

<b>Progressive Cas. Ins. Co. v Bonner</b>
2020 NY Slip Op 31947(U)
June 18, 2020
Supreme Court, New York County
Docket Number: 156576/2019
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

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DOUGLAS D. HAYNES,

Index No. 156576/2019

Plaintiff

- against -

DECISION AND ORDER

LAUREN BONNER and WIGDOR LLP,

Defendants

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APPEARANCES:

For Plaintiff

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LUCY BILLINGS, J.S.C.:

In this defamation action, defendants separately move to dismiss the complaint against each of them pursuant to C.P.L.R. § 3211(1) and (7). For the reasons explained below, the court grants both motions and dismisses this action.

I. BACKGROUND

Defendant Bonner is a financial analyst employed as an associate director at nonparty Point72 Asset Management, L.P., since August 2016. Aff. of Brett A. Scher Ex. A (V. Compl.) ¶ 15. Plaintiff Haynes became Point72's president in 2014. Id. ¶ 14. On February 12, 2018, Bonner commenced an employment discrimination action against Point72 and Haynes in the United States District Court for the Southern District of New York where defendant Wigdor LLP represented her. Id. ¶ 17. On July 5, 2018, the federal court (Torres, J.) denied the motion by the defendants there to dismiss the complaint, but stayed the action and granted their motion to compel arbitration of Bonner's claims pursuant to her employment contract with Point72. Scher Aff. ¶ 9, Ex. D. The parties then stipulated to dismiss the federal action and proceeded to arbitration of Bonner's claims beginning in April 2019. Id. ¶¶ 10-11; Aff. of Jeanne Marie B. Christensen ¶¶ 9, 15, Ex. 3. Jeanne Marie Christensen, an attorney at Wigdor LLP, authenticates nine pre-hearing deposition transcripts and 11 days of hearing transcripts in the arbitration. Christensen Aff. ¶¶ 14-15, Exs. 2-3.

Before voluntarily dismissing the federal action, Bonner granted three media interviews concerning her claims in the action. On May 3, 2018, the New Yorker magazine published an article based on Bonner's first interview. Scher Aff. ¶ 13, Ex.

A (V. Compl.) ¶¶ 21-22, Ex. E. On May 4, 2018, Wigdor LLP published a link to the New Yorker article on the firm's website. Id. Ex. A ¶ 25.

On June 11, 2018, Leslie Picker interviewed Bonner on CNBC television. Id. Ex. A (V. Compl.) ¶¶ 26-27, Ex. F. Wigdor LLP posted a video recording of the CNBC interview on the firm's website on the same day and on the firm's You Tube channel on June 13, 2018. Id. Ex. A (V. Compl.) ¶¶ 30-31.

On July 9, 2018, Christiane Amanpour interviewed Bonner on CNN television. Id. Ex. A (V. Compl.) ¶¶ 26, 33, Ex. G. On July 10, 2018, Wigdor posted a video recording of the CNN interview on the firm's website and You Tube channel. Id. Ex. A (V. Compl.) ¶¶ 36-37. On July 10, 2018, Bonner and Wigdor LLP both also posted video recordings of the CNN interview on their Twitter feeds. Id. ¶ 37.

This action by Haynes alleges only one defamatory statement by each defendant, Bonner and Wigdor LLP, in connection with the CNN interview July 9, 2018: "that Mr. Haynes sexually harassed female Point72 employees when he wrote the word 'pussy' on a whiteboard hanging in his office, where female employees were forced to work and participate in meetings for weeks." Id. ¶¶ 53, 64.

II. APPLICABLE STANDARDS

When evaluating defendants' motion to dismiss the complaint pursuant to C.P.L.R. § 3211(a)(7), the court "must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference." Chanko v. American Broadcasting Cos. Inc., 27 N.Y.3d 46, 52 (2016). Pursuant to C.P.L.R. § 3211(a)(1), however, admissible documentary evidence that completely refutes plaintiff's factual allegations, resolving all factual issues as a matter of law, will rebut the presumption of truth and the favorable inferences accorded to the complaint and warrant its dismissal. Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital, Inc., 30 N.Y.3d 572, 601 (2017); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); Calpo-Rivera v. Siroka, 144 A.D.3d 568, 568 (1st Dep't 2016). Although defendants fail to authenticate the video recording of the CNN interview on which they rely, the parties stipulated on the record February 27, 2020, that both the video recording and the written transcript of the interview that plaintiff presents are authenticated and admissible for purposes of defendants' motions.

