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STATE E-DISCOVERY

Recent Decisions Tackle Electronic Defamation

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Blogs and personal Web pages, such as on MySpace and Facebook, provide a broad stage to spread potentially defamatory statements. Thus, care must be taken when posting content on social media. Postings can take just seconds to compose and frequently little thought is given to what is being stated and its consequences, especially where such communication may reach an audience of millions, virtually instantaneously.[1]

Addressing the now prevalent claim of Internet or electronic defamation, the recent cases discussed below describe how New York state courts are analyzing such cause of action, and the defenses available to it.

Opinion Versus Fact

In *Greenky v. Toussaint*,[2] the court denied in part a motion to dismiss a defamation claim that was predicated on statements contained on a blog. There, a manager sued a former model and actress alleging that defendant's words defamed him in his business, and contended that the online context of defendant's speech did not shield her from liability for defamation. The court set out the following standard for reviewing such alleged defamatory statements:

> 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. The determination of whether a statement expresses fact or opinion is a question of law for the court, to be resolved on the basis of what the average person hearing or reading the communication would take it to mean. The Court of Appeals generally analyzes the following factors to distinguish fact from opinion: (1) whether the specific language at issue has a precise meaning which is readily understood, (2) whether the statements are capable of being proven true or false, and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal…readers or listeners that what is being read or heard is likely to be opinion, and not fact.

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The court further noted that "statements of opinion not based in fact that criticize the job performance of a plaintiff are statements of opinion, which are not actionable."[3]

Applying the above principles, the court analyzed each posting to determine whether they were or were not protected opinion. The court held, as constitutionally protected opinion, such words and phrases as "leech," "sleazy male worm," "a showbiz reject," "parasite," "a loose cannon," "pathological," "lazy" and "unethical and sleazy."

However, statements that were based on allegations of fact, including that plaintiff "kept [defendant's] name and likeness on his website during the peak of the Departed and blocked work from [defendant]," that "[plaintiff] lied to many people taking credit when he brought nothing to the table" and "used [defendant's] name…to lure people to the business" were factual, and thus provided a predicate for plaintiff's defamation cause of action.

Communications Decency Act

In *Shiamili v. Real Estate Group of NY Inc.*,[4] plaintiff asserted a claim of defamation against defendants TREGNY, a real estate company, its chief operating officer and its administrator and moderator of its Web site. Plaintiff was the principal of a real estate company that competed with TREGNY.

The complaint alleged that defendants' site contained statements that plaintiff mistreated employees, including that he "screws the agents over on commissions," that his company "can't retain anyone," that he was "unable to pay his bills," and further accused him of anti-Semitism and racism as well as spousal abuse and adultery.

The court found that the disclaimer that "[u]se of this site explicitly acknowledges the users understanding and consent that [the site] is a satire and comedic website and not a source of news," as not a "conclusive" defense.

While the court agreed that many of the posts and comments could be viewed by a reasonable reader as "inane or juvenile invective couched in vulgar language," the "tastelessness" and "puerility" of the statements did not insulate them from review under the law of defamation.

The court found that the statements involving plaintiff's conduct relative to his company and treatment of his employees are statements which

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"tend to injure [plaintiff] in his trade or business," and that the statements that he discriminated against specific employees based upon race or anti-Semetic bias "signal to a reasonable reader that assertions of fact and not merely opinion were being conveyed." The statements concerning plaintiff's alleged spousal abuse and adultery were also held to be actionable.

Defendants argued that because defendant's administrator only "published" the statements and that none of the defendants authored them, the statements were protected under the Communications Decency Act (CDA), 47 U.S.C. §230.

Under the CDA,[5] "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider" [§230 (c)(1)].

The court, however, did not rule on this argument, holding instead that "information as to defendants' role, if any, in authoring or developing the content of the site is exclusively within [defendants'] possession" and, as such, defendants' motion should be denied as "premature."

On appeal, the Appellate Division, First Department, reversed, and granted defendants' motion to dismiss on the basis that the action is barred by the CDA. With respect to the CDA, the court held that:

> [t]he immunity provided by the CDA applies only where the information that forms the basis of the state law claim has been provided "by another information content provider" (47 USC §230[c][1]). "Internet content provider" is defined in the statute as "any person or entity that is responsible, in whole or part, for the creation or development of information provided through the Internet or any other interactive computer service" (§230[f][3]). Accordingly, an interactive computer service provider remains liable for its own speech or for its material contribution to the content of a third party's statement. However, the "development of information"… means something more substantial than simply editing portions of an e-mail and selecting material for publication.[6]

In applying the facts to the law, the First Department critically held:

> The complaint makes no allegation that defendants authored any defamatory statements. It merely alleges that defendants "choose and administer content" that appears on the Web site. This is precisely the kind of function that the CDA immunizes. Even accepting as true all of plaintiff's allegations and giving it the benefit of all favorable inferences, the complaint does not raise an inference that defendants were "information content providers" within the meaning of the CDA. Plaintiff argues that defendants engaged in a calculated effort to encourage, keep and promote "bad" content on the Web site. However, message board postings do not cease to be data "provided by another information content provider" merely because "the construct and operation" of the Web site might have some influence on the content of the postings. Where, as here, there is no allegation that defendants authored the defamatory statements, it is not appropriate to permit discovery to determine if a cause of action exists.[7]

Jurisdiction

In *Aintabi v. Horn*,[8] plaintiffs who resided in New York sued a New Jersey resident for defamation. The defendant contended that jurisdiction did not properly lie in New York, as he had not transacted business in New York.

Plaintiffs argued that the Web site of defendant's current company described him as having been the senior managing director of plaintiff, a New York company.

> The Communications Decency Act provides a broad defense, under certain circumstances, where the accused 'defamer' did not author the words, but only posted them on a Web site.

The court did not address plaintiff's contention that defendant's site supported a finding of jurisdiction in New York. Instead, it focused on a more traditional means of addressing whether there was jurisdiction and held no jurisdiction to exist, where

> the allegedly defamatory statement was neither made in the product of transactions in which defendant engaged in New York, nor is it directly about any such transactions. Indeed, the offending statement could have been made even had defendant not engaged in any transactions in New York. Plaintiff has not adduced, and this court is not aware of any case that holds that a non-domiciliary defamation defendant is subject to the long-arm jurisdiction of the state, pursuant to CPLR 302(a)(1), where the alleged transactions in New York are not necessarily the but-for basis of other alleged defamatory statement.

Conclusion

When posting materials online, one's words must be chosen carefully, where, as similar to statements contained in books or newspapers, they may provide liability under the law of defamation.

The issue of whether a statement is one of "opinion" or "fact," however, is in the eye of the beholder, so that a defense predicated on a statement constituting mere "opinion" may not result in a dismissal of a defamation claim as a matter of law or fact.

Further, as noted above, the Communications Decency Act provides a broad defense, under certain circumstances, where the accused "defamer" did not author the words, but only posted them on a Web site.

1. Courts grant pre-action applications, pursuant to CPLR §3102(c), that seek to uncover the identity of alleged authors of defamatory statements made on blogs or personal Web pages. See, e.g., *Cohen v. Google*, 25 Misc. 3d 945, 887 N.Y.S.2d 424 (Sup. Ct. NY Co, 2009).

2. Index No. 603184/2007 (Sup. Ct. N.Y. Co, Jan. 22, 2010).

3. Id. (citing *Aronson v. Wiersma*, 65 N.Y.2d 592, 593-94, 493 N.Y.S.2d 1006, 1008 ("holding that statements that defendant is 'neglectful of her job' and 'not doing her job' are general reflection upon plaintiff's character [and]… does not defame plaintiff in her trade or profession"), as well as other New York State court decisions.

4. Index No. 600460/08 (Sup. Ct. N.Y. Co, Jan. 2, 2009), rev'd, 68 A.D.3d 581, 892 N.Y.S.2d 52 (1st Dep't 2009).

5. See M. Berman, State Courts and the Federal Computer Fraud and Abuse Act, July 28, 2009 NYLJ, 5, Vol. 242, col. 1.

6. 68 A.D.3d at 582-83, 892 N.Y.S.2d at 54 (citations omitted).

7. 68 A.D.3d at 583, 892 N.Y.S.2d at 54-55 (citations omitted).

8. Index No. 108363/09 (Sup. Ct. N.Y. Co., Dec. 2, 2009).

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