Matter of Nanoviricides, Inc. v Seeking Alpha, Inc.
2014 NY Slip Op 31681(U)
June 26, 2014
Sup Ct, New York County
Docket Number: 151908/2014
Judge: Cynthia S. Kern

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

----------x

In the Matter of the Application for an Order Pursuant to Section 3102(c) of the Civil Practice Law and Rules to Compel Disclosure

NANOVIRICIDES, INC.,

Petitioner,

Index No. 151908/2014

-against-

DECISION/ORDER

SEEKING ALPHA, INC.,

Respondent.

----------x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Cross-Motion and Affidavits Annexed.....	3
Answering Affidavits to Cross-Motion.....	4
Replying Affidavits.....	5
Exhibits.....	6

Petitioner Nanoviricides, Inc. ("NNVC") commenced the instant proceeding seeking pre-action disclosure from respondent Seeking Alpha, Inc. ("Seeking Alpha") to obtain the identity of the anonymous author known as "Pump Terminator" who allegedly posted a defamatory article about petitioner on Seeking Alpha's website. Seeking Alpha cross-moves for an order

dismissing the petition. For the reasons set forth below, the petition is denied and the cross-motion is granted.

The relevant facts are as follows. Respondent is the owner and operator of the website www.seekingalpha.com, which is a free online platform and source for financial information. The website functions as a virtual bulletin board and as an open discussion forum where people can publish commentary and articles covering U.S. financial markets. The website's content is overwhelmingly comprised of posts by third-party sources such as money managers, financial experts and investors. The website's tagline reads: "Read. Decide. Invest." NNVC is a pre-clinical bio-pharmaceutical development company whose primary business includes research and development of potential antiviral drugs.

On or about February 11, 2014, an anonymous user using the pseudonym "Pump Terminator" posted an article about petitioner on Seeking Alpha's website entitled: "NanoViricides: House of Cards with -80% Downside, 'Strong Sell' Recommendation" (hereinafter referred to as "the article"). Directly below the title, the author states: "Disclosure: I am short NNVC. I wrote this article myself, and it expresses my own opinions. I am not receiving compensation for it. I have no business relationship with any company whose stock is mentioned in this article." After this, the author proceeds for several pages to critique petitioner's business practices calling it, among other things, "the worst US reverse merger we have ever seen" and comparing it to the "China RTO frauds." Additionally, the author identifies the article as "the first report in a series we will release outlining the most egregious shareholder violations we are aware of in any NYSE company." Contained in the article is a hyperlink to a

complaint filed in Colorado against NNVC's Chief Executive Officer and President by a NNVC shareholder (the "Shareholder Complaint"), which contains serious allegations of misconduct by said individuals. The author refers to this complaint as a "must-read" and asserts that it "outlines countless examples and allegations of NNVC managers Seymour and Diwan abusing shareholders and looting the company."

Petitioner now brings the instant proceeding against respondent to obtain the true identity of Pump Terminator so that it can bring a libel claim against the anonymous author. In its petition, petitioner alleges that the article contains defamatory statements about NNVC presented as fact and published for the sole purpose of destroying NNVC's reputation and driving down its stock price. Specifically, petitioner alleges that the following two statements in the article are false and defamatory:

- With multiple questionable stock promoters NNVC has pumped the stock +330% while heavily diluting shareholders and stealing NNVC out from under public investors as insiders siphoned off millions of dollars.

- Anil hires his wife as CFO while Auditor and Internal Financial Controls are failing.

Petitioner also alleges in its petition that "these are only a small sampling of the false and disparaging comments presented as fact in the article" and in its reply papers, it further identifies the following statements as false and defamatory:

- NNVC is so obviously a vehicle designed specifically to enrich insiders we find it offensive similar to the China RTO Frauds. This is the first report in a series we will release outlining the most egregious shareholder violations we are aware of in any NYSE company.

- Anil Diwan and Eugene Seymour have stolen all potential value in NNVC from public US shareholders.

- They combined a public financing vehicle that bleeds shares into the market to unknowing public investors while Theracourt and insiders get money.
- The terms of certain material agreements are not in line with industry standards.
- In another example of NNVC Diwan and Seymour extracting cash . . .
- NNVC shareholders are fed a steady diet of 'imminent news,' promises and promotion that never materialize into anything meaningful . . .
- NNVC has burned $33m in cash over the past nearly 7+ years and done essentially nothing . . . except dilute public shareholders, make insiders rich and develop Anil Diwan's technology.
- [NNVC is a] worthless shell where shareholders own virtually nothing and management seems intent on extracting all money for themselves.

Seeking Alpha opposes the petition on the ground that the article is an expression of the author's opinion and is not actionable as a matter of law.

The law in New York governing pre-action discovery is well settled. Pre-action discovery is available under CPLR § 3012(c) only "where a petitioner demonstrates that it has a meritorious cause of action and that the information sought is material and necessary to the actionable wrong." *Sandals Resorts Int'l Ltd. v. Google, Inc.*, 86 A.D.3d 32, 38 (1st Dept 2011) (quoting *Bishop v. Stevenson Commons Assoc., L.P.*, 74 A.D.3d 640, 641 (1st Dept 2010)). "[C]ourts traditionally require a strong showing that a cause of action exists." *Cohen v. Google Inc.*, 887 N.Y.S.2d 424, 426-427 (Sup. Ct. N.Y. Co. 2009) (internal citations omitted).

In the present case, the court finds that NNVC is not entitled to pre-action disclosure as it has failed to demonstrate that it has a meritorious cause of action for defamation against the anonymous author Pump Terminator. Defamation arises from "the making of a false statement

which tends to 'expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society.'" *Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dept 1999) (citing *Foster v. Churchill*, 87 N.Y.2d 744, 751 (1996)). The elements of a defamation claim are "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." *Dillon,* 261 A.D.2d at 38. "'Since falsity is a *sine qua non* 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 on assertions of opinion." *Sandals*, 86 A.D.3d at 38 (quoting *Brian v. Richardson*, 87 N.Y.2d 46, 51 (1995)).

Distinguishing between assertions of fact and non-actionable expressions of opinion has often proved a difficult task. The Court of Appeals in *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 243 (1991), "announced that the New York State Constitution provides broader speech protections than does the United States Constitution." *Sandals*, 86 A.D.3d at 40. "The dispositive inquiry, under either Federal or New York law, is whether a reasonable reader could have concluded that [the article was] conveying facts about the plaintiff." *Gross v. New York Times Co.*, 82 N.Y.2d 146 (1993) (internal quotations omitted). The approach now used in New York State for determining whether statements are protected opinion or unprotected factual assertions is based on a four-part formula: (1) "whether the statement at issue has a precise meaning so as to give rise to clear factual implications"; (2) "the degree to which the statements

are verifiable, i.e., 'objectively capable of proof or disproof'"; (3) "whether the full context of the communication in which the statement appears signals to the reader its nature as opinion"; and (4) "whether the broader context of the communication so signals the reader." *Sandals*, 86 A.D.3d at 39-40 (internal citations omitted). Accordingly, in New York, the operative standard for distinguishing protected expressions of opinion from actionable assertions of fact is as follows:

> A 'pure opinion' is a statement of opinion which is accompanied by a recitation of the facts upon which it is based. An opinion not accompanied by such a factual recitation may, nevertheless, be 'pure opinion' if it does not imply that it is based upon undisclosed facts. When, however, the statement of opinion implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, it is a 'mixed opinion' and is actionable. The actionable element of a 'mixed opinion' is not the false opinion itself–it is the implication that the speaker knows certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking.

Steinhilber v. Alphonse, 68 N.Y.2d 235, 252 (1991).

Thus, in determining whether a particular communication is actionable, the court must distinguish "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*, 82 N.Y.2d at 154 (internal citations omitted). "The former are actionable not because they convey 'false opinions' but rather because a reasonable listener or reader would infer that the 'the speaker [or 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*, 68 N.Y.2d at 290). "In contrast, the latter are not

actionable because . . . 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. Thus, "[s]ifting through a communication for the purpose of isolating and identifying assertions of fact should not be the central inquiry." *Sandals*, 86 A.D.3d at 41-42. "Rather, it is necessary to consider the writing as a whole as well as the 'over-all context' of the publication to determine 'whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff.'" *Id.* at 42 (quoting *Brian v. Richardson*, 87 N.Y.2d at 51).

