

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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CELIA FARBER,

Plaintiff,

-against-

RICHARD JEFFERYS, KEVIN D. KURITSKY,
JAMES J. MURTAUGH M.D.,

Defendants
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LOUIS B. YORK, J.S.C.:

Index No.: 106399/2009

INTERIM
DECISION/ORDER

FILED

NOV 09 2010

NEW YORK
COUNTY CLERK'S OFFICE

The allegedly defamatory statements at issue in this case are the byproduct of a bitter dispute in the medical, scientific and advocacy communities over the cause and proper treatment of Acquired Immunodeficiency Syndrome ("AIDS"). Plaintiff Celia Farber is a journalist who has written extensively on issues related to AIDS. In particular, for many years she has covered, with sympathy and respect, the positions of Peter Duesberg, Ph.D., and other HIV dissenters on this subject.¹ Duesberg, a retrovirologist who in the 1970s and 1980s became a highly esteemed cancer researcher, contends that HIV is, at best, a harmless passenger virus and that AIDS results from recreational drug use and the use of drugs such as (AZT), which are used to treat AIDS. As for the AIDS epidemic in South Africa, Duesberg questioned that there was an AIDS problem at all; along with other colleagues, he stated that the term was being used to describe conditions of

¹ Their detractors call these individuals "AIDS Denialists," a more pejorative expression which incorrectly suggests that this group denies the existence of AIDS; some, but not all, of the dissenters, are denialists. An analogous pejorative is the phrase "AIDS Vigilantes" or "so-called AIDS activists," which Farber and others use to denote their detractors. This Court chooses to use the more neutral expressions "the traditional HIV-AIDS community" for those who share Jefferys' point of view, and "HIV dissenters," which was used in a study of Dr. Duesberg's theories, for those who support Duesberg and Farber's position. Cohen, Jon. "The Duesberg Phenomenon," Science, Vol. 266, 1642-49 (9 Dec 1994).

severe malnutrition and unsanitary lifestyles in the country. The contentions of the HIV dissenters have not only disturbed but enraged members of the traditional medical, scientific research, nonprofit and activist community who focus on HIV and AIDS. Their ire extends to Farber; based on her extensive coverage of the story from the point of view of the dissenters, they view her as aligned with the dissenters and in addition they feel her coverage and other actions assists the dissenters in disseminating their theories.

In 2006, Farber wrote an article for Harper's magazine entitled "Out of Control: AIDS and the Corruption of Medical Science" ("Out of Control"). More details concerning the article and the response to it will be included in future Court decisions. However, in brief, in the third part of the article, Farber discussed Duesberg and his theories on AIDS. The article implicitly and explicitly compared Duesberg's situation – including reduced funding, marginalized status in the scientific community, and, more recently, an ethics investigation relating to one of his more recent articles – to the plight of a NIAIDS (National Institute of Health Division of AIDS) employee, Dr. Jonathan Fishbein.

In addition, there admittedly was a backlash against Harper's for publishing the piece. Negative critiques of Harper's, Farber and the article appeared in Columbia Journalism Review, The New York Times and other prominent publications. In addition, scientists, doctors and activists in the traditional community protested the piece and some of them produced a document called "56 Errors," or "Errors in Celia Farber's March 2006 article in Harper's Magazine" ("56 Errors") which characterizes numerous statements in "Out of Control" as either false, misleading, unfair or biased.

On the other hand, many HIV dissenters cheered the piece. In addition, some whistleblowers admired Farber and Duesberg's stance against the traditional HIV/AIDS

community. As a result, an organization called Semmelweiss Society International, an organization comprised of and dedicated to whistleblowers, decided to give them its 2008 Clean Hands award (“the award”) during “Whistleblower Week in Washington” (“Whistleblower Week”) in May 2008. As is relevant here, co-defendant Richard Jefferys, the Coordinator of Treatment Action Group’s (“TAG”) Michael Palm Basic Science, Vaccine and Prevention Project, allegedly sent an email² to Walter Fauntroy, a coordinator of testimony for Whistleblower Week. Farber claims that the email contained defamatory statements.

Subsequently, plaintiff Celia Farber commenced this defamation action against Jefferys and two other defendants – Kevin D. Kuritsky, and James J. Murtaugh M.D. – who allegedly defamed her when they protested her receipt of the award. Currently, Jefferys makes this pre-answer motion to dismiss on several grounds. Plaintiff Farber opposes the motion in its entirety. For the reasons below, the Court exercises its discretion under CPLR § 3211(c) and converts this motion into one for summary judgment. The parties will have a chance to supplement their original papers pursuant to the guidelines at the end of this decision.

Initially, the Court notes that it has researched the critical issues extensively, and has studied the history of HIV and AIDS research as well as the fundamentals of the underlying scientific controversy. In addition, it has begun drafting a decision which thoroughly sets forth this background and the numerous legal issues the parties have raised in their papers. However, in the course of doing so it has become increasingly clear that, although some of the issues at hand – for example, the determination of plaintiff’s status as a public, private, or limited purpose private figure and whether malice is pled sufficiently – can be resolved under CPLR § 3211,

² Jefferys claims he did not send an email but instead filled out a response form on the Whistleblower Week website, but the distinction is not relevant for the purpose of this decision.

many issues are more appropriate for resolution under CPLR § 3212. These include: (1) whether Jefferys he had a reasonable basis for the statements about Farber in his email as a matter of law and (2) Jefferys' statements are not defamatory because they are substantially true. Some of the other questions, such as whether this was a matter of public interest or whether Jefferys' comments were hyperbolic, in line with the general tenor of the debate, may possibly be resolved under CPLR § 3211. However, it is more prudent to broaden the inquiry to include facts not asserted in the pleadings as well as evidentiary materials.

According to Jefferys, despite the contentious nature of the dispute, resolution of the lawsuit against him is proper under CPLR § 3211(a)(1). In support of the portion of his motion seeking to dismiss under CPLR§ 3211(a)(1) based on documentary evidence, Jefferys relies on numerous documents – not only the Harper's article and "56 Errors," but numerous other materials referenced in the complaint along with Columbia Journalism Review and New York Times articles about "Out of Control," pieces published in medical journals about nevirapine, one of Duesberg's writings on HIV, and a NIAIDS document setting forth evidence that HIV causes AIDS. According to Jefferys, because Farber mentions some of these materials in the complaint the documents are properly considered in the context of this CPLR § 3211(a)(1) motion. Farber has challenged the appropriateness of these documents at this juncture of the litigation.

In the context of a pre-answer motion to dismiss under CPLR§ 3211, the Court liberally construes the complaint, accepting its allegations as true and giving plaintiff the benefit of every inference. EBC I, Inc. v. Goldman Sachs & Co., 5 N.Y.3d 11, 19, 799 N.Y.S.2d 170, 175 (2005). Here, where Jefferys asserts that documentary evidence requires dismissal under CPLR§ 3211(a)(1), the documents on which he relies must refute the allegations against him,

“conclusively establishing the defense as a matter of law.” Crepin v. Fogarty, 59 A.D.3d 837, 838, 874 N.Y.S.2d 278, 279-80 (3rd Dept. 2009). Some documents, such as articles, affidavits, and the like, might suffice on a motion for summary judgment, are insufficient in the context of a pre-answer motion to dismiss. Id. at 839, 874 N.Y.S.2d at 280. “To qualify as ‘documentary,’ the evidence relied upon must be unambiguous and undeniable, such as judicial records and documents reflecting out-of-court transactions such as mortgages, deeds, and contracts. Letters, affidavits, notes, and deposition transcripts are generally not documentary.” MBIA Ins. Corp. v. Royal Bank of Canada, Index No. 12238/09 (Sup. Ct. Westchester County Aug. 19, 2010)(avail at 2010 WL 3294302, *20). Newspaper articles, printouts of various web pages, and transcripts of interviews also do not qualify as documentary evidence in most circumstances. See Springer v. Almontaser, 75 A.D.3d 539, —, 904 N.Y.S.2d 765, 766 (2nd Dept. 2010). Even a contract, normally a proper document for consideration under this statute, cannot be a basis for CPLR § 3211(a)(1) disposition if there is a legitimate dispute as to critical portions of its meaning. See Gateway Detroit Assoc., LLP v. Witkoff Group, LLC, 280 A.D.2d 354, 354-55, 721 N.Y.S.2d 33, 33 (1st Dept. 2001).

