SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART** **34M**

Justice

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BRIAN CAHN

Plaintiff,

- v -

ELYSSA HIRMES CHAPLER,

Defendant.

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INDEX NO. 158746/2023

MOTION DATE 04/11/2024

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for JUDGMENT - DEFAULT.

On September 5, 2023, plaintiff Brian Cahn commenced this action by filing a Summons with Notice against defendant, his ex-wife, Elyssa Hirmes Chapler. (NYSCEF doc. no. 1, summons.) Therein, plaintiff provided notice of three separate statements she made that he alleges defamed him. (*Id*. at 2-3.) Plaintiff filed proof of service of the summons on September 12, 2023. (NYSCEF doc. no. 2, affidavit of service.) Thereafter, on October 17, 2023, he moved for a default judgment based on her failure to interpose an answer or otherwise appear. (NYSCEF doc. no. 3, notice of motion.) On November 29, 2023, approximately two months after her time to appear under CPLR 320 expired, defendant's *pro bono* counsel served a Demand for a Complaint (NYSCEF doc. no. 10, demand dated 11/29/23), which plaintiff rejected as untimely (NYSCEF doc. no. 11, notice of rejection). By Decision and Order dated February 27, 2024, the Court denied plaintiff's motion for default, holding that he had not established entitlement to said judgment due to his failure to articulate the law concerning defamation and defamation *per se*. (NYSCEF doc. no. 12, Decision and Order.)

In this motion sequence (Mot. Seq. 002), plaintiff now renews his motion for a default judgment against defendant pursuant to CPLR 3215. In response, defendant opposes the motion and cross moves to dismiss the action pursuant to CPLR 3012 (b), or alternatively, for an order under CPLR 3012 (d) compelling plaintiff to file a complaint in response to its demand 11/29/23. (NYSCEF doc. no. 20, notice of cross motion.)

As the Court explain in its previous Decision and Order, CPLR 3215 (f) requires the movant seeking a default judgment to submit the following proofs: (1) proof of service of the summons and complaint or summons with notice; (2) an affidavit of facts constituting the claim; and (3) an affidavit showing the default in answering or appearing. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action" (*Guzelli v City of New York*, 32 AD3d 234, 235 [1st Dept 2006].) In support of the motion, plaintiff contends that he has rectified his previously deficient motion by detailing how the

alleged statements defendant made constitute defamation and further evidencing the nature of the damages he suffered. The Court, however, remains unpersuaded that he is entitled to the default judgment he seeks.

As alluded to above, plaintiff's Summons with Notice identifies three allegedly defamatory statements that defendant communicated to her followers via her social media account. Nonetheless, while plaintiff submits an affidavit, he does not attest to any facts which might constitute his defamation claim—including any reference to the statements made—and no other forms of evidence, i.e., the social media posts themselves, have been proffered to substantiate the allegations that defendant made the purported statements. Rather, he merely alludes to "her false allegation" that "if perceived as true" will cause, or "have already[,] caused damage." (NYSCEF doc. no. 4 at ¶ 3-4, plaintiff's affidavit.) Further, since the Summons and Notice were attested to by plaintiff's counsel, it is also insufficient to establish the merits of the claim. (*See Joosten v Gale*, 129 AD2d 531, 535 [1st Dept 1987] ["plaintiff was not entitled to a default judgment since, as noted, an attorney's verification not made on personal knowledge cannot be used for purposes of obtaining a default judgment"] *3 DLJ Mortg. Cap., Inc. v United Gen. Title Ins. Co.*, 128 AD3d 760, 761 [2d Dept 2015]; *Mattera v Capric*, 54 A.D.3d 827, 828 [2d Dept 2008].)

Even were the Court to overlook this evidentiary issue, it cannot find that, on its face, the facts alleged in the Notice constitutes prima facie evidence of defamation. Each of the three statements concern defendant's belief that plaintiff, her ex-husband, had an extra-marital affair with his now partner while he was employed as a resident/fellow at Mt. Sinai Hospital. The alleged defamatory statements are reproduced below:

(1) "Evil acts always find a way to come to the light-including individuals who engage in evil to violate the code of medical ethics…And I'm not afraid to report them so that they lose their license to practice after the disgusting acts engaged in…in the presence of children;"
(2) "Jayme [plaintiff's now partner], who just got engaged during our wedding to her ex from high school (Brian Cahn) who she had an affair with while her father was on his deathbed while brian was working at the hospital and utilized this as an opportunity to pursue a married woman with 2 kids and a father dying of cancer (which I'm pretty is [sic] a major violation of the medical code of ethics);" and
(3) "said 'mother' [Jayme] was too busy in Italy with her boyfriend [plaintiff]—the one she destroyed her family for and has been with since she cheated on her husband with him." (*See* NYSCEF doc. no. 1 at 2.)