In an action to recover damages for defamation, "whether particular words are defamatory presents a legal issue to be resolved by the court." Greenberg v. Spitzer, 155 A.D.3d 27, 44 (2d Dep't 2017) (quoting Brach v. Congregation Yetev Lev

D'Satmar, 265 A.D.2d 360, 361 (2d Dep't 1999)). See Armstrong v. Simon & Schuster, 85 N.Y.2d 373, 380 (1995); Ava v. NYP Holdings, Inc., 64 A.D.3d 407, 412 (1st Dep't 2009). 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 A.D.3d 102, 104 (1st Dep't 2014); Dillon v. City of New York, 261 A.D.2d 34, 38 (1st Dep't 1999). Defamation per se is a statement (1) charging plaintiff with a serious crime, (2) that tends to injure him in his business or profession, (3) that he has a loathsome disease; or (4) imputing unchastity to a woman. Liberman v. Gelstein, 80 N.Y.2d 429, 435 (1992); Nolan v. State of New York, 158 A.D.3d 186, 195 (1st Dep't 2018). Haynes's complaint alleges that defendants published false statements about him in connection with the CNN interview that were defamatory per se because they "falsely tainted and permanently damaged Mr. Haynes's professional reputation." Scher Aff. Ex. A (V. Compl.) ¶¶ 59, 69.

### III. NEW YORK CIVIL RIGHTS LAW § 74

Defendants move to dismiss Haynes's complaint on the grounds that Bonner's statements during the CNN interview were privileged under New York Civil Rights Law (CRL) § 74, which provides 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, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published.

This section does not apply to a libel contained in any other matter added by any person concerned in the publication; or in the report of anything said or done at the time and place of such a proceeding which was not a part thereof.

"To be 'fair and true,' the account need only be 'substantially accurate.'" McRedmond v. Sutton Place Rest. & Bar, Inc., 48 A.D.3d 258, 259 (1st Dep't 2008) (quoting Holy Spirit Assn. for Unification of World Christianity v. New York Times Co., 49 N.Y.2d 63, 67 (1979)). Statements that "essentially summarize or restate the allegations of the complaint" are deemed to be "substantially accurate" and protected by CRL § 74. McRedmond v. Sutton Place Rest. & Bar, Inc., 48 A.D.3d at 259. See Highland Capital Mgt., L.P. v. Dow Jones & Co., Inc., 178 A.D.3d 572, 573 (1st Dep't 2019); Russian Am. Found., Inc. v. Daily News, L.P., 109 A.D.3d 410, 413 (1st Dep't 2013).

Defendants maintain that Bonner's statements during the CNN interview "essentially summarize or restate the allegations" in the first two paragraphs of her federal court complaint, which alleged that:

The "PUSSY Board" at Point 72

1. For several weeks, the whiteboard hanging on the wall of Douglas Haynes's office included the word "PUSSY" written across it.

The Year: 2017.

The Company: Point72, the "family office" founded by billionaire Steven A. Cohen after insider trading charges decimated his former hedge fund, S.A.C. Capital Advisors.

The Owner: Douglas D. Haynes, President of Point72.

2. In his capacity as President of Point72, Haynes believed it was both acceptable and appropriate for him to write the word "PUSSY" on the whiteboard hanging in his office and leave it there for weeks. During this time, female employees were humiliated and ashamed as they were forced to work and participate in meetings held in Haynes's office, including with other male executives, as the PUSSY Board drifted above them, taunting them with repulsive references to their own bodies. No female employee should be forced to endure such sexist and misogynist treatment during one office meeting, much less multiple meetings over the course of several weeks.

Scher Aff. Ex. B ¶¶ 1-2 (emphasis in original). Defendants contend that Haynes's complaint about Bonner's defamatory statement in the CNN interview readily admits that it reiterated Bonner's allegations in her federal action. If so, CRL § 74 applies and warrants dismissal of his claims. A comparison of Bonner's allegations in her federal action with the transcript of the CNN interview demonstrates that the latter "essentially summarizes" the former. Haynes nevertheless contends that the CNN interview was not a "fair and true" report as required for CRL § 74 to apply.

A. Report of a Judicial Proceeding

Before addressing the issue of whether the defendants published a "fair and true report," it is also incumbent on the party asserting the privilege to establish that the statements at issue reported on a "judicial proceeding." . . . If the publication does not purport to comment on a



judicial proceeding, Civil Rights Law § 74 is inapplicable. . . . "If the context in which the statements are made make it 'impossible for the ordinary viewer [listener or reader] to determine whether defendant was reporting'" on a judicial proceeding, the absolute privilege does not apply.

Cholowsky v. Civiletti, 69 A.D.3d 110, 114-15 (2d Dep't 2009) (internal citations omitted). See Martin v. Daily News L.P., 121 A.D.3d 90, 100-101 (1st Dep't 2014).

First, Haynes posits several reasons why defendants' statements in connection with the CNN interview are not "reports" protected by CRL § 74. (a) Bonner's defamatory statements about him on CNN did not once refer to her lawsuit against Haynes, as opposed to Point72. (b) She mentioned the federal action only briefly, in passing. (c) The context of her statements make it impossible for an ordinary viewer to determine that Bonner was reporting on a judicial proceeding, as opposed to describing her personal observations and experiences. The transcript of the CNN interview reveals, however, that the interviewer repeatedly referred to "the lawsuit" and "your case" and asked Bonner to relate the substance of her factual allegations in the litigation. Scher Aff. Ex. G; Aff. of Leonard F. Lesser Ex A.

The interviewer Christiane Amanpour began:

Now to a different crisis facing women, the Me Too Movement has toppled once untouchable Hollywood stars, journalists and business moguls.

No industry seems immune, no individual too big to fall, yet amid all the public accusations, the finance sector has managed to maintain a fairly low profile.

Well, that changed earlier this year after Lauren Bonner, an associate director at one of Wall Street's most prominent firms filed a claim against her company alleging widespread sexual discrimination. The case has earned her the nickname, the face of Me Too on Wall Street, but her firm Point72 has vehemently denied any accusation of wrongdoing. I spoke to Lauren Bonner about her lawsuit from New York.

Lauren Bonner, welcome to the program.

Scher Aff. Ex. G; Lesser Aff. Ex. A, at 5. Amanpour asked Bonner to "start if you can by summing up the nature of your lawsuit," id., and "what is the status of your case, does it go to trial? Is there a timeline? Do we know what the whole legal procedure is going to look like?" Id. at 9. Finally, a visual review of the CNN interview reveals a text banner below the depiction of Bonner and Amanpour talking, projecting the headline: "lawsuit alleges male misconduct at Wall Street firm." Scher Ex. G.

These combined statements and depictions do not "make it 'impossible for the ordinary viewer [listener or reader] to determine whether defendant was reporting' on a judicial proceeding." Cholowsky v. Civiletti, 69 A.D.3d at 114-15 (internal quotation omitted). Instead, they make it abundantly clear that the content and status of Bonner's federal action are the subject of the CNN interview. The multiple references to the federal action make that conclusion the only reasonable one that a viewer would draw. Haynes's contentions that Amanpour only briefly mentioned Bonner's lawsuit at the beginning and end of the interview and that the context in which Bonner discussed

Haynes and the whiteboard provided no basis for a reasonable viewer to believe the interview reported on the federal action are unsustainable. Haynes either ignores the conclusive documentary evidence or misconceives the law's definition of reasonableness. The CNN interview constitutes a "report" about Bonner's federal judicial proceeding, as that term is used in CRL § 74.

B. Fair and True Report

Second, Haynes contends that defendants' statements were not "fair and true" reports of a judicial proceeding. CRL § 74. Specifically, plaintiff insists that Bonner's statements in the CNN interview imply more serious misconduct than actually alleged in her federal court complaint and extend well beyond that pleading to include five new defamatory accusations.

As set forth above, CRL § 74 requires that, to be protected from defamation claims by the statutory privilege, litigation reports must be "fair and true," which are interpreted as "substantially accurate" statements that "essentially summarize or restate the allegations of the complaint." McRedmond v. Sutton Place Rest. & Bar, Inc., 48 A.D.3d at 259. See Russian Am. Found., Inc. v. Daily News, L.P., 109 A.D.3d at 413.

"Substantially accurate" is interpreted liberally; the "test is whether the published account of the proceeding would have a different effect on the reader's mind" than the actual true

account. Highland Capital Mgt., L.P. v. Dow Jones & Co., Inc., 178 A.D.3d at 573; Daniel Goldreyer, Ltd. v. Van de Wetering, 217 A.D.2d 434, 436 (1st Dep't 1995). None of the five new defamatory statements that Haynes identifies, however, actually was included in the CNN interview so as to constitute an unfair or untrue report outside the statutory privilege.

Haynes claims that three statements depart from Bonner's federal complaint by describing the whiteboard as located in his Connecticut office and indicating that Bonner personally observed it there. (1) The whiteboard was in Haynes's glass office in Connecticut. (2) Bonner had personal knowledge of the whiteboard in his Connecticut office. (3) Every woman working at Point72's Connecticut office had personal knowledge of the whiteboard in his office and had been subjected to sexual harassment due to the whiteboard in his office.

The complaint in this action does not allege these defamatory statements, nor does the CNN interview on which the complaint is premised include them. The CNN interview nowhere mentions an office in Connecticut. Nor does the complaint in Bonner's federal action mention the location of the office in which the "Pussy Board" hung. The first two paragraphs of her federal complaint quoted above, however, in recounting the occurrence without attributing her knowledge to any source, indicate her personal knowledge as much as her statements in the

CNN interview, which similarly recount the occurrence without specifying that she personally observed it. Scher Aff. Ex. A (V. Compl.) ¶¶ 53, 64.

The description of Haynes's office as "glass" in the interview but not in the federal complaint still satisfies the liberally interpreted "substantially accurate" test. Highland Capital Mgt., L.P. v. Dow Jones & Co., Inc., 178 A.D.3d at 573; McRedmond v. Sutton Place Rest. & Bar, Inc., 48 A.D.3d at 259; Daniel Goldreyer, Ltd. v. Van de Wetering, 217 A.D.2d at 436. Since the federal complaint described the whiteboard hanging in Haynes's office for several weeks while employees worked and participated in multiple meetings in his office "as the PUSSY Board drifted above them, taunting them," Scher Aff. Ex. B ¶ 2, the inference that the whiteboard was visible from outside his office does not produce a substantially "different effect" than the federal complaint does. Highland Capital Mgt., L.P. v. Dow Jones & Co., Inc., 178 A.D.3d at 573; Daniel Goldreyer, Ltd. v. Van de Wetering, 217 A.D.2d at 436. Therefore the statements in the interview do not meaningfully extend beyond Bonner's federal complaint and could not have produced the inferences of more serious conduct that Haynes suggests a viewer might have drawn.

The fourth statement claimed to depart from Bonner's federal complaint is that Bonner filed an internal complaint reporting to Point 72 Haynes's alleged misconduct in using the whiteboard to

sexually harass female employees. Similarly, neither the complaint in this action nor the CNN interview includes such a defamatory statement. The complaint in Bonner's federal action alleged that Bonner complained to Point72's director of human resources "about unacceptable behavior by Seetharam Gorre, Managing Director and Head of Information Technology." Scher Ex. B ¶ 36. In the CNN interview Bonner stated that "I took it [referring to pay parity disputes] to HR." Id. Ex. G; Lesser Aff. Ex. A, at 6. Neither document mentions Haynes or the "Pussy Board" in connection with an internal report to Point72 human resources personnel. Such a non-existent statement could not have produced the inferences that Haynes suggests a viewer might have drawn, to constitute a defamatory statement about him in the first instance. Aboutaam v. Dow Jones & Co., 180 A.D.3d 573, 575 (1st Dep't 2020); Russian Am. Found., Inc. v. Daily News, L.P., 109 A.D.3d at 413.

The fifth statement that Haynes attributes to Bonner beyond the parameters of her federal complaint is that his behavior after she commenced the federal action was similar to the behavior of the accused sexual predator Harvey Weinstein. Again, neither the complaint in this action nor the CNN interview includes such a defamatory statement. The transcript of the CNN interview sets forth the following exchange:

AMANPOUR: So obviously Point72 has already react[ed] to your charges. What is your reaction to their reaction?

BONNER: I'm in no way surprised. I think it's a page right out of Harvey Weinstein's playbook to deny, discredit, shame and blame me and I think it speaks to how antiquated and out of touch this boy's club is.

Scher Aff. Ex. G; Lesser Aff. Ex. A, at 9. Bonner plainly directed her comment to Point72's behavior. She does not mention Haynes at all. A "defamatory statement directed at a corporation is not 'of and concerning' unnamed employees of that corporation" and thus may not serve as the basis for a defamation claim by such employees. Three Amigos SJL Rest., Inc. v CBS News Inc., 28 N.Y.3d 82, 87 (2016). See Aboutaam v. Dow Jones & Co., 180 A.D.3d at 575; Russian Am. Found., Inc. v. Daily News, L.P., 109 A.D.3d at 413. Therefore none of Haynes's reasons why the CNN interview was not a "fair and accurate" report of the federal litigation finds any support in his complaint or in the undisputed documentary evidence presented here.

C. The Sham Litigation Exception

Third, Haynes contends that the "sham litigation exception" precludes defendants from relying on the privilege under CRL § 74. Williams v. Williams, 23 N.Y.2d 592, 599 (1969), created a judicial exception to CRL's protections if the commencement of litigation is intended simply as a device to protect a report of the litigation and, with that protection, disseminate defamatory information, in derogation of statute's public policy goals. Halcyon Jets, Inc. v. Jet One Group, Inc., 69 A.D.3d 534, 534

(1st Dep't 2010). Thus a plaintiff who commences an underlying lawsuit as "a sham action brought solely to defame" a defendant and never diligently prosecutes her claims may not invoke the privilege under CRL § 74. Manhattan Sports Rests. of Am., LLC v. Lieu, 146 A.D.3d 727, 727 (1st Dep't 2017) (quoting Flomenhaft v. Finkelstein, 127 A.D.3d 634, 638 (1st Dep't 2015)). See Casa de Meadows Inc. [Cayman Is.] v. Zaman, 76 A.D.3d 917, 920 (1st Dep't 2010); Lacher v. Engel, 33 A.D.3d 10, 13-14 (1st Dep't 2006).

Haynes insists that Bonner commenced her federal action knowing that it violated the mandatory arbitration provision in her employment contract and that the claims against him were false. Defendants contend that the "sham litigation exception" is inapplicable because they have extensively litigated the merits of the underlying claims.

By specifically denying Haynes's motion to dismiss Bonner's federal action on its merits in the decision dated July 5, 2018, the federal court implicitly held that her claims were not a sham, even though the court ordered her to submit those claims to arbitration according to her employment contract with Point72. Scher Aff. Ex. D. Bonner did so, has actively pursued those claims through the arbitration process, and has engaged in extensive proceedings on the merits of her claims before an arbitrator. Christensen Aff. Exs 2, 3. In reply to Haynes's suggestion that Bonner did not pursue her claims on their merits,



Christensen further authenticates Bonner's statements of her claim and the arbitrator's decision denying Haynes's motion for summary judgment in the arbitration. Reply Aff. of Jeanne Marie B. Christensen ¶¶ 4, 6, 9, Exs. 4, 5, 8. Had Bonner's employment contract not provided for arbitration, the federal court would have determined the merits of Bonner's employment discrimination claims. These indisputable facts belie Haynes's suggestion that Bonner commenced the federal action solely as a vehicle to generate sufficient publicity to gain a series of interviews with the New Yorker magazine and CNBC and CNN television, so that then in the CNN interview she could defame Haynes.

Although Haynes also alleges that Bonner voluntarily abandoned her claims related to the "Pussy Board" when she rested during the arbitration hearing, Bonner vigorously denies that she did so. She explains that she merely amended her claim to conform to the testimony by a Point72 employee other than Bonner that the whiteboard was in Haynes's New York office.

At minimum, this dispute still is being litigated. Moreover, even if Bonner did abandon her claims related to the Pussy Board, she still litigated that claim until resting her case and still is litigating the remainder of her closely related employment discrimination claims that were the subject of her federal action and of the CNN interview and now are committed to arbitration. Her allegations about the "Pussy Board" are not so

divorced from her gender discrimination and sexual harassment claims as to suggest that the "Pussy Board" incident was inserted into the federal complaint just so Bonner could publicize that particular incident with immunity. For all these reasons the "sham litigation exception" does not apply.

IV. CONCLUSION

Consequently, the privilege under CRL § 74 protects the statements that Bonner made about her employment discrimination action during her CNN interview July 9, 2018, and that Wigdor LLP later re-posted from Haynes's claims of defamation per se. Because plaintiff's claims of defamation per se fail as a matter of law, the court grants both defendants' motions to dismiss the complaint and dismisses this action, C.P.L.R. § 3211(a)(1) and (7), with costs and disbursements to defendants as taxed by the Clerk of the Court. The Clerk shall enter a judgment accordingly in favor of each defendant.

DATED: June 18, 2020

*Lucy Billings*

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LUCY BILLINGS, J.S.C.

**LUCY BILLINGS  
J.S.C.**