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

PRESENT: MANUEL J. MENDEZ *Justice* **PART** 13

CHRISTOPHER BRUMMER,
Plaintiff,
-against-
BENJAMIN WEY, FNL MEDIA LLC, and NYG CAPITAL LLC d/b/a NEW YORK GLOBAL GROUP,
Defendants.

INDEX NO. 153583/2015
MOTION DATE 01-20-16
MOTION SEQ. NO. 004
MOTION CAL. NO.

The following papers, numbered 1 to 9 were read on this motion to/for Dismiss pursuant to CPLR §3211[a],[1],[7],[8]:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 4
Answering Affidavits — Exhibits ____cross motion ____	5
Replying Affidavits ____	6 - 9

Cross-Motion: Yes X No

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

Upon a reading of the foregoing cited papers, it is Ordered that defendant's motion pursuant to CPLR §3211[a] [1], [7], is denied. The relief sought for defendant Benjamin Wey pursuant to CPLR §3211[a][8], is granted, soley to the extent of ordering a traverse hearing. Plaintiff's motion filed under Motion Sequence 008, to strike this motion to dismiss, for sanctions and for an Order directing defendants to refrain from the spoliation of evidence and to preserve evidence, is denied.

Plaintiff commenced this action on April 22, 2015, asserting three causes of action for defamation, defamation per se, and intentional infliction of emotional distress (Mot. Wipper Aff., Exh. A). Plaintiff, is a professor of law at Georgetown University Law Center and the sole African-American on the National Adjudicatory Council (NAC). He was part of a panel that upheld a decision by the Financial Industry Regulatory Authority, Inc. ("FINRA"), issuing a lifetime ban from the security industry against two African-American stockbrokers: non-parties William Scholander and Talman Harris. NYG Capital LLC d/b/a New York Global Group (hereinafter referred to individually as "NYGG") is a U.S. and Asia based strategic market entry advisory, venture capital, and private equity investment group that services clients worldwide. FNL Media, LLC, is described in the Complaint as a division or subsidiary of NYGG, and the owner of *TheBlot,* a website and online digital magazine that claims to combine investigative journalism with reader-submitted opinions. According to the Complaint Benjamin Wey is the CEO of NYGG, a publisher and contributor to *TheBlot* (Mot. Wipper Aff., Exh. A).

The Complaint alleges that almost a month after the NAC panel wrote the decision upholding the FINRA lifetime ban on non-parties William Scholander and Talman Harris, *TheBlot*, an on-line magazine, began publishing a series of articles defaming the plaintiff. The articles are described by plaintiff as falsely characterizing him as a "racist," an "Uncle Tom," as having an affair with a married woman, as being under investigation and implicated in fraud. Plaintiff also alleges that the defendants posted comments under a false identity and altered photographs of the plaintiff. Plaintiff claims that he is a private individual that had an excellent professional and personal reputation which has been damaged by the defendants' defamatory statements that resulted in the loss of work together with other damages (Mot. Wipper Aff., Exh. A).

Defendants seek an Order pursuant to CPLR §3211[a], [1],[7] dismissing all the causes of action asserted against them in the Complaint relying on documentary evidence and plaintiff's alleged failure to state a causes of action. Defendants argue that the

TheBlot clearly identifies itself as opinion based and as publishing sensationalist content which is protected by the right to free speech afforded in both the United States and New York State Constitutions. They provide printouts including the "About Us" page, as documentary evidence in support of the contention that the material printed is only opinion and not stated as fact.

A motion to dismiss pursuant to CPLR §3211[a][1], requires that the party seeking dismissal produce documentary evidence that "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." (Leon v. Martinez, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994]). Plaintiff is provided with every favorable inference and the complaint is construed liberally. A motion to dismiss pursuant to CPLR §3211[a][1], does not require that the plaintiff establish the ultimate success of the allegations (African Diaspora Maritime Corp. v. Golden Gate Yacht Club, 968 N.Y.S. 2d 459 [1st Dept., 2013]).

The documentary evidence provided by the defendants does not "utterly refute" the allegations asserted in the Complaint. Plaintiff has stated a potentially meritorious claim and he is not required to establish the success of his allegations.

