Benedict v Tarnow & Juvelier, LLP

2013 NY Slip Op 33508(U)

December 24, 2013

Supreme Court, New York County

Docket Number: 116709/2009

Judge: Shlomo S. Hagler

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SCANNED ON 1/9/2014

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

PRESENT: Hon. Shlomo S. Hagler PART: **17**
Justice

THEODORA BENEDICT,

Plaintiff,

- against -

TARNOW & JUVELIER, LLP, TARNOW LAW FIRM, PL, MARTIN JUVELIER, PLLC, MARTIN D. JUVELIER, an individual, and HERMAN H. TARNOW, an individual,

Defendants.

INDEX NO.: 116709/2009

MOTION SEQ. NO.: 007

DECISION and ORDER

Motion by plaintiff to dismiss defendants' libel counterclaim.

	Papers Numbered
Plaintiff's Notice of Motion with Affirmation of Plaintiff's Counsel, Alexander T. Coleman, Esq., in Support of the Motion & Exhibits A through D	1, 2
Affidavit of Defendant Martin D. Juvelier, Esq., in Opposition to Plaintiff's with Exhibits A through F	3
Reply Affirmation of Plaintiff's Counsel, Alexander T. Coleman, Esq.,in Further Support of Plaintiff's Motion	4
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Defendants' Letter dated January 28, 2013	7
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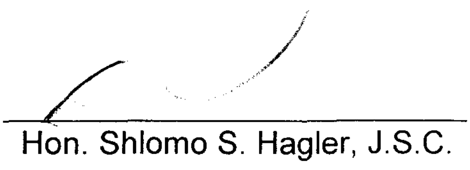
UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Cross-Motion: ❑ No ❑ Yes

Upon the foregoing papers, it is hereby Ordered that this Motion is granted as set forth in the attached separate written Decision and Order and the libel counterclaim of the defendants Tarnow & Juvelier, Llp, Martin Juvelier, PLLC, Martin D. Juvelier, is hereby Ordered dismissed.

Dated: December 24, 2013
New York, New York



Hon. Shlomo S. Hagler, J.S.C.

Check one: ❑ **Final Disposition** ❑ **Non-Final Disposition**

Motion is: ❑ Granted ❑ Denied ❑ Granted in Part ❑ Other

Check if Appropriate: ❑ SETTLE ORDER ❑ SUBMIT ORDER ❑ DO NOT POST ❑ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

--X

THEODORA BENEDICT,

Plaintiff,

-against-

TARNOW & JUVELIER, LLP, TARNOW LAW FIRM PL, MARTIN JUVELIER, PLLC, MARTIN D. JUVELIER, an individual, and HERMAN H. TARNOW, an individual,

Defendants.

--X

Index No.: 116709/2009

Motion Seq. No.: 007

DECISION/ORDER

HON. SHLOMO S. HAGLER, J.S.C.:

Plaintiff Theodora Benedict ("plaintiff" or "Benedict") commenced this action against defendants Tarnow & Juvelier, LLP ("T&J LLP"), Martin D. Juvelier, individually ("Juvelier"), Martin Juvelier, PLLC ("Juvelier's new firm") (collectively "the Juvelier defendants"), Herman Tarnow, individually ("Tarnow"), and the Tarnow Law Firm, PL ("Tarnow's new firm") (collectively "the Tarnow defendants"), alleging disability discrimination, intentional infliction of emotional distress, and retaliation. The Juvelier defendants counterclaimed for libel. In this motion sequence number 007, plaintiff moves to dismiss the Juvelier defendants' libel counterclaim for failure to state a cause of action pursuant to CPLR § 3211(a)(7).

STATEMENT OF THE FACTS

Prior to this action, plaintiff filed a claim with the New York State Department of Human Rights ("SDHR") for wrongful termination, age discrimination, and disability discrimination claiming that she was fired because of being diagnosed with a rare tumor in her sinuses, which required surgery. On October 25, 2007, after giving notice of her illness to her employer and co-workers, Benedict's employment was terminated. (Complaint, ¶¶ 5, 6, 14, 27.) On November 9, 2007, Benedict filed an age and disability discrimination claim with the SDHR. (*Id.* at ¶¶ 35-37.)

On or about November 28, 2007, Benedict was offered her old position back at T&J LLP. (*Id.* at ¶¶ 38-39.) In December of 2007, soon after plaintiff was rehired at her old position, she once again lost her job due to the firm's dissolution. At the SDHR proceeding, plaintiff claimed that she was discriminated against and terminated because of her medical condition. In addition, plaintiff alleged at the SDHR proceeding that T&J LLP was dissolved in order to avoid the legal ramifications of firing the plaintiff for discriminatory reasons. (*See* Plaintiff's Rebuttal Letter to the SDHR, dated March 13, 2008 ["SDHR Rebuttal Letter"], at p. 2, submitted by plaintiff's counsel on January 16, 2013, at the request of the Court at the January 14, 2013 hearing date.)

