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October 17, 2019

Via ECF

The Honorable Judge John G. Koeltl
United States District Court, Southern District of New York
500 Pearl Street, Courtroom 14A
New York, NY 10007

Re: *Parneros* v. *Barnes & Noble, Inc.*, No. 18-cv-07834 (JGK)

Dear Judge Koeltl:

We represent Defendant and Counterclaim Plaintiff Barnes & Noble, Inc. ("B&N"). Pursuant to Your Honor's Individual Practices, we respectfully request a pre-motion conference for B&N's contemplated partial summary judgment motion to dismiss Plaintiff's defamation and breach of covenant of good faith and fair dealing claims. The contemplated motion would significantly narrow the scope of the trial by eliminating two of Plaintiff's three claims, including the one claim (defamation) for which Plaintiff seeks the largest amount in damages (approximately $70 million), obviate the need for expert testimony, and leave only Plaintiff's breach of his employment contract claim (for which Plaintiff seeks approximately $6.4 million) to be tried. Summary judgment is appropriate with respect to these two claims because the undisputed facts require their dismissal as a matter of law.

Summary Judgment Should Be Granted on Plaintiff's Defamation Claim

Plaintiff's defamation claim is based on the press release B&N issued on July 3, 2018.[1] Under New York law, in order to succeed on a defamation claim, a plaintiff must show: (1) a defamatory statement of fact concerning the plaintiff, (2) publication to a third party by the defendant without authorization or privilege, (3) falsity of the statement, (4) some degree of fault

[1] The July 3 press release stated: "The Board of Directors of Barnes & Noble, Inc. today announced the termination of its Chief Executive Officer, Demos Parneros, for violations of the Company's policies. This action was taken by the Company's Board of Directors who were advised by the law firm Paul, Weiss, Rifkind, Wharton & Garrison LLP. Mr. Parneros' termination is not due to any disagreement with the Company regarding its financial reporting, policies or practices or any potential fraud relating thereto. Mr. Parneros will not receive any severance payment and he is no longer a member of the Company's Board of Directors." (B&N-00001337.)

on the part of the publisher, and (5) defamation *per se* or special damages. *See Thai* v. *Cayre Grp. Ltd.*, 726 F. Supp. 2d 323, 329 (S.D.N.Y. 2010); *Ratajack* v. *Brewster Fire Dep't, Inc. of the Brewster Se. Joint Fire Dist.*, 178 F. Supp. 3d 118, 158 (S.D.N.Y. 2016).

B&N is entitled to summary judgment on Plaintiff's defamation claim because (a) the statements at issue are all true, (b) the undisputed facts negate any finding of fault by B&N as a matter of law, and (c) there is no evidence of actual malice and common law malice necessary to sustain Plaintiff's claim for damages.

First, Plaintiff cannot prove falsity because the documentary evidence and the testimony of Board members and the General Counsel demonstrate that all of the statements in the July 3, 2018 press release are true.[2] The Board did terminate Plaintiff for violations of Company policies; the Board was advised by Paul, Weiss; Plaintiff did not receive severance; he was no longer a Board member; and the reason for his termination did not relate to financial reporting issues or fraud.[3] Plaintiff's claim that he did not violate Company policies and therefore should not have been terminated for Cause does not change the analysis. The press release stated that Plaintiff was terminated for violation of policies and that statement is true. (B&N-00001337.) Substantial truth is an absolute defense to a defamation claim. *Silverman*, 35 A.D.3d at 12.

Second, Plaintiff cannot meet his burden on fault. Because Plaintiff has alleged a defamatory statement that was a matter of public concern, *Chapadeau* v. *Utica Observer-Dispatch* applies, and establishes, as a matter of law, a qualified privilege in making the statements at issue. 38 N.Y.2d 196, 198-99 (1975). Under the *Chapadeau* standard of fault, Plaintiff must show, by a preponderance of the evidence, that B&N published the press release in a "grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." *Id.* at 199. Numerous courts have held that a company's reliance on a thorough, responsible investigation in announcing employee misconduct "negates the existence of gross irresponsibility as a matter of law." *Kamfar* v. *New World Rest. Grp., Inc.*, 347 F. Supp. 2d 38, 47 (S.D.N.Y. 2004); *see also Post* v. *Regan,* 677 F. Supp. 203, 209 (S.D.N.Y. 1988); *Konikoff* v. *Prudential Ins. Co. of Am.*, 234 F.3d 92, 103-05 (2d Cir. 2000). Here, the record reflects that B&N's investigation of Plaintiff's conduct was conducted in a careful and responsible manner by senior management.[4] The record also demonstrates that the Board's unanimous decision to terminate Plaintiff for cause was the product of a deliberative process,[5] and that the press release was extensively reviewed by the Board and senior management (*see, e.g.*, Feuer Dep. 388:18-389:18). There is

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[2] Under New York law, when a defendant brings a summary judgment motion on grounds that the allegedly defamatory statements were substantially true, it bears the initial burden of demonstrating substantial truth. The burden then shifts to the plaintiff to raise a triable issue of fact as to the statements' falsity. If the plaintiff does not satisfy his burden, summary judgment is warranted. *See, e.g., Silverman* v. *Clark*, 35 A.D.3d 1, 12 (1st Dep't 2006).