Opinions that imply they are based on facts, "...which justify the opinion but are unknown to those reading or hearing it," are considered mixed opinion and actionable (Steinhilber v. Alphonse, 68 N.Y. 2d 283, 501 N.E. 2d 550, 508 N.Y.S. 2d 901 [1986]). Opinions are privileged, no matter how offensive, but defamatory statements of fact are actionable. Three factors to be taken into consideration are, "(1) whether the specific language in issue has a precise meaning, which is readily understood, (2) whether the statements are capable of being proven true or false, and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such to signal ...readers or listeners that what is being read or heard is likely to be opinion, not fact" (Davis v. Boeheim, 24 N.Y. 3d 262, 22 N.E. 3d 999, 998 N.Y.S. 3d 131 [2014]). Under the New York State and United States Constitutions publications that can be reasonably interpreted as stating or implying false facts are actionable (Gross v. The New York Times Co., 82 N.Y. 2d 146, 623 N.E. 2d 1163, 603 N.Y.S. 2 d 0813 [1993]).

The printed material from *TheBlot* contains the referenced disclaimer, on the "About Us" page, which states that it, "...brings traditional journalism to the modern day with smart, witty and opinionated content..." (Mot. Wipper Aff. Exh. C). The website includes "articles, written by "contributing journalists," and references "investigations" that result in the reasonable perception by the readers as being derived from fact. The "articles" include a "comment" section that is more readily interpreted as the opinion to which the disclaimer would apply (Mot. Wipper Aff. Exh. A).

Dismissal pursuant to CPLR §3211[a][7], requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and is properly pled. A cause of action does not have to be skillfully prepared but it does have to present facts so that it can be identified and establish a potentially meritorious claim (Leon v. Martinez, 84 N.Y. 2d 83, supra).

A limited purpose public figure is a private individual that has placed himself in the forefront of public controversies and is required to, "...show by clear and convincing evidence that the defendants published the statements at issue with "actual malice" (Huggins v. Moore, 94 N.Y. 2d 296, 726 N.E. 2d 456, 704 N.Y.S. 2d 904 [1999] and Perez v. Violence Intervention Program, 116 A.D. 3d 601, 984 N.Y.S. 2d 348 [1st Dept. 2014]).

Defendant's argue that plaintiff as a limited purpose public figure has not established malice. Defendants have not provided proof that the plaintiff did anything to place himself in the forefront of the controversy or otherwise draw attention to himself concerning the NAC's December 14, 2014 decision. They have not established that

plaintiff's employment as either a professor of law or with the NAC makes him a limited purpose public figure, and that the higher "actual malice" standard applies.

Defamation involves a false statement that tends to expose the subject of the communication to, "public contempt, ridicule, aversion or disgrace, or induce an evil opinion of [her] in the minds of right-thinking persons and to deprive [her] of their friendly intercourse in society" (Rinaldi v. Hold, Rinehart & Winston, 42 N.Y. 2d 369, 366 N.E. 2d 1299, 397 N.Y.S. 2d 943 [1977]). A claim of defamation requires, "(1) a false statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm, unless the statement is one of the types of publications actionable regardless of harm" (Stephanov v. Dow Jones & Co., 120 A.D. 3d 28, 987 N.Y.S. 2d 37 [1st Dept., 2014]). The publication must be given a fair reading and considered as a whole and considered in context, statements should not be considered in isolation (Alf v. Buffalo News, Inc., 21 N.Y. 3d 988, 995 N.E. 2d 168, 972 N.Y.S. 2d 206 [2013]).

The argument that the Complaint fails to state causes of action for defamation or defamation per se, because the statements plaintiff relies on are imprecise, ambiguous and "race baiting" or name calling which are not actionable, fails because the terms cited are taken out of context. Racist terms referring to plaintiff, as stated *TheBlot,* together with other statements describing the plaintiff as available for hire, involved in fraud, and affiliated with felons, could reasonably be susceptible to a defamatory connotation. The "articles" refer to plaintiff's alleged affiliation and implication in fraud investigations and the language is sufficiently specific to state a claim of defamation.

Defamation per se, involves a statement that, charges the plaintiff with a serious crime or "tends to injure another in his or her trade, business or profession." (Konig v. Wordpress.com, 112 A.d. 3d 936, 978 N.Y.S. 2d 92 [2nd Dept., 2013]). Plaintiff has stated a potential claim of defamation per se by the allegations in the Complaint that defendants referred to criminal affiliation and fraud. Plaintiff alleges he had to forgo a consulting engagement involving banking regulations and spend an additional $882.82, to purchase internet domains to protect himself and his professional reputation (Mot. Wipper Aff., Exh. A).

