Napoli v New York Post
2016 NY Slip Op 32268(U)
November 4, 2016
Supreme Court, New York County
Docket Number: 161367/2015
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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MARIE NAPOLI, ESQ.,

Plaintiff,

-against-

DECISION/ORDER
Index No. 161367/2015
Mot. Seq. Nos. 001, 002 & 003

NEW YORK POST, NEWS CORPORATION, NEWS CORP., TWENTY-FIRST CENTURY FOX, INC., and ALL OF ITS SUBSIDIARIES, ISABEL VINCENT, MELISSA KLEIN, SUSAN EDELMAN and LIA EUSTACHENWICH,

Defendants.

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KATHRYN E. FREED, J.:

RECITATION, AS REQUIRED BY CPLR 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THESE MOTIONS:

PAPERS	NUMBERED[1]
MOT. SEQ. NO. 001	
NOTICE OF MOTION, AFF. IN SUPP. AND EXHIBITS ANNEXED	24, 26-41
MEMO OF LAW IN SUPP	25
AFF. IN OPP. AND EXHIBITS ANNEXED	64-77
MEMO OF LAW IN OPP	63
REPLY MEMO OF LAW	100
MOT. SEQ. NO. 002	
ORDER TO SHOW CAUSE, AFF. IN SUPP	78, 46
MEMO OF LAW IN SUPP	48
ADLER AFF. IN OPP. AND EXHIBITS ANNEXED	81-96
MANCUSO AFF. IN OPP., LLOYD AFF. IN OPP., JUDGE AFF. IN OPP	97-99
MEMO OF LAW IN OPP	80
PAUL NAPOLI AFF. IN FURTHER SUPP	102
MARIE NAPOLI AFF. IN FURTHER SUPP	103

[1] Unless otherwise indicated, the papers are referred to according to the document numbers assigned to them by the New York State Courts Electronic Filing System (NYSCEF).

HAWRLCHAK AFF. IN FURTHER SUPP. AND EXHIBITS ANNEXED.....104-110
MEMO OF LAW IN FURTHER SUPP.....101

MOT. SEQ. NO. 003

NOTICE OF MOTION, AFF. IN SUPP. AND EXHIBITS ANNEXED.....112-117
MEMO OF LAW IN OPP.....118
AFF. IN OPP AND EXHIBIT ANNEXED.....119-120

UPON THE FORGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTIONS IS AS FOLLOWS:

In this action by plaintiff Marie Napoli, Esq. sounding in, among other things, defamation, based on articles published by defendants, defendants move, pre-answer, to dismiss the complaint under CPLR 3211 (a) (1) and (7). (Motion Sequence No. 001).[2] Plaintiff has filed an amended complaint (Doc. No. 49) and opposes the motion. Plaintiff also moves, by order to show cause, for a preliminary injunction restraining and enjoining defendants from continuing to publish articles concerning plaintiff and her family on their website. (Motion Sequence No. 002). Defendants oppose and move to strike plaintiff's reply papers in that motion (Doc. Nos. 101-110). (Motion Sequence No. 003). After oral argument and a review of the papers, relevant statutes and case law, **the motion to dismiss the complaint is granted in its entirety, the amended complaint is dismissed, and the remaining motions are denied as moot**.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff and her spouse, Paul Napoli, are both attorneys. (Doc No. 49 at ¶ 34). They worked together for some time in a law firm that eventually became Napoli Bern Ripka Shkolnik, LLP

[2] It is noted that, according to defendants, they were erroneously sued as "New York Post," and the proper legal entity was NYP Holdings, Inc. They also maintain that News Corporation should have been sued in place of "News Corp."

(hereinafter "the firm"), at which Paul Napoli and Mark Bern were named partners. In October 2014, Paul Napoli commenced an action in this Court under Index No. 159576/2014, alleging that Bern had breached their partnership agreement.[3] (Doc. No. 28).