On November 25, 2009, plaintiff filed the summons and complaint in this action. Shortly before commencing this action, plaintiff and her attorney discussed the filing of this action and the SDHR proceeding with the New York Post regarding plaintiff's firing, rehiring, and subsequent termination as a result of the firm's dissolution. On November 30, 2009, the New York Post published a story regarding plaintiff's lawsuit and included statements by the plaintiff and plaintiff's attorney, Michael Borrelli ("Borrelli"), that the purpose of the dissolution and re-formation of the firm was to hide the discriminatory firing. (Exhibit "D" to Affidavit of Martin D. Juvelier in Opposition to Plaintiff's Motion to Dismiss Libel Claim ["Juvelier Aff. in Opp."].) The New York Post story quoted Borrelli as saying "It was clearly an egregious and willful attempt to avoid liability. . . . How could it not be?" (*Id.*) The New York Post story also included a denial of plaintiff's allegations by Juvelier. (*Id.*)

In defendants' counterclaim for libel, they allege that the statements made to the New York Post by plaintiff and Borrelli were defamatory. Plaintiff moves to dismiss the counterclaim for failure to state a cause of action on three grounds, as follows: (1) that because the statements made by her and/or her attorney to the New York Post reporter were primarily verbal rather than written,

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libel does not apply, (2) that the Juvelier defendants failed to plead with sufficient specificity the allegedly false and defamatory words which gave rise to the libel counterclaim, and (3) that plaintiff's statements to the New York Post was protected by the "fair report" privilege under Civil Rights Law § 74. The Juvelier defendants oppose the motion.

DISCUSSION

Standard for a Motion to Dismiss For Failure to State a Cause of Action

In determining a motion to dismiss a pleading for failure to state a cause of action, the court must "accept the facts as alleged in the Complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Nonnon v City of New York*, 9 NY3d 825 [2007].) In a defamation action, the court must determine if the alleged defamatory statements are not actionable as a matter of law. (*Steinhilber v Alphonse*, 68 NY2d 283 [1986].)

Standard for Defamation Action

To establish a cause of action for defamation, plaintiffs must demonstrate the following elements:

1) a false statement on the part of the defendants concerning the plaintiffs;
2) published without privilege or authorization to a third party;
3) with the requisite level of fault on the part of the defendants; and
4) causing damage to plaintiffs' reputation by special harm or defamation *per se*

(Restatement [Second] of Torts § 558; *Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999].) CPLR § 3016(a) requires that the alleged false and defamatory words be specified with

particularity in the complaint. The complaint must also allege the "time, place and manner of the false statement and to specify to whom it was made." (*Dillon*, 251 AD2d at 38 [citations omitted].)

<u>Whether the Statements Were Libel or Slander</u>

The Juvelier defendants have counterclaimed for libel. Plaintiff argues that because the statements made by her and Borrelli to the New York Post were verbal and not written, they cannot form the basis for a libel counterclaim (Affirmation of Alexander T. Coleman, Esq., in Support of Plaintiff's Notice of Motion to Dismiss Remaining Counterclaim of Juvelier Defendants ["Coleman Aff. in Support of Motion to Dismiss"], at ¶ 19). In this regard plaintiff is incorrect. As noted in *Park Knoll Assoc. v Schmidt*, (89 AD2d 164, 168 [2d Dept 1982] *revd on other grounds* 59 NY2d 205 [1983]), "[w]here a defamatory statement is oral but is expected by the speaker to be reduced to writing and published, and is subsequently communicated in written form, such a statement constitutes a libel (Sack, Libel, Slander, and Related Problems, § II.3, p 44)."

<u>Specificity of the Counterclaim</u>

Plaintiff alleges that the defendants have not pled with the required specificity the exact words which they allege are defamatory. Pursuant to CPLR § 3016(a), any cause of action for libel must set forth the particular words allegedly constituting defamation and it must also allege the time, place, and manner in which the false statement was made. Defendants contend that they have stated the time, place, and manner in which the false statements were made with the required specificity.

With respect to plaintiff's allegations that defendant did not specifically plead the libelous words verbatim, this argument lacks merit. Defendants' cross-claim specifically sets forth the words that the defendant believes were libelous from the New York Post article including verbatim quotations (Juvelier Defendants' Verified Answer, Affirmative Defenses and Counterclaims, ¶¶ 21,

22, 24, and 25, attached as Exhibit "C" to Notice of Plaintiff's Motion to Dismiss Remaining Counterclaim of Juvelier).