Defendants have not established immunity under the Communications Decency Act of 1996. A claim for liability under the Communications Decency Act of 1996 will not survive if the statements were re-posts or third-party statements on a Web site. Active provision of defamatory content by the website's developers or provider that is not merely a heading, subheading or illustration of a third-party's posts, establishes a claim that is not barred by the Communications Decency Act of 1996 (Shiamili v. Real Estate Group of New York, 17 N.Y. 3d 281, 952 N.E. 2d 1011, 929 N.Y.S. 2d 19 [2011]). The plaintiff's causes of action for defamation and defamation per se, are not barred by the Communications Decency Act of 1996. Defendants have not denied that the *TheBlot* includes re-posts and third-party statements. Defendants have not established, or provided sufficient proof, to avoid the assertions in the Complaint that they used false identities to avoid any connection with authorship and posted their own content (Mot. Wipper Aff., Exh. A).

Intentional infliction of emotional distress requires, "(1) extreme and outrageous conduct, (2) with intent to cause, or in disregard of a substantial probability of causing severe emotional distress, (3) a causal connection between the conduct and the injury and (4) severe emotional distress" (Suarez v. Bakalchuk, 66 A.D. 3d 419, 66 N.Y.S. 2d 6 [1st Dept., 2009]). The conduct alleged must be outrageous, extreme and beyond the bounds of decency, such that it would be regarded as, "atrocious and utterly intolerable in a civilized community"(Howell v New York Post Company, Inc., 81 N.Y. 2d 115, 612 N.E. 2d 699, 596 N.Y.S .2d 350 [1993]). A claim that establishes a "deliberate and malicious campaign of harassment or intimidation" or malevolent purpose is sufficient for intentional infliction of emotional distress (Herlihy v. Metropolitan Museum of Art, 214 A.D. 2d 250, 633 N.Y.S. 2d 106 [1st Dept. 1995] and Fleishcher v. NYP Holdings, Inc., 104 A.D. 3d 536, 961 N.Y.S. 2d 393 [1st Dept., 2013]).

Plaintiff alleges that the defendants deliberately re-published the "articles" from *TheBlot* on other sites like "Twitter," and intentionally sought to have them appear on the top of search results. Some of the posts include his office e-mail address and telephone number. He has sufficiently stated a potential claim of intentional infliction of emotional distress resulting from the defendants alleged actions as part of an internet-based campaign of harassment and intimidation.

Although a claim for intentional infliction of emotional distress will typically, "fall within the ambit of other traditional tort liability, including causes of action sounding in defamation," and should be dismissed (Hirshfeld v. Daily News, L.P., 269 A.D. 2d 248, 703 N.Y.S. 2d 248 [1st Dept., 2000]), the defamatory conduct alleged in the complaint is not duplicative of that alleged in the cause of action for intentional infliction of emotional distress. Plaintiff is relying on additional actions by the defendants that are separate from the defamatory acts and used for harassment and intimidation.

Benjamin Wey seeks an Order pursuant to CPLR §3211[a], [8] dismissing the complaint against him for lack of jurisdiction arguing he was not served with the summons with notice in accordance with CPLR §308[2]. It is Mr. Wey's contention that the affidavit of service states substituted service at his home address on an individual, "Jason P. (refused last name) - Cotenant" (Mot. Wipper Aff., Exh. F), but that he does not share the residence. Defendant also claims that service is defective because the affidavit of service does not state the address used as his residence.

A motion to dismiss pursuant to CPLR §3211[a][8], applies to lack of jurisdiction over the defendant. In opposing a motion to dismiss pursuant to CPLR §3211[a][8], the burden is on the plaintiff to establish personal jurisdiction by proper service (Cornely v. Dynamic HVAC Supply, LLC, 44 A.D. 3d 986, 845 N.Y.S. 2d 797 [2nd Dept., 2007]). Pursuant to CPLR §308[2], substituted service is permitted on a person of suitable age and discretion at the defendant's place of dwelling with an additional mailing to his place of residence. An affidavit by a process server is prima facie evidence of sufficient service absent a non-conclusory sworn denial of service (NYCTL 1998-1 Trust v. Rabinowitz, 7 A.D. 3d 459, 777 N.Y.S. 2d 483 [1st Dept., 2004]). A non-conclusory denial of service and the parties total disagreement about whether service has been accomplished in an action, requires a traverse hearing (Hinds v. 2461 Realty Corp.,169 A.D. 2d 629, 564 N.Y.S. 2d 763 [1st Dept., 1991]).