In November 2014, Bern moved, by order to show cause, for a temporary restraining order and preliminary injunction requesting, among other things, to restore his access to the firm's property. In support of the motion, Bern submitted an affidavit. (Doc No. 29). Exhibit A to the affidavit was the draft of a complaint in an action bearing New York County Supreme Court Index No. 153857/2014, in which Vanessa Dennis, an associate in the firm, was the named plaintiff, against plaintiff herein, Paul Napoli, Bern, and the firm. (*Id.*) At the time of Bern's motion in that action, although an index number had plainly been purchased, Dennis's complaint had not yet been filed. The draft complaint contained many allegations of defamation against plaintiff. Bern averred in his affidavit that, a result of Paul Napoli's illness, plaintiff had attempted to place herself in the position of manager of the law firm. Bern accused plaintiff of "spearheading" the efforts to have herself put in place as the temporary manager of the law firm and causing it harm. Bern included the draft compliant to support his contention that plaintiff was causing harm to the firm.[4]

Throughout this time period, defendants ran several articles concerning these events. Plaintiff included, as an exhibit to her amended complaint, over 120 pages of articles from various

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[3] To the extent the details of that and the other various related actions are not directly addressed by the parties' papers, this Court is empowered to take judicial notice of official court records. *See Kinberg v Kinberg*, 85 AD3d 673, 674 (1st Dept 2011).

[4] Notably, this Court (Bransten, J.), granted Bern's request for a temporary restraining order when it signed the order to show cause (NYSCEF Doc No. 24, under Index No. 159576/2014) and, eventually, in July 2015, said court granted major portions of Bern's requests for a preliminary injunction. (NYSCEF Doc. No. 610, under Index No. 159576/2014).

sources, only several of which appear on their face to be attributable to defendants, although her papers do not clearly differentiate between them. (Doc. No. 68.) Defendants, in their motion papers, limit the focus to three articles that they admit to having published and which contain allegedly defamatory references to plaintiff: namely, the articles published on November 9, 2014, November 23, 2014 and December 7, 2014. (Doc. No. 25.) Plaintiff, in her opposition papers, does not appear to take issue with defendants' limitation of the scope of analysis to those three articles.

The November 9, 2014 article was titled "Affair and vengeful wife rip apart 9/11 law firm." (Doc. No. 33). The article stated that, "in court papers," Bern "made unspecified 'startling discoveries' about [Paul] Napoli's operation of the [firm], including 'financial irregularities and debts.'" The article reported that Paul Napoli "had an affair with one of the young lawyers at the firm, [as] court papers allege, and when his wife, [plaintiff], discovered it, she stalked and harassed the woman – and may have even taken her cat."[5] (Doc. No. 33). The article also reported, among other things, the other various allegations in Dennis's draft complaint against plaintiff.

The November 23, 2014 article was titled "9/11 lawyer accuses partner of sex with staffer, prostitutes." (Doc No. 34). The article began with the statement that "[t]he co-founder of the high-powered law firm that pocketed tens of millions of dollars in fees from 9/11 cases has accused his law partner of patronizing prostitutes and cajoling an office receptionist into oral sex at a company Christmas party." According to the article, Dennis's court filings claimed, among other things, that plaintiff "harassed her – calling her [various names] on social media in letters she mailed to the wives of her new bosses."

The December 7, 2014 article was titled "9/11 lawyer was hellbent on having sex with me."

[5] The cat came back. (Doc. No. 31, ¶ 56, n 5).

(Doc. No. 35). The article began, "Prominent Manhattan lawyer Paul Napoli would stop at nothing to continue his sordid affair with a pretty auburn-haired associate even after [plaintiff] uncovered their 18-month dalliance, court filings allege." The article repeated some of the allegations that had previously been reported in earlier coverage of the draft complaint.

According to plaintiff's amended complaint, plaintiff "has done much advertising" with defendants, but "had discontinued the advertising because of the defamations and was assured that if [she] continued the advertising the articles would come down." Plaintiff specified that, "[o]n or around June 22, 2015, [she] met with Caitlin Egan (New York Post Advertising Director), David Mancuso (New York Post Account Executive), and Patrick Judge (New York Post Group Vice President)." She alleged that, during her meeting with those three individuals, "she was told that if she continued to advertise her business in [defendants'] publications, [defendants] would remove the defamatory articles about her from their online sites." Plaintiff claimed that she "justifiably relied on these assertions and reinstated and continued advertising with [defendants]."

