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

PRESENT: LUCY BILLINGS J.S.C. Justice

PART 46

Index Number : 117363/2009
HUMANE LEAGUE OF PHILADELPHIA
vs.
BERMAN AND CO.
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for Summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1 - 2

Answering Affidavits — Exhibits _____ | No(s). 3

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered ~~that this motion is~~ and adjudged that:

The court grants defendants' motion for summary judgment only to the extent of dismissing the claims against defendant New York Times and otherwise denies defendants' motion, pursuant to the accompanying decision. C.P.L.R. § 3212(b) and (e).

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).

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

Dated: 2/7/13

Lucy Billings, J.S.C.

LUCY BILLINGS

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 46

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HUMANE LEAGUE OF PHILADELPHIA,

Plaintiff

- against -

BERMAN AND COMPANY, CENTER FOR CONSUMER FREEDOM, RICHARD BERMAN, DAVID MARTOSKO, NEW YORK TIMES, AND DOES 1-100,

Defendants

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Index No. 117363/2009

DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

In this action for defamation by plaintiff Humane League of Philadelphia, defendants, the Center for Consumer Freedom, Berman and Company, Richard Berman, David Martosko, and the New York Times, move for summary judgment dismissing the First Amended Complaint. Plaintiff is a not-for-profit organization dedicated to preventing and alleviating cruelty to animals used in laboratory experimentation or farming. Defendant Center for Consumer Freedom is a tax-exempt lobbying group, whose clients include enterprises engaged in food production, farming, and animal breeding. The Center itself is a client of defendant Berman and Company, a for-profit public relations corporation. The New York Times is a daily newspaper with worldwide circulation. No party claims any organizational ties between the New York Times and the other defendants.

I. THE ALLEGED FACTS

The focus of this action is on a full-page advertisement written and designed by defendant Martosko while employed by Berman and Company and conducting a research program for the Center for Consumer Freedom, which paid the New York Times to publish the advertisement. Defendant Berman is the Executive Director of the Center as well as the principal of Berman and Company. The advertisement appeared in the New York Times December 11, 2008, and in bold letters bore the caption "WHY IS THE HUMANE SOCIETY OF THE UNITED STATES HELPING A TERRORIST GROUP RAISE MONEY?"

The advertisement's text, also published on the Center's websites, described plaintiff Humane League of Philadelphia, in graphic terms, as the latest incarnation of SHAC (Stop Huntingdon Animal Cruelty), an extremist animals rights organization. Its resort to violence and threats of violence in the name of animal protection resulted in its leaders' arrest and conviction and court orders restraining its activities. "Huntingdon" in SHAC's name refers to Huntingdon Life Sciences, a laboratory in New Jersey that developed pharmaceuticals for GlaxoSmithKline, a major pharmaceutical manufacturer. Plaintiff and its predecessors and affiliates claimed the laboratory conducted experiments on live animals. The advertisement characterized the Humane League of Philadelphia as an irresponsible "terrorist" organization, with a long history of violent activity by the organization's leaders and of association with violent animal

rights groups such as SHAC Philly.

The advertisement criticized the animal rights organization Humane League of the United States for lending support to plaintiff Humane League of Philadelphia. The advertisement included a photograph of two persons speaking through a bullhorn and focussed particular criticism on announced plans for a representative of the Humane League of the United States to appear as a featured speaker to support, explicitly or implicitly, the Philadelphia organization at its Christmas holiday fundraiser.

Before the New York Times accepted the advertisement for publication, the Center for Consumer Freedom defendants provided the newspaper documentation which, in the Center's opinion, supported the advertisement's text. New York Times personnel reviewed that voluminous documentation, now submitted in support of defendants' motion, before publishing the advertisement.

II. PROCEDURAL HISTORY

Defendants previously moved, before conducting disclosure, for summary judgment on their defense that the advertisement was not defamatory. In a Decision and Order dated November 1, 2010, Justice Solomon denied defendants' initial motion for summary judgment, ruling that, on the record before her, plaintiff had raised three factual issues material to its defamation claims:

1. whether plaintiff had ties to SHAC USA;

2. whether plaintiff's organizers were involved in acts of violence; and

3. whether the advertisement's statement that plaintiff's President Nicholas Cooney, during a demonstration by plaintiff, threatened to kill the child or children of a GlaxoSmithKline employee was substantially true.

Justice Solomon's decision did not address the status of the New York Times.

Defendants now claim that the subsequent disclosure has answered the identified factual questions, particularly when considered with the court orders against plaintiff and its officers by the Superior Court of Pennsylvania dated December 12, 2007, Aff. of Sammi Malek Ex. Z, and by the Superior Court of New Jersey, dated April 1, 2005. Id. Ex. AA. Although the Center for Consumer Freedom defendants, including Berman and Company, have treated the New York Times' legal position as indistinguishable from the other defendants' position, the Times' status as a defendant must be considered separately.

III. THE *NEW YORK TIMES'* DEFENSE

Absent a special relationship between a newspaper and an advertiser, a newspaper is not liable for misstatements in advertisements. Coakley v. VV Publ. Corp., 254 A.D.2d 135, 136 (1st Dep't 1998). See Stoianoff v. Gahona, 248 A.D.2d 525, 526 (2d Dep't 1998). The record here discloses no evidence of such a relationship. The New York Times' publication of the advertisement does not subject the newspaper to liability for plaintiff's defamation claims because the advertisement in no way purports to represent the New York Times' report of facts or

opinions concerning any other party. Woon Pang Ng v. Chee Kong Tong Supreme Lodge Chinese Freemasons of the World, 8 A.D.3d 214, 215 (1st Dep't 2004).