Plaintiff's affidavit of service is defective in that it does not state the address defendant was served. The claims asserted by plaintiff's counsel that the affidavit was merely redacted are insufficient without proof. Benjamin Wey's affidavit also raised an issue of whether the process server effectuated service on a person of suitable age and discretion, since he claims that there is no other person residing at the apartment requiring that a traverse hearing be conducted.

Plaintiff 's motion filed under Motion Sequence 008, seeks to strike or deny this motion filed under Motion Sequence 004 with prejudice, together with sanctions, costs and attorneys fees, alleging that the defendants committed a fraud on this Court by providing altered copies of *TheBlot* as evidence in support of dismissal. Plaintiff further seeks an order directing defendants to refrain from any spoliation of evidence and to preserve all versions of *TheBlot* along with all evidence of the content.

The standard for fraud on the Court is that the moving party provide, "clear and convincing evidence" of the egregious conduct. The movant is required to establish that the offending party, "acted knowingly in an attempt to hinder the fact finder's fair adjudication of the case..." The alleged falsification must concern, "issues that are central to the truth-finding process,..." and "not central to the substantive issues in the case" (CDR Creances S.A.S. v. Cohen, 23 N.Y. 3d 307, 15 N.E. 3d 274, 991 N.Y.S. 2d 519 [2014]).

The alleged differences between the "About Us Page," provided by plaintiff are minor and do not affect the final determination on the motion (Mot. Seq. 008, Exh. C & D). The alleged differences on the other two articles and defendants' submissions were also not substantial or affect the final determination on Motion Sequence 004. Plaintiff has not established the defendants committed a fraud on the Court or knowingly attempted to hinder the determination on the motion to dismiss.

Spoliation involves the destruction of evidence, the negligent or intentional destruction of evidence will result in sanctions, particularly if the "allleged spoliator" was on notice that the discovery sought might be needed (Strong v. City of New York, 112 A.D. 3d 15, 973 N.Y.S. 2d 15 [1st Dept., 2013]). It is well settled that a party must suspend any automatic deletion or otherwise preserve e-mails or the end result will be sanctions (Voom HD Holdings LLC v. Echostar Satellite LLC, 93 A.D. 3d 33, 939 N.Y.S. 2d 321 [1st Dept., 2012]).

Plaintiff failed to provide proof that the defendants have spoliated discovery. Defendants have not admitted to spoliation only that they operate a site that is available to the public and by its nature is subject to modification as a result of use. Plaintiff is seeking the equivalent of injunctive relief without making the relevant arguments. His desire to obtain assurances that the potential evidence is not being spoliated has not established that an Order is required at this time.

Accordingly, it is ORDERED that defendant's motion pursuant to CPLR §3211[a][1], [7], is denied, and it is further,

ORDERED, that the relief sought for defendant Benjamin Wey pursuant to CPLR §3211[a][8], is granted, soley to the extent of ordering a traverse hearing, and it is further,

ORDERED that, this matter is referred to a Special Referee for a Traverse Hearing, and it is further,

ORDERED that, plaintiff shall serve a copy of this Order with Notice of Entry pursuant to e-filing protocol upon the Trial Support Clerk located in the General Clerk's Office (Room 119), and upon the Special Referee Clerk (Room 119M) who is directed to place this matter on the Calendar of the Special Referee's Part at the earliest convenient date, for a traverse hearing to determine if service upon the defendant Benjamin Wey was proper, and it is further,

ORDERED that, the Special Referee is to hear and report pursuant to the accompanying Order of Reference, a final determination on this Motion shall be rendered upon receipt of a report from the special referee, and it is further

ORDERED that the remainder of the relief sought in this motion is denied, and it is further,

ORDERED that Plaintiff's motion filed under Motion Sequence 008, to strike or deny defendant's motion to dismiss, for sanctions and for an Order directing defendants to refrain from the spoliation of evidence and to preserve evidence, is denied.

ENTER:

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ,
J.S.C.

Dated: March 1, 2016

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE