Swyer v Giuliano
2020 NY Slip Op 35356(U)
December 23, 2020
Supreme Court, Albany County
Docket Number: Index No. 903123-19
Judge: Susan M. Kushner
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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

DAVID H. SWYER,

Plaintiff

-against-

VINCENT GIULIANO,

Defendant.

PARTIAL DECISION AND ORDER
Index No. 903123-19
RJI No, 01-20-135821

APPEARANCES:
FOR PLAINTIFF: **Pro se**
FOR DEFANDANT: **Law Offices of John Wallace[1]**
(John F. Pfeifer, of counsel)

Plaintiff, David H. Swyer, commenced this libel action against Defendant, Vincent Giuliano, by the filing of a Summons with Notice on May 23, 2019. *(NYSCEF #1)*[2] Subsequently, Plaintiff served the Summons with Notice upon the Defendant on July 16, 2019. Proof of Service was filed on July 25, 2019. *(NYSCEF #3).* Thereafter, on July 25, 2019, Defendant by his attorney, John F. Pfeifer, filed a Demand for Complaint *(NYSCEF #2).* The Demand required Service of the Complaint upon the Defendant's "attorneys, the Law Offices of Theresa J. Puleo, John F. Pfeifer, of counsel, PO Box 2903, Hartford, CT 06104". The Demand was mailed on July 31, 2019. Plaintiff filed and mailed the Verified Complaint to Defendant's attorney on August 22, 2019. *(NYSCEF #4).* On August 23, 2019, Mr. Pfeifer sent a letter to Plaintiff noting they have not appeared for Defendant and were refusing to accept service of the Complaint. Mr. Pfeifer insisted he orally informed Plaintiff that they would not accept service. *(NYSCEF #18).* On August 26, 2019, Plaintiff responded to Mr. Pfeifer stating he complied with the requirement of the Demand for Complaint and considered service complete. *(NYSCEF #19).* Mr. Pfeifer responded by letter dated September 3, 2019 wherein he continued to dispute proper

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[1] A substitution of attorney was recorded on February 20, 2020 where the Law Offices of Theresa J. Puleo were replaced by the Law Offices of John Wallace. *(NYSCEF #5).* John F. Pfeifer continued of counsel with the new office.
[2] All Papers have been filed in NYSCEF; references are to NYSCEF document number.

service of the Verified Complaint. *(NYSCEF #20).* Thereafter, no action was taken by either party for nearly one year.

Throughout this time, Plaintiff has not moved for an Order requiring Defendant to accept service. ***See Carp v. Marcus*, 105 AD2d 584, 585 (Third Dept, 1984)**. Similarly, the Defendant, while refusing to accept service, failed to return the Verified Complaint and failed to move to dismiss it. ***See Mullen v. Ackerman*, 117 Misc2d 1022, 1023 (Sup.Ct., 1983)**.

On August 20, 2020, Plaintiff filed a Motion for a Default Judgment alleging Defendant has failed to Answer or otherwise appear in this matter. On August 31, 2020, Defendant filed a Cross Motion to Dismiss the Complaint pursuant to **CPLR §3012 (b)** on the ground that the Plaintiff failed to timely serve a Verified Complaint in accordance with the Demand for Complaint. Both motions hinge on a single issue: whether service of the Verified Complaint satisfied the requirements of **CPLR § 3012 (b)**. In the event Plaintiff properly served the Verified Complaint pursuant to the Demand of Defendant, Defendant is in default of answering and appearing.[3] In the event Plaintiff failed to properly serve the Verified Complaint upon Defendant, the Cross Motion dismissing the Complaint must be granted. In relevant part, **CPLR §3012 (b)** states:

> Service of complaint where summons served without complaint. If the complaint is not served with the summons, the defendant may serve a written demand for the complaint within the time provided in subdivision (a) of rule 320 for an appearance. Service of the complaint shall be made within twenty days after service of the demand…The court upon motion may dismiss the action if service of the complaint is not made as provided in this subdivision…

Plaintiff correctly notes the Demand for Complaint directed service of the Complaint upon the Defendant's attorneys. *(NYSCEF #2).* Both parties appear to agree that the Demand was served by mail upon Plaintiff on July 31, 2019 and there does not appear to be any dispute that the Verified Complaint was filed and mailed to Defendant's attorney on August 22, 2019. Pursuant to CPLR § 3012 (b) and Rule 2103 (b), this service was timely as Plaintiff had twenty-five days after receipt of the mailed Demand to serve the Verified Complaint.

