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1. *Decisions Give Glimmer of Hope to Internet Defamation Plaintiffs*

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Decisions Give Glimmer of Hope to Internet Defamation Plaintiffs

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Body

'DECEIVER, CUNNING, CONNIVING, SCHEMER, SWINDLER," "Con artists, scammers, storm chasers, rip off employees, will take all your money too."

The foregoing illustrates the derogatory comments regarding professionals and business owners that permeate consumer review websites, blogs, and chat forums across the ***Internet***. And ***given*** that each year more and more consumers regularly rely on customer review websites such as Yelp, Angie's List, and even Facebook in ***deciding*** whether to hire a particular business or individual, many professionals and business owners are-and should be-committed to both maintaining a positive presence on the ***Internet*** and protecting their goodwill and reputation against ***Internet*** postings they perceive as defamatory. Yet, seeking redress in connection with defamatory ***Internet*** speech-whether in the form of an order directing its retraction or an award of damages or both-often necessitates judicial intervention and a substantial financial investment.

Of course, to obtain judicial relief from an allegedly defamatory statement made on the ***Internet*** (as with any other allegedly defamatory statement), the ***plaintiff*** must establish that the challenged statement is "actionable." Amongst several other factors, an actionable statement is one of fact or "mixed opinion" as opposed to "pure opinion."[1] Unfortunately for corporate and business ***plaintiffs***, when distinguishing between actionable expressions of fact or mixed opinion and non-actionable statements of pure opinion in the context of ***Internet defamation*** claims, two of New York's appellate courts have adopted the perhaps antiquated notion that "readers ***give*** less credence to allegedly defamatory ***Internet*** communications than they would to statements made in other milieus."[2] Notably, this standard with which ***Internet defamation plaintiffs*** must contend emanates from a 2002 law review note.[3] Based on this standard, when faced with the difficult task of "distinguishing between assertions of fact and non-actionable expressions of opinion,"[4] courts appear slightly more apt to find potentially defamatory ***Internet*** postings to be "pure opinion" ***given*** the "broader framework in which they appear."[5]

But providing a ***glimmer of hope*** to potential ***Internet defamation plaintiffs*** are three recently ***decided*** lower court cases that seem, either expressly or implicitly, to follow dicta of the First Department observing that, regardless of whether readers afford less credence to ***Internet*** postings, such an "observation is in no way intended to immunize emails the focus and purpose of which are to disseminate injurious falsehoods about their subjects."[6]

Fact, Mixed Opinion, or Pure Opinion

The elements of a claim for ***defamation*** in New York have generally been stated as "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."[7] Unlike expressions of opinion which are non-actionable, only factual statements "capable of being proven false" will form the basis of a ***defamation*** suit.[8]

Accordingly, New York courts consider the following factors in attempting to distinguish between assertions of fact or "mixed opinion" from non-actionable expressions of pure opinion: "(1) whether the specific language in 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 [to] readers or listeners that what is being read or heard is likely to be opinion, not fact."[9] Courts have paid particular attention to the context of the communication in the ***Internet*** ***defamation*** arena in order "to determine whether the reasonable reader would have believed that the challenged statements were conveying facts."[10]

'Sandals'

Since 2011 the First Department case of Sandals Resorts International Limited v. Google[11] has been cited and generally accepted by other New York courts as articulating the proper legal analysis for determining in a ***defamation*** lawsuit whether speech on the ***Internet*** constitutes actionable fact or mixed opinion or non-actionable expression of pure opinion.

In Sandals, the First Department affirmed the New York County Supreme Court's dismissal of a petition for pre-action disclosure in an ***Internet*** ***defamation*** case, finding the corporate operator of multiple Sandals resorts in Jamaica had failed to establish an actionable claim of ***defamation***. The claim was based on a published email accusing Sandals of discriminatory hiring practices with regard to its employment of only foreigners for senior management positions and native Jamaicans for only menial jobs at its resorts. The court in Sandals explained that a meritorious cause of action was not stated because the allegedly defamatory email constituted constitutionally protected opinion.

In analyzing whether the challenged email in Sandals was a non-actionable expression of opinion or a factual statement, the First Department relied primarily on the "broader social context into which the [email] fits," noting: "The culture of ***Internet*** communications, as distinct from that of print media such as newspapers and magazines, has been characterized as encouraging a free-wheeling, anything-goes writing style."[12] In this regard, the court in Sandals heeded the suggestion of a 2002 law review note which observed:

It is ... imperative that courts learn to view libel allegations within the unique context of the ***Internet***. In determining whether a ***plaintiff***'s complaint includes a published "false and defamatory statement concerning another," commentators have argued that the defamatory import of the communication must be viewed in light of the fact that bulletin boards and chat rooms "are often the repository of a wide range of casual, emotive, and imprecise speech," and that the online "recipients of [offensive] statements do not necessarily attribute the same level of credence to the statements [that] they would accord to statements made in other contexts."[13]

Nevertheless, the First Department did note that "[t]his observation is in no way intended to immunize emails the focus and purpose of which are to disseminate injurious falsehoods about their subjects"[14]-therefore signaling that it was not under any circumstances establishing a blanket rule that ***Internet*** postings are per se non-actionable statements of pure opinion.

Second Department's Adoption of 'Sandals'

In 2012, the Second Department endorsed the principles set forth in Sandals, including that "readers ***give*** less credence to the allegedly defamatory ***Internet*** communications than they would to statements made in other milieus."

Specifically, in LeBlanc v. Skinner,[15] the ***plaintiff***, a political opponent of defendants, alleged, inter alia, that statements posted by defendants on a website administered by the local newspaper were defamatory inasmuch as

they accused the ***plaintiff*** of being a terrorist and, either expressly or impliedly, of being responsible for dumping a severed horse head into the swimming pool at a residence belonging to a member of the local Town Board.

The Second Department deemed the accusation "Dave LeBlanc is a terrorist" as non-actionable inasmuch as it was likely to be perceived as "'rhetorical hyperbole, a vigorous epithet." The court, consistent with the First Department's ***decision*** in Sandals, indicated that its conclusion was "especially apt in the digital age," where readers afford less credence to ***Internet*** postings than remarks in other contexts.[16] Nevertheless, the Second Department held the allegation "that the ***plaintiff*** put a severed horse head in a Town Board member's swimming pool," to be defamatory per se.

So while under Sandals and LeBlanc ***plaintiffs*** currently face increased difficulty in establishing that an online posting that could be construed either as a statement of fact or opinion is actionable, LeBlanc also demonstrates that an unambiguously factual and harmful allegation will be deemed an actionable statement of fact or mixed opinion despite its appearance on an ***Internet*** chat forum.

Is the Standard Appropriate?

It is true that the ***Internet*** presents a unique context within which courts must evaluate potentially defamatory content. But it is uncertain whether the notion-adopted by the First and Second Departments-that readers ***give*** less credence to allegedly defamatory remarks published on the ***Internet*** holds true today. In this regard, a 2014 Local Consumer Review Survey concluded:

· 88 percent of consumers have read ***Internet*** reviews to determine the quality of a local business (up from 71 percent in 2011); and

· 72 percent of consumers say that positive ***Internet*** reviews make them trust a local business more (up from 55 percent in 2011).[17]

Yet, courts which have found a challenged ***Internet*** posting to constitute non-actionable opinion almost universally cite one or both of Sandals or LeBlanc, thus affording ***Internet defamation*** defendants a thin, yet surmountable, layer of insulation which may not be justified based upon the current reality of ***Internet*** usage.[18]

Cases Finding in Favor of ***Plaintiffs***

Despite the emerging trend to treat ***Internet*** statements as non-actionable opinion where they do not constitute unambiguously clear statements of fact designed to disseminate injurious falsehoods about their subjects,[19] on three separate occasions over the past three months, three different lower courts have found, either in whole or in part, the challenged ***Internet*** postings with which they were presented to constitute actionable statements of fact or mixed opinion. These ***decisions***, discussed below, seem to align themselves with empirical data reflecting the reliance of consumers on ***Internet*** reviews published on webpages, blogs, and chat forums.

