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19-P-1546

Appeals Court

YONG LI vs. YANLING ZENG.

No. 19-P-1546.

Middlesex. September 8, 2020. - November 3, 2020.

Present: Green, C.J., Milkey, & Wendlandt, JJ.

Libel and Slander. Social Media. Practice, Civil, Judgment on the pleadings.

Civil action commenced in the Superior Court Department on December 21, 2018.

The case was heard by Janice W. Howe, J., on a motion for judgment on the pleadings.

Yong Li, pro se.
Michelle J. Blair (Robert F. Dionisi, Jr., also present)
for the defendant.

MILKEY, J. The plaintiff, Yong Li, brought a defamation action against the defendant, Yanling Zeng, based on comments that Zeng had posted in an Internet "chat group." Li claimed that the statements defamed her, notwithstanding that she participated in the group using a pseudonym. A Superior Court

judge allowed Zeng's motion for judgment on the pleadings. We affirm, albeit on different grounds than those relied upon by the judge.

Background. The factual recitation that follows is drawn from the allegations of Li's complaint and her proposed amended complaint. For present purposes, we accept those allegations as true.¹ Revere v. Massachusetts Gaming Comm'n, 476 Mass. 591, 595 (2017). Li once lived in Sudbury and still owns a house there. She met Zeng once in person in 2016 when Zeng, a real estate agent, visited Li at the house in Sudbury to provide an estimate of the value of Li's home. As of 2018, both Li and Zeng participated in a chat group on "WeChat," an Internet-based communications service.² The specific WeChat group at issue was organized around a discrimination suit that had been brought against Harvard University with respect to that university's admission policies. According to Li, the purpose of the group,

¹ As explained below, Li's motion to amend her complaint was denied as "futile." Our acceptance of the allegations of the proposed amended complaint obviates the need for us to consider Li's claim that the judge erroneously denied her motion to amend, as well as Zeng's argument that such a claim falls outside the scope of Li's notice of appeal. Finally, we note that, in any event, the two versions of the complaint differ in only limited respects.

² According to Li, WeChat is similar to the messaging application "Whatsapp," except that it specifically caters to the Chinese-speaking community.

which included 437 members, was to assist the plaintiffs in the action against Harvard.

Li participated in the group using the pseudonym "zeber." Li alleges that Zeng knew that Li was the person behind zeber. She does not allege that any of the other participants knew zeber's identity.

On December 11, 2018, Li -- as zeber -- posted comments critical of Zeng, apparently in response to something Zeng had said about zeber. Specifically, Li wrote that Zeng was the first person she had met who had "no character."³ She added that Zeng claimed to know everything about her when in fact the two women had met only once.

Zeng first responded by posting a message to the group as follows:

"Are you attacking my character? I believe that everyone who knows me knows what my character is. Those kind of pink-news . . . about you have nothing to do with me. Please pay attention to yourself. You can take whatever medicine you want, but you can't say whatever [comes to your mind]."

Li alleges that "pink-news" is a Chinese expression that refers to sex gossip or rumors. Li also alleges that there was no "pink-news" involving her.

³ Li's complaint and proposed amended complaint translate the statements, originally made in an unspecified Chinese language, to English. For present purposes, we accept Li's translations as accurate.

Zeng then posted again, stating:

"I have a wide area of activities and a lot of contacts with people. It is the first time I have heard that my character is not good, but I will not cater to people at the trash level. I believe that the people in the group look at your endless arguments. It is easy to guess that you have delusional symptoms. I also saw the opinions of the group of friends and found that their words are similar. It seems that the whole village . . . has a very consistent opinion about the rumor regarding you, and it is not good to switch black and white!"

In response to these messages, Li (again as zeber) posted, "Nonsense, do you want me to bring you to court and sue you for defamation, so that you will lose your houses?" A third member of the WeChat group then joined the conversation, posting that zeber had "just made a threat that I need to curtail my speech in order to avoid your legal harassment." The "owner" of the chat group subsequently removed zeber from the group.⁴

Three days after the exchange of posts detailed above, Li contacted Zeng about the defamation case that Li had threatened. According to Li's own account, she did this because she "hoped this would provide an opportunity to settle the problem before the case went to court." Once Zeng "did not show her willingness to settle" and in fact told Li to stop contacting her, Li filed a one-count defamation complaint in which she requested \$1 million in damages.

⁴ Li does not allege that zeber's removal from the group meant that she (Li) was prevented from rejoining the group under a different pseudonym.

After Zeng filed her answer, Li moved to amend her complaint. As Li explained in her motion, her amended complaint sought to split the existing defamation count into two counts (one for libel and one for slander) and to add a third count for negligence. The amended complaint also would have added a few factual allegations not included in the original. In particular, the amended complaint alleged that Zeng

"continuously posted: 'Can you allow me to post your real name and let everyone know your history on line?'⁵ There were rumors spreading among the villagers . . . but I'm not involved in your business. I don't know why you are so hostile to me. I was forced to say these words tonight, even if someone asked me about you, I would never talk about someone like you!'"

Zeng opposed the motion to amend, arguing that amending the complaint would be futile because, even with the proposed amendments, Li's claims would fail as a matter of law. A Superior Court judge agreed and denied the motion to amend (even though no dispositive motion had yet been considered or even filed). Zeng then sought dismissal of the existing complaint by filing a motion for judgment on the pleadings. See Mass. R. Civ. P. 12 (c), 365 Mass. 754 (1974). A different Superior Court judge allowed Zeng's motion. The second judge concluded

⁵ According to Li, this was not Zeng's only gesture towards unveiling Li's identity. Elsewhere in the proposed amended complaint, Li had vaguely characterized certain of Zeng's messages in a different WeChat group in 2016 as Zeng's having "attempted to unveil [Li's] ID."

that the alleged defamatory statements, when viewed in context, were not actionable as a matter of law. Specifically, the judge concluded that the key statement at issue -- the reference to "pink-news" about Li circulating in her community -- either constituted a statement of opinion, or was excused as a matter of "rhetorical hyperbole" or "imaginative expression."⁶ In the alternative, the judge concluded that Li's action failed as a matter of law because she had not alleged that she had suffered any "actionable damages" from Zeng's statements.

Discussion. To prevail in a claim for defamation, a plaintiff must prove "four elements: first, the defendant made a statement, of and 'concerning the plaintiff, to a third party'; second, the 'statement could damage the plaintiff's reputation in the community'; third, the defendant was at fault for making the statement; and fourth, the statement caused economic loss or, in four specific circumstances, is actionable without economic loss" (footnote omitted). Scholz v. Delp, 473 Mass. 242, 249 (2015), cert. denied, 136 S. Ct. 2411 (2016), quoting Ravnikar v. Bogojavlensky, 438 Mass. 627, 629-630 (2003). "Furthermore, to be actionable, the statement must be one of fact rather than opinion." Scholz, supra. See King v.

⁶ The terms "rhetorical hyperbole" and "imaginative expression" derive from Milkovich v. Lorain Journal Co., 497 U.S. 1, 17, 20 (1990).

Globe Newspaper Co., 400 Mass. 705, 708 (1987), cert. denied, 485 U.S. 940 (1988) ("Statements of pure opinion are constitutionally protected" and, hence, not actionable as defamatory). In addition, damning words that would be understood as "rhetorical flourish or hyperbole" are not actionable. See Dulgarian v. Stone, 420 Mass. 843, 850-851 (1995). However, "[e]ven a statement that is 'cast in the form of an opinion may imply the existence of undisclosed defamatory facts on which the opinion purports to be based, and thus may be actionable.'" Scholz, supra at 252-253, quoting King, supra at 713.

Li principally focuses on Zeng's reference to "pink-news" about her. According to Li, Zeng's reference created, or passed along, a false rumor that Li had had an affair or had committed some other sort of sexual impropriety.⁷ Zeng's statement contained or implied defamatory facts, Li contends, and was not -- as the judge concluded -- pure opinion. In addition, Li

⁷ The boundaries of what constitutes "pink-news" and whether such allegations could be defamatory are far from clear. For example, at oral argument, Li seemed to assert that "pink-news" about someone could include an allegation that the person's spouse had been unfaithful, even though a false statement that someone had been betrayed by his or her spouse may not be defamatory. See Flamand v. American Int'l Group, Inc., 876 F. Supp. 356, 372-373 (D.P.R. 1994) (wife could not sue in her own right over statements that husband was unfaithful, as statements were not "of and concerning" wife); Larrimore v. Dubose, 827 So. 2d 60, 62 (Ala. 2001) ("an allegation of adultery by one spouse does not defame the other spouse").

argues that whether the reference to "pink-news" could be excused as a matter of "excusable hyperbole" or "imaginative expression" is not something that the judge could resolve in Zeng's favor as a matter of law. Rather, Li maintains, that issue was for a jury to resolve. See Phelan v. May Dep't Stores Co., 443 Mass. 52, 58 (2004) (although plaintiff employee's removal from workplace by security guard "did not have a specific, obvious meaning and did not necessarily convey that [employee] had engaged in criminal wrongdoing . . . it was for the jury to decide whether such communication was understood by [employee's] coworkers as having a defamatory meaning"). See also Milkovich v. Lorain Journal Co., 497 U.S. 1, 3-4, 21-23 (1990) (reversing grant of summary judgment in newspaper's favor where fact finder could have found that article suggesting wrestling coach had perjured himself was defamatory).

We need not decide whether Zeng's statement about the existence of "pink-news" could constitute an actionable statement of fact, because Li's suit fails for a different reason. See Gabbidon v. King, 414 Mass. 685, 686 (1993) (appellate court can affirm judgment on any ground fairly raised by record). To prove defamation, Li must show that those to whom the "pink-news" statement was published would have understood that statement as being "of and concerning" her (quotation and citation omitted). Scholz, 473 Mass. at 249.

"In Massachusetts, the test whether [an alleged defamatory statement] is of and concerning the plaintiff is met by proving either (1) that the defendant intended the words to refer to the plaintiff and that they were so understood or (2) that persons could reasonably interpret the defendant's words to refer to the plaintiff and that the defendant was negligent in publishing them in such a way that they could be so understood." ELM Med. Lab., Inc. v. RKO Gen., Inc., 403 Mass. 779, 785 (1989). "[I]f the person is not referred to by name or in such manner as to be readily identifiable from the descriptive matter in the publication, extrinsic facts must be alleged and proved showing that a third person other than the person [defamed] understood it to refer to him." Brauer v. Globe Newspaper Co., 351 Mass. 53, 56 (1966).

Applying those principles to the case at hand demonstrates a critical deficiency in Li's allegations. As her complaint acknowledges, she participated in the chat group through a pseudonym. Li does not allege that anyone in the chat group other than Zeng knew that zeber, the target of Zeng's comments, was Li. True, Li alleges that Zeng threatened or "attempted" to unmask her identity. Ultimately, however, she does not allege that Zeng actually unmasked her.⁸ Because Li has not pleaded

⁸ Li does allege that she suspects that Zeng may have been spreading rumors about her over the last two years, because

facts plausibly suggesting that Zeng made a statement "of and concerning her," her complaint fails to include a necessary element of a defamation action. Accordingly, with or without her proposed amendments, Li's complaint fails as a matter of law.⁹

To be clear, we are not relying on the specific alternative ground on which the judge rested: Li's failure to plead actionable damages.¹⁰ Rather, we are relying on Li's failure to

"people in the local Sudbury WeChat group were sometimes rude to [Li] for no apparent reason." To the extent that Li suggests that this supports an allegation that Zeng actually unmasked her, it is utterly speculative and therefore does not plausibly suggest an entitlement to relief. See Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008). Li's further suggestion in her reply brief that a comment that Zeng made about Li in a different chat group might have connected the zeber pseudonym to Li is itself speculative, and seeks to add allegations beyond her amended complaint.

⁹ To the extent that Li alleges that Zeng defamed her through posted statements other than the reference to "pink-news," her claim fails for the same reason. To the extent Li seeks to claim Zeng must have made oral comments that defamed Li because Sudbury residents have been rude to her, as noted, such speculation does not plausibly suggest an entitlement to relief. See note 8, supra. Finally, although the proposed amended complaint purports to include a claim for negligence, that claim is devoid of content. It alleges, in conclusory fashion, only that "[t]he action[s] of [Zeng] set forth above constitute [n]egligence under common tort law."

¹⁰ In fact, the propriety of that alternative ground lies in substantial doubt. Zeng's statement, if defamatory, may constitute libel, not slander, because a WeChat communication is written, not oral. See Ravnikar, 438 Mass. at 629 (characterizing defamation as libel where the actionable statement is "published in writing or some other equivalent medium"). A plaintiff who proves that she has been libeled is

plead a plausible case that her own reputation in the community was diminished by Zeng's statements about zeber.¹¹

One final clarifying point bears noting. We recognize that there may be situations where someone known by a pseudonym can bring a defamation action on behalf of the pseudonym. See Alexander vs. Falk, U.S. Dist. Ct., No. 16-CV-02268 (D. Nev. Aug. 30, 2017) (allowing defamation action by romance author and model to proceed through use of plaintiffs' professional pseudonyms). In such a case, the plaintiff would be seeking damages for harm done to the pseudonym's independent reputation in the community. Id. This, however, is not one of those situations. Nothing in Li's complaint suggests that zeber had a legally cognizable independent reputation or that Li sued to protect such a reputation. Instead, Li brought her case in her

"entitled to nominal damages" at least. Shafir v. Steele, 431 Mass. 365, 373 (2000).

¹¹ Because a statement "of and concerning" a plaintiff is an element of a defamation claim, there is no inconsistency between holding that a plaintiff has not made out a case of libel if she fails to show that the statements at issue were "of and concerning" her, and saying that a plaintiff who has proven she was libeled is entitled to at least nominal damages. Cf. Tyler v. Michaels Stores, Inc., 464 Mass. 492, 503 (2013) (consumer's proving that defendant has committed violation of G. L. c. 93A "does not necessarily mean the consumer has suffered an injury or a loss entitling her to at least nominal damages and attorney's fees; instead, the violation of the legal right that has created the unfair or deceptive act or practice must cause the consumer some kind of separate, identifiable harm arising from the violation itself").

own right based on the alleged harm caused to her own reputation.

Judgment affirmed.