Consequently, the court grants the motion for summary judgment to the extent of dismissing plaintiff's claims against defendant New York Times. C.P.L.R. § 3212(b) and (e). Since no other defendant cross-claims against the New York Times, this disposition dismisses the New York Times from this action.

IV. THE REMAINING DEFENDANTS' DEFENSES

Turning to the controversy between plaintiff and the remaining defendants, defendants acknowledge that their publication of the advertisement was motivated primarily by their longstanding interest in the activities not of plaintiff Humane League of Philadelphia, but of the Humane League of the United States. Whatever defendants' subjective motivation, the advertisement remains an outright attack on the Humane League of Philadelphia. Regrettably, however, plaintiff Humane League of Philadelphia, the latest in a succession of entities led by Nicholas Cooney, a zealous animal rights advocate, was vulnerable to attack.

Defamation is an injury to the reputation of a person or private entity through a form of speech. Liability for libel, defamation through a written publication, may depend on the status of defendants, the publishers, and of plaintiff, the target of the libel, as well the subject of the publication. To recover for libel, plaintiff must establish that defendants made

(1) an unprivileged statement of fact, Shulman v. Hunderfund, 12 N.Y.3d 143, 146-47 (2009); Steinhilber v. Alphonse, 68 N.Y.2d 283, 289-90 (1986); St. David's School v. Hume, 101 A.D.3d 582, 583 (1st Dep't 2012); Sprewell v. NYP Holdings, Inc., 43 A.D.3d 16, 21 (1st Dep't 2007), (2) of and concerning plaintiff, Smith v. Catsimatidis, 95 A.D.3d 737 (1st Dep't 2012); Prince v. Fox Tel. Stas., Inc., 93 A.D.3d 614 (1st Dep't 2012), (3) with the requisite degree of fault, (4) that is false and defamatory, Brian v. Richardson, 87 N.Y.2d 46, 51 (1995); Omansky v. Penning, 101 A.D.3d 514, 515 (1st Dep't 2012); Amaranth LLC v. J.P. Morgan Chase & Co., 100 A.D.3d 573, 574 (1st Dep't 2012); Konrad v. Brown, 91 A.D.3d 545, 546 (1st Dep't 2012), and (5) that damaged plaintiff. E.g., Rinaldi v. Holt, Rinehart & Winston, 42 N.Y.2d 369, 379 (1977); Sandals Resort Intl. Ltd. v. Google, Inc., 86 A.D.3d 32, 38 (1st Dep't 2011).

As an activist group that has sought to attract attention and to participate in public debate concerning humane treatment of animals, plaintiff Humane League of Philadelphia is a public figure subject to a heavier burden in establishing defamation. Shulman v. Hunderfund, 12 N.Y.3d at 147; Huggins v. Moore, 94 N.Y.2d 296, 301-302 (1999); Konrad v. Brown, 91 A.D.3d at 546; Sprewell v. NYP Holdings, Inc., 43 A.D.3d at 20-21. The degree of fault that plaintiff, as a public figure, must demonstrate, by clear and convincing evidence, is actual malice: that defendants wrote and published the advertisement with serious doubts as to its truth. Kipper v. NYP Holdings Co., Inc., 12 N.Y.3d 348, 353-

54 (2009); Shulman v. Hunderfund, 12 N.Y.3d at 147; Sweeney v. Prisoners' Legal Servs. of N.Y., 84 N.Y.2d 786, 792-93 (1995); Konrad v. Brown, 91 A.D.3d at 546.

Had defendants published the advertisement in December 2007 rather than in December 2008, as they did, they might have been in a position to show that they published the advertisement without any serious doubts as to its truth. The extensive documentation defendants collected on the activities of the Humane League of Philadelphia and its predecessors through 2007, revealed that, albeit under changing names, the League had been allied with the SHAC USA movement. Aff. of David Martosko Ex. 2. Second, Nicholas Cooney, plaintiff's President, had been involved in violent demonstrations or other acts of violence and, during a demonstration against GlaxoSmithKline, had threatened to kill or injure the children of one of its employees. Id.

As of the end of 2007, these facts would have supported the text of the advertisement and consequently defendants' motion for summary judgment. Defendants point to no evidence, however, nor do they even claim that, during the ensuing year 2008, at the end of which defendants published their advertisement, the Humane League of Philadelphia or its President Cooney had conducted or participated in any violent demonstrations or threatened to kill or injure anyone. To be sure, plaintiff was responding to orders of the courts of New Jersey and Pennsylvania, which had imposed severe restrictions on how plaintiff conducted its demonstrations. This factor may be probative of defendants' lack

of malice, but does not establish a defense as a matter of law.

In fact, plaintiff's compliance with court orders represented a dramatic reversal that defendants refused to acknowledge. In the past Cooney, plaintiff's President, had not complied with legal restraints, but during 2008 plaintiff, including Cooney, at last was engaging in more responsible conduct. Thus, insofar as defendants' advertisement failed to account for plaintiff's efforts to abide by the court orders, moderate its tactics, and align with the mainstream Humane League of the United States through their planned participation together in the holiday gathering, defendants' advertisement in December 2008 raises a factual issue whether defendants published it with actual malice.

V. CONCLUSION

For this reason, the court denies the motion for summary judgment by defendants Berman and Company, Center for Consumer Freedom, Berman, and Martosko. C.P.L.R. § 3212(b). As set forth above, the court grants the motion for summary judgment to the extent of dismissing the action against defendant New York Times. C.P.L.R. § 3212(b) and (e). This decision constitutes the court's order and its judgment of dismissal in favor of defendant New York Times.

DATED: February 7, 2013

LUCY BILLINGS, J.S.C.



LUCY BILLINGS
J.S.C.