Plaintiff contends that the references to defendant violating a "code" of medical ethics constitutes defamation *per se* as it suggests improper performance of one's professional duties or conduct. Yet, as to (1), plaintiff has not identified a clear factual assertion that defendant leveled against him. Indeed, the references to "evil" and "disgusting acts" appear indefinite, ambiguous, and incapable of being objectively characterized as true or false. (*See Thomas H. v Paul B.*, 18 NY3d 580, 584 [2012] [finding that to constitute a statement of fact, the words must have a precise meaning, capable of being proven true or false, and whether they are likely to be understood by the listener to be opinion]; *Hollander v Cayton*, 145 AD 2d 605 [2d Dept 1988].) And as to (2), in sum and substance, it is clear from the context that this statement does not in

any material way concern a professional standard that plaintiff violated, hence the language pulling back from any definitive assertion. Rather, the focus is clearly on the alleged affair. In other words, from the surrounding context of the statement, the listener may not be likely to read defendant's assertion as actually impugning plaintiff's professional conduct. Alternatively, in the Summons and Notice, plaintiff asserts that defendant's reference to a marital affair constitutes *per se* defamation because it alleges that he and his partner committed the crime of adultery under New York Penal Law § 255.17. Yet he has not cited First Department precedent in which a court has granted a default judgment for defamation based a violation of this unenforced penal statute.

The Court recognizes four additional reasons for which a default judgment should not be entered: (1) the proffered excuse for defendants failure to appear appears reasonable —that this litigation arises in the context of two bitter divorce proceeding, that defendant's counsel attempted to resolve the issues raised herein as part of a global settlement, and that he, as asserted in his affidavit, believed there was an understanding with plaintiff's counsel that the settlement agreement would encompass this litigation (*see* NYSCEF doc. no. 26, Nottes affirmation); (2) defendant has advanced a meritorious defense, i.e., both she and her husband have submitted affirmations in which they assert the truth—that plaintiff was indeed having an affair—as a bar to recovery for defamation; (3) nowhere in plaintiff's moving papers or in reply did he affirmatively deny said allegation (*see* NYSCEF doc no. 4); and (4) there remains the strong public policy of resolving cases on their merits and plaintiff, given the two month delay, cannot show prejudice to their claim. To be sure, the Court is *not* holding that plaintiff's defamation causes of action have no merit, but rather, since by their nature defamation requires a fact intensive analysis and plaintiff has not raised statements that clearly fit within the category of defamation *per se*, it is merely holding that they are not entitled to a default judgment. Since plaintiff's motion is denied, defendant's cross motion for an order compelling him to serve a complaint as required by CPLR 3012 (d) is granted. Lastly, because plaintiff has yet to serve a complaint, defendant's motion to dismiss based upon CPLR 3211 (a) is premature and, thus, denied without prejudice.

Accordingly, for the foregoing reasons, it is hereby

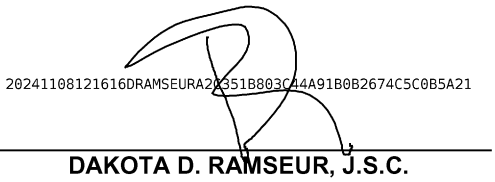
ORDERED that plaintiff Brian Cahn's motion for a default judgment under CPLR 3215 is denied; and it is further

ORDERED that the branch of defendant Elyssa Hirmes Chapler's cross motion under CPLR 3012 (d) is granted and defendant shall serve a complaint per defendant's demand dated November 29, 2023, in accordance with the CPLR within twenty (20) days of service of a notice of entry of this order; and it is further

ORDERED that the branch of defendant's motion seeking dismissal of the Summons with Notice is denied; and it is further

ORDERED that defendant shall serve a copy of this order, along with notice of entry, on plaintiff within ten (10) days of entry.

This constitutes the Decision and Order of the Court.



11/7/2024
DATE

DAKOTA D. RAMSEUR, J.S.C.

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