

Goldberg v Manchester Mgt. Co., LLC

2018 NY Slip Op 31991(U)

August 14, 2018

Supreme Court, New York County

Docket Number: 155950/2017

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2

Justice

-----X INDEX NO. 155950/2017

ALEC GOLDBERG,

Plaintiff,

MOTION SEQ. NO. 001

- v -

MANCHESTER MANAGEMENT COMPANY, LLC and JOHN
DOES NOS. 1 THROUGH 5,

Defendants.

DECISION AND ORDER

-----X
The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17

were read on this motion to/for DISMISSAL (CPLR 3211 [a] [7])

Upon the foregoing documents, it is ordered that the motion is **denied**.

In this defamation action commenced by plaintiff Alec Goldberg, defendant Manchester Management Company, LLC moves, pursuant to CPLR 3211(a)(7), to dismiss the complaint for failure to state a cause of action. Plaintiff opposes the motion. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is **denied**.

FACTUAL AND PROCEDURAL BACKGROUND:

On November 29, 2016, Manchester Management Company, LLC (“Manchester”) and other entities commenced an action against Echo Therapeutics, Inc. (“Echo”), Michael Goldberg, Shepard Goldberg, Alec Goldberg, Platinum Management (NY) LLC (“Platinum”), Mark Nordlicht, Bernard Fuchs, and Medical Technologies Innovation Asia, Ltd. in the United States District Court for the Southern District of New York under case number 1:16-cv-09217-KPF (“the

federal action”). Doc. 9.¹ The complaint in the federal action (“the federal complaint”) contained numerous claims, including securities fraud, theft of intellectual property, and conspiracy to steal intellectual property. Doc. 9. The federal complaint referred to Michael Goldberg and Shepard Goldberg, but not Alec Goldberg, as the “Goldberg defendants.” Doc. 9, at par. 4.

Count I of the federal complaint alleged that Echo violated section 10(b) of the Exchange Act and Securities and Exchange Act (“SEC”) Rule 10b-5. Doc. 9, at pars. 117-119. Count II of the federal complaint alleged that the Goldberg defendants violated section 20(a) of the Exchange Act. Doc. 9, at par. 123. Count IV of the federal complaint alleged that certain defendants, including the Goldberg defendants, stole trade secrets in violation of 18 USC § 1831 et seq. Doc. 9, at pars. 131-135. Count VI alleged a breach of fiduciary duty against the Goldberg defendants. Doc. 9, at pars. 141-145. Count IX, the only claim specifically alleged against Alec Goldberg, was for unjust enrichment. Doc. 9, at pars. 29-30, 156-158.

On or about December 6, 2016, Manchester published a press release to PR Newswire (“the press release”) (Doc. 3; Doc. 5, at par. 6), which read as follows:

Manchester Management LLC Reports: NEW YORK FEDERAL COURT GRANTS TEMPORARY RESTRAINING ORDER AGAINST ECHO THERAPEUTICS, INC., PLATINUM MANAGEMENT, MARK NORDLICHT, BERNARD FUCHS, MEDICAL TECHNOLOGIES INNOVATION, MICHAEL GOLDBERG, SHEPARD GOLDBERG AND ALEC GOLDBERG

NEWS PROVIDED BY
Manchester Management LLC
06 Dec, 2016 19:44 ET

NEW YORK, Dec. 6, 2016/PRNewswire/ -- On November 29, 2016, Manchester Management and its affiliates (the “Plaintiffs”) filed a complaint in Federal District Court for the Southern District of New York against Echo Therapeutics, Inc. (“Echo”) . . . Platinum Management, Platinum, Mark Nordlicht, Bernard Fuchs, Medical Technologies Innovation Asia, Ltd (“MTIA”), Michael Goldberg (CEO of Navidea Biopharmaceuticals), Shepherd Goldberg, and Alec Goldberg.

¹ All references are to the documents filed with NYSCEF in this matter.

Collectively, the suit alleges that the “Platinum/Goldberg/MTIA Defendants”, among other items, violated Federal Securities Laws including Section 10b and Rule 10b-5 of the Securities Exchange Act of 1934 and conspired to steal the intellectual property of Echo. This stems from both the prior theft and current attempts to steal the crucial IP of Echo.

In connection with such lawsuit, the Plaintiffs on such date also filed an Order to Show Cause seeking, among other relief, a temporary restraining order against Platinum/Goldberg/MTIA Defendants to prevent the Platinum/Goldberg/MTIA Defendants from transferring any assets of Echo and taking any actions to subordinate the rights of the Plaintiffs and other senior note holders (the “TRO”).