In November 2015, plaintiff commenced this action by summons with notice (Doc. No. 1), and in March 2016, she filed the initial complaint, with exhibits (Doc. No. 4-16). In April 2016, defendants moved, pre-answer, to dismiss the complaint (motion sequence No. 001). (Doc Nos. 24-41). During the pendency of the motion, plaintiff filed an amended complaint, with exhibits (Doc. Nos. 49-61), and filed opposition papers to the motion, including the amended complaint as an exhibit (Doc. Nos. 64-77). Plaintiff also moved, by order to show cause, for a preliminary injunction (motion sequence No. 002), and defendants moved to strike plaintiff's reply in that motion (motion sequence No. 003).

POSITIONS OF THE PARTIES

Defendants argue that plaintiff fails to state a cause of action for libel against them, because the publications were protected by the fair reporting privilege contained in Civil Rights Law § 74, since those statements not covered by the privilege were substantially true and because the other challenged statements did not concern plaintiff. Defendants further contend that plaintiff's other claimed causes of action fail as well. In response to plaintiff's filing of an amended complaint, defendants contend in their reply that plaintiff's time to file an amended complaint without leave of court had expired. In addition to defendants' contentions with respect to the initial complaint, they also maintain that plaintiff's cause of action sounding in breach of contract should be dismissed based on the statute of frauds.

Plaintiff opposes the motion, and asserts that she has adequately pleaded causes of action for defamation, breach of contract and intentional infliction of emotional distress. Specifically, plaintiff maintains that defendants' publications do not fall within the protection of the fair reporting privilege, since she has adequately alleged that they were complicit in the filing of defamatory material that was essentially a sham, without any factual basis.

LEGAL CONCLUSIONS

I. Plaintiff's filing of an amended complaint during the pendency of defendants' motion to dismiss was permitted and did not abate the motion.

CPLR 3025 permits a plaintiff to amend the complaint once, as of right, without court leave, "within twenty days after service of a pleading responding to it." Where a defendant moves, pre-answer, to dismiss the complaint, the motion extends the defendant's time in which to answer the

complaint and, concomitantly, extends the plaintiff's time in which to file an amended complaint. *See* CPLR 3211 (f). In such a circumstance, the plaintiff may elect to file an amended complaint rather than oppose the motion, but this option does not automatically abate the motion to dismiss. Rather, the moving party has the option to decide whether the motion should be applied to the new pleading, and the question becomes whether the amended pleading cures the problems identified in the motion, thereby rendering it moot, or fails to do so, in which case the motion may be granted and the dismissal is effective against the amended complaint. *See Fownes Bros. & Co., Inc. v JPMorgan Chase & Co.*, 92 AD3d 582, 582-583 (1st Dept 2012); *49 W. 12 Tenants Corp. v Seidenberg*, 6 AD3d 243, 243 (1st Dept 2004); *DiPasquale v Security Mut. Life Ins. Co. of N.Y.*, 293 AD2d 394, 395 (1st Dept 2002); *Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35, 38 (1st Dept 1998); *see generally* Siegel, NY Prac § 236 at 408 (5th ed 2011). Here, while defendants have not explicitly requested that this Court apply their motion as against the amended complaint, they have not withdrawn the motion, and their reply maintains many of the same arguments they made against the original complaint. Thus, the motion will be considered as against the amended complaint.

II. The amended complaint fails to state a cause of action for defamation.

Turning to the merits, "regardless of which subsection of CPLR 3211 (a) a motion to dismiss is brought under, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Ray v Ray*, 108 AD3d 449, 451 (1st Dept 2013); *see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 (2001); *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). "However, factual allegations presumed to be true on a motion pursuant to CPLR 3211 may properly

be negated by affidavits and documentary evidence." *Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 613 (1st Dept 2015) (internal quotation marks, brackets and citations omitted).

