VDARE Found., Inc. v New York Times Co.
2022 NY Slip Op 32406(U)
July 22, 2022
Supreme Court, New York County
Docket Number: Index No. 156665/2020
Judge: Lisa Headley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LISA HEADLEY** **PART** **28M**

Justice

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VDARE FOUNDATION, INC

Plaintiff,

- v -

THE NEW YORK TIMES COMPANY,

Defendant.

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INDEX NO. 156665/2020

MOTION DATE 02/22/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for DISMISSAL.

Defendant, New York Times Company ("defendant" and "New York Times"), filed the motion before this court for an Order, pursuant to *CPLR §§3211 (a)(1), (a)(7), & (g),* to dismiss plaintiff's complaint for failure to state a cause of action for defamation. Defendant also seeks that the complaint should be dismissed pursuant to the amended Anti-SLAPP statute. The defendant motions this court to grant their motion to dismiss in its entirety, and award defendant its costs and fees in this action, including reasonable attorneys' fees. Plaintiff, VDARE Foundation, Inc. ("plaintiff") filed opposition. Defendant filed a reply.

Background

In this action, the plaintiff asserts claims for defamation arising from four articles. The plaintiff is seeking $700,000 in actual damages with punitive damages and costs.

First, in August 2019, the plaintiff alleges, *inter alia*, that the defendant, in a Times article "quoted the associate director of the Anti-Defamation League opining that while the term 'kritarch' has historically been used in a non-pejorative way to describe 'rule by judges,' more recently it has been 'co-opted' by extremists and taken on a different meaning." The plaintiff argues that it was false and defamatory to report that the term, "kritarchy" had "suddenly been transformed into an anti-Semitic code word."

Second, in September 2019, plaintiff alleges, *inter alia*, that the defendant published a story that referenced and included an underlined text hyperlink to the August 2019 article, and that it was defamatory to say that "a post on the plaintiff's website used an anti-Semitic reference."

Thirdly, in November 2019, plaintiff alleges, *inter alia*, that the defendant published an article about Stephen Miller, who cited "Peter Brimelow, the founder of the anti-immigration website VDARE, [who] believes that diversity has weakened the United States[.]" Further, the November article 2019 reported that "the SPLC 'has labeled VDARE a 'hate website' for its ties to white nationalists[.]" The plaintiffs asserts that such statements about VDARE were false and defamed it.

Lastly, in May 2020, the plaintiff alleges that the defendant published a wire article from Reuters, and defamed the plaintiff when it reported, *inter alia*, that VDARE is accused of "race

hatred," "manipulating on-line readers by utilizing a 'bot-farm' of fake accounts," and violating VDARE's "501(c) status."

Defendant's Motion to Dismiss

The defendant argues that the plaintiff's action should be dismissed for its failure to state a claim under *CPLR §§3211(a)(1)* and *(7)*, as well as the heightened pleading standard imposed by the New York Anti-SLAPP law. In support of the motion, defendant argues that the purported defamatory statements are non-actionable opinion and not "of and concerning" plaintiff. Defendant contends that the plaintiff cannot show actual malice, given that the plaintiff's extensive publications repeatedly supported the defendant's statements. Defendant also contends that this action is the second of two lawsuits, in which plaintiff asserted claims for defamation based on the same articles. Defendant references the Order on a Motion to Dismiss in the matter, *Peter Brimelow v. The New York Times Company (20 Civ. 222)*, dated December 17, 2020, and issued in the United States District Court, Southern District of New York, by District Judge Katherine Polk Failla, whereby the defendant's motion to dismiss was granted. In *Brimelow v. The New York Times Company*, the district court judge determined that none of the defendant's purported defamatory articles were actionable as a matter of law. (*See, NYSCEF Doc. No. 11*). Specifically, Judge Failla opined that, under New York law, characterizing plaintiff as "racist," "white nationalist," and "white supremacist" is non-actionable opinion, and even if those terms were considered factual, plaintiff could not plausibly show actual malice. Defendant also submits that the Order on the defendant's Motion to Dismiss in the *Brimelow v. The New York Times Company* case was appealed by plaintiff Brimelow, and the decision granting the defendant's motion to dismiss the complaint was affirmed. Similarly, in this case, the defendant argues that plaintiff is pursuing the identical claims that were made in the District Court with this court, which have the same deficiencies in law, including that there is no showing of actual malice, and defendant's statement is a non-actionable opinion.