On November 29, 2016, the court granted the Plaintiff’s motion for the TRO.

The Manchester led Plaintiffs were purchasers of senior secured promissory notes of Echo in a private placement conducted in approximately December 2015 and May 2016. In connection with the private placement, Platinum was named collateral agent for all of the Noteholders. However, Echo, led and controlled by various Platinum/Goldberg/MTIA Defendants made various believed fraudulent disclosures that are believed to be fraudulent and/or failed to disclose, among other items, that:

- Platinum and its affiliates secretly controlled Echo
- The Goldbergs were affiliates of Platinum
- That Michael Goldberg, a former executive, control person and portfolio manager of Platinum failed to disclose his beneficial ownership of securities of Echo through Platinum pursuant to a written agreement with Platinum
- That various Platinum/Goldberg/MTIA Defendants had already conspired to and stole certain Echo key assets and were conspiring to steal the remaining material IP assets of Echo . . .

Over the past 5 months, Manchester has offered a series of substantive and credible proposals to finance and revitalize Echo including infusions of both capital and management expertise. Every such proposal has been rejected by one or more of the Platinum/Goldberg/MTIA Defendants. In particular, the Goldbergs, as the sole directors of the Board of Echo, have repeatedly placed their personal interests above those of Echo and the holders of its securities while repeatedly threatening to shutter operations at Echo rather than consider any proposals other than the transfer of Echo’s intellectual property to MTIA. This intellectual property was developed at a cost of over \$100 million.

These and other actions leave legal action as our only remaining avenue to protect our investment and the rights of shareholders and debt holders.

We have been and remain committed to our efforts to save the company and its assets, human and otherwise. Only bad faith negotiations, continued attempted self-dealing and other actions by the current board and management driven by undisclosed conflicts of interest have prevented us from commencing this new chapter in the development of Echo technology.

We remain hopeful that the current directors and officers of Echo will step aside and allow us to create value as we have done in the past at other companies.

Interested parties should contact:

Ryan Whalen
Ryan Whalen, Member / Gusrae Kaplan Nusbaum PLLC
120 Wall Street / New York, NY 10005 / T: (212) 269-1400

SOURCE Manchester Management LLC

Doc. 3.

The federal action was discontinued on or about December 19, 2016. Doc. 7, at par. 3.

On June 30, 2017, Alec Goldberg commenced the captioned defamation action against Manchester by filing a summons and complaint. Docs. 1 and 2. In his amended complaint, Alec Goldberg alleged that Manchester's press release gave rise to a claim for libel *per se* since it falsely suggested that he committed certain serious crimes. Doc. 5. Specifically, Alec Goldberg claimed that the statements in the press release damaged his professional reputation by representing that he committed crimes of moral turpitude such as securities fraud and conspiracy to steal intellectual property. Doc. 5, at par. 2. He further alleged that Manchester knew that the statements in the press release were false when they were made. Doc. 5. In his amended complaint, Alec Goldberg quoted the specific statements in the press release which, he claimed, gave rise to his libel claim.

Doc. 5.

Manchester now moves, pursuant to CPLR 3211(a)(7), to dismiss the complaint for failure to state a cause of action and Alec Goldberg opposes the motion.

CONTENTIONS OF THE PARTIES:

In support of the motion, Manchester argues, inter alia, that Alec Goldberg fails to state a cause of action for libel *per se*. It further asserts that, since the press release was substantially true, it is protected by the “fair and true” reporting privilege set forth in Civil Rights Law § 74. In addition, Manchester maintains that the alleged libelous statements in the press release are not actionable since they did not pertain to Alec Goldberg. Manchester also claims that the statements in the press release constitute nonactionable opinion.

In opposition to the motion, Alec Goldberg argues that the amended complaint states a claim for libel *per se* since the press release falsely states that he was accused of committing certain serious crimes. Alec Goldberg further asserts that, since the statements in the press release are about him and are not substantially true, they are not protected by the fair and true reporting privilege. He also maintains that certain statements in the press release do not constitute nonactionable opinions merely because they contain the word “believed.”

In reply, Manchester argues, inter alia, that Alec Goldberg fails to state a claim of libel *per se* because the press release does not contain any statements which are reasonably susceptible of a derogatory meaning. Manchester further asserts that the press release: 1) accurately stated that “various” defendants named in the complaint allegedly conspired to steal Echo’s intellectual property; 2) contains an accurate statement of the claims filed in the federal action; and 3) sets forth nonactionable opinions.

LEGAL CONCLUSIONS:

On a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, must accept the facts as alleged in the complaint as true, and must grant 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). 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).