The dispute lies in the Defendant's counsel's contention that he expressly informed Plaintiff, in a telephone call on or about August 20, 2019, that Defendant's attorney would not

[3] Indeed, the filing of the Cross Motion is Defendant's counsel's first appearance in this matter, and to date no Answer has been served or filed.

accept service for Defendant. Plaintiff acknowledges there was a telephone communication with John F. Pfeifer that day but that it was for the sole purpose of seeking an extension of time to file and serve the Verified Complaint. Plaintiff contends that there was no discussion regarding upon whom to serve the Verified Complaint. The Court notes that in a letter dated August 2, 2019 from Mr. Pfeifer to Plaintiff, another copy of the written Demand for Complaint is provided. *(NYSCEF #16)*. There is no evidence that this second Demand for Complaint required the Verified Complaint be served directly on Defendant. After Plaintiff served the Complaint upon Defendant's counsel, said counsel wrote to Plaintiff by letter dated August 23, 2019 refusing to accept service. *(NYSCEF #18)*.

The cases interpreting § 3012 (b) clearly hold that failing to timely serve the Complaint will result in dismissal of the action unless the Plaintiff can show a valid reason for the delay and a meritorious action. ***Allstate Ins. Co. v. Marrano Development Corp.*, 26 AD3d 727, 728-9 (Fourth Dept., 2006)**. If Plaintiff was properly noticed that the Complaint was to be served on Defendant personally, then this action must be dismissed. On the other hand, if the Plaintiff was entitled to rely on the directions for service contained in the Demand for Complaint, service was proper and Defendant in default.

In further support of his contention, Plaintiff asserts the service of the Demand for Complaint is an appearance by Defendant's attorney. Upon that appearance, Plaintiff properly served the Complaint upon Defendant's counsel. Defendant correctly notes, as a matter of law, that serving a Demand for Complaint does not constitute an appearance by counsel in the action. **CPLR § 3012 (b)**[4].

The ultimate question is whether Defendant's attorney can alter the written directions contained in the Demand by an oral modification in a telephone communication with Plaintiff. If there was an agreement to do so, it would have to be stated on the record in open court or reduced to a writing to be valid. **CPLR R 2104**. A unilateral and disputed oral modification must have been timely reduced to writing to provide notice to Plaintiff of the alteration of the directions for service of the Verified Complaint. If Defendant's counsel was not willing to accept service of the Complaint, the written Demand for Complaint should not have required service of the Verified Complaint upon the Law Office of Theresa J. Puleo. Furthermore, if

[4] The final sentence of CPLR § 3012 (b) states: A demand or motion under this subdivision does not of itself constitute an appearance in the action.

there was an intent to alter the service directions, an Amended Demand should have been filed and served thereafter. Instead, counsel served another copy of the original Demand for Complaint on August 2, 2019. *(NYSCEF #16).*

The Court finds the Plaintiff reasonably relied upon and complied with the written Demand for Complaint, which Defendant's counsel failed to timely amend in writing. Therefore, this Court finds that Plaintiff timely served the Verified Complaint upon the Defendant by mailing it to the Law Offices of Theresa J. Puleo, John F. Pfeifer, of counsel, pursuant to CPLR §3012 (b). As a result, Defendant's Cross Motion to Dismiss is denied.