[3] *See, e.g.*, B&N-00000449 at 463-64; Ferrara Dep. 322:7-324:6; B&N-00010660; Van Der Zon Dep. 298:16-299:23; Guenther Dep. 306:15-307:5; B&N-00000444; B&N-00008118; Feuer Dep. 390:17-391:17. We will provide the record evidence referenced herein at the Court's request.

[4] *See, e.g.*, Pl. 001259; Exec. Asst. Dep. 245:8-21, 248:9-14; Feuer Declaration (May 31, 2019), ¶ 16, ECF No. 84; Guenther Dep. 229:7-231:5, Ferrara Dep. 186:10-187:9 and 249:15-252:9.

[5] *See, e.g.,* B&N-00010660, Ferrara Dep. 269:10-272:3 and 315:18-317:5; Feuer Dep. 372:21-374:17.

no evidence, let alone the preponderance of evidence that the law requires, of gross irresponsibility.

Third, Plaintiff's claims for punitive and any presumed[6] damages fail as a matter of law because there is no supporting evidence. As the Supreme Court has stated, "States may not permit recovery of presumed or punitive damages" for defamation claims involving a matter of public concern without a showing of actual malice (*i.e.*, "knowledge of falsity or reckless disregard of the truth" of the statement at issue). *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 349 (1974). Further, under New York law, punitive damages can only be awarded upon a showing of common law malice—*i.e.*, that a defendant's "outrageous" conduct was "malicious, wanton, reckless, or in willful disregard for another's rights." *Prozeralik* v. *Capital Cities Commc'ns*, 82 N.Y.2d 466, 479-80 (1993). As there is no record evidence of any conduct on the part of B&N that is even remotely close to actual or common law malice, Plaintiff's claims for punitive and any presumed damages cannot succeed.[7]

Summary Judgment Should be Granted on Plaintiff's Breach of Covenant of Good Faith and Fair Dealing Claim

Plaintiff's good faith and fair dealing claim is premised on the timing of his firing. He asserts that B&N fired him "without cause just prior to the date defendant would have awarded him an additional $3.6 million in equity." (Am. Compl. ¶ 97.) In order to prevail on a breach of the covenant of good faith and fair dealing claim, a plaintiff must prove: (1) defendant owed plaintiff "a duty to act in good faith and conduct fair dealing"; (2) defendant breached that duty; and (3) the breach proximately caused plaintiff's damages. *Schonfeld* v. *Wells Fargo Bank, N.A. for Aegis Asset Backed Secs. Tr. Mortg. Pass-Through Certificates, Series 2004-3*, 1:15-cv-01425 (MAD/CFH), 2017 WL 4326057, at *5 (N.D.N.Y. Sept. 27, 2017) (citations omitted). A plaintiff must also show that the defendant acted "*deliberately*," and with an "improper motive." *See Nautilus Neurosci., Inc.* v. *Fares*, No. 13 Civ. 1078(SAS), 2013 WL 6501692, at *6 (S.D.N.Y. Dec. 11, 2013) (emphasis added); *Wagner* v. *JP Morgan Chase Bank*, No. 06 Civ. 3126(RJS), 2011 WL 856262, at *4 (S.D.N.Y. Mar. 9, 2011).

Here, there is no evidence that B&N acted in bad faith or with the deliberate purpose of depriving Plaintiff of his equity. The undisputed evidence shows that there was no discussion of the impending vesting of Plaintiff's equity awards and that such vesting played no role in the Board's deliberations. *See, e.g.*, Ferrara Dep. 314:22-315:17; Guenther Dep. 262:24-263:4. This lack of any evidence of bad faith *is fatal*, and therefore, as a matter of law, the implied covenant of good faith and fair dealing claim must be dismissed on summary judgment. *See, e.g., CCM Rochester, Inc.* v. *Federated Inv'rs, Inc.*, 234 F. Supp. 3d 501, 510 (S.D.N.Y. 2017).

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[6] Under New York law, courts will presume that damages will result where a plaintiff has shown that the statement is defamatory per se and has established the constitutional requirement of actual malice. *Liberman* v. *Gelstein*, 80 N.Y.2d 429, 435 & n.1 (1992); *Gertz*, 418 U.S. at 349-50.

[7] To the extent Plaintiff asserts a defamation claim in addition to defamation *per se* (*see* Am. Compl. ¶ 90), that claim should be dismissed for failure to plead special damages. *See, e.g., Berwick* v. *New World Network Int'l, Ltd.*, No. 06 CIV. 2641 JGK, 2007 WL 949767, at *14 (S.D.N.Y. Mar. 28, 2007) (Koeltl, J.).

* * *

For the foregoing reasons, summary judgment should be granted on Plaintiff's defamation and breach of the covenant of good faith and fair dealing claims.

Respectfully submitted,

/s/ Liza M. Velazquez
Liza M. Velazquez

cc: Counsel of Record (via ECF)