Civil Rights Law § 74 provides that "[a] civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding." On a motion to dismiss the complaint in this context, an allegedly libelous publication "must be considered in its entirety when evaluating the defamatory effect of the words." *Alf v Buffalo News, Inc.*, 21 NY3d 988, 990 (2013) (internal quotation marks and citation omitted); *see Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 (1st Dept 2014). Further, "[n]ewspaper accounts of . . . official proceedings must be accorded some degree of liberality. When determining whether an article constituted a 'fair and true' report, the language used therein should not be dissected and analyzed with a lexicographer's precision." *Alf v Buffalo News, Inc.*, 21 NY3d at 990; *accord Martin v Daily News L.P.*, 121 AD3d 90, 100-101 (1st Dept 2014), *lv denied* 24 NY3d 908 (2014); *Russian Am. Found. Inc. v Daily News, L.P.*, 109 AD3d 410, 413 (1st Dept 2013), *lv denied* 22 NY3d 856 (2013). Instead, "[t]o be 'fair and true,' the account need only be 'substantially accurate.'" *McRedmond v Sutton Place Rest. & Bar, Inc.*, 48 AD3d 258, 259 (1st Dept 2008), quoting *Holy Spirit Assn. for Unification of World Christianity v New York Times Co.*, 49 NY2d 63, 67 (1979); *see Alf v Buffalo News, Inc.*, 21 NY3d at 990; *Russian Am. Found., Inc. v Daily News, L.P.*, 109 AD3d at 413. The privilege extends not only to pleadings but also to reports of the contents of all "court papers," such as an "affidavit." *Russian Am. Found. Inc. v Daily News, L.P.*, 109 AD3d at 412-413.

There is, however, a limited exception to the reporting privilege. An individual or entity that maliciously "participates in the drafting of [a] sham" court document in order to defame another loses the benefit of the privilege to report the contents of the document. *WA Rte. 9, LLC v PAF*

Capital LLC, 136 AD3d 522, 522 (1st Dept 2016); *see Williams v Williams*, 23 NY2d 592, 599 (1969); *Casa de Meadows Inc. (Cayman Is.) v Zaman*, 76 AD3d 917, 920 (1st Dept 2010); *Halcyon Jets, Inc. v Jet One Group, Inc.*, 69 AD3d 534, 534-535 (1st Dept 2010).

Here, however, plaintiff has failed to adequately allege that defendants were involved in filing sham court documents such that the fair reporting privilege was lost. At best, plaintiff has alleged only that Bern was in contact with defendants prior to filing the papers in support of his motion for a preliminary injunction in the action brought against him by Paul Napoli. Even assuming, for the sake of argument, that Bern's papers can be construed as a sham, this is simply not an adequate degree of participation to preclude defendants from invoking the fair reporting privilege.

Moreover, considering that this Court (Bransten, J.) ultimately granted large portions of the relief sought in Bern's motion for a preliminary injunction, which was made in the context of Paul Napoli's action against him, it is palpably incredible that his motion papers were a sham brought maliciously and solely for the purpose of defaming plaintiff. Furthermore, plaintiff's argument that Dennis's draft complaint against her, sounding in defamation, was a fabrication is utterly refuted by the allegations in plaintiff's own complaint. Most notably, plaintiff admits to having "wr[itten] a . . . letter to [Dennis's current boss's wife] warning her of [Dennis's] behavior." (Doc. No. 69, ¶ 82). Indeed, this Court (Kern, J.) granted a request by Dennis for a preliminary injunction against plaintiff, enjoining her from continuing similar conduct, and denied plaintiff's motion to dismiss Dennis's complaint against her. (Doc. No. 32). Thus, Plaintiff has failed to establish that defendants cannot claim the fair reporting privilege based on the sham doctrine.

