Bibliotechnical Athenaeum v National Lawyers Guild, Inc.
2018 NY Slip Op 31616(U)
March 2, 2018
Supreme Court, New York County
Docket Number: 653668/16
Judge: Sherry Klein Heitler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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BIBLIOTECHNICAL ATHENAEUM,

Plaintiff,

-against-

NATIONAL LAWYERS GUILD, INC. and THE NATIONAL LAWYERS GUILD FOUNDATION, INC.,

Defendants.

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Index No. 653668/16
Motion Sequence 002

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.S.C.

This is the second motion by defendants National Lawyers Guild, Inc. and The National Lawyers Guild Foundation, Inc. (collectively "the Guild", "NLG", or "Defendants") to dismiss plaintiff Bibliotechnical Athenaeum's ("Plaintiff") complaint. Defendants' first motion to dismiss was denied by order dated March 30, 2017 ("Prior Order"), which is incorporated into this order by reference.

The Prior Order gives a detailed rendering of the background and facts of this case. Briefly, Defendants, which have been described as a "progressive bar association committed to advancing civil rights and civil liberties,"[1] organized and held a "Law for the People" convention in August of 2016. The convention included an annual awards banquet. As part of the banquet, Defendants offered attendees the opportunity to buy advertising in a "Dinner Journal." Plaintiff, a self-described Israeli organization, attempted to submit an advertisement to be included in the Dinner Journal. The advertisement was to be approximately 3" by 3" and was to read in its entirety:

> Bibliotechnical Athenaeum
> Congratulations to the Honorees
> 4 Shlomtzion St. Elazar
> Gush Etzion 9094200
> State of Israel

[1] *Cohen v City of New York*, 255 FRD 110 (SDNY Nov. 10, 2008).

Defendants, however, informed Plaintiff in writing that they would not accept Plaintiff's advertisement because of a "resolution barring [Defendants] from accepting funds from Israeli organizations."[2]

Plaintiff's initial complaint alleged violations of the New York State Human Rights Law and the New York City Human Rights Law. Defendants moved to dismiss, arguing that their actions were protected by the First Amendment. In denying Defendants' motion, the court held, among other things, that Plaintiff had standing to commence this action; that the First Amendment did not bar Plaintiff's complaint; and that the banquet and Dinner Journal fell within the scope of the Human Rights Laws. Notably, the court denied Defendants' motion without prejudice. Neither party had submitted a copy of the Dinner Journal for the court's review, meaning that the court was unable to evaluate Defendants' assertion that their First Amendment rights would be violated were they obliged to accept Plaintiff's advertisement.

On September 24, 2017, Plaintiff filed an amended complaint as required by the Prior Order. This time, Plaintiff annexed a copy of the Dinner Journal to the complaint. The court has now had a chance to review the Dinner Journal thoroughly. The document consists of 40 pages. With the exception of a cover page, a two-page introduction, a program agenda, and seven pages of honoree biographies, the remaining 25-plus pages consist of advertisements. Most of the advertisements congratulate one or more of the honorees, some simply list the name and address of the advertiser without any accompanying message, and some contain what could be considered statements or messages referencing current and historic political issues.

Defendants now move to dismiss the amended complaint under CPLR 3211(a)(1) and CPLR 3211(a)(7). In their motion papers, Defendants advance several arguments, including that the Guild's resolution barring it from accepting money from Israeli corporations is First Amendment-protected speech, and that neither the banquet nor the Dinner Journal constitute "public accommodations" under

[2] Affidavit of David Abrams, sworn to November 8, 2017, exhibit D.

the Human Rights Law. Defendants also ask that the court take judicial notice of the "controversial nature" of Gush Etzion, which is purported to be a settlement in the West Bank that is listed as Plaintiff's address in its proposed advertisement.

DISCUSSION

CPLR 3211(a)(1) and CPLR 3211(a)(5) collectively provide, in relevant part, that a "party may move for judgment dismissing one or more causes of action asserted against [it] on the ground that . . . [a] defense is founded upon documentary evidence . . . . [or] the pleading fails to state a cause of action." To prevail on a motion to dismiss based on documentary evidence, "the documents relied upon must definitively dispose of plaintiff's claim." *Bronxville Knolls v Webster Town Ctr. P'ship*, 221 AD2d 248, 248 (1st Dept 1995). "Such a motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 (2002). In deciding a motion to dismiss, the court must afford the pleadings a liberal construction, must accept the facts as alleged in the complaint as true, and must afford the plaintiff the benefit of every favorable inference. *Roni LLC v Arfa*, 18 NY3d 846, 848 (2011); *see also Leon v Martinez*, 84 NY2d 83, 88 (1994) ("We . . . determine only whether the facts as alleged fit within any cognizable legal theory"). A motion to dismiss will fail if "from [the Complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law . . . ." *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977); *see also Rovello v Orofino Realty Co.*, 40 NY2d 633 (1976).

