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

HON. JOAN A. MADDEN
J.S.C.

Index Number : 103050/2011

PART 11

SELDON, PHILIP

VS

COMPASS RESTAURANT

INDEX NO. _____

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

DISMISS

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the annexed decision and order.

FILED
OCT 25 2012
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: October 24, 2012

_____, J.S.C.
HON. JOAN A. MADDEN
J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

----------X

PHILIP SELDON,

Plaintiff,

INDEX NO. 103050/11

-against-

COMPASS RESTAURANT, COSMIC GROUP DBA COMPASS RESTAURANT, COSMIC GROUP, INC. DBA COMPASS RESTAURANT, COSMIC GROUP, LLP DBA COMPASS RESTAURANT, COSMIC GROUP, COSMIC GROUP, INC., COSMIC GROUP, LLP, ROXANNE "DOE," "JANE DOE," AND ROXANNE@COMPASSRESTAURANT.COM,

Defendants.



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JOAN A. MADDEN, J.:

In this action to recover damages for defamation, defendant Cosmic Group, LLC d/b/a Compass Restaurant ("Compass") moves for an order pursuant to CPLR 3211(a)(7) dismissing the complaint for failure to state a cause of action.[1] Plaintiff *pro se* Philip Seldon opposes the motion and cross-moves for an order "compelling the deposition of Roxanne 'Doe' and Julie Concannon," an order "finding Roxanne 'Doe' and Julie Concannon in contempt of court," and

[1]In his affidavit in support of the motion, counsel for defendant Compass states that the complaint incorrectly names "Compass Restaurant," "Cosmic Group DBA Compass Restaurant," "Cosmic Group, Inc. DBA Compass Restaurant," "Cosmic Group LLP DBA Compass Restaurant," "Cosmic Group," "Cosmic Group, Inc." and "Cosmic Group, LLP," and that the proper name for the corporate defendant is Cosmic Group, LLC d/b/a Compass Restaurant. Counsel also states that upon information and belief, the defendants named as Roxanne "Doe," "Jane Doe" and Roxanne@CompassRestaurant.com have not been served with process.

an order "granting sanctions against James Frank [the attorney for defendant Compass] individually for frivolous conduct."

Plaintiff Seldon commenced this action on March 11, 2011 by filing a one-page Summons with Notice, for "libel, libel per se," and seeking "relief" in the sum of $1 million. Plaintiff subsequently served a complaint[2] alleging that on or about March 2, 2011, "defendants including but not limited to Roxanne 'Doe,' 'Jane Doe' and Roxanne@compassrestaurant.com published to Julie Concannon and upon information and belief others, identity to be determined in discovery, an email which contained multiple defamatory statements about Plaintiff." The complaint quotes the following statements contained in the email which plaintiff alleges are "false and defamatory, being libel *per se*":[3]

> he's a serial suer, scammer, spammer, embezzler, and revenge artist. Here are a few supporting links . . there are some more our [sic] there, but some are PDF Downloads, and I didn't want to make you download a hunk of shit:
>
> revenge expert: http://articles.latimes.com/1995-10-01/news/mn-51957_1_night-school
>
> Philip Seldon sued by Andrew Spinnelli for fraud and what appears to be embezzlement: http://law.justia.com/cases/new-jersey/appellate-division-unpublished/2010/a5095-08-opn.html
>
> Philip Seldon tries to counter-sue Michael Flomenhaft, after he himself had been sued for "frivolous litigation" - http://law.justia.com/cases/new-york/other-courts/2006/2006-52443.html
>
> Philip Seldon tries to review a book that he co-wrote, scroll down and look at the responses: http:/www.amazon.com/review/R2MUGCTMN767BO

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[2]The court's computer records do not indicate that the complaint or any affidavits of service were filed.

[3]It is unclear whether the complaint quotes the email in its entirety, as neither plaintiff nor defendant submits a copy of the of the actual email.

Philip Seldon getting in trouble for making fake websites that mimic T-Mobile: http://www.wipo.int/amc/en/domains/decisions/html/2007/d2007-0674.html

Philip Seldon sues Harvard Press (this is a PDF download) - http://pacer.mad.uscourts.gov/dc/cgi-bin/recentops.pl?filename=otoole/pdf/seldon+v+harvard+order.pdf

Philip Seldon "Best Deal Magazine"spam SCAM (scroll down a bit) - http://www.abestweb.com/forums/showthread.php?t=50044

Philip gets caught by Eric Larson, who clearly states that this guy is a scammer: http://www.moneymakergroup.com/Swisscash-Swisscashnet-t26058.html&st=15060

On May 18, 2011, defendant Compass filed an Answer asserting eight defenses including failure to state a cause of action; the purported statements by Compass and/or its employees about plaintiff were not published, are opinion, are true and are protected by a qualified privilege; plaintiff has not alleged and cannot establish that the statements were made with constitutional or common law malice; and Compass is not liable for the purported defamatory statement of "Roxanne." Defendant Compass is now moving under CPLR 3211(a)(7) to dismiss the complaint for failure to state a cause of action, asserting that the alleged defamatory statements are non-actionable statements of opinion.