Based on this standard, the annexed documents do not qualify as documentary evidence for the purposes of a CPLR § 3211(a)(7) motion. The academic articles submitted are in conflict with a 2003 piece Duesberg wrote with Rasnick and Claus Koehnlein, also annexed, which suggests that recreational drugs, chemotherapy and malnutrition can cause AIDS. “Out of Control” challenges the veracity of the results of the various nevirapine studies which are discussed in some of the annexed documents. Richard Kim’s piece for The Nation clearly sets forth his opinion about the quality of the journalism and the ideas contained in the piece; Columbia Journalism Review’s piece also expresses a negative opinion about “Out of Control”

and Harper's decision to publish it. Moreover, though the authors of "56 Errors" are highly regarded and several are acknowledged experts in the field, Farber claims in her papers that other scientists and medical professionals have refuted their statements. "Where, as here, evidentiary material is submitted . . . it may be considered in assessing the viability of a complaint, but unless the defendant demonstrates that a material fact alleged by the plaintiff 'is not a fact at all' and that "no significant dispute exists regarding it," the complaint should not be dismissed. Yew Prospect, LLC v. Szulman, 305 A.D.2d 588, 589, 759 N.Y.S.2d 357, 358, 2003 N.Y. Slip Op. 14301 (N.Y.A.D. 2 Dept. 2003). Even if Jefferys' evidence appears to be stronger than Farber's, it is undeniable that, giving the complaint the benefit of every possible inference as to the truth of its contentions, a dispute exists. Thus, Jefferys has presented a factual issue more appropriate for summary judgment or trial.

Moreover, the cases to which Jefferys cites are not persuasive because they are distinguishable. In Bowen v. New York City Gay and Lesbian Anti-Violence Protection, Inc., 10/31/2002 NYLJ 21, col 2 (Sup. Ct. N.Y. County), for example Justice Heitler examined the documents which were allegedly defamatory and found that the challenged allegations – that plaintiff had a criminal record – were true. Dillon v. City of New York, 261 A.D.2d 34, 38-39, 704 N.Y.S.2d 1, 5 (1st Dept. 1999), looked to the terms of a contract and determined that defendant's allegations concerning the termination of plaintiffs was true. Neither of these cases rely on documents such as newspaper and academic articles; instead, they rest on contracts and criminal records, which unequivocally refute the plaintiffs' claims. A third case on which Jefferys relies, Mayer v. Sanders, 264 A.D.2d 827, 695 N.Y.S.2d 593, (2nd Dept. 1999), concluded that the third party complaint relies on conclusory allegations of liability. Thus, despite a passing reference to allegations which may be contradicted by the evidence, the case is

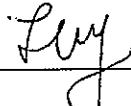
not relevant to the issue for which the case is cited.

Although this is a preanswer motion, the Court has the power to convert Jefferys CPLR § 3211 motion to a CPLR § 3212 motion as long as it provides adequate notice to the parties. CPLR § 3211(c) (allowing court to convert the motion regardless of whether issue has been joined); see Mihlovan v. Grozavu, 72 N.Y.2d 506, 508, 534 N.Y.S.2d 656, 657 (1988)(noting that in case at hand notice had not been provided); Fontanetta v. Doe, 73 A.D.3d 78, 87-88, 898 N.Y.S.2d 569, 576-77 (2nd Dept. 2010)(though there was no prior notice by court, motion otherwise could have been converted prior to joinder). Therefore, and based on the above, it is

ORDERED that this motion to dismiss is converted to a motion for summary judgment; and it is further

ORDERED that defendant shall file his submissions in support of his summary judgment motion dismissing the action within 30 days from the entry of this order and plaintiff has 30 days from the date of defendant's service on her to oppose and defendant has 15 days from the service of the opposition to reply.

ENTER:



Louis B. York, J.S.C.

Dated: 11/3/10



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