For example, in Torati v. Hodak, the court denied, in large part, defendant's motion to dismiss the complaint. There, the alleged defamatory statements were posted on the prominent consumer websites "ripoffreport.com" and Yelp.[20] The challenged remarks, which were directed at both the ***plaintiff*** and his companies, included that the ***plaintiff*** "is an incompetent and dishonest person. He defrauded me out of 15K and has a trail of people to which he has bounced checks (including me) and caused harm."
In support of his motion to dismiss the complaint, the defendant averred, inter alia, that the statements constituted protected opinion. In rejecting that contention, the court noted the challenged statements were 'mixed opinion,' or opinion based on undisclosed facts." In so holding, the court pertinently stated "[i]t is true that the postings appeared on a consumer review website; however, the postings cannot be considered pure opinion" because, inter alia, "Defendant does not disclose certain facts about Torati in his postings" upon which his alleged opinions were based, such as "the nature of their relationship: that they established a limited liability company together that did not accomplish the goals they set out to accomplish."[21]

Another encouraging case for ***Internet defamation plaintiffs*** is Technovate v. Fanelli.[22] In that case, in which the ***plaintiffs*** were a national wood floor finishing franchise and the owner of the local franchise, respectively, the

challenged statements were posted on Yelp and silive.com (a local Staten Island website). After a trial, the court held the following statements not only constituted "mixed opinion" and were hence actionable, but that they were defamatory per se:

· "do not use mr sand less of staten island matt is the name he will destroy you [sic] floor he is a liar and a con artist beware."[23]

· "This guy mat the owner is a scam do not use him you will regret doing business with his company I'm going to court he is a scam ... he is nothing by [sic] a liar he robs customers and promises you everything if you want shit then go with him if you like nice work find another he is A SCAM LIAR BULLSHITTER."[24]

In reaching its conclusion, the court highlighted that "[t]he courts have been struggling with the application of the traditional analysis of ***defamation*** to the ***Internet***." It proceeded to cite Sandals and another lower court case in which the court found no liability on behalf of a defendant who wrote that another person was "'immoral' and 'unethical' (citations omitted) and for 'lying, deceiving [and] making false promises.'"[25]

Nevertheless, the court found the foregoing postings constituted "mixed opinion," inasmuch as they lacked any "specifics" to support the defendant's allegations. And the court went even further, declaring that "[t]erms such as 'scam' 'con artist' and 'robs' imply actions approaching criminal wrongdoing rather than someone who failed to live up to the terms of a contract." The court also commented that the statements "were personal in their invective and were designed to impugn [***plaintiff***'s] integrity and business practices with the intent to damage his business reputation"[26]-harking back to Sandals' proviso.[27]

Finally, in Sachs v. Matano, the court granted the extraordinary relief of mandating the ***plaintiff*** in a medical malpractice action to take down the URL "*www.matano.kill.com*" and enjoining the ***plaintiff*** from posting defamatory statements on any other website.[28] There, the ***plaintiff*** on his self-created website by which he sought to recruit other patients for a class action malpractice suit against the defendant compared the maligned defendant "to the notorious nazi doctor, Joseph Mengele and asserts that he is anti-semitic." The ***plaintiff*** also wrote, "Beware, he is stubborn, act [sic] like a mule, and will discriminate against you if you are not Italian with a Mercedes Benz."[29]

Conspicuously, in its ***decision*** the court did not once cite Sandals or LeBlanc, even though it appears the challenged statement "Beware, he is stubborn, act [sic] like a mule, and will discriminate against you if you are not Italian with a Mercedes Benz" easily could have been deemed "'rhetorical hyperbole, a vigorous epithet," a conclusion "especially apt in the digital age where readers afford less credence to ***Internet*** postings than remarks in other contexts."[30]

Instead, the court recognized that "[t]he tone of ***plaintiff***'s statements, and the statements themselves, are nothing more than an attack on the defendants designed to injure their reputation and business"[31]-also seemingly following Sandals' declaration that its ***decision*** was "in no way intended to immunize emails [or other ***Internet*** postings] the focus and purpose of which are to disseminate injurious falsehoods about their subjects."[32]

Conclusion

Does the recent spate of favorable lower court ***decisions*** for ***Internet*** ***defamation*** ***plaintiffs*** signal that courts are integrating, perhaps silently, the significance of consumer review websites, blogs, and chat forums to a consumer in ***deciding*** whether to hire a particular business or individual? It is too early to tell. But ***given*** the prevalence of statements such as "con artist" and "fraudster" across the ***Internet***, it bears following how courts, and in particular the Appellate Division, continue to grapple with the sometimes blurry line between actionable statements of fact or mixed opinion and nonactionable statements of pure opinion.