Fair Report Privilege

Plaintiff asserts that the "fair report" privilege bars the Juvelier defendants' counterclaim of defamation under the Civil Rights Law § 74. With the enactment of the Civil Rights Law § 74 in 1962, the Legislature created a statutory privilege that prohibits, in relevant part, the maintenance of a civil action including defamation and other related claims based on the publication of a "fair and true report" of any judicial proceeding. The apparent purpose of the privilege is to promote the dual public policy interest of ensuring the free flow of true information without fear of being sued, and public dissemination of judicial decisions and proceedings for proper administration of justice. (*Beary v West Publishing Co.*, 763 F2d 66 [2nd Cir] *cert denied* 474 US 903 [1985].)

This privilege has been liberally interpreted to provide broad protection for news reports of judicial proceedings. (*Holy Spirit Assn. for the Unification of World Christianity v New York Times Co.*, 49 NY2d 63 [1979].) In view of the above purpose and the liberal interpretation, courts have established the meaning of a"fair and true" report as a substantially accurate report. (*Id.* at 67, quoting *Briarcliff Lodge Hotel, Inc. v Citizen-Sentinel Publs.*, 260 NY 106, 118 [1932].) In contrast, courts have rejected the notion that a news report be tested for literal accuracy because the language should not be "dissected and analyzed with a lexicographer's precision." (*Holy Spirit*, 49 NY2d at 68.) The standard must comport with substantial as opposed to literal accuracy because a "newspaper article [or on-line report] is, by its very nature, a condensed of events which must, of necessity, reflect to some degree the subjective viewpoint of its author." (*Id.*). Even the failure to report other facts that were favorable to the complainant in the published news report still constitutes

a fair report where "those omissions did not alter the substantially accurate character of the article." (*McDonald v East Hampton Star*, 10 AD 3d 639, 640 [2d Dept 2004].) In summary, the courts must look for substantial and contextual accuracy of the news report as the standard for determining a fair report under Civil Rights Law § 74.

The Juvelier defendants argue that the statements made to the New York Post are not privileged under Civil Rights Law § 74 because, while the New York Post article appeared after the lawsuit was commenced, there was no lawsuit pending when the plaintiff made the alleged libelous statements. The Juvelier defendants argue that this is evidenced by the fact that the New York Post reporter, Alex Ginsberg, contacted Juvelier regarding the article he was writing on November 24, 2009, which was one day before the complaint for the instant action was filed (*see* Exhibit B to Juvelier Aff. in Opp.). Therefore, the Juvelier defendants claim the statements do not fall under the privilege of Civil Rights Law § 74, because there was no judicial proceeding to report about.

It is true that plaintiff and her attorney made their statements to the New York Post reporter prior to the filing of the instant lawsuit and that allegedly defamatory statements which are made before the commencement of a judicial proceeding does not qualify for the fair reporting privilege of Civil Rights Law § 74 (*Park Knoll Assoc. v Schmidt*, 59 NY2d 205, 209-210 [1983] *revd on other grounds* 59 NY2d 205 [1983]; *Kenny v. Cleary*, 47 AD2d 531, 532 [2d Dept 1975]). However, in the instant case, plaintiff claims that the statements made by her and Borrelli to the New York Post were privileged under the Civil Rights Law § 74, because they were a fair report of the prior proceeding filed with the State Department of Human Rights. Statements made in proceedings before the State Department of Human Rights are covered by the fair report privilege of Civil Rights Law § 74 (*Silver v Mohasco Corp.*, 62 NY2d 741, 742 [1984]). Therefore, the statements made to the New York Post by plaintiff and her attorney were privileged under Civil

Law § 74 because they were a substantially accurate report of the previous SDHR proceeding, as noted in *Holy Spirit*. Similarly, as stated in *McDonald v East Hampton Star*, even a failure to report facts that are favorable to the opposing party does not constitute a violation of a "fair and true" report.

CONCLUSION

Based upon the foregoing, it is hereby

ORDERED and ADJUDGED that the motion sequence number 007 by plaintiff Theodora Benedict to dismiss the libel counterclaim of defendants Tarnow & Juvelier, LLP, Martin D. Juvelier, Martin Juvelier, PLLC, is granted as the alleged libelous statements were protected under the fair reporting privilege of Civil Rights Law § 74.

The clerk is directed to enter judgment accordingly.

The foregoing constitutes the decision and order of this Court.

ENTER:

Dated: December 24, 2013
New York, New York

Hon. Shlomo S. Hagler, J.S.C.

Shlomo Hagler
J.S.C.

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