Milton v Queens Daily Eagle
2022 NY Slip Op 32548(U)
July 28, 2022
Supreme Court, New York County
Docket Number: Index No. 151740/2019
Judge: John J. Kelley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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JACOB MILTON and LEGAL NETWORK INTERNATIONAL, LLC,

Plaintiffs,

- v -

QUEENS DAILY EAGLE, DAVID BRAND, CHRISTINA CARREGA, JONATHAN SPERLING, and VICTORIA MERLINO,

Defendants.

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INDEX NO. 151740/2019

MOTION DATE 05/25/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76

were read on this motion to/for ENFORCE/EXEC JUDGMENT OR ORDER.

In this action to recover damages for defamation, the defendants move for leave to enter judgment dismissing the complaint, upon the plaintiffs' failure to comply with this court's February 25, 2022 conditional order of dismissal that became absolute upon the plaintiffs' failure to comply with the discovery deadlines set forth therein. The plaintiffs oppose the motion and cross-move for summary judgment on the complaint. The motion is granted, the sanction of dismissal that had been conditionally imposed upon the plaintiffs is deemed to have become absolute, the cross motion is denied, upon searching the record the court awards summary judgment to the defendants dismissing the complaint, and the complaint is dismissed.

In its February 25, 2022 order, the court granted the defendants' motion pursuant to CPLR 3126 for the imposition of discovery sanctions, to the extent of conditionally dismissing the complaint unless, on or before March 31, 2022, the plaintiffs provided complete and proper responses to numerous discovery demands that the defendants had served upon the plaintiffs. In the order, the court articulated, in detail, what information and documents the plaintiffs were obligated to provide, the majority of which were relevant to the plaintiffs' calculation of special

damages. The court expressly stated that "[t]his conditional order shall become absolute upon the plaintiffs' failure to comply with its provisions (*see Trabanco v City of New York*, 81 AD3d 490, 492 [1st Dept 2011]; *Rampersad v New York City Dept. of Educ.*, 30 AD3d 218, 219 [1st Dept 2006])"

When the defendants submitted a proposed judgment to the court shortly after the deadline for the service of the plaintiffs' responses had lapsed, the plaintiffs wrote the court to object to the entry of judgment as premature. In response to that letter, the defendants informed the court, by letter dated April 1, 2022, that the plaintiffs had not complied with most of the directives by the applicable deadline and did not fully comply with several of them.

When a plaintiff fails to comply with a self-executing, conditional order dismissing the complaint if he or she does not provide discovery by a date certain, "the order became absolute" (*Humble Monkey, LLC v Rice Sec., LLC,* 184 AD3d 498, 498 [1st Dept 2021]; *see Diaz v Maygina Realty LLC*, 181 AD3d 478 [1st Dept 2020]; CPLR 3126[3]). The plaintiffs' "proper recourse was to move to vacate the conditional order on the ground of excusable default" (*Humble Monkey, LLC v Rice Sec.*, LLC, 184 AD3d at 498; *Mehler v Jones*, 181 AD3d 535, 535 [1st Dept 2020]; CPLR 5015[a]). As the Appellate Division, First Department, explained in *Rampersad,* where "[a] self-executing order" has been issued that requiring production of discovery items by a date certain, the parties who were directed to comply with that order are deemed to be "cognizant of the repercussions of their failure to produce" (*Rampersad v New York City Dept. of Educ.*, 30 AD3d at 218). Rather than produce the information and documentation, move to vacate the conditional order, "or contact the court for a protective order for their anticipated noncompliance" (*id.*), the plaintiffs "simply took no action" and "took this position at their peril. Their conduct of flouting the court order, without good cause and without contacting the court for relief therefrom, was willful and contumacious conduct, warranting sanction" (*id.* at 219).

In opposition to the defendants' showing on this motion, the plaintiffs failed to show that they actually complied with the February 25, 2022 order, and failed to provide a reasonable excuse for their failure timely to comply with that order. Moreover, as discussed below, the record does not reveal the existence of a potentially meritorious cause of action (*see generally J.G. v. Fortress CD, LLC,* 199 AD3d 571, 572 [1st Dept 2021]).

Inasmuch as the directives set forth in this court's February 25, 2022 conditional order were explicitly detailed and "sufficiently specific" as to the items of discovery that the plaintiffs were required to produce and when they were to produce them (*see Trabanco v City of New York*, 81 AD3d at 492), the conditional order had become absolute by April 14, 2022, when the defendants made the instant motion, and it is appropriate to dismiss the complaint on that ground (*see Santiago v City of New York*, 71 AD3d 468, 469 [1st Dept 2010] [complaint was properly dismissed for persistent, unexplained noncompliance with four disclosure orders, including a self-executing conditional order of dismissal that became absolute]).

Although, upon dismissing the complaint, the court need not consider the plaintiffs' cross motion for summary judgment on the complaint, the court nonetheless concludes that there is no merit to the plaintiffs' cross motion and, upon searching the record, also awards the defendants summary judgment dismissing the complaint (*see* CPLR 3212[b]).