I. Public Accommodation

In the Prior Order, the court addressed the issue of whether the banquet and Dinner Journal constituted "public accommodations" under the City and State Human Rights Laws. In sum, the court emphasized that the phrase "public accommodation" has been interpreted broadly since the statutes were first enacted, and held that the annual dinner banquet fell squarely within its broad scope. Likewise, the court found that the Guild's offer to advertise in the Dinner Journal was open to the

public and that Defendants refused to accept the advertisement based only on Plaintiff's national origin. In fact, Defendants did not controvert Plaintiff's assertion that they refused the advertisement solely because Plaintiff was an Israeli corporation. Thus, the court found that Plaintiff had pleaded a colorable claim against Defendants under the New York State and New York City Human Rights Laws.

On this motion, Defendants make the same arguments that they made on the prior motion. For example, they argue again that "New York courts have rejected attempts to expand the 'public accommodation' doctrine beyond its bounds." (Defendants' Memorandum of Law at 20). In the Prior Order, however, the court noted that Defendants' position is actually the converse of the law. New York courts have interpreted the scope of "public accommodation" more and more liberally, gradually expanding the category of venues that fall within the scope of that category to include many private establishments and organizations that "are to some extent public." *See, e.g., Matter of United States Power Squadrons v State Human Rights Appeal Bd.*, 59 NY2d 401 (1983); *Cahill v Rosa*, 89 NY2d 14 (1996). Nothing in the current motion papers changes that conclusion.[3] Hence, as on the prior motion to dismiss, the court rejects Defendants' argument that neither the award dinner nor the Dinner Journal constitute public accommodations.

II. First Amendment

On their previous motion, as on this one, Defendants place much reliance on *Miami Herald Publ'g Co. v Tornillo*, 418 US 241 (1974), in which the Supreme Court struck down Florida's "right of reply" statute requiring newspapers to print a reply if a published article assailed a political candidate's record or character. Several courts have relied on *Tornillo* to dismiss lawsuits against newspapers that have refused to print advertisements. In the Prior Order, the court found that because Defendants were

[3] In fact, the Dinner Journal now attached to the amended complaint further supports that conclusion. The Dinner Journal includes an invitation page that notes that the dinner is co-hosted by New York University and held at a New York University facility. (Dinner Journal, p. 10).

not traditional newspapers, this case appeared to fall outside *Tornillo's* scope. The court also recognized that, notwithstanding *Tornillo*, Defendants' actions may still be entitled to First Amendment protection since requiring Defendants to publish Plaintiff's advertisement might be considered compelled speech. *See Zauderer v Office of Disciplinary Counsel of Supreme Court*, 471 US 626, 650 (1985); *West Virginia Bd. Of Ed. v Barnette*, 319 US 624 (1943).

On this motion, Defendants argue that the Dinner Journal is more than just a phone-book style compilation of biographies and information, but rather a publication filled with assertions of political opinions. Defendants explain that the Dinner Journal highlights several of the honorees' work on behalf of Palestinians and shows that many of the advertisers supported this work. For example, the Arab American Action Network placed an advertisement "salut[ing] the NLG and [one of the honorees] for their incredible work defending the rights of Palestinians in Chicago."[4] Similarly, one of the advertisements congratulates an honoree for "selflessly supporting . . . the struggle of the Palestinian people, and other anti-racist and anti-imperialist struggles."[5] The Dinner Journal contains several other advertisements of this nature.[6] Set against this background, Defendants' counsel contends that "the proposed ad submitted by Plaintiff with its controversial Gush Etzion address expressed its own political message in gross contradiction of the view of the National Lawyers Guild."[7] In other words, by listing Gush Etzion as Plaintiff's address, Defendants argue that the proposed advertisement contained "controversial" information which they were entitled to reject.

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[4] Amended Complaint p. 29.

[5] Amended Complaint p. 40.

[6] *See e.g.* Amended Complaint p. 14 (describing honoree as having "successfully defended Chicago Palestinian community activist Muhammed Salah charged with terrorism and RICO as well as Palestinian community organizers targeted by the FBI . . ."); p.17 (describing honoree as having "moved to Palestine to work as a Human Rights attorney for seven years, largely focusing on the issue of Palestinian political prisoners . . . [honoree] was a passenger on the second voyage of the Free Gaza Movement."); p. 21 (congratulating honoree for fighting for "the self-determination of the . . . Palestinian Peoples and their political prisoners . . . and many other freedom fighters and targets of racist and political repression.").

[7] Defendants' Memorandum of Law, p. 10.