In order to establish a claim of libel, a plaintiff must show:

"(1) a written defamatory factual statement concerning the plaintiff; (2) publication to a third party; (3) fault; (4) falsity of the defamatory statement; and special damages or per se actionability." *Chau v Lewis*, 771 F3d 118, 126-127 (2d Cir 2014) (citation omitted) (applying New York law). "A plaintiff in a libel action must identify a plausible defamatory meaning of the challenged statement . . ." *Celle v Filipino Reporter Enterprises Inc.*, 209 F 3d 163, 178 (2d Cir 2000) (citation omitted) (applying New York law).

Bilinski v Keith Haring Found., Inc., 96 F Supp 3d 35, 49 (SDNY 2015); *see also Dillon v City of New York*, 261 AD2d 34, 38, 704 N.Y.S.2d 1 (1st Dept 1999); *Gutierrez v McGrath Mgt. Servs., Inc.*, 152 AD3d 498, 502, 59 N.Y.S.3d 52 (2d Dept 2017).

A statement is "libelous or actionable without alleging special damages [libel per se] if it 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, and to deprive him of their friendly intercourse in society." *Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 379 (1977) (citations omitted), *rearg denied* 42 NY2d 1015 (1977), *cert denied* 434 US 969 (1977).

After considering the foregoing factors, this Court finds that Alec Goldberg has pleaded a claim of libel per se. In his amended complaint, Alec Goldberg alleged, inter alia, that Manchester libeled him by falsely stating in its press release that he "committed crimes of great moral turpitude; specifically, securities fraud and conspiracy to steal intellectual property of a third-party." Doc. 5, at par. 2. Alec Goldberg claimed that the press release falsely stated that plaintiffs

in the federal action alleged that he “violated Federal Securities Laws including Section 10b and Rule 10b-5 of the Securities Exchange Act of 1934 and conspired to steal the intellectual property of Echo.”² Doc. 5, at par. 9. He further claimed that the press release was false insofar as it stated that he “had already conspired to and stole certain [Echo] key assets and [was] conspiring to steal [additional] material [intellectual property] assets of Echo . . .” Doc. 5, at par. 10. Alec Goldberg, whose profession involves information technology and business development services, further maintained that the foregoing false statements harmed his professional reputation. Doc. 5, at pars. 4, 18.³ Thus, Alec Goldberg has set forth the elements of a claim of libel per se.

Manchester asserts that the libel claim must be dismissed because “[t]here was nothing untruthful about the content of the [p]ress [r]elease.” Doc. 11, at p. 9. Subsequently, however, it argues that the press release “is, at the very least, substantially true.” Doc. 11, at p. 10. Thus, maintains Manchester, the content of the press release was protected by Civil Rights Law § 74.

Truth is an absolute defense to a defamation claim (*see Dillon*, 261 AD2d at 39; *see also Konrad v Brown*, 91 AD3d 545, 546 [1st Dept 2012]) and a statement that is “substantially true” is not actionable. *See Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 (1st Dept 2014); *Konrad*, 91 AD3d at 546. A statement will be deemed substantially true where it would not have a “different effect on the mind of the reader from that which the pleaded truth would have produced.” *Fleckenstein v Friedman*, 266 NY 19, 23 (1934); *see also Biro v Condé Nast*, 883 F. Supp. 2d 441, 458 (SDNY Aug. 9, 2012).

² As noted above, plaintiffs in the federal action alleged violations of section 10b and Rule 10b-5 only as against Echo.

³ This allegation undermines Manchester’s contention that Alec Goldberg failed to set forth the nature of his profession. Doc. 11, at p. 7.

Civil Rights Law § 74 provides, in pertinent part, 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.” The application of the statute:

[r]equires a determination of whether or not the report is “substantially accurate.” *Karedes v Ackerley Grp.*, 423 F3d 107, 119 (2d Cir. 2005) (citation omitted). Application of the fair reporting privilege is inappropriate at the motion to dismiss stage if a reasonable jury could conclude that the report “suggest[ed] more serious conduct than that actually suggested in the judicial proceeding. *Id.* (citation omitted).

Bilinski v Keith Haring Found., Inc., 96 F Supp 3d at 49.

