

Leser v Penido

2013 NY Slip Op 30352(U)

February 21, 2013

Supreme Court, New York County

Docket Number: 104005/2007

Judge: Paul G. Feinman

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

PRESENT: **HON. PAUL G. FEINMAN.**

PART 12

Index Number : 104005/2007

LESER, JEAN WALTON

vs

LUZ PENIDO

Sequence Number : 007

SUMMARY JUDGMENT

INDEX NO. 104005/2007B

MOTION DATE _____

MOTION SEQ. NO. 007

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION AND CROSS MOTION(S) ARE DECIDED
IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.**

Remand to MED - J

Dated: 9/28/10

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X

JEAN WALTON LESER d/b/a The Luxury Portal a/k/a
amamxr,

Plaintiff,

Index No. 104005/2007E
Mot. Seq. No. 007

DECISION and ORDER

- against -

CHRISTOPHER PENIDO a/k/a Karenkooper a/k/a
Karen@Karenkooper.com, and LUZ PENIDO a/k/a
karenkooper,

Defendants.

-----X

Appearances: For Plaintiff:
Victoria M. Brown, Esq.
324 West 83rd Street, Suite 4S
New York, NY 10024

For Defendants:
Richard A. Altman, Esq.
285 West 4th Street
New York, NY 10014

Papers considered in review of this motion and cross motion:

Papers	E-Filing Document Number
Notice of motion	55
Corrected notice of motion	63
Proposed order	56
Affirmation in support and exhibits	57
Todd Leser affidavit	58
Memo of law in support and exhibit	59-60
Jean Leser affidavit and exhibit	61
Notice of cross motion	74
Defendants' affirmation and exhibits	65
Christopher Penido affidavit	66
Luz Penido affidavit	67
Jean Leser reply affidavit and exhibits	68
Plaintiff's reply affirmation and amendment and exhibits	69, 71
Plaintiff's reply memo of law	70
Defendants' reply affirmation and exhibit	75
Plaintiffs' affirmation in opposition and exhibit	77
Transcript of proceedings	78, 79

PAUL G. FEINMAN, J.:

Plaintiff moves for summary judgment as against defendant Christopher Penido on the cause of action for libel per se. Defendants cross-move for summary judgment seeking to dismiss the complaint. For the reasons below, the motion is granted; the cross motion is denied.

Background

Plaintiff sells luxury handbags and accessories via the internet (Doc. 60 ¶ 7).¹ She used to conduct business under the trade name “amamxr” using various forums such as Ebay. Her trade name apparently reached a level of distinction within the industry as demonstrated by her appointment “as a moderator in the Louis Vuitton Forum, on the luxury handbag website known as The Purse Forum” on February 21, 2007 (Doc. 60 ¶¶ 10-15). She claims that within days of this appointment, defendant Christopher Penido, an industry competitor d/b/a karenkooper.com, sought to disparage her reputation “by putting her photo and home address on pornographic websites and posting under her name “AMAMXR” and her real name, [and] sexual solicitations” (Doc. 60 ¶ 16).

Mr. Penido admits to creating a blog bearing plaintiff’s name, jeanwalton.blogspot.com (Doc. 57-2), upon which, plaintiff alleges, he posted plaintiff’s name, photo, home address and telephone number. Plaintiff’s photo and information was surrounded by multiple pornographic and sexually explicit pictures, animations, textual postings, and links to pornographic websites all of which are too graphic to detail. On a prior appeal, the Appellate Division has found that these “pornographic pictures and statements linked to plaintiff’s name and photograph on various websites ‘allegedly falsely imply[] that [s]he is sexually lustful and promiscuous’” such that a cause of action for libel per se was stated (*Leser v Penido*, 62 AD3d 510, 510-511 [1st Dept 2009]). The blog was also linked to various business forums (Doc. 60 ¶¶ 53-57), and accordingly, plaintiff commenced this action for libel per se against Christopher Penido (Mr.

¹ Unless otherwise indicated, all references are to the E-filing document numbers.

Penido) and Luz Penido (Ms. Penido), his mother, with whom he allegedly resides and shares internet access.

