SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

MICHAEL E. MANN, PH.D. Plaintiff, v. NATIONAL REVIEW, INC. *et. al.*, Defendants	Case No. 2012 CA 8263 B Judge Frederick H. Weisberg

ORDER

This matter is before the court on the separate special motions of defendants Mark Steyn and National Review, Inc. ("National Review")[1] and of defendants Competitive Enterprise Institute and Rand Simberg ("CEI") to dismiss the amended complaint pursuant to the District of Columbia Anti-SLAPP Act, defendants' separate Rule 12(b)(6) motions to dismiss for failure to state a claim upon which relief can be granted, and defendants' motion for a stay of discovery pending the court's decision on the Anti-SLAPP special motions. On December 19, 2013, the District of Columbia Court of Appeals dismissed as moot defendants' interlocutory appeal of the orders dismissing plaintiff's original complaint, which were entered on July 19, 2013, after plaintiff had filed his amended complaint on July 10, 2013. Defendants have now renewed their special motions to dismiss and their Rule 12(b)(6) motions to dismiss, this time directed against

[1] When these motions were filed, defendants Steyn and National Review were represented by the same counsel. That law firm has recently withdrawn as counsel for both defendants. Mr. Steyn is currently representing himself, and new counsel has entered its appearance for National Review. On January 21, 2014, Mr. Steyn filed his own Motion to Vacate Judge Combs Greene's July 19, 2013, order, stating his intention to file a new motion to dismiss the amended complaint. Because the court is denying the pending defense motions to dismiss with respect to all seven Counts of the amended complaint, it is unnecessary to wait for still another similar motion from Mr. Steyn.

plaintiff's amended complaint, which is almost identical to the original complaint except for the addition of one new claim for relief.[2]

Under the D.C. Anti-SLAPP Act, a defamation defendant may file a special motion to dismiss any claim arising from an "act in furtherance of the right of advocacy," which shall be granted unless the claim is "likely to succeed on the merits." D.C. Code § 16-5502(a)-(b). Columnists and organizations writing on issues of public interest, such as defendants, are engaged in acts "in furtherance of the right of advocacy." D.C. Code § 16-5501. Therefore, the court must grant the motions unless plaintiff is "likely to succeed on the merits."[3]

The only substantive difference between the original complaint and the amended complaint is the addition of Count VII, alleging libel *per se* against all defendants. The court (Combs Greene, J.) denied defendants' previous special motions to dismiss on the ground that plaintiff had shown a likelihood of success on the merits. To the extent that the current motions are addressed to the six claims that were pled in plaintiff's original complaint (*see* note 2, *supra*) – and regardless of whether the rulings embodied in the non-final orders of July 19, 2013, should be treated as "law of the case" – the court agrees with Judge Combs Greene that plaintiff has shown a sufficient likelihood of success on Counts I through VI of the amended complaint to survive defendants' special motions to dismiss and, *a fortiorari*, defendants' Rule 12 (b)(6) motions to dismiss for failure to state a claim upon which relief can be granted.[4]

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[2] Defendants have focused their motions to dismiss on the new Count VII in plaintiff's amended complaint, and they have addressed Counts I -VI primarily through their motions for reconsideration. Judge Combs Greene denied the motions for reconsideration on August 30, 2013 (National Review defendants) and September 20, 2013 (CEI defendants). In the interest of judicial efficiency, the court is treating the motions to dismiss as if they sought dismissal of all seven Counts of the amended complaint.

[3] D.C. Code § 28-5502(d) enjoins the court to hold "an expedited hearing" on a special Anti-SLAPP motion to dismiss. However, Judge Combs Greene already held such a hearing on the original Anti-SLAPP motions in this case. Given the delay that has attended the convoluted procedural history of those motions and defendants' appeal, it is in the interests of the parties and the court to dispose of these nearly identical motions on the papers.

[4] The defendants point out that the July 19 orders contain factual errors, including attributing to the National Review defendants actions taken by the CEI defendants, and vice versa. Even correcting for those errors, the court's legal

Opinions and rhetorical hyperbole are protected speech under the First Amendment. Arguably, several of defendants' statements fall into these protected categories. Some of defendants' statements, however, contain what could reasonably be understood as assertions of fact. Accusing a scientist of conducting his research fraudulently, manipulating his data to achieve a predetermined or political outcome, or purposefully distorting the scientific truth are factual allegations. They go to the heart of scientific integrity. They can be proven true or false. If false, they are defamatory. If made with actual malice, they are actionable. Viewing the allegations of the amended complaint in the light most favorable to the plaintiff, a reasonable finder of fact is likely to find in favor of the plaintiff on each of Counts I-VI, including the Intentional Infliction of Emotional Distress alleged in Count VI as to both sets of defendants.[5]

In Count VII, plaintiff alleges that CEI published, and National Review republished, the following defamatory statement: "Mann could be said to be the Jerry Sandusky of climate science, except that instead of molesting children, he has molested and tortured data in the service of politicized science that could have dire economic consequences for the nation and planet." The allegedly defamatory aspect of this sentence is the statement that plaintiff "molested and tortured data," not the rhetorically hyperbolic comparison to convicted child molester Jerry Sandusky.[6] To "molest" means "to annoy, disturb, or persecute esp. with hostile intent or injurious effect." Webster's New Collegiate Dictionary 741 (1977). To "torture" means "to twist or wrench out of shape"; and to "distor[t] or overrefin[e] a meaning or an argument."

