SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

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PATRIARCH PARTNERS, LLC and
LYNN TILTON,

Plaintiffs,

-against- Index No.: 160379/2016

MERGERMARKET (U.S.) LTD., d/b/a *DEBTWIRE*
and KYLE YOUNKER,

Defendants.

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COHEN, DAVID BENJAMIN, J.:

Plaintiffs bring this defamation case based on an article (the article)[1] that was written by defendant Kyle Younker and published by defendant Mergermarket (U.S.) LTD., d/b/a *Debtwire* (Debtwire) in December 2016. Defendants move to dismiss the action (CPLR 3211 [a] [1], [7]).

Background

Tilton founded Patriarch Partners, LLC. (Patriarch), a company that is "focused on restructuring and rebuilding distressed iconic American companies" and that "manag[es] and monetiz(es) the distressed portfolios of financial institutions" (Amended Complaint [complaint]), ¶¶ 11-12). The complaint recites that Tilton is a businessperson of noted acclaim and the recipient of numerous awards, including "being recently named by CNBC as one of the 100 Most Influential Names in Business in the last 25 years" (*id.*, ¶ 12). Younker is a senior reporter at Debtwire who

[1] The article is available in full on the court's electronic filing system in this case (NYSCEF Document No. 29), and familiarity with its contents is presumed.

avers that he reports on high yield and distressed debt situations.

The article reports on a proceeding commenced by the United States Security and Exchange Commission (the SEC) against Tilton and Patriarch in 2015.[2] In that proceeding, the SEC claims that plaintiffs misrepresented to investors the value of assets held in certain collateralized loan obligation funds (Zohar Funds) and did not disclose a conflict of interest concerning Tilton's approach to loan or asset valuation (Younker aff, exhibit C, § 4; McNamara affirmation, exhibit H). Within the SEC proceeding, a dispute arose when the SEC withheld the production of certain documents, based upon the "law enforcement privilege," and plaintiffs sought to compel the SEC to produce the documents. In opposition, the SEC submitted the sworn declarations of two SEC attorneys, and an accompanying privilege log which itemized 113 documents that the SEC claimed it was entitled to withhold.

The SEC proceeding was adjudicated by administrative law judge Carol Fox Foelak (the ALJ). The ALJ reviewed the 113 SEC documents in camera, and, in an order dated November 9, 2016, found that some were privileged, others irrelevant, and that none should be turned over for these reasons, and also because they did not contain exculpatory or impeachment evidence. The ALJ's determination included insight into her reasoning, stating that some of the documents:

> "consist of emails between an [SEC] attorney and an Assistant U.S. Attorney in June 2015 concerning access to filings made by [plaintiffs] in this proceeding, and copies of publicly filed motions. They do not reveal confidential law-enforcement techniques or confidential sources. The notion that disclosure would harm ongoing or future investigations is unsupported speculation, particularly because *[the SEC] provides no reason to believe that any investigation is, in fact, ongoing.* Also it is not apparent that the Assistant U.S. Attorney's request for [plaintiffs'] filings was part of the course

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[2] For simplicity, although Tilton and Patriarch were the respondents in the SEC proceeding, they will be referred to as plaintiffs.

> of an active investigation focused on any specific possible violation by [plaintiffs] or others"

(Younker aff, exhibit E at 2 [emphasis supplied]).

Plaintiffs complain that the article's headline, text, and an introductory tweet concerning the article are defamatory. The headline of the article is "Tilton, Patriarch, subject of DOD, DOJ investigations – SEC." The statements in the text of the article that plaintiffs allege are defamatory are:

- "Lynn Tilton and her private equity fund Patriarch Partners have been subject to multi-year investigations conducted by the Department of Justice and Department of Defense";
- "Moreover, fallout from any government investigation could have implications for disputes over boardroom and executive control of these companies";
- "A criminal case would potentially give oppositional Zohar holders a stronger argument in favor of their management and board choices, and for removing Tilton as CEO of the many companies she still controls"

(complaint, ¶ 95). The tweet is the same as the headline.

Plaintiffs allege that Debtwire falsely attributed accusations to the SEC, which gave them the supposed imprimatur of a federal agency (complaint, ¶ 36). They further allege that Debtwire knew that these statements were false, because Younker "indicated" that he understood that the investigations referred to in the submissions in the SEC proceedings did not involve investigations of plaintiffs (complaint, ¶ 26). Plaintiffs state that before the article was printed, and reprinted, their counsel and public relations firm informed Younker, who had contacted plaintiffs for a comment, that plaintiffs had not been the subject of a Department of Justice (DOJ) or a Department of Defense (DOD) investigation, as, if they had been, they would have known it, for various reasons. Plaintiffs state that they informed defendants, through counsel, that they were merely involved, as cooperating witnesses, in

the investigation and prosecution of a former army colonel who had dealings with a company in Patriarch's portfolio, MD Helicopter. Plaintiffs state that defendants acknowledge that the DOD investigation into MD Helicopters, owned by Patriarch, resulted in the guilty plea of Norbert Vergez, and that Patriarch cooperated with the investigation.

Plaintiffs state that a later Debtwire publication claimed only that the SEC declarations and privilege log concerned "interagency documents that detail communications between investigators from the SEC, the DOJ, and the DOD about investigations *related to*" plaintiffs, instead of stating that plaintiffs were the *subject of* investigations that related to criminal activity or that the investigations were active and ongoing (*id.*, ¶¶ 90-91) [emphasis supplied]). Plaintiffs contend that this underscores that plaintiffs knew that the article was false when published.

Discussion

On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, and the complaint construed in a light most favorable to plaintiff, which must be given the benefit of reasonable favorable inferences (*Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 996 [2d Dept 2010]). Mere legal conclusions and "factual claims either inherently incredible or contradicted by documentary evidence, are not entitled to such consideration" (*Quatrochi v Citibank*, 210 AD2d 53, 53 [1st Dept 1994] [citation omitted]). "A motion to dismiss a complaint pursuant to CPLR 3211 (a) (1) may be granted only if the documentary evidence submitted by the defendant utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law" (*Granada Condominium III Assn.*, 78 AD3d at 996).

"Defamation has long been recognized to arise 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 [or her] in the minds of right-thinking persons. . . . The elements 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 v City of New York*, 261 AD2d 34, 37-38 [1st Dept 1999] [internal quotation marks and citations omitted]). Defendants argue that the complaint should be dismissed as: (1) the report on the SEC proceeding is privileged under New York Civil Rights Law (CRL) § 74; (2) the statements regarding the potential impact of investigations on plaintiffs' business are not actionable because they constitute opinion, incapable of being proved true or false; and (3) there are insufficient allegations that defendants acted with actual malice.

> "Even news articles containing false factual statements capable of defamatory interpretation will be protected by the absolute privilege afforded by Civil Rights Law § 74 if the gist of the articles constitutes a 'fair and true report.' Civil Rights Law § 74 states 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,' and the privilege applies to reports about legal pleadings. 'When determining whether an article constitutes a "fair and true" report, the language used therein should not be dissected and analyzed with a lexicographer's precision.' Rather, the question is whether the article 'provided substantially accurate reporting'"

(*Martin v Daily News L.P.*, 121 AD3d 90, 100-101 [1st Dept 2014] [internal citations omitted]; *Holy Spirit Assn. for Unification of World Christianity v New York Times Co.*, 49 NY2d 63, 67 [1979]; *Becher v Troy Pub Co.*, 183 AD2d 230, 233 [3d Dept 1992] ["fair and true" is liberally interpreted in order to provide broad protection to news accounts of official proceedings]). "The defamatory potential of a particular . . . statement is to be ascertained by considering the challenged publication in its entirety; only after doing so can one then determine whether, and to what extent, the

falsehood affects the overall impression left on the average reader" (*Fraser v Park Newspapers of St. Lawrence,* 246 AD2d 894, 895–96 [3d Dept 1998]).

Plaintiffs argue that CRL ¶ 74 does not apply because the article is not substantially accurate. Plaintiffs note that the statements in the SEC's submissions to the SEC proceeding only refer vaguely to the possibility of some kind of governmental inquiries of some unknown person or entity, by perhaps the SEC, the DOJ, or the DOD, but does not say that the SEC confirmed that they were currently the subjects of ongoing, multi-year investigations by the DOJ and DOD. Plaintiffs assert that claims that plaintiffs were currently the subjects of multi-year, ongoing, criminal investigations by both the DOJ and the DOD would cause readers to take a more sinister view of plaintiffs' business prospects than the truth, which was that plaintiffs were merely cooperating witnesses in a DOD investigation of the army colonel years ago.

Plaintiffs note that the privilege log, upon which defendants rely, does not contain a reference to any communications between the SEC and DOC regarding the matter with the army colonel after April 2015. They further point out that the privilege log references to a DOJ investigation is a line item regarding a privilege claim over four emails, all of which were sent and received over the course of two days in May 2015, over a year before the December 2, 2016 publication of the article. Plaintiffs contend that the defendants asserted false, overly broad claims that are not supported by the facts of the actual proceeding. Plaintiff also rely on the ALJ's opinion that there was no reason to believe that there was an ongoing investigation.

Relevant here is the sworn declaration submitted by Brent S. Mitchell, an SEC attorney, in the

SEC proceeding.[3] In paragraph 10 of the declaration, Mitchell averred that the SEC sought to withhold the documents because their disclosure could harm the SEC, DOJ's and DOD's "on-going law enforcement interests" by, among other things, revealing what these entities knew, their strategies, and the evidence that they considered important "in the ongoing investigations and any enforcement actions that might arise from those investigations" (Younker aff, exhibit C, [Mitchell declaration] ¶ 10). Hence, the implication that there were ongoing SEC, DOJ and DOD investigations, and that the SEC sought to withhold documents relating to those investigations. Also in paragraph 10 of his declaration, Mitchell avers that the SEC sought to withhold the documents listed in paragraph 8 therein, linking Mitchell's averment with those documents.

In paragraph 8, in turn, Mitchell refers to various entries of the SEC-authored privilege log concerning the actual documents that the SEC sought to withhold as, purportedly, important to ongoing law enforcement efforts and investigations (the log entries). All of the log entries are labeled by the SEC as falling within the category of "Investigative Information Requests." For some of these log entries, the SEC states that certain documents, from 2013, were communications between the SEC and certain Assistant US Attorneys (AUSAs) that took over the DOD investigation regarding a company in plaintiff's portfolio. In log entries, for other documents, from 2015, the SEC states that the documents concerned the SEC's grant of the DOJ's request for access to information that was part of the SEC's confidential investigative file related to Tilton and Patriarch. Log entries numbered 90-93 are for

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[3] The record also includes the sworn declaration of another SEC attorney that contains averments about shielding documents due to SEC's ongoing law enforcement interests (Younker aff, exhibit B).

documents dated May 11-12, 2015, which the SEC states, concern emails arranging communications by SEC lawyers with AUSAs regarding "the DOJ's investigation of Tilton and Patriarch" (*id.*, exhibit D).[4]

The documents, just discussed, include Mitchell's sworn reference to a 2016 ongoing investigation by the DOJ, as reflected through documents addressed in privilege log entries stating that the documents concern a DOJ investigation of Tilton and Patriarch in 2015. Even if there was no such investigation, this demonstrates that the SEC's position appeared to be that there was an ongoing DOJ investigation of Tilton and Patriarch during a two-year period. The SEC 2016 reference to a DOD investigation, based on paragraph 8's reference to the privilege log, along with the privilege log references to a 2013 DOD investigation into one of plaintiff's portfolio companies, implies a multi-year DOD investigation of a company in plaintiffs' portfolio.[5]

As the alleged defamatory the statements must be read in context, it is necessary to review more of the article, which quoted from the ALJ's decision, and states:

> "Meanwhile, even as the SEC attorneys defend the shielding of the interagency documents in part due to what they refer to as 'ongoing investigations,' *Judge Foelak ruled that some of their asserted grounds are 'doubtful,'* and that the SEC office '*provides no reason to believe that any investigation is, in fact ongoing.*' Nonetheless, [the ALJ] ruled in favor of the SEC and against document production,

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[4] The "Subject" column in the privilege log lists the subject as "Tilton/Patriarch Partners" for the investigative information request (Younker aff, exhibit D, [Log Entries 90-93]). The subject column in the log references Patriarch many times and there are also some reference to Tilton.

[5] The complete sentence from the article about which plaintiffs complain is "Tilton and Patriarch have been *subject to* multi-year investigations conducted by the Department of Justice and Department of Defense, according to a source familiar with the matter, along with declarations filed by SEC lawyers in the commission's administrative proceeding against Tilton over fraud allegations" (Younker aff, exhibit F at 1). Thus, the article does not state that plaintiffs were the *subjects of* these investigations.

stating that the documents don't contain relevant evidence."

(Younker aff, exhibit F [emphasis supplied]). This portion of the article supports plaintiffs' point, that there was no ongoing investigation, as it demonstrates that the SEC submissions, including the actual documents that the ALJ had reviewed, were not sufficient to meet the SEC's burden to demonstrate law enforcement privilege due to an ongoing investigation. It also informs the reader of controversy concerning the SEC's assertions. In addition, when plaintiffs' counsel provided a statement to Debtwire, denying that there was any investigation and explaining the reasons for the denial, Debtwire published the entire statement (Younker aff, exhibit F at 2), and also referenced the statement midpoint in the article.[6]

Finally, the article also discusses 2014 reports concerning a DOD investigation relating to the hiring of the former army colonel by MD Helicopters, a company in the Patriarch and Zohar Funds portfolio. The article notes that MD Helicopters had done extensive business with the DOD, "and has been proximate to the federal investigations" (Younker aff, exhibit F at 2). Also printed in the article is what is purported to be Patriarch's statement, which Debtwire asserts was made at the time of the investigation, that Patriarch had cooperated with the DOD investigation that led to that colonel's

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[6] Plaintiffs' counsel's statement, published in full, explains why sophisticated parties, which, presumably, includes those that would be in the reading audience of an online publication that focuses on commercial finance, would know, from the timing and duration of certain investigative requests, that the SEC privilege log demonstrated that there was no investigation of plaintiffs. Plaintiffs' counsel's statement explains that the only reference in the privilege log to DOD communications ceased by April 2015, and that the only references to DOJ and the United States' Attorneys Office were communications in the three-month period after the SEC filed civil charges against plaintiffs, at the end of March 2015. The statement also contains plaintiffs' counsel's assertion that "[a]ny misreading of the SEC's privilege log or related declarations as supposedly substantiating [an active or ongoing, or any DOJ or DOD] investigation is false and defamatory" (Younker aff, exhibit F at 2).

criminal conviction, and that the colonel's plea deal did not contain allegations of misconduct by Patriarch or MD Helicopters.

Reading the article as a whole, in a liberal manner, it reports on the SEC's position in the proceeding, and includes information that demonstrates that the ALJ adjudicating the proceeding may not have considered this position to be sound or persuasive. The article also included the plaintiffs' written statement, although not when the article was initially published, as plaintiff had not yet provided it.[7] The article contains a link to the Mitchell declaration, with privilege log,[8] and to a document concerning a civil suit against plaintiffs, filed by some associated with the Zohar Funds, which the article states was filed shortly prior to publication. The SEC's submissions could lead a reader to believe that the SEC's attorneys' position was that there were ongoing government investigations of plaintiffs, by the DOJ and the DOD, that carried on for more than a year. The article is a substantially accurate reflection of the SEC's position in the proceeding, and is therefore shielded by CRL ¶ 74. Whether the SEC's sworn statements and the privilege log were accurate is not adjudicated here, but the court notes that privilege logs, with their short entries, sometimes can paint a picture that may be interpreted in more than one way.

That plaintiffs' counsel and its public relations firm had informed Debtwire that there was no DOJ or DOD investigations, then, or ever, does not change this determination. While acknowledging

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[7] The copy of the article provided by Debtwire is dated December 2, 2016, the alleged first publication date, and contains plaintiffs' counsel's statement.

[8] Defendants assert, and plaintiffs do not dispute, that the documents contained links to the Mitchell declaration and privilege log. Consequently, Debtwire readers could review them in order to make their own assessments.

that it can be extremely difficult for anyone to demonstrate the absence of something, including a government investigation, subjecting the press to defamation damages, based on a denial by the subject of the article, could potentially present an unwarranted deterrent to the flow of timely information to the public. Although the article might have better connected the DOD investigation involving MD Helicopters with the privilege log notations, when the article is read in its entirely, liberally construed, as required, it is a substantially accurate report of what occurred during the discovery dispute in the SEC proceeding.

Plaintiffs also label, as defamatory, the article's statements concerning the fallout from any government investigation, and the potential implications of a criminal case on a battle for control of the Zohar Fund companies. The parties dispute whether or not these statements constitute opinions. "[O]nly statements of fact can be defamatory because statements of pure opinion cannot be proven untrue" (*Martin*, 121 AD3d at 100 [internal quotation marks and citation omitted]). "Expressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation" (*Mann v Abel*, 10 NY3d 271, 276 [2008], *cert denied* 555 US 1170 [2009]). Whether a statement is one of fact or opinion is a question of law for the court, and depends upon "'whether a reasonable reader or listener would understand the complained-of assertions as opinion or statements of fact'" (*Millus v Newsday, Inc.*, 89 NY2d 840, 842 [1996], *cert denied* 520 US 1144 [1997], quoting *Brian v Richardson*, 87 NY2d 46, 52 [1995]). Factors to be examined 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 as to signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact"

(*Mann*, 10 NY3d at 276 [internal quotation marks and citation omitted]).

Concerning the third factor, the court must consider the content of the communication in which the assertions were made as a whole, as well as its tone and apparent purpose, and not merely "sift [ ] through a communication for the purpose of isolating and identifying assertions of fact" (*Brian*, 87 NY2d at 51). To be addressed is the issue of "whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff" (*id.* [internal quotation marks and citation omitted]). Courts also distinguish between a "mixed opinion," an opinion that implies an undisclosed basis in facts which are not disclosed to the reader, and a "pure opinion," which includes the facts on which it is based, or does not imply the existence of undisclosed facts (*Gross v New York Times Co.*, 82 NY2d 146, 153 [1993] [citations omitted]).

Plaintiffs argue that the alleged defamatory statements about the fallout from investigations and the implications of a criminal investigation are not privileged as opinion, because they imply a criminal investigation when there was none. Concerning the statement about the potential fallout from government investigations, there is no dispute that the SEC, a government agency, commenced a civil action against plaintiffs for fraud, so that the reference to any government investigation also would include that which underlay the then-pending SEC securities proceeding. In any event, in context, both comments are opinions about unspecified, speculative and vague implications, and either hypothetical, or mere prediction about potential future events. They address something that might occur or be the outcome (such as a heightened battle for control over companies) of another thing (government

investigations, criminal or otherwise), that might or might not be happening. Such supposition, especially where, as here, the underlying basis upon which the statements are made is included, falls into the category of nonactionable opinion.[9]

Conclusion

In light of the foregoing, the case must be dismissed. Consequently, it is unnecessary to reach the issue of whether or not plaintiffs could be considered public figures.

In light of the foregoing, it is

ORDERED that defendant's motion to dismiss the complaint is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

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[9] Although, from their opposition, it appears that plaintiffs may have abandoned their complaint allegation concerning the use of the word "distressed," in the tweet address, in the context in which it was used, it constitutes "[l]oose, figurative or hyperbolic statements, [which], even if deprecating the plaintiff, are not actionable" (*Dillon*, 261 AD2d at 38). "Distressed" is defined as "of, relating to, or experiencing economic decline or difficulty" (**https://www.merriam-webster.com/dictionary/distressed**), is vague, and has an imprecise meaning, which includes the experience of physical or mental distress. Thus, "distressed" is subjective when used to refer to individuals (*id.* at 40). Plaintiffs themselves use the word "distressed" in describing their work in restructuring companies, the SEC proceeding concerns collateralized loan obligation funds, and plaintiffs do not dispute that some debt, issued by certain Zohar Fund entities was slated for auction, suggesting that it was distressed debt. Plaintiffs were also the respondents in an SEC fraud investigation and were sued regarding the Zohar Funds. Whether "#distressed" was used to describe plaintiffs' endeavors in the distressed debt arena, assets slated for auction, or the tribulation that arises from being subjected to any kind of government investigative action and prosecution, or a lawsuit, a claim based on the use of that word, is not actionable.

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 3-26-2018

ENTER:

J.S.C.

HON. DAVID E.