Defendants' articles contain substantially accurate reporting of the contents of Bern's affidavit and the draft complaint attached thereto as an exhibit. Defendants' reporting of the contents

of an email concerning plaintiff was also accurate (Doc. No. 41), and therefore not actionable. *See Love v Morrow & Co.,* 193 AD2d 586, 587-88 (2d Dept 1993). Finally, to the extent that plaintiff complains about articles that defendants did not publish or that do not contain references to her, they are not actionable. *See Omansky v Penning*, 101 AD3d 514, 514-515 (1st Dept 2012). Thus, the causes of action sounding in defamation are dismissed.

III. The amended complaint fails to state a cause of action in breach of contract.

"[A] party alleging a breach of contract must demonstrate the existence of a contract reflecting the terms and conditions of [its] purported agreement" with the defendant. *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182-183 (2011) (internal quotation marks, ellipses and citation omitted). An action in breach of contract fails where the alleged terms are too "ambiguous, indefinite and non-specific" to be enforced. *International Fin. Corp. v Carrera Holdings, Inc.*, 82 AD3d 641, 641 (1st Dept 2011); *see Stanwich Consulting v Etkin*, 47 AD3d 403, 403 (1st Dept 2008). Here, despite plaintiff's amendments to her complaint so that it contains the names of the individuals she claims to have spoken to, the terms of her alleged oral contract with defendants are still too ambiguous and indefinite to be enforced. Plaintiff claims that defendants promised her to remove the articles about her from their online webpage in exchange for her advertising with them. However, she fails to specify how much advertising she was obligated to purchase, the length of time the advertising had to be taken out, and how much she had to pay for such advertising. Furthermore, it is unclear whether defendants were obligated to remove the articles permanently upon the purchase of advertising for a discrete period of time, or only for so long as plaintiff continued to take out advertising with them. These deficiencies render the contract fatally ambiguous and indefinite, and

the cause of action sounding in breach of contract is dismissed.[6]

IV. The remaining causes of action are without merit.

"The intentional infliction of emotional distress [claim is] duplicative since the underlying allegations fall within the ambit of the defamation causes of action," and therefore must be dismissed. *Bacon v Nygard*, 140 AD3d 577, 578 (1st Dept 2016) (internal quotation marks and citation omitted). The negligent infliction of emotional distress cause of action must also be dismissed, since plaintiff failed to allege that she was placed in physical danger or was caused to fear for her personal safety as a result of defendants' conduct. *See Taggart v Costabile*, 131 AD3d 243, 252-253 (2d Dept 2015). Finally, New York does not recognize the tort of false light. *See Howell v New York Post Co.*, 81 NY2d 115, 123-124 (1993). In light of this Court's determination that the amended complaint must be dismissed in its entirety, plaintiff's open motion for a preliminary injunction is rendered moot, as is defendants' motion to strike plaintiff's reply in that motion.

Accordingly, it is hereby,

ORDERED that defendants' motion to dismiss the complaint (motion sequence No. 001) is granted; and it is further,

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[6] Although first raised in defendants' reply papers, defendants maintain that plaintiff's alleged contract violates the statute of frauds. As noted above, this Court is unable to discern the precise terms of the alleged contract. If, however, the contract contemplated that defendants take down the articles for so long as plaintiff kept advertising with them, and would only terminate within one year upon the breach of one of the parties, it would indeed violate the statute of frauds without a writing. *See D & N Boening v Kirsch Beverages*, 63 NY2d 449, 456 (1984).

ORDERED that plaintiff's motion for a preliminary injunction (motion sequence No. 002) is denied as moot; and it is further,

ORDERED that defendants' motion to strike plaintiff's reply papers in the preliminary injunction motion (motion sequence No. 003) is denied as moot; and it is further,

ORDERED that the amended complaint is dismissed in its entirety, and the Clerk is directed to enter judgment accordingly, with costs and disbursements as taxed by the clerk upon submission of an appropriate bill of costs; and it is further,

ORDERED that defendants are directed to serve a copy of this order, with notice of its entry, on plaintiff within 20 days after it is uploaded to NYSCEF; and it is further,

ORDERED that this constitutes the decision and order of the court.

Dated: November 4, 2016

ENTER:

NOV 04 2016

Kathryn E. Freed, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT