena Gardner, Chairwoman and CEO of Heritage and CEO of Revealed. (NYSCEF 476, Gardner aff ¶¶ 6-7.) “Bald conclusory assertions, even if believable, are not enough to defeat summary judgment.” (*S. J. Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 342 [1974] [internal quotation marks and citations omitted].) Besides Gardner’s conclusory statement, plaintiffs fail to present evidence or case law supporting the notion that these statements are false because late payments, negative service issues, and non-responsiveness are part of the normal course of business. Gardner’s self-serving and conclusory affidavit fails to “establish an issue of fact” and “is insufficient to overcome [Virtuoso’s] prima facie showing.” (*Munoz-Rosario v Padilla*, ___AD3d___, 2025 NY Slip Op 02010, *1 [1st Dept 2025].)

Plaintiffs also argue that the issue of substantial truth should be resolved by a jury, relying on *Guccione v Hustler Mag., Inc.*, 800 F2d 298 (2d Cir 1986). In the *Guccione*, the Second Circuit held that the trial court's jury instructions "improperly permitted the jury to disregard the substantial truth defense." (*Id.* at 302.) The Second Circuit explained that the later part of the jury instructions "permitted the jury to read the alleged libel as accusing Guccione of committing adultery 'only' in 1983, in which event the jury was not to consider whether his past adultery made the statement substantially true" and concluded that "that reading is not within the range of reasonable interpretations requiring the jury's resolution." (*Id.*) Plaintiffs' reliance on this snippet to assert that a determination of substantial truth is a question for the jury is misplaced. The Second Circuit did not rule that this issue can only be resolved by a trier of fact. Contrary to the usual summary judgment rules, "summary judgment is particularly favored by New York courts" in libel cases. (*Khan v NY Times Co.*, 269 AD2d 74, 77 [1st Dept 2000] [citations omitted].)

Thus, summary judgment is granted, and this claim is dismissed.⁵

Product and Trade Disparagement

Plaintiffs allege that the false statements in the Notifications "denigrated the quality of plaintiffs' core products, goods and services, which is to provide good trips and good customer service." (NYSCEF 195, Fourth Amended Complaint ¶ 78.) "Product disparagement is an action to recover for words or conduct which tend to disparage or negatively reflect upon the condition, value, or quality of a product or

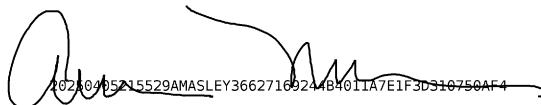
⁵ For the same reason, this claim is dismissed against defendant Upchurch. Accordingly, the court need not evaluate other arguments raised by Upchurch or Virtuoso.

property, and ... the elements of a product disparagement which must be proven are: (1) falsity of the statement; (2) publication to a third person; (3) malice (express or implied); and (4) special damages.” (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 105 [1st Dept 2009] [internal quotation marks and citations omitted].) Trade disparagement requires the knowing publication of false and derogatory facts about the plaintiff’s business of a kind calculated to prevent others from dealing with the plaintiff, to its demonstrable detriment. (*Banco Popular N. Am. v Lieberman*, 75 AD3d 460, 462 [1st Dept 2010] [citation omitted].) This claim fails as there is no falsity as previously discussed. Accordingly, defendants’ motion is granted, and this claim is dismissed.

Accordingly, it is,

ORDERED that defendants’ motion for summary judgment is granted and the fourth amended complaint is dismissed with costs and disbursements to defendants 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.



4/5/2025
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

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