

**JUDGE MICHAEL JOHNSON
DEPARTMENT 56**

DEC 20 2013

Sherril R. Carter, Executive Officer/Clerk
By Denise Gonzalez Deputy

Hearing Date: December 20, 2013
Case Name: Gordon & Holmes, et al. v. Love
Case No.: BC462438
Matter: (1) Defendant's Motion for Summary Judgment/Adjudication
(2) Plaintiffs' Motion for Summary Adjudication

~~Holden~~ **Ruling: All motions are denied.**

Plaintiffs Gordon & Holmes (G&H), Rhonda J. Holmes APC (Holmes PC), and Rhonda J. Holmes filed this action against Defendant Courtney Michelle Love, alleging a single cause of action for libel per se concerning statements relating to Plaintiffs' representation of Defendant. Defendant moves for summary judgment or adjudication, and Plaintiffs move for summary adjudication of several affirmative defenses.

EVIDENTIARY RULINGS

Defendant's Motion –

Defendant requests judicial notice of declarations filed in support of Defendant's motion for leave to file a cross-complaint. Judicial notice is granted.

Plaintiffs object to Defendant's declaration and the declaration and supplemental declaration of Richard A. Dongell. Objections 5-10 are sustained; remainder overruled.

Defendant objects to the declarations of Carmela Kelly, Rhonda J. Holmes and Edward Finegan. Objections 26 and 29 are sustained; remainder overruled.

Plaintiffs' Motion –

Defendant objects to the declaration of Mitchell J. Langberg. All objections are overruled. Defendant's remaining objections are directed at facts asserted in Plaintiffs' separate statement. These are not proper objections, as objections must be directed to the evidence; see CRC 3.1354(a).

Plaintiffs object to portions of evidence submitted by Defendant. Objection 1 is sustained; remainder overruled.

DEFENDANTS' MOTION

Plaintiffs' action arises out of a June 2010 "Tweet" published by Defendant and a July 2010 article published by Alan Cross detailing an interview with Defendant. The Tweet refers to Holmes as an attorney who was "bought off" and the Cross Interview states that Defendant told "of a female attorney who has since stopped taking her calls because 'they got to her' 'She's disappeared.'"

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Statement of Fact or Opinion –

Defendant argues that the Tweet and Cross Interview are not defamatory on their face. Whether an alleged defamatory statement is a statement of fact or a statement of opinion is a question of law to be decided by the court under a “totality of the circumstances” test. *Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260. First, the court examines the language of the statement to determine whether the words are reasonably understood in a defamatory sense; second, the court considers the context of the statement by looking “at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed.” 24 Cal.3d at 260-61.

Defendant argues that these statements are not libel per se, relying on *Barnes-Hind v. Superior Court* (1986) 181 Cal.App.3d 377. In *Barnes-Hind*, the statements addressed the effectiveness and safety of a product. 181 Cal.App.3d at 383-84. The Court of Appeal concluded that the statements were not libel per se because no reasonable reader could conclude a defamatory meaning without knowledge of specific facts and circumstances extrinsic to the publication and which are not matters of common knowledge rationally attributable to all reasonable persons. 181 Cal.App.3d at 386-88.

Here, no extrinsic facts and circumstances are required to reasonably understand a defamatory meaning. The statements referred to an attorney being “bought off,” “gotten to,” and “disappearing.” This language is inconsistent with the customary duties of an attorney advocate, and it is reasonably understood to be defamatory. The context of each statement does not support a contrary conclusion.

Defendant argues that the Tweet was made on the Internet and qualifies as an opinion because of common hyperbole and exaggeration in the Internet context. The cases relied upon by Defendant are inapposite, because they involve statements quite different from a Tweet: *Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, 696-97 (statements in a section of a website entitled “Rants and Raves,” where any reasonable reader expects to see one-sided viewpoints and strongly worded opinions rather than objective facts); *Chaker v. Mateo* (2012) 209 Cal.App.4th 1138, 1149 (statements made on websites which plainly invited “exaggerated and insulting criticisms”); *Krinsky v. Doe 6* (2008) 159 Cal.App.4th 1154, 1162-63 (statements published anonymously, which leads “many to substitute gossip for accurate reporting and often to adopt a provocative, even combative tone.”); *Global Telemedia Int’l v. Doe 1* (C.D. Cal. 2001) 132 F.Supp.2d 1261, 1267 (anonymous messages in an Internet chat-room). In our case the statements involved comments that Defendant made about her own lawyer in a widely used Internet vehicle for communicating personal views.

“Of and Concerning” Plaintiffs –

Defendant argues that the Tweet does not identify Holmes PC or G&H and that no identification at all is present in the Cross Interview. The alleged defamatory statement “must specifically refer to, or be ‘of and concerning,’ the plaintiff in some way.” *Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1042. But the “identification” of the

plaintiff can be either express or by clear implication. 42 Cal.3d at 1044, n.1; Peterson v. Rasmussen (1920) 47 Cal.App. 694, 695 ("To constitute libel a party need not be named in the writing if pointed to by description or circumstance tending to identify him."). This determination is a question of law for the court. Tamkin v. CBS Broadcasting, Inc. (2011) 193 Cal.App.4th 133, 146.

Defendant is not entitled to summary adjudication of this issue. The Tweet referred to Holmes individually and the Cross Interview referred to a "female attorney." Holmes operated her law practice through Holmes PC and the G&H law firm. There are triable issues as to whether all of the circumstances clearly imply that Defendant's references concern Holmes PC and G&H as well as Holmes individually.

Malice –

Defendant argues that Plaintiffs are limited public figures and that Plaintiffs cannot show that the statements were made "with knowledge of their falsity or with reckless disregard of their truth or falsity." See Overstock.com, Inc. v. Gradient Analytics, Inc. (2007) 151 Cal.App.4th 688, 700. For purposes of this motion, Plaintiffs do not dispute that they qualify as limited public figures.

Plaintiffs argue that Defendant has provided a declaration which is inconsistent with her Tweet and statements in the Cross Interview. In her declaration, Defendant states that she "let Homes go as my lawyer for not performing." This alone raises triable issues of fact as to whether Defendant made the statements with knowledge of falsity or reckless disregard for the truth.

Unclean Hands –

Defendant argues that Plaintiffs' claims are barred by the affirmative defense of unclean hands, referring to the Holmes' letter sent to Defendant's minor daughter. See Fibreboard Paper Products v. East Bay Union of Machinists (1964) 227 Cal.App.2d 675, 727). But the alleged misconduct pertaining to Defendant's minor daughter (which was the subject of Defendant's proposed cross-complaint) has nothing to do with Plaintiffs' defamation claims. The statements challenged by Plaintiffs did not concern Holmes' performance as an attorney or any conduct relating to Defendant's daughter. They relate to an entirely different subject: Plaintiffs' failure to prosecute Defendant's legal claims.

PLAINTIFFS' MOTION

Plaintiffs' motion for summary adjudication addresses Defendant's affirmative defenses of substantial truth (2nd), not false assertions of fact (3rd), no malice (5th), and statements were not "of and concerning" Plaintiffs (6th).

As to the 2nd and 5th Affirmative Defenses, Plaintiffs rely on Defendant's declaration in which she states that she "let Homes go as my lawyer for not performing." Plaintiffs argue that this is a judicial admission that Defendant knew that the statements in the Tweet and Cross Interview were not true. The declaration is not necessarily inconsistent with the statements in the Tweet and Cross Interview, and Defendant has presented

evidence which raises triable issues. The motion for summary adjudication is denied as to the 2nd and 4th Affirmative Defenses.

As to the 3rd and 6th Affirmative Defenses, Plaintiffs cite language from the court's earlier ruling on Defendant's demur. The court's references are not binding determinations, but were based upon the allegations that were then before the court. The parties have now presented evidence which raises triable issues on the affirmative defenses. Moreover, the motion cannot be granted because it would not completely dispose of either affirmative defense; see CCP §437c(f)(1).

RULINGS

All motions are denied.

Dec 20, 2013

Michael Johnson
MICHAEL JOHNSON

12/24/2013