Generally, on a CPLR 3211motion to dismiss, the court must liberally construe the pleading, "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." Nonnon v. City of New York, 9 NY3d 825, 827 (2007) (quoting Leon v. Martinez, 84 NY2d 83, 87-88 [1994]). On a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, "the criterion is whether the proponent of the pleading has a cause of

action, not whether he has stated one." Leon v. Martinez, supra at 88 (quoting Guggenheimer v. Ginzburg, 43 NY2d 268, 275 [1977]); accord Amaro v. Gani Realty Corp, 60 AD3d 491, 492 (1st Dept 2009); Weiner v. Lazard Freres & Co, 214 AD2d 114, 120 (1st Dept 1998).

A claim for defamation must allege a "false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum a negligence standard, and, it must either cause special harm or constitute defamation *per se*." O'Neill v. New York University, 97 AD3d 199, 212 (1st Dept 2012) (quoting Salvatore v. Kumar, 45 AD3d 560, 563 [2nd Dept 2007], lv app den 10 NY3d 703 [2008], quoting Dillon v. City of New York, 261 AD2d 34, 38 [1st Dept 1999]). "Since falsity is a *sine qua nom* of a libel claim and since only assertions of fact are capable of being proven false, . . . a libel action cannot be maintained unless it is premised on published assertions of fact," rather than expressions of opinion. Brian v. Richardson, 87 NY2d 46, 51 (1995); accord Sandals Resorts International Ltd v. Google, Inc, 86 AD3d 32, 38 (1st Dept 2011).

The determination of whether a statement is an assertion of actionable fact or an expression of non-actionable opinion is a question of law for the court, to be resolved "on the basis of what the average person hearing or reading the communication would take it to mean." Steinhilber v. Alphonse, 68 NY2d 283, 290 (1986). The court "must consider the content of the communication as a whole, as well as its tone and apparent purpose." Brian v. Richardson, supra at 51; accord Mann v. Abel, 10 NY3d 271, 276 [2008], cert denied 555 US 1170 [2009]). "Rather than sifting through a communication for the purpose of isolating and identifying assertions of fact, the court should look to the over-all context in which the assertions were made

and determine on that basis 'whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff.'" Id (quoting Immuno, AG v. Moor-Jankowski, 77 NY2d 235, 254, cert den 550 US 954 [1991], citing Steinhilber v. Alphonse, supra at 293); accord Mann v. Abel, supra at 276.

To distinguish fact from opinion, the Court of Appeals generally analyzes the following factors: "1) whether the specific language in issue has a precise meaning which is readily understood; 2) whether the statements are capable of being proven true or false; and 3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to 'signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact.'" Brian v. Richardson, supra at 51 (quoting Gross v. New York Times Co., 82 NY2d 146, 153 [1993], quoting Steinhilber v. Alphonse, supra).

The Court of Appeals also utilizes "the important distinction between a statement of opinion that implies a basis in facts which are not disclosed to the reader or listener and a statement of opinion that is accompanied by a recitation of the facts on which it is based or one that does not imply the existence of undisclosed underlying facts." Gross v. New York Times Co., supra at 153. "The former are actionable not because they convey 'false opinions' but rather because a reasonable . . . reader would infer that the [writer] knows certain facts unknown to the audience which support the opinion and are detrimental to the person toward whom the communication is directed." Id at 153-154 (quoting Steinhilber v. Alphonse, supra at 290). The latter, however, are not actionable as "a proffered hypothesis that is offered after a full recitation

of the facts on which it is based is readily understood by the audience as conjecture." Id at 154. "Indeed, this class of statements provides a clear illustration of situations in which the full context of the communication 'signal[s] . . . readers or listeners that what is being read or heard is likely to be opinion, not fact.'" Id (quoting Steinhilber v. Alphonse, supra).

Applying the foregoing principles to plaintiff's cause of action, the court finds that the email at issue qualifies as non-actionable opinion. Reading the email as a whole, in the context of the entire communication as quoted in the complaint, it is clear the ordinary reader would understand that the writer's remarks describing plaintiff as a "serial suer, scammer, spammer, embezzler, and revenge artist," are based on eight separate articles about plaintiff which the writer found on the internet and references in the email.

The email does not imply that it is based upon undisclosed facts; just as in Sandals Resorts International Ltd v. Google, Inc, supra, the remarks are followed by a hyperlink or citation to a specified Web site or on-line article about plaintiff, as the source of the information on which the remarks are based. "Far from suggesting that the writer knows certain facts that his or her audience does not know, the email is supported by links to the writer's sources." Id at 45. Notably, the portion of the email quoted in the complaint, explicitly states: "Here are a few *supporting* links."

Thus, relying on First Department's decision in Sandals Resorts International Ltd v. Google, Inc, this court concludes that since the links and Web sites disclose the facts underlying the writer's remarks, the email "is 'accompanied by a recitation of the facts upon which it is based,' and therefore qualifies a 'pure opinion' under the *Steinhilber* analysis." Id at 43 (quoting Steinhilber v. Alphonse, supra at 289). As "pure opinion," the email is not actionable as matter

of law and defendant's motion to dismiss the complaint is granted. In light of this conclusion, plaintiff's cross-motion for various relief is denied as moot.

Accordingly, it is

ORDERED that the motion is granted and the complaint is dismissed in its entirety and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff's cross-motion is denied as moot.

DATED: October 21, 2012

ENTER:

J.S.C.