

Verdi v Dinowitz

2020 NY Slip Op 34127(U)

December 10, 2020

Supreme Court, New York County

Docket Number: 156209/2019

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

PART 8

VERDI

INDEX NO. 158747/2016

- v -

MOT. DATE

DINOWITZ

MOT. SEQ. NOS. 12, 13 & 14

The following papers were read on these motions:

Motion Sequence 12

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits

ECFS DOC No(s). 335-345
ECFS DOC No(s). 370-391
ECFS DOC No(s). 394

Motion Sequence 13

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits

ECFS DOC No(s). 346-369, 393
ECFS DOC No(s). 414

Motion Sequence 14

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits

ECFS DOC No(s). 395-403
ECFS DOC No(s). 405-413
ECFS DOC No(s). 415-416

Documents Applicable to All Motions

3/5/20 Decision/Order with Reference
9/21/20 Case Scheduling Order
10/20/20 Supplemental Order
10/20/20 Transcript
Defendant Supplemental Affirmation
Plaintiff Supplemental Affirmations

ECFS DOC No(s). 423-425
ECFS DOC No(s). 432
ECFS DOC No(s). 435-437
ECFS DOC No(s). 441
ECFS DOC No(s). 442
ECFS DOC No(s). 444-447

Previously, in decision/order dated March 5, 2020, the court decided motion sequence numbers 12, 13 and 14 to the extent that, inter alia, this action was referred to a Special Referee to supervise discovery. Due to limitations on judicial resources, referees are not available to supervise discovery (see i.e. Hindlin v. Prescription Songs LLC, Index Number 657194/18, J. Masley, A., October 6, 2020). After a conference on the record, the court vacated the reference and ordered the parties "to file a supplemental affirmation on NYSCEF outlining whatever outstanding discovery issues they previously raised in motion sequence numbers 12, 13 and 14 within 30 days" and restored these motions to the calendar

Dated: 12/10/20

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

- 1. Check one: [] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [] GRANTED [] DENIED [] GRANTED IN PART [X] OTHER
3. Check if appropriate: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST
[] FIDUCIARY APPOINTMENT [] REFERENCE

for submission on November 24, 2020 (see order dated October 20, 2020). The parties have complied with the court's order, and the court's decision on the balance of the subject motions follows.

Defense counsel explains that defendant is renewing his request for an order: [1] "limiting all future depositions in this matter only to the witness's personal knowledge of the facts relevant to Mr. Verdi's defamation claims, just as this Court has already ordered with respect to the deposition of Justin Brannan"; and [2] "preventing Mr. Verdi from attending any and all further depositions in this matter or, in the alternative, ordering that Mr. Verdi not speak on the record at any and all further depositions in this matter."

Meanwhile, plaintiff's counsel has filed what appears to be five duplicate copies of a document entitled "Affirmation in Response to Supplemental Order of the Court". In this document, plaintiff's counsel asserts that there are four open depositions and that he would like to serve subpoenas and explains that he has not done so because he believes that there is a stay of discovery. Otherwise, plaintiff's counsel complains that the court's 10/20/20 order is confusing, requests that the court reappoint a referee to supervise discovery and otherwise opposes the relief requested by defendant. On the first page of said affirmation appears the words "Oral Argument Requested". Oral argument is granted in the court's discretion (22 NYCRR § 202.8[d]; see *i.e. Wadiak v. Pond Management, LLC*, 101 AD3d 474 [1st Dept 2012]). Here, the court declines plaintiff's request for oral argument. Defendant has not requested oral argument and the court otherwise deems oral argument unnecessary given the numerous and exhaustive opportunities the parties have had to propound their positions and the completeness of the record before the court.

The court rejects plaintiff's counsel's complaint that the 10/20/20 order was confusing. To the extent that plaintiff's counsel is confused, he has not established prejudice or any other disadvantage which would warrant further delay in resolving the underlying motions and moving this case towards its logical conclusion.

The court further denies plaintiff's request to have this court reappoint a referee to supervise discovery. Not only is this an improperly noticed attempt to reargue the court's 10/20/20 order, this request flies in the face of the court's paucity of resources and the fact that there are literally no referees available to supervise discovery. Instead of referring this matter, this court can and should resolve any discovery disputes that remain so that this case can move forward without further delay.

Turning to the parties' substantive arguments, the court herein incorporates its prior decision/order dated September 24, 2019 which held, *inter alia*, "non-party Council Member Justin Brannan deposition shall be limited only to his 'personal knowledge of the relevant facts to plaintiff's defamation claims'". Disclosure is not an opportunity to engage in a fishing expedition."

Defendant argues that because the court has held that plaintiff failed to allege that defendant was solely motivated by a desire to injure him when he made the allegedly defamatory statements, it is law of the case that plaintiff cannot "prove 'common law malice,' and thus any inquiries into whether Defendant harbored ill will toward plaintiff or intended to injure him when making the alleged statements are irrelevant to Plaintiff's claims and should not be the subject of any further discovery." Meanwhile, plaintiff's counsel argues that it is absurd to argue that "malice is not an element in a defamation case" and that "[e]very defamation case, by definition, must show malice."

Malice is not an element of a defamation claim. The elements of a defamation claim are: [1] a false statement; [2] publication of the statement without privilege or authorization to a third party; [3] constituting fault as judged by, at a minimum, a negligence standard; and [4] the statement must either cause special harm or constitute defamation *per se* (*Dillon v. City of New York*, 261 AD2d 34 [1st Dept 1999] citing Restatement of Torts, Second § 558). While malice is not an element of a defamation claim in the first instance, malice can be an issue if the plaintiff is a public figure or the defendant raises certain affirmative defenses (see *i.e. Winklevoss v. Steinberg*, 170 AD3d 618 [1st Dept 2019] and *Liberman v.*

Gelstein, 80 NY2d 429, 441 [1992]). Defendant's tenth and eleventh affirmative defenses allege the following:

Plaintiff's claims are barred, in whole or in part, because Plaintiff is a public figure and/or limited-purpose public figure, and none of the alleged defamatory statements were made with actual malice, reckless indifference or gross irresponsibility.

Plaintiff's claims are barred, in whole or in part, because all of Defendant's alleged statements were made by Defendant with a good motive, with a lack of malice, and were fair comments discussing matters of public importance, and Defendant's speech is protected under the United States Constitution and the Constitution of the State of New York

Proof that the defendant acted with malice, knowledge of the falsity of the statement or reckless disregard for its truth or falsity, can overcome a defendant's assertion of a qualified privilege (*Lieberman v. Gelstein*, *supra* at 441 [1992]). Since defendant claims plaintiff is a public figure (and a limited purpose public figure) and has asserted a qualified privilege defense, malice is a material issue in this case and plaintiff is entitled to ask witnesses about whether or not the defendant was motivated by malice. Therefore, defendant's request to limit plaintiff's questioning at further depositions as proposed is denied.

Next, defendant requests that the plaintiff himself be prohibited from attending all further depositions or alternatively ordered not to speak on the record at such depositions. In the 3/5/20 decision, the court sanctioned plaintiff and his counsel due to their frivolous conduct at depositions. As it relates to plaintiff himself, he spoke during Mr. Shelton's deposition, interrupting same, and his counsel admitted that plaintiff disregarded his advice to not speak during the deposition. The court finds that the sanction imposed in the 3/5/20 order, which was affirmed by the First Department (2020 NYSlipOp 06373, November 5, 2020), should serve as a sufficient deterrent to any further obstructive behavior at future depositions. The court therefore denies the request for an order prohibiting plaintiff from attending depositions and/or otherwise proscribing his behavior without prejudice to renew should the need arise for such relief.

This decision hereby fully resolves motion sequence numbers 12, 13 and 14. The court's 10/20/20 order further directed the parties "to make any discovery-related motions on issues not raised in motion sequence number[s] 12, 13 and 14 such as motions to compel discovery or regarding objections raised in prior depositions" within 60 days thereof. That deadline remains and has not yet run. The court takes this opportunity to remind the parties that this deadline will not be extended except on good cause shown in writing.

Plaintiff claims that there are currently four open depositions. Plaintiff's counsel further indicates a desire to serve subpoenas for additional testimony. The court hereby directs the parties to complete all outstanding depositions within 90 days and all outstanding discovery on or before May 14, 2021. The deadline to file note of issue is extended to May 14, 2021.

Conclusion

In accordance herewith, it is hereby

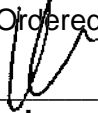
ORDERED that the issues referred to a Special Referee in the court's 3/5/20 decision (said reference vacated by the court's 10/20/20 order) are resolved so that the balance of motion sequence numbers 12, 13 and 14 is denied; and it is further

ORDERED that the parties shall complete all outstanding depositions within 90 days and all outstanding discovery on or before May 14, 2021. The deadline to file note of issue is extended to May 14, 2021; and it is further

ORDERED that the parties are each directed to file on NYSCEF an affirmation, no more than two pages in length, outlining the status of discovery on or before **March 15, 2021**.

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

Dated: 12/10/20
New York, New York

So Ordered:


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