UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

LIVE FACE ON WEB, LLC,

Plaintiff,

-v- No. 15 CV 4779-LTS-SN

FIVE BORO MOLD SPECIALIST INC., MARTY KATZ, and JAMES COUTURE, et al.

Defendants.

----------x

MEMORANDUM OPINION AND ORDER

Plaintiff Live Face On Web, LLC ("Plaintiff" or "Live Face") alleges that, after it filed a copyright infringement action against Five Boro Mold Specialist Inc. ("Five Boro") and its owner, Marty Katz (collectively, for the purposes of this opinion, "Defendants"), Defendants and their public relations consultant, James Couture, a named defendant who is not a party to the instant motion practice, published defamatory content about Plaintiff on the Internet. Plaintiff filed an Amended Complaint (docket entry no. 90[1] ("Am. Compl.")) asserting a defamation claim against Defendants and Couture. The Court has jurisdiction of this action pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction of the defamation claim pursuant to 28 U.S.C. § 1367(a).

Before the Court is a motion to dismiss Plaintiff's defamation claim against Five

[1] The Amended Complaint was originally filed on January 8, 2016 as docket entry no. 51, but was re-filed on April 5, 2016 at the Court's request because the original filing was not signed by the attorney who filed it.

Boro and to dismiss both the defamation and copyright infringement claims asserted against Katz in his individual capacity. (See docket entry no. 57.) The Court has considered all of the parties' submissions carefully. For the reasons set forth below, Defendants' motion to dismiss is granted as to the defamation claim against Five Boro and Katz, and denied as to the copyright claim against Katz.

BACKGROUND

The facts that follow are drawn from the Amended Complaint and are assumed to be true for the purposes of this motion practice.

Live Face makes and sells software that creates customized online virtual spokespersons for business websites. (Am. Compl. ¶¶ 14-16.) It registered a copyright for this technology in 2007. (Id. ¶ 22.) In its Amended Complaint, Plaintiff alleges that Defendants Katz and Five Boro used Plaintiff's proprietary software on two Five Boro websites without permission. (Id. ¶¶ 23-32.) Plaintiff alleges that Katz is "the owner and/or president of Five Boro" and that "[Five Boro] and Katz own, and/or operate and/or control the [offending] websites." (Id. ¶¶ 3, 23.) Live Face has filed similar copyright infringement lawsuits against other businesses. (Id. ¶ 56.)

Live Face alleges that, after it commenced this action, Defendants defamed Live Face by making statements about this and other litigation on a blog, on Twitter, on Facebook, in a Google+ post, and in a press release (together "the Publications"). (Id. ¶¶ 49-55, 59-62, 71-73.) Among other statements, Plaintiff takes issue with the Publications' claims that: "the filing of actions by [Live Face] to enforce its copyrights are 'frivolous,' and . . . [Live Face] was subjecting 'unsuspecting victims' to [its] 'legal wrath'"; "the lawsuits were filed against

'innocent small business clients'"; "[o]ne can only ascertain . . . that [Live Face] is doing nothing more than patent trolling for profits"; and "[t]he defendants in this particular instance are being subjected to what could be construed in many legal circles as barratry." (Id. ¶¶ 53-55, 71-73, and Ex. O.) Plaintiff alleges that "numerous other media outlets" picked up Defendants' press release, causing harm to Live Face's business and reputation. (Am. Compl. ¶ 74 and Ex. P.)

DISCUSSION

"To survive a motion to dismiss [under Federal Rule of Civil Procedure 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal quotation marks and citations omitted). This requirement is satisfied when the factual content in the complaint "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007)). A complaint that contains only "naked assertions" or "a formulaic recitation of the elements of a cause of action" does not suffice. Twombly, 550 U.S. at 555. In making its Rule 12(b)(6) determinations, the court "may consider any written instrument attached to the complaint, statements or documents incorporated into the complaint by reference . . . and documents possessed by or known to the plaintiff and upon which [he] relied in bringing the suit." ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007). In deciding a Rule 12(b)(6) motion, a court assumes the truth of the facts asserted in the complaint and draws all reasonable inferences from those facts in favor of the plaintiff. See Harris v. Mills, 572 F.3d 66, 71 (2d Cir. 2009).