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (*see* CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in

favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets his or her burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see id.*; *Medina v Fischer Mills Condo Assn.*, 181 AD3d 448, 449 [1st Dept 2020]).

The plaintiffs failed to establish their prima facie entitlement to judgment as a matter of law on their defamation causes of action. "The elements of a cause of action [to recover] for 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" (*Gaccione v Scarpinato*, 137 AD3d 857, 859 [2d Dept 2016], quoting *Epifani v Johnson*, 65 AD3d 224, 233 [2d Dept 2009]). "To establish actionable defamation, it must be shown that the facts are false and," depending on whether the plaintiff is or is not a public figure, "that their publication was generated by actual malice, i.e. with a purpose to inflict injury upon the party defamed, or in a grossly irresponsible manner" (*Kuan Sing Enterprises, Inc. v T.W. Wang, Inc.*, 86 AD2d 549, 550 [1st Dept 1982], *affd* 58 NY2d 708 [1982]).

To succeed on a defamation cause of action, a person who is not a public figure "must establish, by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties" (*Chapadeau v Utica Observer-Dispatch*, 38 NY2d 196, 199 [1975]; *see Huggins v Moore*, 94 NY2d 296 [1999]; *Farber v Jefferys*, 103 AD3d 514 [1st Dept 2013]). Where the plaintiff is a public figure, he or she must show by clear and convincing evidence that the defendant published the allegedly offending statements with actual malice, i.e., with knowledge of the statements' falsity or a reckless disregard as to whether the statements were true or false (*see Gertz v Robert Welch, Inc.*, 418

US 323 [1974]; *Huggins v Moore*, 94 NY2d at 301-302; *James v Gannett Co.*, 40 NY2d 415 [1976]; *see also Kipper v NYP Holdings Co.*, 12 NY3d 348 [2009]).

Public figures are generally defined as persons who "have assumed roles of especial prominence in the affairs of society," "occupy positions of . . . persuasive power and influence," and have achieved "general fame or notoriety in the community" (*Gertz v Robert Welch, Inc.*, 418 US at 345, 352; *see Yiamouyiannis v Consumers Union of U.S.*, 619 F2d 932 [2d Cir 1980]). The critical consideration.is whether the evidence demonstrates that plaintiff had taken affirmative steps to attract personal attention or had strived to achieve a measure of public acclaim (*see Maule v NYM Corp.*, 54 NY2d 880, 882 [1981]; *James v Gannett Co.*, 40 NY2d at 422). The issue of whether a plaintiff is or is not a public figure is generally a question of fact (*see Perez v Violence Intervention Program*, 116 AD3d 601 [1st Dept 2014]).

Assuming for the purposes of this motion that the plaintiff Jacob Milton is not a public figure, and thus is not subject to the higher burden of proof required of public figures, he nonetheless has failed to show that the statements in the subject article published by the defendant Queens Daily Eagle were false or that the Queens Daily Eagle acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.

In his affidavit in support of his cross motion, Milton averred that, notwithstanding several statements reported in the Queens Daily Eagle:

> "I did not plead guilty to grand larceny and did [not] act as a mortgage broker at the Jackson Heights firm Griffin Mortgage to steal Clients' identities or apply for Mortgages worth more than One Million dollars or rack up credit card bills totaling more than $15,700.00 in the 'victim' names.
>
> "No 'victims' refused to proceed with their mortgages because they were too expensive.
>
> "I was never convicted of identity theft."

In fact, Milton was convicted on October 28, 2010 in the Supreme Court, Queens County, upon his plea of guilty, of grand larceny in the first degree. After the Supreme Court

had denied his motion to withdraw the plea, he appealed the judgment of conviction. The Appellate Division, Second Department, explained that Milton

> "was charged, by felony complaint, with, inter alia, grand larceny in the first degree under Penal Law § 155.42. The felony complaint alleged that the defendant knowingly and unlawfully stole property exceeding one million dollars in value by using personal identifying information he received from four named individuals, and, inter alia, securing mortgages on two properties in the name of one of the alleged victims without that individual's knowledge or permission. The defendant waived indictment by a grand jury *and pleaded guilty under a superior court information to grand larceny in the first degree and scheme to defraud in the first degree*, although the plea to the scheme to defraud count was subsequently vacated at the time of sentencing. The charge in the superior court information named two financial institutions 'and others' as alleged victims of the crimes"

(*People v Milton*, 92 AD3d 899, 899 [2d Dept 2012] [emphasis added]). The Appellate Division reversed the judgment of conviction and vacated the plea upon concluding that (a) the charge of grand larceny in the first degree was not an offense for which the defendant had been held for action of a grand jury, in that it was not an offense charged in the felony complaint or a lesser-included offense of an offense charged in the felony complaint, and (b) the designation of the alleged victims in the superior court information differed from those named in the felony complaint (*see id.* at 900; CPL 195.20). The Court of Appeals, however, reversed the Appellate Division's order, reinstated the plea, and remitted the matter the Appellate Division to consider other issues (*see People v Milton*, 22 NY3d 133 [2013]).