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analysis would not change and the result would have been the same, as Judge Combs Greene herself made clear in her orders denying defendants' motions for reconsideration.

[5] Although Judge Combs Greene did not specifically address Intentional Infliction of Emotional Distress when she denied the National Review defendants' motion to dismiss, this court concludes that, even as applied solely to the alleged conduct of the National Review defendants, the claim survives the instant motions to dismiss for the reasons stated by Judge Combs Greene in her original order denying the CEI defendants' motions to dismiss and in her order denying the National Review defendants' motion for reconsideration.

[6] Accusing plaintiff of working "in the service of politicized science" is arguably a protected statement of opinion, but accusing a scientist of "molest[ing] and tortur[ing] data" is an assertion of fact.

Id. at 1233. The statement "he has molested and tortured data" could easily be interpreted to mean that the plaintiff distorted, manipulated, or misrepresented his data. Certainly the statement is capable of a defamatory meaning, which means the questions of whether it was false and made with "actual malice" are questions of fact for the jury.[7] A reasonable reader, both within and outside the scientific community, would understand that a scientist who molests or tortures his data is acting far outside the bounds of any acceptable scientific method. In context, it would not be unreasonable for a reader to interpret the comment, and the republication in National Review, as an allegation that Dr. Mann had committed scientific fraud, which Penn State University then covered up, just as some had accused the University of covering up the Sandusky scandal. For many of the reasons discussed in Judge Combs Greene's July 19 orders, to state as a fact that a scientist dishonestly molests or tortures data to serve a political agenda would have a strong likelihood of damaging his reputation within his profession, which is the very essence of defamation. *See Payne v. Clark*, 25 A.3d 918, 924 (D.C. 2011) (citing *Clawson v. St. Louis Post-Dispatch, LLC*, 906 A.2d 308, 313 (D.C. 2006)). Viewing the alleged facts in the light most favorable to plaintiff, as the court must on a motion to dismiss, a reasonable jury is likely to find the statement that Dr. Mann "molested and tortured data" was false, was published with knowledge of its falsity or reckless disregard of whether it was false or not, and is actionable as a matter of law irrespective of special harm. *See Payne*, 25 A.3d at 924; *Guilford Transp. Ind., Inc. v. Wilner*, 760 A.2d 580, 597 (D.C. 2000); *Foretich v. CBS, Inc.*, 619 A.2d 48, 59 (D.C. 1993) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 297 (1964)); *Nader v. de Toledano*, 408 A.2d 31, 40 (D.C. 1979). Accordingly, the special motion of defendants CEI and

[7] For purposes of this order, the court assumes that plaintiff is at least a "limited-purpose public figure" and that all defendants are media defendants acting "in furtherance of the right of advocacy." *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 337, 345 (1974); *Moss v. Stockard*, 580 A.2d 1011, 1030-31(D.C. 1990).

Simberg to dismiss Count VII must be denied, as must their motion to dismiss Count VII for failure to state a claim.

Turning to the special motion of defendants National Review and Steyn to dismiss Count VII, when Mr. Steyn republished Mr. Simberg's words, he stopped short of wholeheartedly endorsing the offensive Sandusky metaphor.[8] Nevertheless, Mr. Steyn did not disavow the assertion of fact that Dr. Mann had "molested and tortured data," and he added insult to injury by describing Dr. Mann as "the man behind the fraudulent climate-change 'hockey-stick' graph." Am. Compl. ¶ 28. In context, calling Dr. Mann's work "fraudulent" is itself defamatory and parallels Mr. Simberg's claim that Dr. Mann "molested and tortured data." Viewing the facts in the light most favorable to plaintiff, a reasonable jury is likely to find in favor of the plaintiff on Count VII against the National Review defendants, and their special motion of those defendants to dismiss Count VII as well as their Rule 12(b)(6) motion to dismiss will also be denied.[9]

For the foregoing reasons, it is this 22nd day of January, 2014,

ORDERED that the Special Motion of defendants Mark Steyn and National Review, Inc. to Dismiss Plaintiff's Amended Complaint Under D.C. Anti-SLAPP Act and their Motion to Dismiss Plaintiff's Amended Complaint Under D.C. Super. Ct. Civ. R. 12(b)(6) be, and they hereby are, denied; and it is further

ORDERED that the Special Motion of defendants Competitive Enterprise Institute and Rand Simberg to Dismiss Plaintiff's Amended Complaint Pursuant to the D.C. Anti-SLAPP Act and their Motion to Dismiss Pursuant to Rule 12(b)(6) be, and they hereby are, denied; and it is further

[8] In paragraph 28 of his amended complaint, plaintiff quotes Mr. Steyn as follows: "Not sure I'd have extended that metaphor all the way into the locker-room showers with quite the zeal Mr. Simberg does, but he has a point."
[9] Because the court is denying both special motions to dismiss, defendants' motion for a protective order staying discovery pursuant to D.C. Code § 16-5502(c)(1) is moot. If defendants attempt another interlocutory appeal, the court will rule on any accompanying motion for a further stay.

ORDERED that defendants' Motion for a Protective Order Enforcing Stay of Discovery Proceedings be, and it hereby is, denied as moot; and the automatic discovery stay imposed by D.C. Code § 16-5502(c)(1) is hereby lifted; and it is further

ORDERED that defendant Steyn's Motion to Vacate Order of July 19, 2013 be, and hereby is, denied.

Judge Frederick H. Weisberg

Copies to:

All parties listed in Case File Xpress

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