

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Index No.: 09-CV-2096
District Judge Joanna Seybert

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ILAN ABRAHAM, EDGARDO ACOSTA GARCIA,
ILDEFONSO ACOSTA GARCIA, ALLEN AKERS, MARY L.
AKERS, JIMMY ALEMAN, NIEVES ALEMAN, MARCUS
ALONSO, LUCIA ALVA, JOSE ALVAREZ, JOHN APPELT,
DARREN AQUINO, JOHN AQUINO, SUSAN ASARO, A.W.
MANAGEMENT SERVICES, INC., DEBROAH MCGLONE-
BALUCH, STEPHEN BELLUARDO, NICOLE BENTON, JOHN
BIERL, MICHELE BIERL, WILLIAM BIERL, LIRON
BINSHTOCH, JAMES BOMBOLEVICZ, BERNADATTE
BURNS, DAVID BURNS, KEVIN BUTLER, MARIO
CAPUANO, DOMINICK CASAZZA, FRANK CASERTA,
JERRY CASTALDO, CRAIG COLLUZZI, JAMES COOKE,
JOSEPH CRAVOTTA, PATRICIA CRAVOTTA, MARIA
DELGADO, LOUIS D'ERRICO, VINCENT D'ONOFRIO,
KAPPA FARID, KATHLEEN FERRANTE, ROSIE
FERRAIOLO, ROSSI FERRAIOLO, JAMES FERRAIOLO,
STANLEY FERRAIOLO, NINA FITZMAURICE, JOSEPH
GALLETTI, CHRISTOPHER GRAVAGNA, LAUREN GUNSEL,
JANINE HAUFI, IOANNIS KARAGIANNIS, LUIS LARA-
RIVAS, RICKY LEE, SHYVONNE LOPEZ, THOMAS P.
LUCEY, PAUL J. LUKASIK, RUSSELL MARTIN, JOSEPH
MARTINO, THOMAS MAUGHAN, ROBERT MCKENNA,
DALIANA BADILLO MERCADO, LUCAS MOELLER, RAY
MOELLER, BENVENDO NEVES, WILLIAM K. NG, ALFRED
PAPPALARDI, KALPESH PATEL, RAMASH B. PITTI,
GENNARO PRUDENTE, RICHARD RACIOPPI, JR.,
KATHLEEN RAY, MARJORIE RODRIGUEZ, MARYANNE
ROTELLA, LARRY SAMUELS, GILA SCHIOWITZ, ROBERT
SCHWABB, JOHN SCHERILLO, KATHLEEN SMITH, JOSEPH
STEMBERGER, MICHAEL SULEK, KATHRYN SULEK,
RANDY TEJADA, AVI TROPE, HILLIL TROPE, ARTHUR
TYLER, MARK TYLER, ANGEL VASQUEZ,
KONSTANTINOS VASSILIOU, ADAM WYSOCKI, JAN
WYSOCKI,

Plaintiffs,

-against-

ENTREPRENEUR MEDIA, INC.,

Defendant.

**AFFIRMATION IN
OPPOSITION TO
DEFENDANT'S
MOTION TO
DISMISS AND
REQUEST FOR
CONTINUANCE
UNDER RULE 56(f)**

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ELIOT F. BLOOM (9423), an attorney duly licensed to practice law before the Courts of this State, hereby affirms the following to be true under penalties of perjury:

1. I am the attorney of record for Plaintiffs, and, as such, am fully familiar with the facts and circumstances herein.

2. This Affirmation is respectfully submitted in opposition to Defendant's Motion to Dismiss all counts of Plaintiffs' complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Additionally, Plaintiffs respectfully request a continuance under Federal Rule of Civil Procedure 56(f) so that they may conduct discovery in this matter.

ARGUMENT

I. Rule 12(b)(6) Motion to Dismiss and Rule 56 Motion for Summary Judgment Standard

Dismissal of a complaint for "failure to state a claim is a 'drastic step.'" *Davidson v. Citicorp*, 1990 WL 176426 (S.D.N.Y. 1990) (quoting *Meyer v. Oppenheimer Management Corp.*, 764 F.2d 76, 80 (2d Cir. 1985)). In evaluating a motion to dismiss under Rule 12(b)(6), a court must "accept as true all factual statements alleged in the complaint and draw all reasonable inferences in favor of the non-moving party." *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104 (2d Cir. 2008) (quoting *Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 591-92 (2d Cir. 2007)). Thus, because the complaint is to be liberally construed in favor of Plaintiff, *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969), a motion to dismiss must be assessed in light of liberal pleading standards, which require only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8. Plaintiff may survive dismissal if it is demonstrated that a cognizable claim would exist under the alleged facts. *See generally*

Boddie v. Schnieder, 105 F.3d 857 (2d Cir. 1997).

However, Rules 12(b) and (c) of the Federal Rules of Civil Procedure provide that “if, on a motion to dismiss under Rule 12(b)(6) or a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment and disposed of as provided in Rule 56.” 138 A.L.R. FED. 393. It is well established that the “party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists and that the undisputed facts establish her right to judgment as a matter of law.” *Florangel Rodriguez v. City of New York*, 72 F.3d 1051, 1060-61. In evaluating a summary judgment motion, the Court “is required to draw all factual inferences in favor of, and take all factual assertions in the light most favorable to, the party opposing summary judgment.” *Rule v. Brine, Inc.*, 85 F.3d 1002, 1011 (2d Cir. 1996). Nevertheless, summary judgment is wholly inappropriate until the non-movant has had an adequate opportunity to conduct discovery. *See Crystalline H2O, Inc. v. Orminiski*, 105 F.Supp.2d 3, 7-8 (N.D.N.Y. 2000). In other words, the non-moving party “must have . . . the opportunity to discover information that is essential to [its] opposition to the motion for summary judgment.” *Id.* at 8.

II. Plaintiffs’ Complaint States A Cognizable Cause Of Action And Must Survive Rule 12(b)(6) Dismissal

Defendant asks that this Court dismiss the within matter because Plaintiffs’ allegations are insufficient to establish that Defendant acted with gross negligence and in disregard for the rights of Plaintiffs. As discussed at length *infra*, prior to Defendant’s within motion Plaintiffs had not been afforded the opportunity to conduct discovery in this matter, as Defendant has answered by way of Rule 12(b)(6) motion to dismiss.

When deciding a motion to dismiss, “the Court must accept the plaintiff’s allegations of fact as true, together with such reasonable inferences as may be drawn in [its] favor.” *Davidson v. Citicorp/Citibank*, 1990 WL 176426 (S.D.N.Y. 1990). Accordingly, the factual allegations of the complaint—which Plaintiffs have not yet had the opportunity to further refine and develop through the discovery process—highlight Defendant’s reckless and grossly negligent conduct, thereby allowing for a reasonable inference that Defendant had reason to doubt the veracity of the Agape World, Inc. (hereinafter “Agape”) information prior to its publication of the article at issue, “Hot 100: America’s Top Fast-Growth Businesses and the Entrepreneurs Who Built Them” (hereinafter “Hot 100”). Far from constituting a mere suspicion of a right of action, the facts as set forth in Plaintiffs’ complaint raises plausible allegations of misconduct on the part of Defendant to the detriment of Plaintiffs herein.

III. Defendant’s Motion to Dismiss All Counts of Plaintiffs’ Complaint Under Federal Rule of Civil Procedure 12(b)(6) Is In Fact A Motion for Summary Judgment Pursuant Federal Rule of Civil Procedure 56

While Defendant labels its motion as a “motion to Dismiss All Counts of the Complaint Under Federal Rules of Civil Procedure 12(b)(6)”, Defendant’s instant motion is in fact a Motion for Summary Judgment pursuant to Federal Rules of Civil Procedure 56. Although Defendant submits that Plaintiffs have failed to state a claim upon which relief may be granted, Defendant’s argument disputes issues of fact that pertain to Plaintiffs’ theories of law.

For example, in its Argument section of its Motion to Dismiss Defendant recites what it purports to be the entirety of its Hot 100 publication for Agape. Based on the nature and length of this entry—which Defendant describes as a “brief reference” consisting of Agape “contact information and data”—Defendant asserts that this entry falls short of providing a basis for

Plaintiffs' gross negligence action.

However, Plaintiffs' claim of Defendant's gross negligence is not confined to the text that appeared on the face of its Hot 100 article, but also includes the circumstances surrounding its publication placing Agape in a particularly positive financial light. Indeed, it is the manner in which Defendant conducted itself and the knowledge Defendant possessed as to Agape's financial strength prior to the Hot 100 publication that is of principal importance to Plaintiffs' claim that Defendant acted with gross negligence. These considerations are factual in nature, and Plaintiffs have not yet had the opportunity to discover information in support of their claim. Nevertheless, the factual statements as recited by Plaintiffs in their Verified Complaint, when accepted as true by the Court, as required, constitute a cognizable claim of gross negligence as against Defendant.

IV. Defendant's Motion For Summary Judgment Should Be Stayed And Non-Movant Plaintiffs' Request For A Continuance To Allow Plaintiffs To Conduct Discovery Granted

As discussed above, Defendant's Motion to Dismiss is in actuality a motion for summary judgment pursuant to Rule 56, as it seeks to infuse questions of fact rather than deal exclusively with questions of law. As stated in the text of Rule 56, "discovery and disclosure materials on file" are a chief component in the consideration of a motion for summary judgment. Fed.R.Civ.P. 56(c). Indeed, it is well established that, pursuant to Rule 56(f), "summary judgment may be inappropriate where the party opposing it shows . . . that [it] cannot at the time present facts essential to justify [its] opposition." *Trebor Sportswear Co. v. The Ltd. Stores, Inc.*, 865 F.2d 506, 511 (2d Cir. 1989). Because Defendant answered Plaintiffs' complaint by the within Motion to Dismiss rather than by answer, the parties have not yet commenced discovery and