Pivar v Kratz
2021 NY Slip Op 31060(U)
April 2, 2021
Supreme Court, New York County
Docket Number: 154794/2020
Judge: Richard G. Latin
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD G. LATIN** **PART** **IAS MOTION 46**

Justice

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STUART PIVAR,

Plaintiff,

- v -

DAVID KRATZ, EILEEN GUGGENHEIM, THE NEW YORK ACADEMY OF ART AND THE TRUSTEES OF THE NEW YORK ACADEMY OF ART,

Defendants.

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INDEX NO. 154794/2020

MOTION DATE 3/24/21

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, defendants' motion for an order to dismiss plaintiff's complaint pursuant to CPLR 3211(a)(7) and (a)(11), is determined as follows:

Plaintiff commenced the instant defamation action against defendants in connection with a statement released on August 27, 2019 by defendant David Kratz. It is alleged that the defamatory statements were widely publicized, reported in the fine art press and elsewhere. The alleged defamatory statement was part of David Kratz's response to the accusation of former New York Academy of Art student Maria Farmer. She claimed that Eileen Guggenheim, Chairman of the Board of Trustees for the Academy, acted in complicity with Jeffrey Epstein to introduce him to Academy students and had encouraged Ms. Farmer, while she was a student and afterwards, to socialize with Epstein.

By way of background, The New York Academy of Art is a non-profit corporate institution of graduate education that combines intensive technical training in the fine arts with active critical discourse. The Academy was founded by plaintiff Stuart Pivar in 1979 with the support of Andy Warhol, artists, scholars, and patrons of the arts. Defendant David Kratz is president of the Academy and co-defendant Eileen Guggenheim is Chairman of the Board of Trustees of the Academy. The Board of Trustees is comprised of approximately twenty-eight members.

The alleged defamatory statement states that, "Jeffrey Epstein was introduced to the Academy through one of its original board members, Stuart Pivar, in the 1980's. Epstein served as a board member from 1987-1994. Both men left the board in 1994." Plaintiff herein alleges that he did not introduce Epstein to the Academy and that he was introduced by defendant Guggenheim at some time during the 1980's. Moreover, plaintiff claims that he and Epstein did not both leave the board of the Academy in 1994, but that plaintiff left the board a year prior. Plaintiff further asserts in his complaint that when Kratz issued the statement on August 27, 2019, he knew the statement to be untrue. Additionally, plaintiff alleges that Kratz issued the false remarks about the plaintiff for the "express purpose of injuring plaintiff and casting him in a false negative light as an associate of Epstein, who was a convicted felon and a notorious abuser of underage women." It is also alleged that Guggenheim failed to cause the Academy to issue a repudiation or retraction of Kratz's defamatory statement because of her personal animosity towards Pivar and to further deflect attention from the fact that it was she who initially introduced Epstein to the Academy and facilitated Epstein's access to Academy students. Defendants now move to dismiss plaintiff's complaint, pursuant to CPLR 3211(a)(7) and (a)(11), arguing that defendant Kratz's statements ascribed to plaintiff were not defamatory, that plaintiff's complaint alleges at most libel per quod, that plaintiff is a public figure, and plaintiff fails to state a claim against individual defendants.

On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]). However, bare legal conclusions are not presumed to be true (*see Antoine v Kalandrishvili*, 150 AD3d at 941-942; *Aviaev v Nissan Infiniti LT*, 150 AD3d at 807; *Khan v MMCA Lease*, Ltd., 100 AD3d at 834; *Parola, Gross & Marino, P.C. v Susskind*, 43 AD3d 1020, 1021 [2d Dept 2007]).

The court, thus, is required to determine "whether the complaint gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments" (*Treeline 990 Stewart Partners, LLC v RAIT Atria, LLC*, 107 AD3d 788 [2d Dept 2013]; *JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2d Dept 2010]). In making such a determination, the court must consider whether the complaint contains factual allegations as to each of the material elements of any cognizable claim and whether such allegations satisfy any express, specificity requirements imposed upon the pleading of that particular claim by applicable statutes or rules (*see East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122 [2d Dept 2009], *aff'd* 16 NY3D 775 [2011]).

Plaintiff's first and only cause of action is for defamation. "Defamation is the injury to one's reputation, either by written expression (libel) or oral expression (slander)" (*Penn Warranty Corp. v DiGiovanni*, 10 Misc3d 998, 1002 [Sup Ct, NY County 2005]; *see Morrison v*

National Broadcasting Co., 19 NY2d 453 [1967]; *Cohen v New York Times Co.*, 153 AD 242 [2d Dept 1912]). Defamation has long been recognized to arise from "the making of a false statement which tends to' 'expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society'" (*see Dillon v City of New York,* 261 AD2d 34 [1st Dept 1999]). The elements of defamation 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 (Restatement [Second] of Torts Section 558). CPLR 3016(a) requires that in a defamation action, "the particular words complained of…be set forth in the complaint." The complaint also must allege the time, place and manner of the false statement and specify to whom it was made (*see Vardi v Mutual Life Ins. Co. of N.Y.,* 136 AD2d 453 [1st Dept 1988]).

In evaluating whether a cause of action for defamation is successfully pleaded, the words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction (*see Silsdorf v Levine,* 59 NY2d 8 [1983]). Loose, figurative, or hyperbolic statements, even if depreciating the plaintiff, are not actionable (*see Gross v New York Times Co.,* 82 NY2d 146 [1993]). Moreover, the truth provides a complete defense to defamation claims (*see Dillon v City of New York,* 261 AD2d 34 [1st Dept 1999]).

In reviewing a defamation claim, it is for the court to determine whether the statements complained of would constitute defamation per se (*see James v Gannett Co., Inc.*, 40 NY2d 415, 419 [1976]). In doing so, the court will look at the publication as a whole and read the statement "against the background of its issuance" (*id. quoting Mencher v Chesley*, 297 NY 94, 99 [1947]. If a court finds that the statements in question are reasonably susceptible to a defamatory connotation, it then becomes a question for the jury to determine whether or not an ordinary reader would understand the words to be defamatory (*see James*, 40 NY2d 415).

Here, the alleged defamatory statement, "Jeffrey Epstein was introduced to the Academy through one of its original board members, Stuart Pivar, in the 1980's. Epstein served as a board member from 1987-1994. Both men left the board in 1994," is not a defamatory statement. The first part of the statement claiming that Epstein was introduced to the Academy through the plaintiff in the 1980's does not, in the context of this article, expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons. It merely states that Pivar introduced Epstein to the Academy, not that he had knowledge of or was involved in any wrongdoing or facilitating any wrongdoing with Epstein. The word 'introduction" is innocuous. It could have several meanings in this context. It could simply have been a literal introduction at some cocktail party to a member of the board. It could be a request he made to a business associate or colleague to purchase a ticket for a fundraiser on behalf of the Academy of Art.

The latter part of the statement that both men left the board in 1994 is also not

defamatory and in fact appears to be completely accurate. According to resignation letters submitted in support of defendants' motion, Jeffrey Epstein resigned from the board on October 11, 1994 and plaintiff Stuart Pivar resigned from the board on December 8, 1994. The statement of when Pivar and Epstein left the board does not have a defamatory meaning, did not expose the plaintiff to hatred, contempt or any like sentiment by a substantial part of the community, and it is not alleged by the plaintiff in his complaint. In the context of the entire statement or publication as a whole, tested against the understanding of the average reader, the statement is not reasonably susceptible of a defamatory meaning, and is therefore not actionable. Additionally, the complaint does not state that plaintiff was caused any special harm, only that the alleged defamatory statement cast him in a "false negative light" as an associate of Epstein and requests that the court grant damages in an amount to be determined at trial. Special damages contemplate "the loss of something having economic or pecuniary value" (*see Liberman v Gelstein,* 80 NY2d 429 [1992]). Here, the complaint does not state any specific harm or "special damages," thus the statements must constitute defamation per se to be actionable (*see Dillon v City of New York,* 261 AD2d 34 [1999]).

The four established exceptions to alleging special damages and having an action based on defamation per se consist of statements that (i) charge a plaintiff with a serious crime, (ii) that tend to injure another in his or her trade, business, or profession, (iii) that plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman (*see Liberman v Gelstein,* 80 NY2d 429 [1992]). When statements fall within one of these categories, the law presumes that damages will result, and they need not be alleged or proven (*id.*). However, if a plaintiff alleges that the defamation is the result of libel, it "need not plead or prove special damages if the defamatory statement 'tends to expose the plaintiff to public contempt, ridicule, aversion or grace, or induce an evil opinion of him 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 [1977]).

Here, considering the cause of action pled in plaintiff's complaint and the alleged defamatory statement, it is evident that the statement does not satisfy any of the per se exceptions. The alleged defamatory statement did not indicate that plaintiff committed a crime, is not the type that would injure plaintiff's trade, business, or profession, does not state that plaintiff contracted a loathsome disease, nor impute unchastity to him (*see Stepanov v Dow Jones & Co., Inc.,* 120 AD3d 37 [1st Dept 2014]); *Cassini v Advance Publications,* 125 AD3d 467 [1st Dept 2015]). Based on the subject matter of the article, reasonable people would not read the alleged defamatory statement and conclude that plaintiff has a connection to a crime, but merely that an introduction was made several decades ago. In fact, unlike the interview plaintiff did with "Mother Jones" entitled "Jeffrey Epstein, My Very, Very Sick Pal", the statements do not even suggest that the plaintiff was friendly with Epstein. Therefore, plaintiff did not successfully plead in his complaint an action for defamation per se.

Lastly, although plaintiff failed to allege a cause of action for defamation by implication, a liberal reading of the complaint may suggest that plaintiff may have intended defamation by implication, as an alternative cause of action. "Defamation by implication is premised not on direct statements but on false suggestions, impressions and implications arising from otherwise truthful statements" (*see Stepanov v Dow Jones & Co., Inc.,* 120 AD3d 37 [1st Dept 2014]). To survive a motion to dismiss a claim for defamation by implication where the factual statements at issue are substantially true, the plaintiff must make a rigorous showing that the language of the

communication as a whole can be reasonably read both to impart a defamatory inference and to affirmatively suggest that the author intended or endorsed that inference (*id*.).

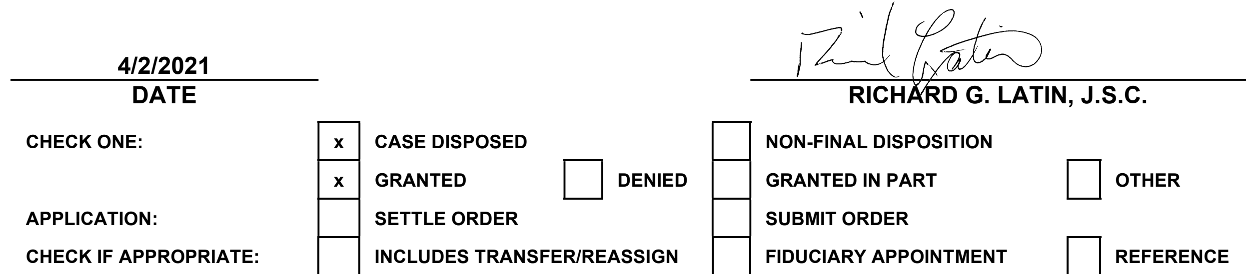
Here, plaintiff alleged in his complaint that Kratz August 27, 2019 statement was made for the express purpose of injuring plaintiff and casting him in a false negative light as an associate of Epstein, who was a convicted felon and a notorious abuser of underage women. Additionally, plaintiff also alleged that Kratz issued remarks about plaintiff maliciously because of past dissention and disputes between plaintiff and the Academy's current Board of Trustees. In considering the alleged defamatory statements there is no implication that plaintiff was connected to the allegations against Epstein as described in the article. These statements that plaintiff introduced Epstein to the board in the 1980's, and that both men left the board in the same year, even if true, are far too attenuated and cannot be reasonably read to imply that plaintiff was somehow involved with Epstein's sexual misconduct. Given the overall context in which the statements were made, a reasonable reader would not conclude that plaintiff was unchaste or involved in any crime (*see Cassini v Advance Publications,* 125 AD3d 467 [1st Dept 2015]); *Stepanov v Dow Jones & Co., Inc.,* 120 AD3d 37 [1st Dept 2014]). Therefore, plaintiff likewise failed to meet the rigorous showing as detailed in *Stepanov* and thus failed to successfully state a cause of action for defamation by implication (120 AD3d 37).

With respect to whether the plaintiff is a public figure, the plaintiff is required to prove, by clear and convincing evidence, that the defamatory statements were published with actual malice (*see Mahoney v Adirondack Publ. Co.,* 71 NY2d 31, 39 [1987]). Since plaintiff does not plead the essential elements to establish a cause of action for defamation, defamation per se, or defamation by implication, the issue of whether plaintiff is or was a public figure is not addressed. If plaintiff was a public figure, he would have to also prove actual malice to prevail, which considering the statement and the context, he cannot prove in this instance. Additionally, defendants' motion seeking relief pursuant to CPLR 3211(a)(11) is moot, as plaintiff's complaint is hereby dismissed.

Accordingly, defendants' motion is granted to the extent of directing the Clerk to enter judgment dismissing the instant action with prejudice.

Defendants shall serve a copy of this order upon plaintiff within thirty (30) days of the date of this order, together with notice of entry.

This constitutes the decision and order of this Court.



4/2/2021
DATE

RICHARD G. LATIN, J.S.C.

CHECK ONE:	x	CASE DISPOSED			NON-FINAL DISPOSITION	
	x	GRANTED	☐ DENIED		GRANTED IN PART	☐ OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	☐ REFERENCE