Endnotes:

1. See generally *Brian v. Richardson, 87 N.Y.2d 46, 51, 660 N.E.2d 1126, 637 NYS2d 347 (1995)*.

2. *LeBlanc v. Skinner, 103 A.D.3d 202, 955 N.Y.S.2d 391 (2d Dep't 2012)*; *Sandals Resorts Int'l v. Google, 86 A.D. 3d 32, 38, 925 N.Y.S.2d 407, 411 (1st Dep't 2011)*.

3. O'Brien, Note, "Putting a Face to a (Screen) Name: The First Amendment Implications of Compelling ISPs to Reveal the Identities of Anonymous ***Internet*** Speakers in Online ***Defamation*** Cases," *70 Fordham L. Rev. 2745, 2774-75 (2002)*.

4. *Richardson, 87 N.Y.2d 46*.

5. *Sandals, 925 N.Y.S.2d at 415*.

6. Id.

7. *Dillon v. City of New York, 261 A.D.2d 34, 38, 704 N.Y.S.2d 1, 5 (1st Dept. 1999)* (citing Restatement of Torts, Second §558).

8. *Gross v. New York Times Co., 82 NY 2d 146, 153, 603 N.Y.S.2d 813, 623 N.E.2d 1163 (1993)*.

9. *Richardson, 87 N.Y.2d at 51* (internal quotations and citations omitted).

10. Id.

11. *86 A.D.3d 32 (1st Dep't 2011)*

12. *Id. at 43*.

13. *Id. at 43-44* (emphasis added) (citing O'Brien, supra note 3 (citations omitted)).

14. *Sandals, 925 N.Y.S.2d at 416*.

15. *LeBlanc v. Skinner, 103 A.D.3d 202, 955 N.Y.S.2d 391 (2d Dep't 2012)*.

16. *Id. at 213*.

17. Myles Anderson, Local Consumer Review Survey 2014, BRIGHTLOCAL, July 1, 2014, *https://www.brightlocal.com/2014/07/01/local-consumer-review-survey-2014/*.

18. See, e.g., *Woodbridge Structured Funding v. Pissed Consumer, 125 A.D.3d 508, 508, 6 N.Y.S.3d 2, 3 (1st Dep't 2015)*; Nanoviricides v. Seeking Alpha, 2014 WL 2930753 (N.Y. Sup. 2015) at 1; Tener v. Cremer, 2012 WL 3230689 (N.Y. Sup. 2015); see also *Konig v. CSC Holdings, 112 A.D.3d 934, 935, 977 N.Y.S.2d 756, 758 (2d Dep't 2013)* (reversing the lower court's granting of a petition for pre-action disclosure to unveil the identity of the anonymous blogger and emphasizing the context, leave to appeal dismissed, *23 N.Y.3d 1029, 16 N.E.3d 1257 (2014)*.

19. Id.

20. Torati v. Hodak, 2015 WL 5578264 (N.Y.Sup. 2015)

21. *Id. at *5*.

22. *Technovate v. Fanelli, 49 Misc. 3d 1201(A) (N.Y. Civ. Ct. 2015)*.

23. *Id. at *2*.

24. Id.

25. Id. (citing *Rakofsky v. Washington Post, 39 Misc. 3d 1226(A), 971 N.Y.S.2d 74 (Sup. Ct. 2013))*.

26. *Technovate, 49 Misc. 3d 1201(A) at *6*.

27. *Sandals, 925 N.Y.S.2d at 416* ("This observation is in no way intended to immunize emails the focus and purpose of which are to disseminate injurious falsehoods about their subjects").

28. Sachs v. Matano, 004586/2015, NYLJ 1202741327174, at *1 (Sup., NA, ***decided*** Oct. 28, 2015)

29. Id.

30. See, e.g., Sandals and LeBlanc.

31. *Id. at *2*.

32. *Sandals, 925 N.Y.S.2d at 416*.

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