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To: Turkowitz

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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MISS UNIVERSE L.P., LLLP, and DONALD J.TRUMP, both individually and derivatively on behalf of MISS UNIVERSE L.P.,LLP,

Index # 652332/2015

Plaintiffs,

Decision/Order

- against –

UNIVSION NETWORKS & STUDIOS, INC., and ALBERTO CIURANA, individually,

Defendants.
---X

Hon. Lester Bruce Sullivan, Acting J.S.C.

This matter comes before the Court on its own motion for sanctions against the plaintiffs for bringing a frivolous defamation claim.

On June 30, 2016, the plaintiffs filed suit in this court alleging causes of action for breach of contract, breach of the covenant of good faith and fair dealing, intentional interference with contractual relationship, and defamation, along with punitive damages and attorneys fees. (NYSCEF, Summons and Complaint, Doc. 1) The gravamen of the complaint was a dispute between the parties resulting when Univision, a Spanish language network, elected not to carry the Miss Universe pageant. Donald J. Trump asserts that he operates the Miss Universe pageant as part of a joint venture with NBCUniversal (Complaint, ¶9), and claims that the defendants breached a contract to air the pageant. This dispute arose after Trump made deeply unflattering remarks about

people of Mexican origin when he announced his candidacy for President of the United States on June 16, 2015.

On July 10th, Univision notified this court that it had removed this action to the United States District Court for the Southern District of New York on diversity grounds pursuant to 28 U.S.C. 1441 and 1446, attaching a Notice of Removal that was contemporaneously filed in that court (NYSCEF, Docs. 6-7).

Facts

Trump's defamation claim is based on facts set forth in paragraph 29 of the Complaint, which he personally verified. This claim sets forth that defendant Alberto Ciurana, Univision's President of Programing and Content:

> "posted a photo on his official Univision Instagram account comparing Mr. Trump to Dylann Roof, the 21 year old who was recently arrested in the murder of (9) African-Americans attending a bible study at a church in Charleston, South Carolina, one of the worst hate crimes to ever take place on U.S. soil. While Mr. Ciurana would later remove the defamatory post, the damage was already done: almost immediately, Mr. Ciurana's post was picked up by the media and became the subject of hundreds, if not thousands, of press articles, yet another example of Univision's dubious efforts to create a false narrative in an attempt to upset Mr. Trump's longstanding personal and business relationship with the Hispanic community."

A copy of the widely available Instagram message, with the juxtaposition of Messrs. Trump and Roof and the words "No Comments" written across the top, with a Spanish translation ("sin comentario") in the text box, is embedded it this decision below:

Authority to Act

As an initial matter, a court has authority to sanction litigants or their counsel *sua sponte* for egregious behavior. *Gruen v. Krellenstein*, 244 A.D.2d 234 [1997].

While this Court was divested of jurisdiction for actions that took place after removal to federal court, it still retains its authority over conduct that took place while the action was here. Specifically, this Court was deeply troubled over the initial filing of the defamation claim, and this decision and order issued today flows from that filing.

Failure to State a Claim

Sanctions would obviously not be an issue if the defamation claim could have survived a motion to dismiss by the defendants. In determining a motion to dismiss a pleading for failure to state a cause of action, the court must "accept the facts as alleged in the Complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal

theory." (*Leon v. Martinez,* 84 N.Y.2d 83, 87–88 [1994]; *see also Nonnon v. City of New York,* 9 N.Y.3d 825 [2007].) In a defamation action, the court must determine if the alleged defamatory statements are not actionable as a matter of law. (*Steinhilber v. Alphonse,* 68 N.Y.2d 283 [1986].

Defamation is defined as the making of a false statement of fact that "tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace" (*Rinaldi v Holt, Rinehart & Winston,* 42 N.Y.2d 369, 379 [1977], *cert denied* 434 U.S. 969 [1977] [citations omitted]). "Since falsity is a *sine qua non* of a libel claim and since only assertions of fact are capable of being proven false, . . . a libel action cannot be maintained unless it is premised on published assertions of fact," rather than on assertions of opinion (*Brian v Richardson,* 87 N.Y.2d 46, 51 [1995]).

To establish a cause of action for defamation, therefore, plaintiffs must demonstrate the following elements:

> 1) a false statement on the part of the defendants concerning the plaintiffs;
> 2) published without privilege or authorization to a third party;
> 3) with the requisite level of fault on the part of the defendants; and
> 4) causing damage to plaintiffs' reputation by special harm or defamation *per se* (*See* Restatement [Second] of Torts § 558; *Dillon v. City of New York,* 261 A.D.2d 34, 38, 704 N.Y.S.2d 1 [1st Dept. 1999].)

CPLR § 3016(a) requires that the alleged false and defamatory words be specified with particularity in the complaint. The complaint must also allege the "time, place and manner of the false statement and to specify to whom it was made." (*Dillon,* 251 A.D.2d at 38, 675 N.Y.S.2d 14 [citations omitted].)

Plaintiffs set forth a single allegation on the defamation claim, that being the comparison of Messrs. Trump and Roof in paragraph 29 of the Complaint. In the case before us, of course, there are no words at all other than "No Comments."

The problem in filing a defamation cause of action here should have been manifest from the outset: This single, published photographic assemblage of two men can represent nothing other than an expression of pure opinion. It may be derogatory, demeaning and disrespectful to put the two together, but it is opinion nonetheless.

New York Times Co. v. Sullivan, 376 U.S. 254, was decided in 1964. We have had more than ample time to absorb its lessons. In that case and others that followed (*e.g., Philadelphia Newspapers v. Hepps,* 475 U.S. 767; *Curtis Publ. Co. v. Butts,* 388 U.S. 130; *Gertz v. Robert Welch, Inc.,* 418 U.S. 323), the nation's Supreme Court delineated the increased burden of proof that libel plaintiffs in the public arena must bear in order to assure the "unfettered interchange of ideas" that is so necessary to the continued vitality of a government "responsive to the will of the people" (*New York Times Co. v. Sullivan, supra,* 376 U.S. at 269, quoting *Roth v. United States,* 354 U.S. 476; *and Stromberg v. California,* 283 U.S. 359, 369). Additionally, in *Greenbelt Publ. Assn. v. Bresler,* 398 U.S. 6, 12, 14, the Court recognized that there are constitutional restrictions on the "permissible scope" of defamation actions and, specifically, that evident "rhetorical hyperbole" is simply not actionable (*see, Milkovich v. Lorain Journal Co., supra,* 497 U.S. at 16,; *see also, Hustler Mag. v. Falwell,* 485 U.S. 46, 50; *Letter Carriers v. Austin,* 418 U.S. 264, 284–286).

Moreover, the fact that the photograph was published on the Internet instead of traditional press makes any claim for defamation even more challenging. About five years ago, the Appellate Division, First Department (Saxe, J.) wrote a scholarly decision analyzing whether certain comments posted on the internet were actionable as defamatory factual statements or just pure opinion. (*Sandals Resorts Intl. Ltd., v. Google,*

Inc., 86 A.D.3d 32, 925 N.Y.S.2d 407 [1st Dept 2011] [on-line e-mail posting that impliedly accused the owners of a Jamaican resort of racism was non-actionable opinion].) The First Department explained that defamation must be premised on published assertions of fact rather than on assertions of opinion. (*Id.*, at 38, 925 N.Y.S.2d 407.) In the leading case of *Steinhilber v. Alphonse* (68 N.Y.2d 283 [1986]), the Court of Appeals articulated the standard for distinguishing between fact and opinion as follows:

> "A pure opinion' is a statement of opinion which is accompanied by a recitation of the facts upon which it is based. An opinion not accompanied by such a factual recitation may, nevertheless, be pure opinion' if it does not imply that it is based upon an undisclosed fact. When, however, the statement of opinion implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, it is a mixed opinion' and is actionable. The actionable element of a mixed opinion' is not the false opinion itself-it is the implication that the speaker knows certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking." (*Id.* at 289–290, 508 N.Y.S.2d 901, 501 N.E.2d 550 [citations and footnote omitted].)
>
> Based on long-standing precedent, the First Department emphasized that the court needs to examine the entirety of the words, including its tone and purpose, as well as the "broader social context" to determine whether the content of the published statement constitutes defamation. (*Sandals,* 86 A.D.3d at 41, 925 N.Y.S.2d 407.) The "broader social context" is one of four factors enunciated by the federal courts to distinguish between protected opinions and unprotected factual assertions. (*Ollman v. Evans,* 750 F.2d 970 (D.C.Cir.1984), *cert denied* 471 U.S. 1127 [1985].).
>
> This determination is quite a complex balancing act as "even apparent statements of fact may assume the character of statements of opinion, and thus privileged, when made in public debate, heated labor disputes, or other circumstances in which the audience may anticipate [the use] of epithets, fiery rhetoric or hyperbole." (*Steinhilber,* 68 N.Y.2d at 294, 508 N.Y.S.2d 901, 501 N.E.2d 550 [citations omitted].) With this in mind, the proper inquiry is, "whether the reasonable reader would have believed that the challenged statements were conveying facts about the ... plaintiff." (*Sandals,* 86 A.D.3d at 42, 925 N.Y.S.2d 407, quoting *Brian v. Richardson,* 87 N.Y.2d 46, 51 [1995], which quoted *Immuno AG. v. Moor-Jankowski,* 77 N.Y.2d 235, 254 [1986].)

Citing to the First Amendment and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-340 (1974), the *Steinhilb*er Court noted that:

"Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."

The Appellate Division made a distinction between traditional print outlets and on-line posts when considering the "broader social context" of communications. It stated that "[t]he culture of Internet communications, as distinct from that of print media such as newspapers and magazines, has been characterized as encouraging a "freewheeling, anything goes writing style.' " (*Sandals,* 86 A.D.3d at 43, 925 N.Y.S.2d 407 [citations omitted].). The Appellate Division observed that readers give less credence to allegedly defamatory comments published on the Internet, as well in e-mail posts or blogs, than in other contexts. (*Id.* at 44, 925 N.Y.S.2d 407.) It concluded that "the anonymity of the e-mail makes it more likely that a reasonable reader would view its assertions with some skepticism and tend to treat its contents as opinion rather than as fact." (*Id.*)

The fact that publication took place on the Internet, in other words, makes any statement even less likely to be believed.

The Complaint, as filed in this Court, clearly did not state a claim for defamation, and no amount of amendment of the language of the Complaint could have rescued it. The defamation claim had zero chance of success when it was filed here.

<u>Sanctions</u>

Oft times, defendants seek to impose sanctions on plaintiffs and plaintiffs' attorney for commencing this allegedly "frivolous" action and awarding defendants reasonable attorney's fees and costs pursuant to CPLR § 8303–a for bringing a claim, or 22 NYCRR § 130–1.1 for continuing it.

CPLR § 8303–a provides for an award of mandatory costs and fees up to $10,000 for making a "frivolous" claim. In order to meet this definition of frivolousness under this statute, a court must find either that (1) the "claim ... was commenced, used or continued in bad faith, solely to delay or prolong, the resolution of the litigation or to harass or maliciously injure another"; or (2) "the claim ... was commenced or continued in bad faith without any reasonable basis in law or fact and could not be supported by a good faith argument for an extension, modification or reversal of existing law." CPLR § 8303–a(c)(I), (ii).

Trump easily meets both of these definitions of frivolous, as the defamation claim was clearly brought in bad faith and had no colorable basis.

Pursuant to 22 NYCRR § 130.1–1, a court, in its discretion, may also impose financial sanctions upon any party who engages in frivolous conduct. Conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false. (22 NYCRR § 130.1–1[c][1–3].) In determining whether the conduct was frivolous, "the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent or should have been apparent, or was brought to the attention of counsel or the party." (22 NYCRR § 130.1–1[c][3].)

The Court finds that, since the matter was quickly removed to federal court after being brought, that any conduct that took place after commencement of the suit would likely fall under the jurisdiction of the Southern District. Thus, this matter is found to be frivolous under CPLR 8303 for bringing the defamation claim, but not under 22 NYCRR § 130.1–1[c][3] for conduct thereafter.

Courts also retain an inherent power to sanction, "to manage their own proceedings and to control the conduct of those who appear before them." *Chambers v. Nasco*, 501 U.S. 32, 33 (1991). The Supreme Court went on to say, regarding the federal standards:

> Although the "American Rule" prohibits the shifting of attorney's fees in most cases, see *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 259, 95 S.Ct. 1612, 1622, 44 L.Ed.2d 141, an exception allows federal courts to exercise their inherent power to assess such fees as a sanction when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, *id.,* at 258–259, 260, 95 S.Ct. at 1622–1623, 1623, as when the party practices a fraud upon the court, *Universal Oil Products Co. v. Root Refining Co.,* 328 U.S. 575, 580, 66 S.Ct. 1176, 1179, 90 L.Ed. 1447, or delays or disrupts the litigation or hampers a court order's enforcement, *Hutto v. Finney,* 437 U.S. 678, 689, n. 14, 98 S.Ct. 2565, 2573, n. 14, 57 L.Ed.2d 522. Pp. 2132–2133.

One legal commentator, Professor Gregory Joseph, has stated that "inherent power sanctions may be imposed only when there is clear evidence that the challenged actions were entirely without color and made for reasons of harassment, delay or other improper purpose. There can be little doubt that the inherent power to sanction may be imposed when there is clear evidence that the challenged actions were entirely without color and made for reasons of harassment, delay or other improper purpose. In addition, while attorneys' fees appear to be the sanction of choice where bad-faith conduct is concerned, they are by no means the exclusive remedy available to a court. One noted scholar, Gregory Joseph, indicates that courts may choose from among the following

types of sanctions: imposition of a fine, disqualification of counsel, preclusion of claims, defenses or evidence, dismissal of an action for failure to prosecute, entry of a default judgment, suspension of counsel from practice before the court or disbarment, vacation of judgment, injunctive relief limiting a litigant's future access to the courts or citation for contempt. (Gregory Joseph, Sanctions: The Federal Law of Litigation Abuse § 25, at 371 (1989)).

In sum, the inherent power to sanction litigants and their counsel provides courts with a readily adaptable means of tailoring an appropriate remedy, but one that should be limited to circumstances warranting its application.

This Court finds no prohibition in adopting the federal rule for state purposes, as there can be no colorable argument that a court should permit vexatious and bad faith litigation.

In addition, it cannot escape notice that the plaintiffs made an incredible $500 million dollar claim. They did so despite this being a clear and unequivocal violation of CPLR § 3017(c) in that it seeks a specified amount of damages. The section states, in pertinent part:

> In an action to recover damages for personal injuries or wrongful death, the complaint, … shall contain a prayer for general relief but shall not state the amount of damages to which the pleader deems himself entitled.

There are only two possible reasons for a plaintiff to put such a thing in a pleading, given that this law was passed in 2003. First, that the party deliberately violated the law in the quest for press, in the hopes of embarrassing someone with headlines. Second, that the lawyer is ignorant. And this Court does not believe that the plaintiffs or their counsel are ignorant.

In this case, simply striking the improper demand would have been meaningless as the goal of obtaining headlines had already been achieved. That bell cannot be un-rung.

If simply striking the monetary demand was the solution, then there would be no downside at all for making improper demands in flagrant disregard to the Legislature's will since the headlines have already been written. It was, perhaps with this in mind that the late Professor David Siegel urged courts in his authoritative tome *New York Practice* to sanction those that violated the Legislature's express intent, writing:

> "Some cases have held that a violation of the CPLR 3017(c) pleading restriction can be cured with a mere amendment striking the reference to the demand,[1] but the imposition of a money sanction in an appropriate sum might better implement this aspect of CPLR 301(c)." (New York Practice, 4th Ed., page 372.

Given that the violation is a willful and contumacious act, a monetary sanction is appropriate.

Further evidence of the willful and contumacious conduct of Mr. Trump is his recent comment that he has used the courts in the past for exactly the transgressions this Court finds here. In a recent *Washington Post* interview regarding another defamation suit that he brought, and lost, Trump said that he knew he couldn't win the suit but brought it anyway to make a point. "I spent a couple of bucks on legal fees, and they spent a whole lot more. I did it to make his life miserable, which I'm happy about."[2]

The challenge for this Court then, is in fashioning a proper sanction to deter vexatious litigation that was clearly brought for an improper purpose. If constrained by

[1] See, e.g. *Twitchell v. Mackay*, 78 AD2d 125, 434 NYS2d 516 (4th Dept. 1980)

[2] Farhi, Peter, What really gets under Trump's skin? A reporter questioning his net worth. March 8, 2016, https://www.washingtonpost.com/lifestyle/style/that-time-trump-sued-over-the-size-of-hiswallet/2016/03/08/785dee3e-e4c2-11e5-b0fd-073d5930a7b7_story.html Last viewed, March 31, 2016,

CPLR § 8303–a, this Court would be limited to $10,000 per cause of action. Thus, there are two plaintiffs and two defendants, and therefore four punishable causes of action, limiting the Court's power to a $40,000 sanction. (See: *In Re Entertainment Partners Group, Inc. v. Davis*, 155 Misc. 2d 894 (Sup. Ct. N.Y.Cnty. October 8, 1992).

But Mr. Trump asserts in a July 2015 Federal Election Commission disclosure that he has a net worth "in excess of $10 billion."[3] Of what value is a $40,000 sanction?

The First Department wrote in *Levy v. Carol Mgmt. Corp.*, 260 AD2d 27, 34 (1999) that "Sanctions are retributive, in that they punish past conduct. They also are goal oriented, in that they are useful in deterring future frivolous conduct not only by the particular parties, but also by the bar at large. The goals include preventing the waste of judicial resources, and deterring vexatious litigation and dilatory or malicious litigation tactics."

A $40,000 sanction will not punish past conduct, nor will it deter future frivolous conduct, for these particular plaintiffs. Mr. Trump believes, however, that $500 million, the amount that he (improperly) brought suit for, would accomplish the twin goals of punishment and deterrence against the free speech rights of the defendants. This Court finds, therefore, that a sanction of $500 million is appropriate as against the plaintiffs, given the self-declared wealth of Mr. Trump.

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3 http://www.fec.gov/fecviewer/CandidateCommitteeDetail.do?candidateCommitteeId=C00580100&tabIndex=3

Conclusion

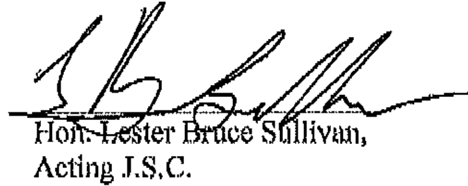
Based on the foregoing, it is hereby:

ORDERED, that the plaintiffs pay to the defendants $500,000,000.00 as a sanction for their conduct in bringing a frivolous claim.

The Clerk is directed to enter judgment accordingly.

The foregoing constitutes the decision and order of this Court.

Dated: March 31, 2016



Hon. Lester Bruce Sullivan,
Acting J.S.C.