Analysis

As an initial matter plaintiff points out that defendants' cross motion and opposition to her motion for summary judgment were untimely. Plaintiff is correct that the court cannot consider defendants' cross motion, answering affidavits, nor supporting papers because they were not timely filed under CPLR 2214 (Doc. 65; Doc. 66; Doc. 67) (*see* L 2007, ch. 185, § 1). A notice of motion that is served at least 16 days before the return day may demand that "[a]nswering affidavits and any notice of cross-motion, with supporting papers, if any, shall be served at least [7] days before" that return day (CPLR 2214 [b]).

Here, plaintiff served and filed a corrected notice of motion on January 21, 2010, designated March 5, 2010 as the return day, and made the pertinent CPLR 2214 (b) demand (Doc. 63). Hence, defendants were required to serve a cross motion, if at all, by February 26, 2010, but the amended notice of cross motion was not served until March 5, 2010 (Doc. 74). "While a court can in its discretion accept late papers, CPLR 2214 and 2004 mandate that the delinquent party offer a valid excuse for the delay" (*Associates First Capital v Crabill*, 51 AD3d 1186, 1187 [3d Dept 2008]). No excuse, let alone a valid one, has been offered here. Thus, defendants' cross motion must be denied (*see Mallards Dairy, LLC v E&M Engrs. & Surveyors, P.C.*, 71 AD3d 1415, 1416 [4th Dept 2010]).

Plaintiff moves for summary judgment as against defendant Christopher Penido on two grounds – he impugned her business and he impugned her chastity by creating a blog bearing her name, posting links to pornographic web sites onto the blog, and posting images and words onto

the blog which were sexually lustful and implied that she was promiscuous. On a motion for summary judgment, the movant bears the initial burden of establishing entitlement to judgment as a matter of law by demonstrating the absence of material questions of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). After this prima facie showing is made, the burden of raising a material question of fact shifts to the opponent and evidence is viewed in a light most favorable to that party (*see Torkel v NYU Hosps. Ctr.*, 63 AD3d 587, 592 [1st Dept 2009]; *Brown v Muniz*, 61 AD3d 526, 531 [1st Dept 2009]). The court's role at this juncture is to find, rather than determine, issues (*see Powell v HIS Contrs., Inc.*, 75 AD3d 463, 465 [1st Dept 2010]).

Defamation is "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" (*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]). Defamation is comprised of slander, defamatory speech, and libel, defamatory writing "which tends to expose the plaintiff to public hatred, contempt, ridicule or disgrace" (PJI 3:23; *see Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 379 [1977]). Unlike slander, damages are presumed to flow from libelous statements (*see Ostrowe v Lee*, 256 NY 36, 39 [1931, Cardozo, Ch. J.] ["What gives the sting to the writing is its permanence of form"]).

Plaintiff supports her motion with an abundance of evidence. At Mr. Penido's deposition, he testified that he created jeanwalton.blogspot.com and that he was the only person

who knew the password to access it (Doc. 57-2, at 97-08).² Plaintiff connects the blog with IP address 68.237.193.234 by pointing to the Subscription Information Report for the blog which reflects that this was the blog's Signup IP Address (Doc. 57-5). Then, plaintiff connects IP address 68.237.193.234 with Karen Kooper, which she claims is Christopher Penido's alias for industry purposes. To do so, she provides the MySpace.com Subscription Information Report and IP Activity Report for "karenkooper" (having an email address of karen@karenkooper.com) which indicates multiple logins into that account from IP addresses 82.66.93.103 and 68.237.193.234 (Doc. 57-5). She then offers the Internet Header of an email sent by Karen Kooper (having an email address of karen@karenkooper.com) from IP address 82.66.93.103 (Doc. 68-2). These items tend to prove that the person who sent emails from karen@karenkooper.com regularly used IP addresses 82.66.93.103 and 68.237.193.234.

Plaintiff then connects defendant Christopher Penido and the blog with Karen Kooper by providing a receipt from a purchase made via the karenkooper.com website which lists "646-894-3826" as the customer service telephone number (Doc. 68-3, at 1). Then she submits documentary evidence that AT&T Wireless Services, Inc. assigned this telephone number to "Christopher Penido 9036 149TH ST APT 5J JAMAICA, NY 11435" (Doc. 68-3, at 2). The connection between the blog, Christopher, and Karen Kooper is further corroborated by the

² Defendants concede that plaintiff has proven that Mr. Penido created the blog bearing plaintiff's name (Doc. 75 ¶ 6) but argue that because he had not yet signed and returned the transcript of the deposition plaintiff "may not properly quote from it" (Doc. 75 ¶ 8). This contention is without merit because defendants admit to having received the transcript at the conference on January 20, 2010 and CPLR 3116 (a) provides that "[i]f the witness fails to sign and return the deposition within [60] days, it may be used as fully as though signed." Additionally, plaintiff submits documentary evidence showing that Fed Ex Express delivered the transcript to defendants' counsel's office on August 19, 2009 (Doc. 71-1).

blog's IP Activity Report which shows that multiple logins occurred from IP address 82.66.93.103 (Doc. 57-5). The postings on the blog and the multiple links and postings on various web sites are, on their face, libelous and clearly impugn plaintiff's chastity and trade on numerous industry forums (*see Ava v NYP Holdings, Inc.*, 64 AD3d 407, 415-416 [1st Dept 2009]). Plaintiff has sufficiently demonstrated the Christopher Penido is responsible for this and has thus met her prima facie burden.

This court need not consider whether defendants have raised a triable issue of fact given the untimeliness of defendants' submissions. Nevertheless, the court notes that were it to consider the defendants' opposition, it would be unpersuasive. They argue that plaintiff's motion must be denied because she fails to demonstrate that either defendant was responsible for any of the postings (Doc. 65 ¶¶ 6, 19; Doc. 75 ¶ 4). They offer self-serving affidavits which state that "most of the blog postings were made from an internet protocol ("IP") address originating in France" (Doc. 64 ¶ 8 [emphasis added]) and state that they were never in France during any of the times when the postings were made (Doc. 57-5). This is unpersuasive for several reasons. First, they constitute self-serving general denials which do not rebut plaintiff's numerous and specific allegations (*see Maines Paper & Food Serv. v Restaurant Mgt. by D.C. Corp.*, 229 AD2d 748, 750 [3d Dept 1996]). Second, assuming the affidavits could be considered, the averment that "most of the blog postings were made from an internet protocol ("IP") address originating in France" is patently deficient inasmuch as it does not speak to the remainder of the blog postings thus failing to even feign the existence of an issue of fact (Doc. 64 ¶ 8 [emphasis added]) (*see Kiss Constr. NY, Inc. v Rutgers Cas. Ins. Co.*, 61 AD3d 412, 424 [1st Dept 2009]). Third, it is a "matter of common and general knowledge" that IP addresses can be easily hidden

and rerouted through foreign servers for the purpose of eliminating traces (Prince, Richardson on Evidence § 2-201 [Farrell 11th ed]; see *TOA Constr. Co., Inc. v Tsitsires*, 54 AD3d 109, 115 [1st Dept 2008]). Notably, Christopher Penido is the “network security analyst at New York University” and as such, his familiarity, indeed his expertise, with such services is readily inferred (Doc. 15 ¶ 1).

Also unavailing is defendants’ claim that “[i]t is well-known that, while anyone can create a website, it is equally the case that anyone else can post anything on that website, not just the original creator” (Doc. 65 ¶ 10). This is neither self-evident nor accurate. Further, it is belied by Christopher Peindo’s own admission that he was the only person with the password to the blog (Doc. 57-2).

The record shows that plaintiff has established entitlement to summary judgment on the issue of liability for libel per se as against defendant Christopher Penido. The only triable issues of fact relate to the amount of damages and punitive damages to which plaintiff is entitled.

Accordingly, it is

ORDERED that plaintiff’s motion for summary judgment is granted only to the extent that defendant Christopher Penido is found liable to plaintiff on the cause of action for libel per se and the issue of the amount of any judgment to be entered thereon shall be determined at the trial herein; and it is further

ORDERED that the action shall continue as against defendant Luz Penido; and it is further

ORDERED that defendants’ cross motion is denied in its entirety as untimely filed; and it is further

ORDERED that the plaintiff shall serve a copy of this order upon the Trial Support Office which shall restore this matter to the Mediation I calendar. The parties are reminded that failure to appear at mediation can result in an appropriate order being entered pursuant to 22 NYCRR 202.27.

This constitutes the decision and order of the court.

Dated: September 25, 2010
New York, New York



J.S.C.

(104005_2007_007_gms(SJ_Libel per se).wpd)