As the Court of Appeals described it,

> "Milton was charged with grand larceny in the first degree and two counts of a scheme to defraud in the first degree, among numerous other crimes. The felony complaint alleged that between April 1, 2006 and October 16, 2007, defendant met with four mortgage loan applicants (named in the complaint) and acquired their personal identifying information. Defendant then used the information from one applicant, Hector Sandoval, to obtain mortgages on a property in Queens and a property in Kings County, without Sandoval's permission or knowledge. Public records showed that the Queens home sold for $625,000 and the Kings property sold for $685,000. The felony complaint did not list the names of the banks from which defendant procured the loans to purchase the properties.
>
> "*Defendant waived his right to be prosecuted by indictment and pleaded guilty under an SCI to one count of grand larceny in the first degree (stealing property whose value exceeds $1 million) and one count of scheme to defraud in the first*

> *degree*. At the plea hearing, defendant originally refused to plead guilty to the crimes charged in the SCI with respect to the named mortgage applicants. The SCI was changed to enumerate Indy Mac Bank and WMC Bank as the victims, *and defendant then pleaded guilty*. After the court denied defendant's motions to withdraw his plea, the court sentenced defendant to 2 to 6 years incarceration on the grand larceny conviction and, with the consent of the People, vacated his plea to the scheme to defraud charge"

(*id.* at 135 [emphasis added]). The Court of Appeals concluded, contrary to the determination of the Appellate Division, that "the offense to which defendant pleaded guilty is the same offense for which he was charged in the felony complaint, and adding the names of the victims in the SCI did not render the offense a different one" (*id.* at 136). On remittal from the Court of Appeals, the Appellate Division affirmed the judgment of conviction, entered upon Milton's plea, "for his role in a wide ranging mortgage fraud and identity theft scheme" (*People v Milton*, 111 AD3d 765, 766 [2d Dept 2013], *lv denied*, 23 NY3d 1157 [2013]).

Milton's "plea of guilty amounted to a statement or admission by him that he did the act charged" (*Ando v Woodberry*, 8 NY2d 165, 168 [1960]; *see Horowitz v Kevah Konner, Inc.*, 67 AD2d 38, 40 [1st Dept 1979]). Hence, the details set forth in Milton's plea allocution, in which he admitted to the acts constituting grand larceny in the first degree, are deemed to be true.

The reporting by the Queens Daily Eagle, in sum and substance, described the acts that Milton admitted, in his plea allocution, to having committed. The substantial truth of an allegedly defamatory statement is a complete defense to a defamation claim (*see Brian v Richardson*, 87 NY2d 46, 51 [1995]; *Reus v ETC Hous. Corp.*, 203 AD3d 1281, 1285 [3d Dept 2022]). "[T]ruth need not be established to an extreme literal degree. Provided that the defamatory material on which the action is based is substantially true (minor inaccuracies are acceptable), the claim to recover damages . . . must fail" (*Ingber v Lagarenne*, 299 AD2d 608, 609-610 [3d Dept 2002] [internal quotation marks and citation omitted]; see *Reus v. ETC Hous. Corp.*, 203 AD3d at 1285; *Cusimano v United Health Servs. Hosps., Inc.*, 91 AD3d at 1151). The plaintiffs have not shown, and cannot demonstrate, that the Queens Daily Eagle's reporting of Milton's conviction, or its description of the conduct underlying it, are substantially untrue. Nor have they

demonstrated, prima facie, that the statements made by the individual defendants in the course of their reporting for the Queens Daily Eagle were substantially untrue. Consequently, the plaintiffs have failed to establish their prima facie entitlement to judgment as a matter of law, and their motion for summary judgment would have to be denied regardless of the sufficiency of the defendants' opposition papers even if the court were not dismissing the complaint pursuant to CPLR 3126.

In considering a summary judgment motion, a court may search the record and award summary judgment to a nonmoving party without the necessity of a cross motion (*see Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429-430 [1996]). Since Milton admitted in open court that he engaged in the conduct described and published by the defendants, the record reflects that there are no triable issues of fact as to whether the defendants defamed the plaintiffs (*see Maun v Edgemont at Tarrytown Condominium,* 156 AD3d 873, 875 [2d Dept 2017]). Hence, the court searches the record and, in addition to dismissing the complaint pursuant to CPLR 3126, also awards summary judgment to defendants dismissing the complaint.

In light of the foregoing, it is

ORDERED that the defendants' motion is granted, this court's February 25, 2022 order conditionally dismissing the complaint is deemed to have become absolute, and the complaint is dismissed; and it is further,

ORDERED that the plaintiffs' cross motion for summary judgment on the complaint is denied; and it is further,

ORDERED that, upon searching the record, the court awards summary judgment to the defendants dismissing the complaint, and the complaint is dismissed; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint.

This constitutes the Decision and Order of the court.

7/28/2022
DATE

JOHN J. KELLEY, J.S.C.

MOTION:	[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
CROSS MOTION:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE
	[ ]			[ ]		[ ]	