Here, a reasonable jury could conclude that the press release suggests that Alec Goldberg committed conduct more serious (securities fraud and conspiracy to steal intellectual property) than that alleged against him in the federal action (unjust enrichment). As noted above, the press release states, inter alia, that “the [federal action] alleges that the ‘Platinum/Goldberg/MTIA Defendants’, among other items, violated Federal Securities Laws including Section 10b and Rule 10b-5 of the Securities Exchange Act of 1934 and conspired to steal the intellectual property of Echo”; that “Echo, led and controlled by various Platinum/Goldberg/MTIA Defendants made various believed fraudulent disclosures”; and that “various Platinum/Goldberg/MTIA Defendants had already conspired to and stole certain Echo key assets and were conspiring to steal the remaining material [intellectual property] assets of Echo.” Doc. 3.

Although Manchester correctly asserts that the federal complaint specifically refers to Michael Goldberg and Shepard Goldberg as the “Goldberg defendants” (Doc. 9, at par. 4), it is conceivable, if not likely, that an individual unfamiliar with the federal action who reads the press release would believe that the phrase “Goldberg defendants” applies to Michael Goldberg, Shepard Goldberg, and Alec Goldberg. Since the federal complaint alleges criminal conduct against Michael Goldberg and Shepard Goldberg, but not as against Alec Goldberg, the press release, by

potentially leading one to believe that Alec Goldberg was one of the “Platinum/Goldberg/MTIA Defendants”, suggests that Alec Goldberg engaged in considerably more serious conduct than that alleged in the federal proceeding. Thus, Manchester’s libel claim cannot be dismissed at this stage of the litigation based on Civil Rights Law § 74. See *Karedes v Ackerley Grp.*, 423 F3d at 119.⁴

Manchester’s contention that the press release is not actionable because it does not contain statements “of or concerning” Alec Goldberg (Doc. 11, at p. 11) is disingenuous. Specifically, Manchester contends that, because the press release states that the federal complaint contains allegations of criminal wrongdoing against “various Platinum/Goldberg/MTIA Defendants”, and not allegations that Alec Goldberg specifically, violated securities laws or conspired to steal Echo’s intellectual property, he was not defamed. However, even a cursory reading of the press release suggests that the plaintiffs in the federal action alleged that Alec Goldberg engaged in such criminal conduct. Thus, the facts herein are sufficient to allow a reasonable jury to conclude that the press release concerns Alec Goldberg. Cf. *Bilinski v Keith Haring Found., Inc.*, 96 F Supp 3d at 50.

Also without merit is Manchester’s assertion that the complaint must be dismissed because a reader could deem the information set forth in the press release to constitute nonactionable opinion. To determine whether the challenged statements in the press release are comprised of nonactionable opinion or assertions of fact, this Court must consider:

“(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.’”

⁴ As noted above, Count IX, the sole claim against Alec Goldberg in the federal complaint, alleged unjust enrichment. Doc. 9, at pars. 29-30, 156-158.

Brian v Richardson, 87 NY2d 46, 51, quoting *Gross v New York Times Co.*, 82 NY2d 146, 153 (1993).

“Rather than sifting through a communication for the purpose of isolating and identifying assertions of fact, the court should look to the over-all context in which the assertions were made and determine on that basis ‘whether the reasonable reader would have believed that the challenged statements were conveying facts about the . . . plaintiff.

Brian v Richardson, 87 NY2d at 51 (citations omitted).

Although “it may well be that [the allegedly defamatory statements] are subject to [Manchester’s] interpretation . . . the motion to dismiss must be denied if [such statements], taking [their] words in their ordinary meaning and in context, [are] also susceptible to a defamatory connotation”, which this Court finds to be the case. *Davis v Boenheim*, 24 NY3d 262, 272 (2014). Manchester asserts that some of the challenged statements are mere opinions because they reflect that it “believed” that the defendants in the federal action committed fraudulent conduct. Doc. 11, at p. 18. This Court rejects this contention, however, because, “in context, a reasonable reader could view [the] statements as supported by undisclosed facts” regarding the allegations against Alec Goldberg. *Davis v Boenheim*, 24 NY3d at 272. Thus, at this nascent stage of the litigation this Court cannot determine, as a matter of law, that the statements set forth in the press release constitute Manchester’s pure opinion. *Davis v Boenheim*, 24 NY3d at 274.

The parties’ remaining contentions are either without merit or need not be addressed in view of the determination of this Court.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendant Manchester Management Company, LLC to dismiss the complaint pursuant to CPLR 3211 (a) (7) is denied; and it is further

ORDERED that defendant Manchester Management Company, LLC is to file its answer within 20 days after the service of this order with notice of entry; and it is further

ORDERED that the parties are to appear for a preliminary conference in this matter on December 11, 2018 at 80 Centre Street, Room 280, at 2:15 p.m.; and it is further

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

8/14/2018
DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED			<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	

KATHRYN E. FREED, J.S.C.