Defendants' arguments, however, must be rejected, as this court cannot, at least on this record, take judicial notice of the controversial nature of settlements in the West Bank. The First Department has defined the test for judicial notice as "whether the fact rests upon knowledge or sources so widely accepted and unimpeachable that it need not be evidentiarily proven." *Ptasznik v Schultz*, 247 AD2d 197, 198 (1st Dept 1998). Thus, as Defendants accurately note, a court may take judicial notice of facts that are capable of "immediate and accurate determination by resort to easily accessible sources of indisputable accuracy." *Hamilton v Miller*, 23 NY3d 592, 603 (2014) (quoting *People v Jones*, 73 NY2d 427, 431 [1989]). Whether denoting an address as being in Israel is controversial or noncontroversial does not fall into that category. Quite to the contrary, the issue of Israeli settlements in the West Bank is the very epitome of a topic that cannot be reduced to "indisputable accuracy." *Hamilton*, 23 NY3d at 592.[8]

Moreover, Defendants' discussion about settlements appears for the first time in counsel's memorandum of law. It goes without saying that a recitation by counsel is patently insufficient for purposes of showing that Defendants' actions were based upon the Guild's political opinions as opposed to a discriminatory motive. *See Roche v Hearst Corp.*, 53 NY2d 767, 769 (1981); *Basilotta v Warshavsky*, 91 AD3d 460, 461 (1st Dept 2012); *Wehringer v Helmsley-Spear, Inc.*, 91 AD2d 585, 585 (1st Dept 1982).

Turning now to the merits of the First Amendment argument, I find that it is not a sufficient basis to dismiss the complaint at this stage. To be sure, the constitutional protection of free speech extends to "the right to refrain from speaking" (*Wooley v Maynard*, 430 US 705, 714 [1977]), as well

[8] The cases that Defendants cite to support their arguments are easily distinguishable. Those courts took judicial notice of concrete and incontrovertible facts, such as the posted speed limit on a road sign (*People v Foster*, 27 NY2d 47 [1970]); the identity of the Egyptian Minister of Defense (*People v Giurdanella*, 144 AD3d 479 [1st Dept 2016]); and the existence of diagnosis and procedure codes key maintained by the United States Government on its HHS Web site (*Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.*, 61 AD3d 13, 20 [2d Dept 2009]). These matters reside in an entirely different category from a dispute over West Bank settlements.

as the right to be free from government-compelled speech or conduct. *See Rumsfeld v Forum for Academic and Institutional Rights, Inc.*, 547 US 47, 61, 126 (2006). Thus, the government may not require an individual to speak a governmental message, nor may it require an individual "to host or accommodate another speaker's message." *Id.* at 63. In assessing whether an individual is being improperly required to engage in forced speech or expressive conduct, the Supreme Court has held that the threshold inquiry is whether the conduct allegedly compelled was sufficiently expressive so as to trigger First Amendment protections. *See Clark v Community for Creative Non-Violence*, 468 US 288, 294, n. 5 (1984); *see also Catholic Charities of Diocese of Albany v Serio*, 28 AD3d 115, 129 (2006), *affd.* 7 NY3d 510 (2006). Conduct, in turn, is considered inherently expressive when there exists "'[a]n intent to convey a particularized message'" as well as a likelihood that the intended "'message [will] be understood by those who view[] it.'" *Texas v Johnson*, 491 US 397, 404 (1989) (*quoting Spence v Washington*, 418 US 405, 410-411 [1974]).

Under those standards, I cannot say on the papers before me that the complaint must be dismissed. Without having the benefit of discovery, it is questionable whether the proposed advertisement is forced speech. The advertisement, which simply stated that Plaintiff congratulated the honorees at the dinner and listed an address, is not so different from many of the others appearing in the Dinner Journal. It is therefore questionable whether there is a likelihood the Guild would be perceived as endorsing any Israeli government policies as opposed to merely complying with anti-discrimination laws. In other words, it is not clear from the complaint or documentary evidence that the speech in question triggers First Amendment protections.

It bears repeating that this is a motion to dismiss. The allegations contained in the amended complaint, namely that Plaintiff was discriminated against on the basis of its national origin, must be deemed true for purposes of this motion. *See Roni LLC v Arfa*, 18 NY3d at 848; *Leon v Martinez*, 84 NY2d at 87-88. The pleadings are supported by an email, purportedly written by the "NLG National Office," which unequivocally states that the advertisement was being rejected on the basis of

Plaintiff's national origin. While the Dinner Journal circumstantially evinces Defendants' political affiliations, it does not totally undermine Plaintiff's allegations or the email in question so as to establish a complete documentary defense.

In sum, this case may eventually turn on the First Amendment, but the issues presented on this motion must first be borne out through discovery before the court can make that determination.

CONCLUSION

In light of the foregoing, it is hereby

ORDERED that Defendants' motion to dismiss is denied; and it is further

ORDERED that counsel for the parties are directed to appear in Part 30 on Monday, March 26, 2018 at 9:30 AM at which time the court will set a discovery schedule.

The Clerk of the Court shall mark his records accordingly.

This constitutes the decision and order of the court.

DATED: 3-2-18

SHERRY KLEIN HEITLER, J.S.C.