Additionally, as to the greater context in which the communication appears, the First Department has noted that it is "imperative that courts learn to view libel allegations within the unique context of the Internet." *Id.* at 43 (quoting O'Brien, Note, *Putting a Face to a [Screen] Name: The First Amendment Implications of Compelling ISPs to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases*, 70 Fordham L Rev. 2745, 2774-2775 (2002)). As the First Department noted, "[i]n determining whether a plaintiff's complaint [or pre-action petition] includes a published 'false and defamatory statement concerning another,' commentators have argued that the defamatory import of the communication must be viewed in light of the fact that bulletin boards and chat rooms 'are often the repository of a wide range of casual, emotive, and imprecise speech,' and that the online 'recipients of [offensive] statements do not necessarily attribute the same level of credence to the statements [that] they would accord to statements made in other contexts.'" *Id.* at 43-44. Thus, in this action, "it is necessary to view [the] allegedly defamatory statements published on the Internet within the broader framework on

which they appear, taking into account both the tenor of the [website] in which they are posted, and the language of the statements." *Id.* at 44.

In the present case, based on the above principles and considering the article as a whole, the court finds that the alleged defamatory statements identified in the petition constitute protected opinion and are not actionable as a matter of law. As an initial matter, the immediate context of the statements would lead a reasonable reader to likely believe that the author was conveying his or her opinion about NNVC's business practices and its stock value. The disclosure directly proceeding the article explicitly identifies the article as an expression of the author's own opinion. Thus, at the outset, a reader is signaled that the statements to follow are the author's opinion. The court takes note that the copy of the article attached to the petition as opposed to the one attached to the cross-motion has the disclaimer at the end of the article. However, this discrepancy is not material as it would not change the import it imparts on readers. The disclaimer still signifies to the reader, albeit in the end, that the article is one of opinion and the actual article contains the phrases "we believe," "it seems to us" or the relevant equivalent over fifteen times. Thus, the fact that the disclosure may have appeared at the end of the article at certain times is irrelevant.

Additionally, reading the article as a whole it is clear that it is one of "pure opinion." The statements made by the author in the article are either followed by a recitation of "facts" uncovered from public filings or publicly available material, which are linked to in the article itself, or no implication is given that they are based on undisclosed facts. Indeed, the author links directly to the Shareholder Complaint, giving readers the opportunity to review the underlying

"facts" and form their own opinion. To the extent petitioner argues that the statement: "This is the first report in a series we will release outlining the most egregious shareholder violations we are aware of in any NYSE company," gives the implication that there are more facts known to the author supporting the statements in the article, such contention is without merit. That statement does not imply that there are more facts known to the author that would support the statements made in the article but only implies that the author plans on releasing further articles about NNVC's business practices. Thus, it does not change the article into one of actionable "mixed opinion." Further, unlike in *Public Relations Socy. of Am., Inc. v. Road Runner High Speed Online*, 8 Misc.3d 820 (Sup. Ct. NY Co. 2005), cited by petitioner to support its assertion that the article is, at the very least, mixed opinion, the author here does not imply that his opinion is shared by other anonymous individuals to give the implication that there are more unstated facts supporting his position. On the contrary, the author explicitly links to the Shareholder Complaint, which clearly identifies the individual asserting the allegations referenced by the author in his article.

Additionally, the fact that the article appears on an internet based message board also supports a finding that the article must be an expression of the author's opinion. As an initial matter, Seeking Alpha's website's tagline is "Read. Decide. Invest." This clearly gives the impression that the website is designed to give people a place to express their opinions and for the reader to then form his or her own assumptions based on the posted articles. Further, the articles published on the website are almost exclusively published by third-parties and not actual reporters. Indeed, the article herein at issue was posted by an anonymous third-party user. Thus, readers are likely to give less credence to the articles found on this website and view the

assertions in the articles, like the one herein at issue, with some skepticism and to treat its contents as opinion rather than fact.

Finally, this court finds its holding in line with the First Department's urging in *Sandals* that courts should protect against "the use of subpoenas by corporations and plaintiffs with business interests to enlist the help of ISPs via court orders to silence their online critics, which threatens to stifle the free exchange of ideas." *Sandals*, 86 A.D.3d at 45. Clearly the article herein at issue does not cast petitioner in a positive light and the court can sympathize with the filing of the instant petition. However, it is paramount in an open and free society that we protect the anonymity of those whose "publication is prompted by the desire to question, challenge and criticize the practices of those in power without incurring adverse consequences." *Id.* at 44.

Accordingly, the petition is denied and respondent's cross-motion to dismiss the petition is granted. This constitutes the decision and order of the court.

Dated: 6/26/14

Enter: _____

J.S.C.

CYNTHIA S. KERN
J.S.C.