Furthermore, the defendant argues that the plaintiff does not meet the heightened pleading standard imposed by the New York Anti-SLAPP law, which deter claims on public speech in connection with an issue of public interest. *See*, *CPLR §3211(g)*. Defendants contend that the first two articles, published August and September 2019, report on a formal complaint filed with the government by immigration judges; the third article examines the political ideology of senior adviser to the then President of the United States; and the fourth article concerns Facebook's removal of several networks of fake social media accounts. Defendants argue that the four articles report on matters of public concern, and report on matters of social and political importance to the general public.

In opposition, plaintiff argues, *inter alia*, that the defendant clearly made statements that concerned plaintiff and mentioned plaintiff by its name. Plaintiff cites to an article in which defendant states that, "[Facebook] removed a U.S. network of fake accounts linked to Qanon ... and a separate U.S- based campaign with ties to white supremacist websites, VDARE and the Uz Review." Plaintiff argues that the statements made by the defendant were false, and accused plaintiff of race hatred, and traits inconsistent with its role as a publisher of journalism. Plaintiff also argues that it can prove actual malice because the defendant had obvious reasons to doubt the veracity of the defamatory statements. Lastly, plaintiff argues that while many courts have found terms like "racist" and "white supremacist" to be non-actionable, there is a public policy concern as defendant is a respected newspaper, which explicitly promises its readers that the taint of opinion will not appear in its news sections. Thus, the plaintiff contends that this Court should deny defendant's motion to dismiss in its entirety.

In reply, the defendant argues that the plaintiff's public policy argument lacks foundation in law and violates the First Amendment. Defendant argues that the plaintiff is attempting to use the First Amendment to privilege its own ideological beliefs, and that almost all news articles, no matter how factual in nature, must employ the kinds of descriptors that constitute "opinion" as that term is defined in Constitutional law.

Discussion

This Court finds that plaintiff has failed to state a claim for defamation and did not meet the heightened pleading standard required as per the newly amended Anti-SLAPP statutes. "When deciding a motion to dismiss a complaint pursuant to *CPLR §3211*, the court is required to afford the pleading 'a liberal construction.' It must accept the facts alleged in the complaint as 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." *New York Racing Ass'n v. Nassau Regional Off-Track Betting Corp.*, 29 Misc. 3d 539, 545 (Sup. Ct. 2010). Additionally, "when deciding a motion to dismiss made pursuant to *CPLR §3211(a)(7)*, the court must determine whether the pleader has a cognizable cause of action, not whether it has been properly plead." *Sutphin Mgt. Corp. v. Rep 755 Real Estate, LLC,* 20 Misc. 3d 1135(A) (Sup. Ct. 2008), O*rder aff'd and remanded*, 73 A.D. 3d 738 (2d Dep't 2010). Dismissal of a claim is appropriate if the claim is made up of " [a]llegations that consist of bare legal conclusions or factual claims that are flatly contradicted by documentary evidence or are inherently incredible." *Napoli v. Bern*, 60 Misc. 3d 1221(A) (Sup. Ct. 2018), *aff'd sub nom., Napoli v. New York Post*, 175 A.D. 3d 433 (1st Dep't 2019).

Under *CPLR §3211 (a)(1)* and *(7)*, "a party may move for judgment dismissing one or more causes of action asserted against him on the ground that: (1) a defense is founded upon documentary evidence; or… (7) the pleading fails to state a cause of action.

The following New York statutes regarding strategic lawsuits against public participation, also known as anti-SLAPP law, apply in this case:

First, under *New York Civil Rights Law § 76-a*,

> [A]n "action involving public petition and participation" is a claim based upon any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition. In an action involving public petition and participation, damages may only be recovered if the plaintiff, in addition to all other necessary elements, shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue.

See, *New York Civil Rights Law § 76-a*.