Having found the service requirements of CPLR § 3012 (b) satisfied, the Court also finds Defendant has failed to Answer. "By failing to answer the summons and complaint in a libel action, Defendant is deemed to have admitted 'all traversable allegations in the complaint, including the basic issue of liability'". ***XiaoKang Xu v. Xiaoling Shirley He,* 147 AD3d 1223 (Third Dept., 2017) *citing Amusement Bus. Underwriters v. American Intl. Group,* 66 NY2d 878, 880 (1985).**

However, there is an additional element the Court must satisfy before it may grant a Default Judgment on the issue of liability. The Court must "examine the proof submitted pursuant to **CPLR § 3215 (f)** and determine whether 'a viable cause of action exists'". ***XiaoKang Xu v. Xiaoling Shirley He at* 1224, *citing State of New York v. Williams,* 73 AD3d 1401, 1402 (Third Dept., 2010), *quoting Woodson v. Mendon Leasing Corp.,* 100 NY2d 62, 70-1 (2003).** The Verified Complaint, along with any papers filed in support of the Motion for a Default Judgment, may be used to evaluate the proof of facts. **CPLR §3215 (f).** Where the Plaintiff's motion papers fail to set forth sufficient facts to enable the court to determine there exists a viable cause of action to recover damages for libel, it is proper to deny Plaintiff's motion for judgment upon defendant's default. ***McGee v. Dunn,* 75 AD3d 624, 625 (Third Dept., 2010).** Or, as the *McGee* court stated, "There is no " 'mandatory ministerial duty' to enter a **default judgment** against a defaulting party (*Resnick v. Lebovitz,* 28 A.D.3d 533, 534, quoting *Gagen v. Kipany Prods.,* 289 A.D.2d 844, 846", [internal quotation marks omitted]). Instead, the court must determine whether the motion was supported with "enough facts to enable [the] court to determine that a viable cause of action exists". ***McGee v. Dunn at* 624.**

Turning to a cause of action for libel, the following elements must be demonstrated:

Defamation is the injury to one's reputation, either by written expression (libel)

> or oral expression (slander). ***Morrison v. National Broadcasting Co.*, 19 N.Y.2d 453, 280 N.Y.S.2d 641, 227 N.E.2d 572 (1967).** The elements of libel are: [1] a false and defamatory statement of fact; [2] regarding the plaintiff; [3] which are published to a third party and which [4] result in injury to plaintiff. ***Idema v. Wager*,120 F.Supp.2d 361 (S.D.N.Y.2000); *Ives v. Guilford Mills*, 3 F.Supp.2d 191 (N.D.N.Y.1998).** Certain statements are considered libelous *per se.* They are limited to four categories of statements that: [1] charge plaintiff with a serious crime; [2] tend to injure plaintiff in its business, trade or profession; [3] plaintiff has some loathsome disease; or [4] impute unchastity. ***Penn Warranty Co., v. DiGiovanni*, 10 Misc3d 998, 1001-3 (Sup. Ct. 2005)**

Where the statement is libelous per se, the law presumes damages will result and they need not be separately proven. ***Penn Warranty Co., v. DiGiovanni*, at 1003.**

Falsity is a necessary element of a defamation cause of action and only "facts" are capable of being proven false. ***Gross v. New York Times Co.*, 82 NY2d 146, 153 (1993).** A claim for libel is defeated by showing the published statements are substantially true. ***Penn Warranty Co., v. DiGiovanni at* 1003, citing *Newport Service & Leasing v. Meadowbrook Distributing Corp.*, 18 A.D.3d 454, (Second Dept., 2005).** Another defense is that the material, when read in context, would be perceived by a reasonable person to be nothing more than a matter of personal opinion. ***Penn Warranty Co., v. DiGiovanni at* 1003, citing *Immuno AG. v. Moor–Jankowski*, 77 N.Y.2d 235 (1991).**

Courts have struggled to distinguish between statements of fact and statements of opinion.

> The New York Court of Appeals has held that the following factors should be considered in distinguishing fact from opinion: [1] whether the language used has a precise meaning or whether it is indefinite or ambiguous; [2] whether the statement is capable of objectively being true or false, and [3] the full context of the entire communication or the broader social context surrounding the communication. ***Penn Warranty Co., v. DiGiovanni at* 1005, *citing Brian v. Richardson*, 87 N.Y.2d 46 (1995).**

There is also a pleading mandate that cannot be ignored. **CPLR § 3016 (a)** requires the particular words complained of to be set forth in the complaint. The requirement that the defamatory words must be quoted verbatim is strictly enforced. ***Varela v. Investors Ins. Hold Co.*, 185 AD2d 309 (Second Dept., 1982).**

Looking at the Verified Complaint, the Plaintiff states the Defendant filed under a fictitious name, two online attorney reviews that were false and libelous. The Complaint clearly

contains the exact words complained of thus satisfying the pleading requirements of **CPLR § 3016 (a)**. The specific language complained of is as follows:

(a) The Avvo, Inc. attorney review:

> I consulted with David on a pending divorce case, he didn't remember any details on my case after meeting several times. His advice to me was to lie under oath to gain a monetary advantage in my case. He would call and pretend to be someone else in order to gain information that would [sic] defamate my ex. I was not interested in being a part of this type of dishonest behavior. So I retained another attorney.

(b) LawyerRatingz.com review:

> Unethical, dishonest and communicates poorly. He (sic) hired to represent me and I was very disappointed with his organizational skills and communication. He was very dishonest in my case.

The affidavit of Defendant's ex-wife, Plaintiff's former client, Pamela Giuliano, on its face establishes that Defendant was the person who placed these two reviews based upon Defendant's admission of doing so to her. While her credibility may have been challengeable at trial, due to Defendant's default, that opportunity has been lost. This Court must accept her affidavit as true. To the extent that Plaintiff sought to further establish Defendant was the source of the Avvo, Inc. review, he provided the affidavit of an employee of Avvo, Inc. to lay the foundation for certain Avvo, Inc. business records. Since these records were not filed with the affidavit, the Court cannot make a determination regarding what proof these records may provide.

In assessing the words used in the Avvo review, the Court finds the following:

(a) *I consulted with David on a pending divorce case, he didn't remember any details on my case after meeting several times.* This term is indefinite, and unlikely to be objectively true. It tends more to an opinion than a statement of fact. Thus, it cannot be libelous.

(b) *His advice to me was to lie under oath to gain a monetary advantage in my case.* This is specific, and factual. Also, it specifically accuses Plaintiff of encouraging perjury, which is a crime. This statement is capable of being objectively true, in that it could have occurred; or objectively false, in that Plaintiff never encouraged the

reviewer to lie under oath. This statement accuses Plaintiff of encouraging the reviewer to commit a crime and appears objectively harmful to Plaintiff's standing in his profession as an attorney. On its face this statement is libelous per se.

(c) *He would call and pretend to be someone else in order to gain information that would [sic] defamate my ex.* This is also factual in that he accuses Plaintiff of intentionally deceiving third parties. While it is a bit more generalized, it is capable of being objectively true or false; either Plaintiff made such deceptive calls, or he did not. While not necessarily criminal, this statement, if false, could be reasonably seen as harmful to Plaintiff's profession as an attorney. Thus, it is libelous per se.

(d) *I was not interested in being a part of this type of dishonest behavior. So I retained another attorney.* The blanket statement "type of dishonest behavior" is indefinite, and clearly a summary of the reviewer's opinion. Thus, this statement is not libelous.

In examining the words of the LawyerRatingz. Com review the Court finds the following:

(a) *Unethical, dishonest and communicates poorly.* Indefinite and ambiguous, not capable of being objectively true or false; clearly a simple statement of opinion.

(b) *He [sic] hired to represent me and I was very disappointed with his organizational skills and communication.* Again, these statements are indefinite and ambiguous, not capable of being objectively true or false; clearly another statement of opinion.

(c) *He was very dishonest in my case. So, I retained another attorney.* This too is simply another statement of opinion.

Using the analytical approach suggested by the Court of Appeals in ***Brian v. Richardson*, 87 N.Y.2d 46 (1995),** the language used in the LawyerRatingz Review is merely opinion and therefore not libelous.