The Defamation Claim

"Under New York law, the elements of defamation claim are (1) a defamatory statement of fact, (2) regarding the plaintiff, (3) published to a third party, (4) that is false, (5) made with the applicable level of fault, (6) causing injury, and (7) not protected by privilege." Egiazaryan v. Zalmayev, No. 11 CV 2670, 2011 WL 6097136, at *3 (S.D.N.Y. Dec. 7, 2011) (citing Dillon v. City of New York, 704 N.Y.S.2d 1, 5 (App. Div. 1st Dep't 1999)). Although it is ultimately "the responsibility of the jury to determine whether the plaintiff has actually been defamed," Levin v. McPhee, 119 F.3d 189, 195 (2d Cir. 1997) (citing James v. Gannett Co., 40 N.Y.2d 415, 419 (1976)), "[w]hether particular words are defamatory presents a legal question to be resolved by the court[s] in the first instance." Celle v. Filipino Reporter Enterprises, Inc., 209 F.3d 163, 177 (2d Cir. 2000) (second alteration in original) (citing Aronson v. Wiersma, 65 N.Y.2d 592, 593 (1985)). Among other questions of law, courts are charged with distinguishing between statements of fact, which may be defamatory, and expressions of opinion, which "are not defamatory; instead, they receive absolute protection under the New York Constitution." Tucker v. Wyckoff Heights Med. Ctr., 52 F. Supp. 3d 583, 597 (S.D.N.Y. 2014) (internal quotation marks and citations omitted).

New York courts have developed a three-step inquiry to distinguish potentially defamatory statements of fact from protected opinions. First, a court asks whether the specific language at issue has a precise and readily understood meaning. Second, the court determines whether the statements are capable of being proven true or false. And third, the court evaluates whether the context of the statements signals to the reader that what is being conveyed is likely to be opinion rather than fact. Gross v. N.Y. Times Co., 82 N.Y.2d 146, 153 (1993). These questions are designed to focus the inquiry on the core issue of "whether a reasonable [observer]

could have concluded that [the statements were] conveying facts about the plaintiff," Gross, 82 N.Y.2d at 152, so courts undertake "an analysis that begins by looking at the content of the whole communication, its tone and apparent purpose." Immuno AG. v. Moor-Jankowski, 77 N.Y.2d 235, 254 (1991).

Read in context, the statements in the Publications are non-actionable expressions of opinion rather than potentially defamatory statements of fact. The statements that Plaintiff's litigation is "frivolous" and that Plaintiff subjected "'unsuspecting victims' to [its] 'legal wrath'" are hyperbolic and imprecise. They may mean different things to different people, and they are not capable of being proven true or false because of their subjective, relative meanings. Courts have consistently found that statements calling into question the legitimacy of litigation are non-actionable statements of opinion. See, e.g., Scholastic, Inc. v. Stouffer, 124 F. Supp. 2d 836, 850 (S.D.N.Y. 2000) (statements that legal claims were "absurd," "ridiculous" and "meritless" were non-actionable statements of opinion that were neither precise nor capable of being proven false).

The statements that "[o]ne can only ascertain . . . that [Live Face] is doing nothing more than patent trolling for profits," that "[t]he defendants in this particular instance are being subjected to what could be construed in many legal circles as barratry," and that Plaintiffs' lawsuits are brought against "innocent small business owners," are arguably more "precise and readily understood" than other statements in the Publications, but are similarly not easily "proven true or false," and their context demonstrates that they are statements of opinion. See Gross, 82 N.Y.2d at 153. Moreover, the effect of the use of the rhetorical indicators "one can only ascertain" and "what could be construed" is that "the defendant's statements, read in context, are readily understood as conjecture, hypothesis, or speculation, [which] signals the

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.