SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C. PART 8

161 LUDLOW FOOD, LLC d/b/a NO FUN

INDEX NO. 153500/2016

MOT. DATE

- v -

L.E.S. DWELLERS, INC. f/k/a DIEM INC., et al.

MOT. SEQ. NO. 003

The following papers were read on this motion to/for dismiss

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s). 55-59

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s). 60-62

Replying Affidavits NYSCEF DOC No(s). 64-67, 69-159, 163, 164

This action sounds in defamation. Defendant moves to dismiss the second amended complaint pursuant to CPLR § 3211[g]. Plaintiff opposes the motion. In an Interim order dated August 17, 2017, the court directed defendants to refile certain papers and reserved the right to reject defendants' reply as untimely. Oral argument on the motion was held on February 27, 2018 pursuant to the parties' stipulation. The court's decision follows.

Plaintiff operates a bar and/or restaurant/lounge which is located on the Lower East Side. Defendants describe L.E.S. Dwellers, Inc. f/k/a Diem, Inc. (the "LES Dwellers") as "a community group... who opposed the renewal of plaintiff's liquor license by the State Liquor Authority" (the "SLA"). Meanwhile, according to the second amended complaint, LES Dwellers is on a "mission to destroy every establishment with a liquor license on the Lower East Side that does not bend to its will, by any means necessary." Defendant Diem Boyd ("Boyd") is the alleged "creator and leader of [the LES Dwellers]." Plaintiff seeks to recover for defamation *per se* because the defendants allegedly made "knowingly false and malicious statements against plaintiff both in writing to public officials and orally in a public forum ... to ensure that plaintiff's liquor license... [would] not be renewed."

Plaintiff alleges that on August 10, 2015, defendants emailed a complaint about plaintiff to Community Board 3 ("CB3") which "include[ed] the demonstrably false claim that plaintiffs (sic) did not have a valid Certificate of Occupancy or Public Assembly License." Specifically, this email stated: [1] "Certificate of Occupancy Violation: ... no C of O exists"; and [2] "C of O Violation: ...no PA issued yet for occupancy exceeding 74 persons". On August 17, 2015, CB3 held a meeting to discuss, *inter alia*, plaintiff's liquor license renewal. At that meeting, where approximately 50 people were allegedly present, defendant Boyd allegedly stated: "No Fun does not have a valid Certificate of Occupancy" and "No Fun does not have a valid Public Assembly license." As a result, plaintiff has asserted two causes of action against the defendants: libel per se in connection with the email and slander per se in connection with Boyd's statements at the 8/17/15 meeting.

Dated: 4/23/18

HON. LYNN R. KOTLER, J.S.C.

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**

Defendants argue that this lawsuit is a SLAPP suit and has been initiated to "punish [them] for protected speech..." Defendants contend that the second amended complaint must be dismissed, because even if the alleged defamatory statements are true, they are not actionable, and the alleged defamation regarding a June 2014 SLA complaint is time-barred.

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). The court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*id.* citing *Morone v. Morone*, 50 NY2d 481 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]).

CPLR § 3211(g) provides as follows:

> (g) Standards for motions to dismiss in certain cases involving public petition and participation. A motion to dismiss based on paragraph seven of subdivision (a) of this section, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law, shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant preference in the hearing of such motion.

Libel

A defamatory statement is libelous *per se* if the statement "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" (*Gjonlekaj v. Sot*, 308 AD2d 471 [2d Dept 2003] quoting *Rinaldi v. Holt, Rinehart & Winston*, 42 NY2d 369 [1977] *cert denied* 434 US 969). 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" (*Frechtman v. Gutterman*, 115 AD3d 102 [1st Dept 2014]).

The court will first consider whether the libel claim is timely. Defamation is subject to a one-year statute of limitations (CPLR § 215[3]). Defendants argue that the libel claim is untimely because the allegedly defamatory written statements were contained in a document uploaded to Google Documents and/or Google Drive which was published as a hyperlink embedded in an email from Boyd to the SLA and CB3 on June 16, 2014. The hyperlink was publicly accessible but not searchable. Defendants admit, however, that the subject document was resent to CB3 and the SLA on August 10, 2015 as an attachment. In the August 10, 2015 email, Boyd wrote:

> Please find the following information on [plaintiff]. ...
>
> 1. June 2014 SLA Complaint (CB3 offices were CCd)

Defendants maintain that since the document was originally sent on June 16, 2014, and this action was only commenced July 7, 2016, the libel claim is untimely. Further, defendants argue that resending the document on August 10, 2015 "constituted additional distribution rather than republication."

In opposition to the motion, plaintiff contends that resending the subject document constitutes a republication since it was sent to a different audience in 2015 as compared to 2014. Ordinarily, the statute of limitations on a libel claim runs from the date of the first publication. However, "republication" of the libelous statement may toll the statute when the following factors are present: "the subsequent publication is intended to and actually reaches a new audience, the second publication is made on an occa-

sion distinct from the initial one, the republished statement has been modified in form or in content, and the defendant has control over the decision to republish" (*Martin v. Daily News, L.P.*, 121 AD3d 90 [1st Dept 2014] [internal quotations omitted]).

Here, assuming *arguendo* that the other factors are present, there can be no dispute that the 2015 email with the subject document attached was **not** modified in form or in content from the 2014 email containing a hyperlink to the same document. Indeed, at best, the 2015 email was "a delayed circulation of the original [document]" (*Rinaldi v. Viking Penguin*, 52 NY2d 422, 435 [1981]). Therefore, the court rejects plaintiff's claim that the statute of limitations began to run from August 10, 2015, and the libel claim is untimely. Accordingly, the first cause of action is severed and dismissed.

In light of this result, the court declines to consider defendants' alternative arguments that the alleged libel was true.

Slander

With respect to the statements Boyd made at the 2015 meeting, defendants maintain that this is a SLAPP suit which should be dismissed because plaintiff cannot demonstrate a substantial basis in law and fact for its claims. A SLAPP suit is a "Strategic Lawsuit against Public Participation", and New York has a strong public policy against such lawsuits because they have a chilling effect on public participation in political activity (*see Hariri v. Amper*, 51 AD3d 146 [1st Dept 2008]). This public policy is embodied in Civil Rights Law §§ 70-a, 76-a.

There is no dispute that plaintiff's claims fall within the ambit of New York's anti-SLAPP law, since Boyd allegedly made the defamatory statement at a community board hearing in opposition to the renewal of plaintiff's liquor license. Pursuant to CRL § 76-a, plaintiff must demonstrate by clear and convincing evidence that the subject defamatory statement "was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue." Further, under CPLR § 3211 [g], plaintiff must demonstrate a "substantial basis in law" for its cause of action, and the court may consider exhibits and other documents submitted in evidentiary form in contravention to a typical CPLR § 3211 [a] motion to dismiss.

Defendants argue that the statements do not constitute defamation *per se*. In order to assert a cause of action for defamation *per se,* plaintiff must "establish that the publication injured its business reputation or its credit standing" (*Sandals Resorts Intern. Ltd. v. Google, Inc.*, 86 AD3d 32 [1st Dept 2011]). Here, plaintiff argues that Boyd's statements damaged its business reputation because what Boyd said was "akin to telling the public that the establishment is an unsafe, illegal and illegitimate operation and impugn[ed] the very existence of the business." At this stage of the litigation, the court finds that plaintiff's allegations survive a motion to dismiss for failure to state a cause of action.

Nonetheless, the court finds that plaintiffs have not met their heavy burden to survive the motion to dismiss pursuant to CPLR § 3211 [g]. Defendants contend that plaintiff cannot recover based upon the "incremental harm doctrine", which provides that "when unchallenged or nonactionable parts of a particular publication are damaging, another statement, though maliciously false, might be nonactionable on the grounds that it causes no harm beyond the harm caused by the remainder of the publication" (*Church of Scientology Int'l v. Time Warner*, 932 FSupp 589 [SDNY 1996]). Defendants essentially argue that Boyd's allegedly defamatory statements were no more harmful than her complaints about plaintiff's business to the effect that it did not operate a restaurant and was disruptive to the neighborhood.

Further, defendants argue that the "libel-proof plaintiff doctrine" applies here since plaintiff operated without a Certificate of Occupancy or Public Assembly Certificate for two years, "[t]here are no bad reputational consequences that could flow from a false statement that in August 2015, [plaintiff] lacked these permits." For this proposition, plaintiff relies upon *Church of Scientology*, *supra* as well as *Duane Reade v. Clark*, 2 Misc 3d 1007(A) [NY Sup, NY Co 2004]).

Here, the motion must be granted because plaintiff's liquor license was ultimately renewed, and plaintiff has otherwise failed to establish by clear and convincing evidence how the defendants' false statements about a Certificate of Occupancy or Public Assembly license harmed its business reputation. Indeed, plaintiff indisputably operated without such licenses for a significant period of time, so that at the time the defendants allegedly made false statements to that effect, its reputation could not be significantly harmed given its history of noncompliance. Further, plaintiff's counsel concedes that "[i]ts reputation is favorable enough that many members of the public came out in support of [it]." Accordingly, the court finds that plaintiff cannot establish by clear and convincing evidence that its business reputation or credit standing were harmed by the alleged defamatory statements, and alternatively, that both the incremental harm and libel-proof plaintiff doctrines warrant dismissal of plaintiff's claims.

To the extent that plaintiff argues that discovery is warranted, the court disagrees. Plaintiff misapprehends the purpose of CPLR § 3211[g] and the relevant provisions of the Civil Rights Law. Nor has plaintiff sufficiently identified what discovery in defendants' possession would enable it to defeat the motion.

Accordingly, plaintiff's complaint is dismissed. Defendants' counterclaims remain. The court directs the parties to appear for a preliminary conference on June 26, 2018 at 9:30am in Part 8, 80 Centre Street, Room 278.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff's complaint is dismissed; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on June 26, 2018 at 9:30am in Part 8, 80 Centre Street, Room 278.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order and Judgment of the court.

Dated: 4/23/18
New York, New York

So Ordered

Hon. Lynn R. Kotler, J.S.C.