As stated, the elements of libel are (1) a false and defamatory statement of fact, (2) about the Plaintiff, (3) published to a third party, (4) causing injury to plaintiff or libelous per se. If the statement is libelous per se, the injury is presumed. Therefore, the following facts and elements have been established:

(1) Two negative reviews of the Plaintiff were posted (published) in online attorney review forums on May 24, 2018. Clearly, some of the content is opinion. But some content is slander per se. This satisfies elements (2) and (3)

(2) Defendant is the person who placed the reviews. This also establishes element (3).

(3) The Avvo, Inc., review is slander per se in the following two statements: (1) His advice to me was to lie under oath to gain a monetary advantage in my case; and (2) He would call and pretend to be someone else in order to gain information that would [sic] defamate my ex.. This satisfies element (4) with respect to these two statements.

(4) The LawyerRatingz review is negative towards Plaintiff and his professional conduct but is merely personal opinion and not slander or slander per se. Thus, the LawyerRatingz review is not libel.

Beyond the Verified Complaint, which contains a bare assertion that the contents of the two Avvo Inc., reviews are false, Plaintiff has submitted no proof. For example, the text message[5] attributed to Defendant implies the second statement may be true, although not as an act made on the Defendant's behalf, but rather on behalf of his ex-wife. Defendant in support of his cross motion attaches a copy of a complaint he made to the Committee of Professional Responsibility wherein he complains Plaintiff acted in such a manner. Plaintiff submitted no additional proof in support of his motion for a default judgment to demonstrate the two statements were false. If the two statements are true, the Plaintiff would have no viable libel claim. **See *Newport Service & Leasing v. Meadowbrook Distributing Corp.*, 18 A.D.3d 454 (Second Dept., 2005).** In the absence of any proof that the two statements are, in fact, false, the Court cannot grant a Default Judgment. ***See McGee v. Dunn, supra.*** The Court will permit both parties to submit additional proof, in admissible form, demonstrating the falsity or truthfulness of the two potentially libelous per se statements.

In the event the Plaintiff demonstrates the falsity of the two statements, the issue of damages will remain. The Court will conduct an inquest to determine damages. In the interim, since the Court is requiring additional proof on the issue of liability, the Court will exercise its discretion and require the parties also submit, in the form of an offer of proof, any competent evidence relevant to the issue of damages to enable the Court to determine if an inquest is necessary.

Therefore, it is

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[5] Attached to the Complaint as Exhibit B is at text message purportedly from Defendant to his ex-wife, and states: Tue, Apr, 24, 6:50 PM: The sh** you and your lawyer pulled today calling Goldstein was down right dirty. I will be working on having your lawyer disbarred or suspended again for his unethical behavior. Goldstein records all there [sic], Rochelle and I are amazed by what we heard. I will not let this go so tell your lawyer or accountant or whatever he claims to be this will not be put aside.

ORDERED, that the Cross Motion to Dismiss is denied, and it is

ORDERED AND ADJUDGED, that the Defendant is in Default of Answering and/or Appearing; and it is

ORDERED, that the Motion for Default Judgment is continued, and the parties shall present additional proof that the two statements determined to be potentially libelous per se are true or false, and it is

ORDERED, that the parties shall also submit material and competent evidence relevant to the issue of damages.

This is the Decision and Order of the Court. This original Decision and Order is being e-filed by the Court. The e-filing of this Decision and Judgment constitutes entry. Counsel for Plaintiff shall provide notice of entry as required under CPLR 2220.

DATED: December 23, 2020

SUSAN M. KUSHNER, A.J.S.C.

ENTER

12/28/2020

Papers considered:

(1) *Notice of Motion for Default Judgment* by Plaintiff filed August 20, 2020, with *Plaintiff's Affidavit in support of Motion for Default Judgment, with Exhibits.*

(2) *Notice of Cross Motion to Dismiss* filed by Defendant on August 31, 2020, with *Affidavit of John F. Pfeifer, Affidavit of Defendant, with Exhibits.*

(3) *Verified Complaint* filed August 22, 2019.

(4) *Summons with Notice* filed on May 23, 2019.

(5) *Demand for Complaint* filed July 24, 2019.