

<b>De Clercq v Time Inc.</b>
2015 NY Slip Op 30489(U)
March 30, 2015
Sup Ct, New York County
Docket Number: 154674/2014
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 61

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NATHALIE DE CLERCQ,

Plaintiff,

DECISION AND  
ORDER

-against-

Index No.154674/2014

TIME INC., CORBIS CORPORATION,  
SPLASH NEWS & PICTURE AGENCY, LLC.,

Defendants.

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HON. ANIL C. SINGH, J.

In this defamation action, defendant Time Inc. (“Time”) moves for an order dismissing plaintiff’s verified complaint in its entirety pursuant to CPLR 3211 (a)(7). Plaintiff Nathalie De Clercq opposes the motion.

*Facts*

In early September, Time published the September 16, 2013 print issue of *People* magazine, containing an article titled “BILLION-DOLLAR-BREAKUP? Google cofounder Sergey Brin and his wife split amid reports that he’s been searching for love on staff.” The article reported the separation of Google cofounder Sergey Brin from his wife, a founder of the consumer DNA-analysis company, 23andMe, Anne Wojciki. The article states that the wife, “Wojciki, ‘is angry and devastated’ about Brin’s alleged romance with Amanda Rosenberg, a Google Glass marketing manager, which the source says began eight months ago.”

Two photographs illustrated the article. The first is a photograph of Brin and his wife. The Second photograph shows another woman purporting to be Rosenberg.

This article would be unremarkable had there not been a photograph of De Clercq illustrating the article, with the misidentifying caption describing the photograph as a “Web of Intrigue Brin and wife Wojciki in April. Right: Google employee Rosenberg wearing a Google Glass in June.” Time concedes that the photograph was in fact a picture of De Clercq- not- Amanda Rosenberg. Upon notification from plaintiff’s counsel, People magazine subsequently issued a correction in print and online.

De Clercq brings this action against defendants alleging “false, defamatory, malicious, and libelous licensing and publication of a photograph misidentifying De Clercq as the individual in a story regarding unchaste behavior and sexual misconduct and for violating Civil Rights Law §§50 and 51 through the unauthorized use of Plaintiff’s image for trade purposes.” Plaintiff reasons that both Rosenberg and De Clercq are Eurasian and have long dark hair thus rather than find a photograph of Rosenberg, Defendants simply used a photograph of plaintiff De Clercq.

Plaintiff’s first cause of action is against non-moving defendants Corbis Corporation and Splash News & Picture Agency, LLC., for defamation per se, her second cause of action is against defendant Time for defamation/ libel per se and

her third cause of action against is also against defendant Time for a violation of Civil Rights Law §§ 50 and 51.

Time argues, *inter alia*, that the article is not defamatory as New York courts have repeatedly held that such innocuous terms like “dating” and “romance” do not impute unchastity or sexual misconduct and accordingly are not actionable as a matter of law.

#### *Standard*

In resolving a motion to dismiss for failure to state a cause of action, the court must accept as true the facts as alleged in the complaint and afford plaintiff the benefit of every favorable inference. (Guggenheimer v. Ginzburg, 43 NY2d 268, 275 [1977]). The court must determine only whether the facts as alleged fit within any cognizable theory. (Id.)

#### *Defamation/ Libel Per Se*

##### *Defamatory Meaning*

“It is, of course, the court's responsibility to determine whether a publication is susceptible of the defamatory meaning ascribed to it. A court should not strain to place a particular construction on the language complained of. By the same token courts should not strain to interpret words in their mildest and most inoffensive sense to hold them nonlibelous.” (Rejent v Liberation Publications, Inc., 197 AD2d 240, 242-3 [1st Dept 1994]) (internal citations omitted).

Under New York law, words are *per se* defamatory if they falsely, impute unchastity to the plaintiff. (James v Gannett Co., Inc., 40 NY2d 415, 419 [1976]). Plaintiff can only recover damages on her defamation cause of action if she can establish that the article was in fact defamatory—tending “to expose her to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him [or her] in the minds of right-thinking persons, and to deprive him [or her] of their friendly intercourse in society. (Ava v NYP Holdings, Inc., 64 AD3d 407, 412 [1st Dept 2009]) (internal citations omitted). Unless the court can say, as a matter of law, that the statement could not have had a defamatory effect, it is for the jury to decide whether or not it did (Armstrong v Simon & Schuster, Inc., 85 NY2d 373, 380 [1995]).

Changing social mores may affect how certain sexual conduct is viewed by the community, so that what was defamatory *per se* at one time may no longer be the case. However recent jurisprudence in Ward v Klein, 10 Misc 3d 648, 651 [Sup Ct, New York Cty 2005], found unchastity imputed to plaintiff by inference from the placement of plaintiff’s photograph “during the documentary [which] could lead a reasonable viewer to conclude that plaintiff was a woman who would regularly make herself available to Simmons, at his beck and call, for casual sexual encounters.” (*id.*).

Defendants argue that there is no reference to sexual misconduct or promiscuity in the *People* article. This court disagrees. A reasonable reader would infer from the article that Brin and Rosenberg are “dating” in an alleged “romance” while in an extramarital affair in the work place (Donati v Queens Ledger Newspaper Group, 240 AD2d 696, 697 [2d Dept 1997]) (“Notwithstanding the loosening of traditional moral standards in the last few decades, the opprobrium of adultery remains with us today”). The juxtaposition of De Clercq’s photograph along with the commentary describing her as Rosenberg, the alleged paramour of a married man causing a marriage to break up, arguably exposes De Clercq to public contempt for unchaste behavior.

*Of or concerning Plaintiff*

Even if the article is capable of a defamatory meaning, in order for plaintiff’s claim to be actionable, it must be based on a false and defamatory statement that is specifically “of or concerning” the plaintiff (Carlucci v Poughkeepsie Newspapers, Inc., 57 NY2d 883, 885 [1982]). To sustain a claim when the person defamed is not named in a defamatory publication, then in light of the surrounding circumstances, persons reading it must be able to understand that it refers to the person complaining (Giaimo v Literary Guild, 79 AD2d 917 [1st Dept 1981]).

Defendant contends that the text of the article and photograph caption plainly states that Rosenberg, not plaintiff, is dating Brin thus the defamatory statements are not of and concerning plaintiff. Plaintiff, on the other hand, argues that the placement of her picture describing her as Rosenberg would expose her to the same ridicule as if it were her behavior at issue.

The First Department has held that a person may be defamed through a photograph where the photograph of the person is incorrectly identified, or is not identified at all, in the text of a companion article that is libelous (De Sando v New York Herald Co., 88 AD 492, 495 [1st Dept 1903]). “While it is true the article does not use the plaintiff’s name or otherwise identify him except by the picture, one may be libeled by having his picture printed in such fashion as to expose him to public ridicule and contempt as effectively as one may be libeled by words directly referring to him by name.” (Jackson v Consumer Publications, 256 AD 708, 709-10 [1st Dept 1939]).

Conversely, defendant relies upon Gaiimo v Literary Guild, 79 AD2d 917 [1st Dept 1981], which dismissed plaintiffs’ complaint where, in a pamphlet, plaintiffs’ photograph was used in a frame with shattered glass to advertise a book regarding “marriage and madness.” The Court reasoned that the defamatory article was not of and concerning plaintiffs since in page two of the pamphlet the article

stated the author's name and that the account was autobiographical therefore it would be unwarranted to conclude that the article is about the plaintiffs' marriage. (id.)<sup>1</sup>. Time's reliance on Giaimo is misplaced as in Giaimo, the reader would have to make the inference that the picture was illustrating the struggles of the author herself and her husband. In contrast, here, the article illustrates plaintiff's photograph with a caption explicitly misidentifying plaintiff as Rosenberg who is the subject of the article.

Courts have more recently held that in instances of misidentifying photographs when plaintiff is not the intended subject of a defamatory article, it is an issue of fact whether a reasonable reader would impute the content of the article to plaintiff (Thomas v Journal Register Co., 24 AD3d 988, 990 [3d Dept 2005]) (denying summary judgment where photograph erroneously identified plaintiff as a sex offender).

Accordingly, giving every inference to plaintiff on the motion to dismiss stage, plaintiff has sufficiently established that persons reading the *People* article will read it to understand she is the subject of the defamatory publication (Prince v

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<sup>1</sup> The Dissent disagreed with the Majority reasoning "[t]he use of [plaintiffs'] photograph in connection with this story could very well have created an incorrect impression putting the plaintiffs in a false light." (Giaimo, 79 AD2d at 918 (Kupferman, J., and Fein, J. dissenting)).



Fox Tel. Stations, Inc., 93 AD3d 614, 614 [1st Dept 2012]) (finding defamatory statements were of and concerning plaintiff even when not specifically named since a reasonable viewer would understand that the defamatory statements referred to plaintiffs as members of a small group).

### *Special damages*

Defendants also move to dismiss the defamation claim on the ground that the complaint fails to plead special damages. Slander that imputes serious sexual misconduct to another needs no proof of special harm. Lieberman v Gelstein, 80 NY2d 429, 435 [1992]; (Civil Rights Law § 77 [McKinney]) (“In an action of slander of a woman imputing unchastity to her, it is not necessary to allege or prove special damages.”).

### *Violation of Privacy Law under Civil rights Law §§50 and 51*

“Civil Rights Law §§ 50 and 51 protect against the nonconsensual use of an individual's name or picture for advertising purposes, or for the purposes of trade”. It is well settled that a picture illustrating an article on a matter of public interest is not considered used for the purpose of trade or advertising unless it has no real relationship to the article or unless the article is an advertisement in disguise (Alvarado v K-III Mag. Corp., 203 AD2d 135, 136 [1st Dept 1994]) (internal citations omitted).

Here, the *People* article was reporting news on a matter of public interest. (Molony v Boy Comics Publishers, 277 AD 166, 171 [1st Dept 1950] (finding gossip and social columns even if not chiefly educational are a matter of public interest under civil rights law). Plaintiff's photograph was used -- albeit inaccurately-- to illustrate the article. The policy behind the Civil Rights Law is to prevent the impermissible usage of photographs for advertising or trade purposes (id. at 169). While plaintiff's picture has no actual relationship to the article, plaintiff cannot reasonably contend that her picture was inserted as an advertisement in disguise (see Murray v New York Mag. Co., 27 NY2d 406, 409-10 [1971] (analyzing whether the photograph of plaintiff related to the subject matter of the article only to determine if alternatively it was then an advertisement in disguise). As such, the Court must conclude that defendant's motion to dismiss on the right to privacy under Civil Rights Law §§ 50 and 51 claim is granted.

Accordingly it is,

ORDERED that Time Inc.'s motion to dismiss is denied as to the second cause of action of the verified complaint; and it is further

ORDERED that Time Inc.'s motion to dismiss is granted as to the third cause of action of the verified complaint; it is further

ORDERED that defendant Time Inc. is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 320, 80 Centre Street, on June 3, 2015, at 9:30 AM.

Date: March 30, 2015  
New York, New York

  
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Anil C. Singh