Nix v Major League Baseball
2018 NY Slip Op 31141(U)
June 4, 2018
Supreme Court, New York County
Docket Number: 159953/2016
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARBARA JAFFE** **PART** **12**

Justice

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NEIMAN NIX and DNA SPORTS PERFORMANCE LAB, INC.,

Plaintiffs,

- v –

MAJOR LEAGUE BASEBALL, OFFICE OF THE COMMISSIONER OF BASEBALL, ROBERT MANFRED, ALLAN SELIG, NEIL BOLAND, AWILDA SANTANA,

Defendants.

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INDEX NO. 159953/2016

MOTION DATE _____

MOTION SEQ. NO. 1

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

were read on this application for dismissal

By notice of motion, defendants move pre-answer pursuant to CPLR 3211(a)(1), (5), and (7) for an order dismissing the complaint. Plaintiffs oppose.

I. BACKGROUND

In or around February 2014, plaintiffs commenced an action in the Circuit Court of the 11th Judicial Circuit, In and For Miami-Dade County, Florida, against Major League Baseball

(MLB), The Office of the Commissioner of Baseball d/b/a MLB, MLB Enterprises, Inc., MLB Properties, Inc., George Hanna, Daniel T. Mullin, and Awilda Santana. They advanced claims for a violation of the Florida RICO Act, a violation of the Florida Civil Remedies for Criminal Practices Act, a violation of FDUPTA, slander, slander of title, tortious interference with business and contractual relationships, intentional infliction of emotional distress, and a temporary and permanent injunction. (NYSCEF 13).

In April 2014, plaintiffs amended the complaint to remove the slander and slander of title claims and replace them with claims for defamation and trade defamation (first complaint). (NYSCEF 16).

By decision and order dated November 6, 2014, the first complaint was dismissed without prejudice based on plaintiffs' counsel's failure to serve process, file a case management report, and appear for an initial case management conference. (NYSCEF 17).

On December 5, 2014, plaintiffs appealed the dismissal (NYSCEF 18), and on April 24, 2015, they voluntarily dismissed the appeal, thereby ending that action. (NYSCEF 19).

On or about July 13, 2016, plaintiffs commenced an action in the United States District Court of the Southern District of New York against MLB, Office of the Commissioner of Baseball d/b/a MLB, Robert D. Manfred, Jr., Allan H. "Bud" Selig, Neil Boland, and Santana. They asserted claims for tortious interference with business relationship under Florida State Tort Law, and tortious interference with business relations/prospective economic advantage under New York State Tort Law. (NYSCEF 12). On or about September 1, 2016, plaintiffs amended the complaint to add claims for defamation and defamation per se (second complaint). (NYSCEF 32).

On November 3, 2016, plaintiffs filed a notice of voluntary dismissal of the second complaint pursuant to Federal Rules of Civil Procedure (FRCP) § 41(a)(1)(A)(i). (NYSCEF 34).

Approximately 25 days after the voluntary dismissal, plaintiffs commenced the instant action in this court, asserting claims for tortious interference with business relationships/prospective economic advantage, defamation, defamation *per se*, a violation of the Computer Fraud and Abuse Act (CFAA), and a permanent injunction. The defamation claims are based on one statement made by MLB on July 14, 2016, in a press release issued in response to the filing of the second complaint, to wit, "in Paragraph 40 of the Complaint Mr. Nix admits to selling products purportedly containing at least one banned performance-enhancing substance (IGF-1) . . ." (NYSCEF 1).

In 2017, defendants removed the case to the United States District Court, Southern District of New York, given the asserted federal CFAA claim. (NYSCEF 6-8). By decision and order dated February 27, 2017, the court directed plaintiffs to either file a motion to remand the matter or an amended complaint conforming to federal pleading standards. (NYSCEF 35, 36). Thereafter, plaintiffs filed a motion to remand the case to state court as well as requesting dismissal of their federal claim (NYSCEF 37), which was granted by decision and order dated July 6, 2017 (NYSCEF 38).

II. CONTENTIONS

Defendants contend that the action must be dismissed as barred by plaintiffs' two earlier voluntarily-dismissed actions pursuant to both FRCP § 41(a)(1)(B) and CPLR 3217(c). They contend that both discontinuances were voluntary, and that all three actions are based on and include the same claim, regardless of whether the claims or parties are identical. They observe that the two actions are based on allegations related to MLB's investigation of plaintiffs and the

hacking of their social media accounts, that the plaintiffs are the same, and that MLB, Selig, and Santana are named as defendants in both cases. While Manfred and Boland are not named in the first action, they had not yet been appointed as MLB Commissioner and Vice President, respectively. (NYSCEF 9).

Defendants also maintain that plaintiffs fail to state a claim for defamation as the statement at issue is not one which would expose plaintiffs to public contempt, hatred, ridicule, aversion, or disgrace, as it was not said, nor may it be inferred therefrom that plaintiffs sold illegal substances or that they had sold them to MLB players notwithstanding the ban on such substances. Defendants argue that plaintiffs also fail to prove that the statement is false or that it was made with actual malice or reckless disregard, which is the standard to be applied when the allegedly injured party is a public figure. (*Id.*).

Plaintiffs, ignoring the legal impact of the two voluntary dismissals (*see infra*, at 5), argue that their claims are not barred absent an identity of parties and claims in the three actions, and as the first complaint contains some claims based on Florida law claims whereas the second complaint is based on events that occurred after the first was filed. They also maintain that the dismissals cannot be deemed to be with prejudice as they specifically discontinued both actions without prejudice. (NYSCEF 41).

Plaintiffs also contend that their defamation claims are sufficiently stated, as in making its statement, MLB "essentially told the world . . . that Nix admitted to selling a banned substance," which is like calling him a drug dealer, that the statement is false as they "sold a line of supplements that contained Insulin Growth Factor derived from shavings from elk antlers – unlike the synthetically-manufacture IGF-1, is a naturally-occurring, 'bio-identical' but

chemically-different substance," that they need not prove actual malice or reckless disregard, and that as the statement is false, it is not privileged. (*Id.*).

In reply, defendants reiterate their prior arguments, and maintain that the defamation claim lacks merit as the allegedly defamatory statement is true given the MLB ban on all forms of IGF-1 (NYSCEF 11), and that it is thus privileged as a fair and true report of plaintiffs' complaint. (NYSCEF 46).

III. ANALYSIS

A. *Res judicata*

The federal rules provide that a plaintiff may dismiss his own action without court order in certain circumstances, and the dismissal is without prejudice, unless the plaintiff has previously dismissed a federal or state court action "based on or including the same claim," in which case a notice of dismissal operates as an adjudication on the merits (two-dismissal rule). (FRCP § 41[a][1][B]). Similarly, CPLR 3217(c) provides that a discontinuance constitutes an adjudication on the merits if the discontinuing party "has once before discontinued by any method an action based on or including the same cause of action in a court of any state or the United States."

Pursuant to CPLR 3211(a)(5), a party may move for dismissal of a claim on the ground that it is barred, as pertinent here, as *res judicata*. (CPLR 3211[a][5]).

It is undisputed that plaintiffs discontinued their two prior actions, and that the instant action and the two prior ones have in common tortious interference with business relations or prospective economic advantage and defamation. Even if the causes of action are not identical, they are all based on the same facts and allegations regarding: (1) plaintiff Nix's personal history and the creation of his business; (2) the development of the business; and (3) defendants' alleged

conduct in destroying his business by interfering with it, defaming them, and manipulating their social media access and accounts. (*See Beckmann v Bank of Am., N.A.*, 2015 WL 11578509 [Dist Ct, ND Georgia 2015], *adopted* 2015 WL 11605516 [Dist Ct, ND Georgia 2015] [dismissing third action as all claims based on same factual allegations even if different theories or causes of action alleged]; *Voiceone Communications, LLC v Google Inc.*, 2014 WL 10936546 [Dist Ct, SD NY 2014] [dismissing case as barred by two-dismissal rule as claims were based on same facts or arose out of same transactions, even though different legal claims or theories asserted]; *Cumptan v Allstate Ins. Co.*, 2011 WL 3501783 [Dist Ct, ND W. Va] [two-dismissal rule does not require identical theories or claims]). Moreover, the same defendants or their successors are parties in each action. (*See e.g., Manning v S. Carolina Dept. of Highway and Pub. Transp.*, 914 F2d 44 [4th Cir 1990] [two-dismissal rule required dismissal of third action where defendants or their privies were named in all actions]).

However, as the allegedly defamatory statement at issue in this case was made after the first complaint was filed and dismissed, and before the second was filed and dismissed, it is not barred by two dismissals.

Defendants thus establish that plaintiffs' claims for tortious interference are barred by the dismissal of the two prior actions. (*Haber v Raso*, 130 AD3d 781 [2d Dept 2015] [third action should have been dismissed as plaintiff had earlier discontinued two actions for same claims]).

B. Defamation

A defamatory statement is "a false statement that tends to expose a person to public contempt, hatred, ridicule, aversion or disgrace" (*Thomas H. v Paul B.*, 18 NY3d 580, 584 [2012]; *see Rinaldi v Holt, Rinehart & Winston, Inc.*, 42 NY2d 369, 379 [1977], *cert denied* 434 US 969), "or to induce an evil or unsavory opinion of him [or her] in the minds of a substantial

number of the community" (*Golub v Empire/Star Group*, 89 NY2d 1074, 1076 [1997]; *see Foster v Churchill*, 87 NY2d 744, 751 [1996]; *Franklin v Daily Holdings, Inc.*, 135 AD3d 87, 91 [1st Dept 2015]; *see also Jewell v NYPHoldings, Inc.*, 23 F Supp 2d 348, 360-361 [SD NY 1998]). The elements of a cause of action for defamation are 1) a false statement, and 2) publication of it to a third party, 3) absent privilege or authorization, which 4) causes harm, unless the statement is defamatory *per se*, in which case harm is presumed. (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014]; *Frechtman v Gutterman*, 115 AD3d 102, 104 [1st Dept 2014], citing *Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]; *see Franklin*, 135 AD3d at 91).

Whether a statement or word is defamatory constitutes "a legal question to be resolved by the court in the first instance." (*Golub*, 89 NY2d at 1076; *Armstrong v Simon & Schuster*, 85 NY2d 373, 380 [1995]; *Aronson v Wiersma*, 65 NY2d 592, 593 [1985]; *James v Gannett Co.*, 40 NY2d 415, 419 [1976]). Moreover, privileged statements are not defamatory as a matter of law, and whether an allegedly defamatory statement is privileged likewise constitutes a question of law for the court. (*People ex rel Bensky v Warden of City Prison*, 258 NY 55, 60 [1932]; *Flomenhaft v Finkelstein*, 127 AD3d 634, 637 [1st Dept 2015]; *Sexter & Warmflash, PC v Margrabe*, 38 AD3d 163, 173 [1st Dept 2007], *abrogated on other grounds by Front, Inc.*, 24 NY3d 713).

Plaintiffs argue that although Civil Rights Law § 74 creates a privilege barring the maintenance of a civil action based on the publication of a fair and true report of a judicial proceeding, it does not apply here as defendants' defamatory statement is false, and therefore does not constitute a "fair and true" report of the second complaint.

A fair and true report is one that is substantially accurate; minor inaccuracies do not remove it from the protection of Civil Rights Law § 74. (*Bouchard v Daily Gazette Co.*, 136 AD3d 1233 [3d Dept 2016]). "When determining whether an article constitutes a 'fair and true' report, the language should not be dissected and analyzed with a lexicographer's precision." (*Greenberg v Spitzer*, 155 AD3d 27 [2d Dept 2017], quoting *Holy Spirit Assn. for Unification of World Christianity v New York Times Co.*, 49 NY2d 63 [1979]). "Comments that essentially summarize or restate the allegations of a pleading filed in an action are the type of statements that fall within [the] privilege." (*Lacher v Engel*, 33 AD3d 10 [1st Dept 2006]). It is not required that a publication report on the plaintiff's side of the controversy. (*Alf v Buffalo News, Inc.*, 100 AD3d 1487 [4th Dept 2012], *affd* 21 NY3d 988 [2013]).

Paragraph 40 of the complaint provides in the first sentence that "[o]ne of the main ingredients used by [plaintiffs] come from Bio-identical Insulin Like Growth Factor ("IGF-1"), which is derived from elk antlers." Defendants in their press release statement verbally expressed paragraph 40 by stating that Nix admitted therein to selling products containing IGF-1, which is a banned substance under MLB rules. That plaintiffs admitted that they sell products containing IGF-1 is precisely what is written in paragraph 40, and that portion of the statement is thus a fair and accurate report of the complaint.

Moreover, plaintiffs do not dispute that IGF-1 is banned by MLB. Rather, they argue that that the IGF-1 they use is not synthetic. However, MLB provides evidence that it bans IGF-1 in all forms, whether synthetic or natural (NYSCEF 11), and plaintiffs offer no proof to the contrary. Defendants thus demonstrate that their statement, in which they recited plaintiffs' own allegations and characterized them by observing that by admitting to using IGF-1, plaintiffs had also thereby admitted use of a substance which is banned by MLB, is a fair and true report of

plaintiffs' second complaint, and is thus, privileged. (*See FCRC Modular, LLC v Skanska Modular LLC*, 159 AD3d 413 [1st Dept 2018] [statements in press release privileged as they restated allegations in complaint]).

Even if not privileged, as defendants demonstrate the truth of the statement, having shown that that plaintiffs sell or sold products containing IGF-1 and that IGF-1 is banned by MLB, it is not defamatory. (*Greenberg*, 155 AD3d at 41 [truth is absolute defense to defamation]; *Carter v Visconti*, 233 AD2d 473 [2d Dept 1996], *lv denied* 89 NY2d 811 [1997] [truth is absolute defense, and defense applies even if publication not literally or technically true in all ways, but substantially true]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss is granted and the complaint is dismissed in its entirety, and the clerk is directed to enter judgment accordingly.

6/4/2018
DATE

BARBARA JAFFE, J.S.C.

HON. BARBARA JAFFE

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		DO NOT POST			FIDUCIARY APPOINTMENT		REFERENCE