Second, under *New York Civil Rights Law § 70-a*

> 1. A defendant in an action involving public petition and participation, as defined in paragraph (a) of subdivision one of section seventy-six-a of this article, may maintain an action, claim, cross claim or counterclaim to recover damages, including costs and attorney's fees, from any person who commenced or continued such action; provided that:

> (a) costs and attorney's fees shall be recovered upon a demonstration, including an adjudication pursuant to subdivision (g) of rule thirty-two hundred eleven or subdivision (h) of rule thirty-two hundred twelve of the civil practice law and rules, that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law;
> (b) other compensatory damages may only be recovered upon an additional demonstration that the action involving public petition and participation was commenced or continued for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights; and
> (c) punitive damages may only be recovered upon an additional demonstration that the action involving public petition and participation was commenced or continued for the sole purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights.
> 2. The right to bring an action under this section can be waived only if it is waived specifically.
> 3. Nothing in this section shall affect or preclude the right of any party to any recovery otherwise authorized by common law, or by statute, law or rule.

See, New York Civil Rights Law § 70-a

This court finds that the plaintiff has not alleged actual malice, and fails to prove that terms such as "racist," and "white supremacist" are not "non-actionable opinion." This court further finds that such terms are considered to be non-actionable opinion, and cannot be shown as evidence of actual malice. Plaintiff sets forth no evidence to contradict the legal notion that such terms are non-actionable opinion, but merely states a public policy argument and cites to ambiguous case law, neither of which can defeat defendant's motion to dismiss. Specifically, the court finds that the plaintiff failed to submit persuasive evidence that defendant has acted with actual malice, and any evidence set forth by plaintiff merely illustrates, at most, journalistic negligence. Plaintiff argues that there is evidence that defendant had doubts about the truth of its statements regarding the articles about plaintiff, but sets forth no evidence to prove that allegation. Plaintiff's arguments are conclusory in nature, and fail to provide factual evidence that defendant was *"purposefully"* avoiding the truth or had *"ill will"* towards plaintiff, or had "*reckless disregard"* in publishing articles about plaintiff. This Court values the importance of precedent, judicial efficiency and judicial consistency.

Furthermore, this Court recognizes that "the actual malice standard recognizes that falsehoods relating to public figures are inevitable in free debate, and that publishers must have sufficient breathing space so that the First Amendment's commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open will be realized." *Kipper v. NYP Holdings Co., Inc.*, 12 N.Y. 3d 348, 355 (2009). This Court upholds the importance of the First Amendment in protecting the right to free speech by the press. Here, the plaintiff fails to demonstrate actual malice, and thus, it would be a violation of the First Amendment to permit the plaintiff to proceed with this action.

This court further finds that the plaintiff failed to meet the heightened pleading standard required pursuant to the amended Anti-SLAPP law. The amended Anti-SLAPP statutes impose a

heightened pleading standard which shifts the traditional burden for a motion to dismiss from the defendant to the plaintiff. *See, CPLR §3211(g).* A plaintiff is now required to establish by "clear and convincing evidence" that there is a substantial basis in fact and law for its claim. *Id.* Additionally, the newly amended Anti-SLAPP law permits courts to consider evidence not mentioned in the pleading, including evidence that may not typically be permitted at the motion to dismiss stage. *Id. (g)(2).* Lastly, the Anti-SLAPP law mandates that a defendant be awarded costs and fees if successful. *N.Y. Civ. Rights Law § 70-a(a) (McKinney).* In this matter, plaintiff has not met the heightened pleading standard required by law because plaintiff failed to establish by "clear and convincing evidence" that a claim for defamation exists. Plaintiff failed to prove actual malice in this matter, and failed to provide any evidence to demonstrate that the alleged defamatory articles were founded in falsity, and were not non-actionable opinion. Therefore, plaintiff does not have a claim that has a substantial basis in law and fact, and cannot overcome defendant's motion to dismiss.

Accordingly, it is

ORDERED that the defendant's motion to dismiss is GRANTED in its entirety**,** on the basis that this Court finds plaintiff failed to state a cause of action for defamation and the amended Anti-SLAPP statute compels dismissal of the complaint; and it is further

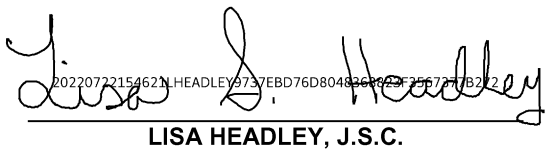
ORDERED that the within action is dismissed with prejudice against defendant The New York Times Company; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant The New York Times Company dismissing the instant matter against it, together with costs and disbursements taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that any requested relief sought not expressly addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, defendant shall serve a copy of this Decision/Order upon the plaintiff with notice of entry.

This constitutes the Decision and Order of the Court.



7/22/2022
DATE

LISA HEADLEY, 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