

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LISA S. HEADLEY PART 28M

Justice

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COMIC STRIP PROMOTIONS, INC.,

Plaintiff,

- v -

ENVIVO LLC, PLANCK, LLC, D/B/A PATCH MEDIA,
MICHAEL AQUILIA, NICK GARBER, JULIE MENIN

Defendant.

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INDEX NO. 150484/2022

MOTION DATE 03/02/2023

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 36, 37, 38, 39, 40, 41, 42, 43, 49, 50, 51, 53, 54, 55, 56, 57, 58, 73, 74, 76

were read on this motion to/for

DISMISSAL

Defendants, Planck, LLC d/b/a Patch Media and Nick Garber (“Patch Defendants”), filed this motion to dismiss the action, pursuant to *CPLR §3211(a)(7)*, for failure to state a cause of action. Plaintiff filed opposition and a cross-motion for sanctions. The Patch Defendants filed a reply.

The background of this action are described herein. On or about January 9, 2022, Plaintiff Comic Strip Promotions, Inc., (“Plaintiff”), a comedy club, published a social media post on Instagram, which contained hashtags related to the anti-vaccine mandate and Nuremberg. It has been alleged that Plaintiff’s post offended a Jewish community member because it suggested an equivalency between the vaccine mandate and the persecution of Jews during the Holocaust. Thereafter, New York City Councilmember Julie Menin (“Councilmember Menin”) wrote a letter to Plaintiff denouncing the post, and demanding the Plaintiff to make a public apology. On or about January 11, 2022, Defendant Planck LLC d/b/a Patch Media (“Patch”) published an article (“Patch article”), which discussed an investigation surrounding the Nazi Swastika symbols found on bills from an ATM. The Patch article discussed another occurrence of anti-Semitism in the area and the anti-vaccine social media post by the Plaintiff, which compared the city’s vaccine mandate to Nazi Germany.

Plaintiff commenced this action against defendants for, *inter alia*, defamation, defamation *per se*, and tort of trade libel and/or injurious falsehoods. It should be noted that the action against, Councilmember Menin has been dismissed pursuant to the Court’s Decision and Order dated October 31, 2022. (*See, NYSCEF Doc. No. 78*).

In support of the motion to dismiss, the Patch Defendants argue that 1) their article contained non-actionable opinion; 2) their reference to Councilmember Menin’s letter is subject to the fair report privilege; 3) the complaint fails to allege that the Patch Defendants acted in a grossly irresponsible manner; and 4) Plaintiff’s claims fail to state a cause of action. The Patch Defendants contend that their comments are constitutionally protected speech that cannot be considered defamatory as a matter of law because the characterization of a person as racist or

antisemitic are matters of opinion, and are not actionable. Additionally, the Patch Defendants contend that the Patch article's reference to Councilmember Menin's letter was fair and true, and they were reporting on the official statements of a government official, which provides them with absolute immunity for the statements. The Patch Defendants further contend the complaint does not allege that the Patch Defendants acted in a grossly irresponsible manner. Lastly, the Patch Defendants argue that they are entitled to attorney fees and cost under the ANTI-SLAPP statute because the Plaintiff failed to demonstrate that the Patch defendants acted with actual malice in publishing the Patch article, and the Plaintiff's claims fail to state a cause of action.

Plaintiff filed opposition to the motion to dismiss, and a cross-motion for sanctions. It should be noted that during oral argument, as it pertains to the arguments that the attorney for Patch Defendants does not reside or maintain an office in New York and therefore the opposition should not be considered and there should be imposition of sanctions, are moot. Defendant's counsel filed opposition indicating that they have remediated the situation and now there is co-counsel on this case, who appeared before the Court, and maintains an office in New York.

Plaintiff further argues that the Patch Defendants published a defamatory article which compared Plaintiff's hashtags to the swastika found on money, in an unrelated incident, implying Plaintiff is racist or antisemitic. Plaintiff contends Defendant Patch's statement were factual, however grossly inaccurate since persons reading the Patch article would associate Plaintiff with Nazi imagery. In addition, Plaintiff argues that this action cannot be dismissed because the Patch Defendants acted in a grossly irresponsible manner by publishing mixed opinions. Lastly, Plaintiff argues that the Patch Defendants amended affirmation should be rejected because it was filed without permission or leave of the court.

In reply, Patch Defendants contend the article contains opinion which does not constitute defamation because the article is of "pure opinion and not mixed opinion." They also contend that the Plaintiff failed to provide support for rejecting the amended affirmation, thus the court should consider all arguments raised.

On a motion brought under *CPLR* §3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the complaint as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

"Defamation is '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.'" *Stepanov v. Dow Jones & Co., Inc.*, 120 A.D.3d 28, 34 (1st Dep't 2014). The two forms of defamation are libel and slander, with the latter described as "defamatory matter addressed to the ear." *Ava v. NYP Holdings, Inc.*, 64 A.D.3d 407, 411 (1st Dep't 2009), *lv denied* 14 N.Y.3d 702 (2010). Since only facts can be proven false, statements purporting to assert facts about the plaintiff are the proper subject of a defamation claim. *Davis v. Boehmeim*, 24 N.Y.3d 262, 268 (2014). The plaintiff must also plead special damages unless the allegedly defamatory statement falls into one of the following four *per se* exceptions: "(i) charging 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." *Lieberman v. Gelstein*, 80 N.Y.2d 429, 435 (1992). Otherwise, the plaintiff must plead the "the loss of something having economic or pecuniary value ... [that] flow[s] directly from the injury to reputation caused by the defamation and not from the effects of the defamation." *Franklin v. Daily Holdings, Inc.*, 135 A.D.3d 87, 93 (1st Dep't 2015) [internal quotation marks and citation omitted]. Thus, to state a claim for defamation, the plaintiff

must prove: “(1) a false statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm, unless the statement is one of the types of publications actionable regardless of harm.” *Stepanov v. Dow Jones & Co., Inc.*, *supra* at 34.

This Court after carefully reviewing the Patch Defendant’s motion and supporting documents, as well as the Plaintiff’s opposition, cross-motion, and supporting documents, hereby finds that the Plaintiff’s complaint must be dismissed for failure to state a cause of action. In determining whether a particular communication is actionable, a distinction is recognized between a statement of opinion that implies an undisclosed factual basis, and an opinion that is accompanied by the recitation of facts on which it is based. *Comic Strip Promotions, Inc. v. Envivo LLC*, 176 N.Y.S.3d 764 (N.Y. Sup. Ct. 2022). Here, this court finds that the Patch Defendants publication was an opinion that referenced Councilmember Menin’s letter, and was based upon the social media post made by Plaintiff. Thus, there is no factual support that such publication was a false statement.

Lastly, the motion by plaintiff and defendants for an award of attorney fees and the imposition of sanctions for frivolous motion practice is denied in the exercise of the court’s discretion. The court has considered all the parties' contentions.

Accordingly, it is hereby

ORDERED that the Patch Defendants’ motion to dismiss the complaint, pursuant to *CPLR* §3211(a)(7), is **GRANTED**; and it is further

ORDERED that the action is **DISMISSED** against Defendants Planck, LLC d/b/a Patch Media and Nick Garber’s; and it is further

ORDERED that the defendants’ motion for attorneys’ fees and/or sanctions is **DENIED**; and it is further

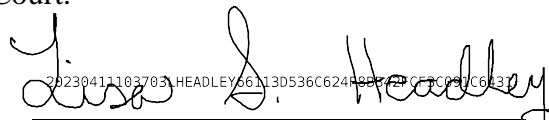
ORDERED that Plaintiff’s cross-motion for sanctions is **DENIED** in the court’s discretion; and it is further

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, movant-defendants shall serve a copy of this decision/order upon all parties with notice of entry.

This Constitutes the Decision and Order of the Court.

4/11/2023
DATE


LISA S. HEADLEY, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE