SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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LUKASZ GOTTWALD p/k/a DR. LUKE, KASZ MONEY, INC., and PRESCRIPTION SONGS, LLC,

Index No.: 653118/2014

DECISION & ORDER

Plaintiffs,

-against-

KESHA ROSE SEBERT p/k/a KESHA,

Defendant.

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JENNIFER G. SCHECTER, J.:

Plaintiffs Lukasz Gottwald, Kasz Money, Inc. and Prescription Songs, LLC commenced this action against defendant Kesha Rose Sebert (Kesha) alleging that she and others "hatched a campaign ... designed to ruin Gottwald's business reputation" by spreading "false, disgusting and highly damaging statements ... to numerous third parties ... that Gottwald purportedly raped Kesha nearly a decade ago" and that he also raped another female recording artist (Dkt 1215 [Second Amended Complaint (SAC)] ¶¶ 2, 4, 64-65, 88-99).[1] The parties substantially completed discovery. Through discovery, plaintiffs were able to learn more about Kesha and her agents' dissemination of the allegedly defamatory statements that were the subject of the SAC.[2] In anticipation of

[1] References to "Dkt" followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF). The SAC also includes causes of action against Kesha for breach of contract (SAC ¶¶ 88-99). Kesha does not substantively oppose amendment of those claims.

[2] A significant portion of discovery was only produced recently after the Appellate Division affirmed this court's determination that Kesha improperly invoked privilege and was required to produce additional materials (*see Gottwald v Sebert*, 58 Misc 3d 625 [Sup Ct, NY County 2017] [Kornreich, J.], *affd* 161 AD3d 679 [1st Dept 2018]). The information that was withheld was material to the proposed amendments (*id.* at 636 [*in camera* review revealed a public relations

trial, plaintiffs served an amended bill of particulars (Dkt 1221 [the Amended BOP]), in which they notified Kesha of their precise allegations. In response, Kesha professed surprise and this motion practice ensued.[3]

Kesha moves to strike the Amended BOP, urging that plaintiffs are improperly seeking to "enormously expand the case" years after it was commenced (Dkt 1466 at 6). Plaintiffs oppose the motion and cross-move for leave to serve a proposed third amended complaint (PTAC) (Dkt 1522) that includes the allegations in the Amended BOP. Because leave to amend is liberally granted and Kesha not only had notice of plaintiffs' proposed amendments, she already obtained discovery relevant to them,[4] plaintiffs' cross-motion is granted and Kesha's motion is denied.[5]

It is well established that leave to amend should be granted freely unless the proposed amendment is palpably devoid of merit or would cause undue prejudice (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]). While unexplained delay in

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strategy, the goal of which, "as Kesha's counsel admitted in open court, was to induce Gottwald to quickly settle, and to seek to influence the prospective jury pool"]).

[3] The notion that Kesha only recently learned of the true scope of plaintiffs' defamation claim is belied by the record. Throughout discovery, including at his June 2017 deposition, Gottwald maintained that Kesha's California complaint was defamatory. In furtherance of her claim of surprise, Kesha's expert rebuttal report was tactically narrow. Kesha has already been allowed to revise her expert's response to address the full scope of plaintiffs' claims.

[4] The court rejects the argument that Kesha has not been afforded the opportunity to take discovery on the full extent of plaintiffs' claims. As discussed in this decision, she has known that all of the issues raised in the amendments were relevant and consequential.

[5] Nothing in this decision should be construed as an opinion on the truth of any of the parties' allegations. Under the legal standard applicable to motions for leave to amend, plaintiffs' proposed amendments must be permitted unless clearly devoid of merit. Kesha's defense in this action is predicated on the truth of the statements that she made. The truth or falsity of her accusations *is not* at issue on this motion and is ultimately for a jury to decide.

seeking leave to amend can, in certain circumstances, warrant denial of the motion (*see Barry v Clermont York Assocs., LLC*, 144 AD3d 607, 608 [1st Dept 2016]), it is settled that a party may amend its pleadings to conform to the proof at any time--even during or after trial--provided that there is no prejudice (*Kimso Apts. LLC v Gandhi*, 24 NY3d 403, 411 [2014] [courts are afforded "the widest possible latitude" in allowing an amendment pursuant to CPLR 3025]).

Additionally, causes of action asserted in an amended complaint against a defendant who is already a party to the action, which would otherwise be time-barred, are deemed to "relate back" so long as the complaint "gave defendant notice of the transactions or occurrences at issue" and there is no "undue prejudice" (*O'Halloran v Metro. Transp. Auth.*, 154 AD3d 83, 87 [1st Dept 2017]; CPLR 203[f]). An amendment that "merely adds a new theory of recovery . . . arising out of a transaction or occurrence already in litigation" is consistent with fairness concerns underlying CPLR 203(f) because "[a] party is likely to have collected and preserved available evidence relating to the entire transaction or occurrence and the defendant's sense of security has already been disturbed by the pending action" (*Duffy v Horton Mem. Hosp.*, 66 NY2d 473, 477 [1985]).

Though defamation has a one-year statute of limitations and must be pleaded with particularity, the relation-back doctrine authorizes amendments that provide more specifics so long as they relate to the transactions on which the original defamation claim was based (*Pickholz v First Boston, Inc.*, 202 AD2d 277 [1st Dept 1994] ["The third amended complaint's cause of action for defamation is not time barred since it merely

expands upon and relates back to the defamation claims made in the first, timely amended complaint"]).

Here, it could not be clearer that the proposed new allegations merely expand on those already contained in the operative pleading. Significantly, the proposed amendments in no way change the theory of the case. For instance, the SAC (to which there was never any objection) sets forth:

> Beginning in 2012, Kesha, her mother Pebe Sebert ("Pebe"), and her manager Vector Management, LLC ("Vector") ***hatched a campaign*** which was expressly and admittedly designed to ruin Gottwald's business and reputation. Kesha, through her management, has admitted that this campaign was undertaken as retaliation after Plaintiffs would not agree to enter into so-called "renegotiated" contracts with Kesha containing terms that would be far less favorable to Plaintiffs than those in their currently binding agreements with Kesha. Even though Kesha and her representatives had no right or basis to insist that Plaintiffs enter into such "renegotiated" contracts, they were greatly angered that Plaintiffs would not agree to do so.
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> Kesha, her mother Pebe, ***and Kesha's other representatives thus embarked on a vicious campaign to destroy Gottwald employing vicious tactics including defamation, blacklisting, and extortion***. In violation of her contractual agreements with Plaintiffs, Kesha refused to comply with her ongoing obligations to deliver sound recordings and compositions to Plaintiffs, to allow Gottwald to produce her work, or to account for or pay substantial royalties to KMI.
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> As part of their coordinated effort to ruin Plaintiffs' business and reputation, Kesha and Pebe spread to the public false, disgusting and highly damaging statements about Plaintiffs to numerous third parties which constitute defamation *per se*. Among other things, they revived an utterly baseless claim--which Kesha and Pebe previously acknowledged under oath to be false--that Gottwald purportedly raped Kesha nearly a decade ago, as well as other false and baseless accusations of purported abuse.
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> After Kesha's initial defamatory smear campaign did not succeed in obtaining business concessions from Plaintiffs, ***she commenced a lawsuit against them in California Superior Court on October 14, 2014, asserting meritless claims arising from false allegations of purported abuse***. Kesha

> and her representatives anticipated wrongly that Plaintiffs would quickly settle the California action and did not expect them to vigorously oppose her baseless claims. In the face of Plaintiffs' opposition, Kesha eventually dismissed her California lawsuit voluntarily, thereby acknowledging ***that it entirely lacked merit***.

SAC ¶¶ 2-5 (emphasis added).

In the SAC, plaintiffs further allege that after this court denied Kesha's motion for a preliminary injunction,

> Kesha and her representatives decided that she would purportedly resume performing under her contracts with Plaintiffs (as she always had the ability to do), but that they would redouble their malicious efforts to utterly ruin Gottwald and his business. ***They organized a campaign to blacklist Plaintiffs from the entire music industry***.
>
> In furtherance of ***her scheme to blacklist Plaintiffs from the music industry***, ***Kesha also spread*** a knowingly false and wholly defamatory accusation that Gottwald ***had purportedly raped another female recording artist***. ***Kesha and her team*** also ***promoted boycotts and social media harassment*** of third parties who continued to work with Gottwald in order to pressure them to stop doing so. Kesha's management even went so far as to develop a plan for "leaking" to the public the cell phone numbers and email addresses of top-level executives from Sony Music Entertainment and its related entities (collectively, "Sony").

SAC ¶¶ 7-8 (emphasis added).

The PTAC contains the exact same causes of action included in the SAC. It simply adds additional specifics as to the continuing "campaign" and identifies "Kesha's other representatives" as well as their roles. There can be no question that Kesha has been on notice that she is accused of attempting to ruin Gottwald's career by disseminating false allegations to the public through social media campaigns and frivolous litigation. The full scope of Kesha's "campaign," however, was not known to plaintiffs until they received all of Kesha's discovery, which was the subject of her

unsuccessful motion practice and appeal. The PTAC establishes that additional damages are being sought based on information that was already contained in the SAC and fleshes out facts and details that either occurred post-litigation or that plaintiffs were only able to develop through the aid of discovery after getting a fuller picture of what transpired.

For instance, plaintiffs allege that as part of her "campaign," Kesha and her representatives "developed a so-called 'Press Plan'" in an effort to extricate her from her relationship with Gottwald and that her California attorney, Mark Geragos, hired a press agent (Sunshine Sachs) that delivered a copy of the "sham" complaint "to the hugely popular gossip website TMZ.com prior to its filing" (PTAC ¶¶ 6, 61-62). They plead that Geragos, as Kesha's agent, made television appearances "during which he repeated Kesha's false allegations that she was drugged and raped by Gottwald" and that he publicized the interviews and defamatory statements through social media and the press (¶¶ 69-75). They assert that in support of her motion for a preliminary injunction in this case, Kesha filed a "sham" affidavit in which she untruthfully swore that Gottwald drugged and raped her, that she and her agents (such as Michael Eisele) coordinated the "Free Kesha" campaign to blacklist plaintiffs and that the defamatory campaign has been ongoing up until as recent as several days before the PTAC was filed (¶¶ 77-97, 98 ["on June 15, 2018, Kesha, through her current legal representatives, issued a lengthy press release, which among other falsehoods, again repeated her false allegation 'that Dr. Luke sexually assaulted her' to the public"], ¶ 110 [the June 15, 2018 press statement "republished the defamatory assertion that Gottwald" raped another recording artist "even though Kesha knows that (the artist) has denied the allegation under oath"]).

To be sure, the PTAC contains new specific instances of Kesha and her agents allegedly defaming Gottwald, all of which Kesha has been well aware of. In each and every one of those instances, Kesha is merely alleged to have spread the very same allegations that have been the subject of this litigation from its inception. Thus, notwithstanding Kesha's protestations about "47 additional statements" (*see* Dkt 1483 at 9), all of them are part of the very same "campaign" already set forth in the SAC and all of them relate to the continued dissemination of the very same content that has always been the subject of this suit from day one (namely, statements asserting that Gottwald drugged and raped Kesha and that he raped another artist too). The PTAC does not change the landscape of this action. Kesha has always known that this case comes down to the truth of these repeated allegations.[6]

Nor will Kesha be "unduly prejudiced" by the amendments. She confirms that she knew that "post-litigation 'campaign' allegations" were relevant because they bear on the issue of malice. She also pleaded litigation privilege as an affirmative defense in this action. Though the defense was purportedly raised only as to the draft complaint (*see* Dkt 1483 at 17), it would make no sense for her to face liability based solely on the unfiled draft complaint and not on the finalized publicly filed one. Nor has it ever been a secret that plaintiffs seek to hold Kesha liable for statements issued by "other

[6] Kesha's contention that the PTAC seeks to expand the defamation claim to encompass categories broader than, and not fairly noticed by, the SAC is unconvincing. For example, Kesha's argument that the SAC does not fairly give notice of Gottwald's claim that her California complaint was a "sham" is refuted by ¶ 5, which states that after her "initial defamatory smear campaign did not succeed in obtaining business concessions . . . she commenced a lawsuit . . . in California . . . asserting ***meritless claims arising from false allegations of purported abuse***" (emphasis added).

representatives" (*see* SAC ¶ 3)--such as Geragos and Eisele--the full extent of whose involvement plaintiffs were able to recognize only after discovery.[7] Their relationship to the "campaign" has been the subject of extensive discovery (including depositions); thus, Kesha cannot reasonably claim to have lacked notice that her liability is potentially predicated, in part, on their conduct.

Kesha has appreciated the significance of post-litigation allegations all along and has had the incentive to fully explore the issues raised by them in discovery. That the allegations she has known about now may expose her to more liability if proven at trial is not the type of prejudice that precludes amendment (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981] ["Prejudice, of course, is not found in the mere exposure of the defendant to greater liability . . . there must be some indication that the defendant has been hindered" in preparation of the case]; *see Kimso*, 24 NY3d at 411).

The proposed amendments, moreover, are not palpably insufficient or patently devoid of merit (*see Thomas v G2 FMV, LLC*, 147 AD3d 700, 700-01 [1st Dept 2017] [defamation was adequately pleaded because the prior case was "a sham action" thus defendants were not entitled to "the protection of the absolute judicial privilege"]; *Flomenhaft v Finkelstein*, 127 AD3d 634, 638 [1st Dept 2015] ["the privilege is capable of abuse and will not be conferred where the underlying lawsuit was a sham action brought solely to defame the defendant"], citing *Lacher v Engel*, 33 AD3d 10, 13 [1st Dept 2006] ["privilege is limited to statements which are not only pertinent to the subject

[7] Defamation liability may be established based on dissemination by an agent (*see National Puerto Rican Day Parade, Inc. v Casa Publs., Inc.*, 79 AD3d 592, 594-95 [1st Dept 2010]; *see also Stevenson v Cramer*, 151 AD3d 1932, 1934 [4th Dept 2017]; *Levy v Smith*, 132 AD3d 961, 963 [2d Dept 2015]).

matter of the lawsuit but are made 'in good faith and without malice'"]; *contrast Manhattan Sports Restaurants of Am., LLC v Lieu*, 146 AD3d 727 [1st Dept 2017]).[8] Here, as in *Thomas v G2 FMV, LLC,* a trier of fact could possibly conclude that the California complaint was a sham maliciously filed solely to defame plaintiffs as part of Kesha's alleged campaign to destroy Gottwald as leverage to renegotiate her contracts.[9]

In sum, because the proposed allegations are transactionally related to those in the SAC and are not palpably insufficient or patently lacking in merit and because Kesha had

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[8] In all the years since this action was commenced, Kesha has never moved to dismiss the defamation causes of action pursuant to CPLR 3211(a)(7). In fact, she consented to prior amendments and, as mentioned above, has asserted a litigation-privilege defense (*see* Dkt 641 ["While (Kesha) vigorously disputes the factual allegations and legal merit of the (SAC), in view of New York's liberal pleading-amendment standard (CPLR 3025[b] [instructing that leave to amend shall be 'freely given']), Kesha does not oppose (plaintiffs' motion for leave to file the SAC)"]). It is unclear why Kesha believes that the proposed claims, unlike the existing ones, are palpably insufficient or patently without merit. It also is not clear that Kesha "diligently" prosecuted her claims against plaintiffs or "vigorously" opposed their dismissal. Her causes of action against Gottwald were either quickly dismissed (for lack of subject matter jurisdiction or as barred by the statute of limitations) or were voluntarily withdrawn. Based on the inability of the counterclaims to withstand early dismissal, it is not unreasonable to infer that Kesha may have pleaded them to induce a settlement and obtain a release from her contracts as alleged in the PTAC.

[9] The court need not separately address Kesha's "fair report" argument under Civil Rights Law § 74 because a pleading that states a claim for defamation based on a "sham complaint" is not subject to dismissal under § 74 (*see Thomas v G2 FMV, LLC*, 2016 WL 320622, at *9 [Sup Ct, NY County 2016] ["Civil Rights Law § 74 does not insulate the report of a sham complaint maliciously distributed for the purpose of defaming. It insulates an accurate and 'fair' report. If [a complaint] was a sham, publication of it would not be 'fair.' Instead, a sham complaint would be a false statement given to a news organization for the purpose of publication"], *affd* 147 AD3d 700; *see Williams v Williams*, 23 NY2d 592, 599 [1969] ["We conclude that it was never the intention of the Legislature in enacting section 74 to allow 'any person' to maliciously institute a judicial proceeding alleging false and defamatory charges, and to then circulate a press release or other communication based thereon and escape liability by invoking the statute"]). Likewise, the court need not address the viability of the PTAC under California's anti-SLAPP statute (which was never raised as to the allegations in the preceding complaints) because it is "a procedural statute enacted as part of California's code of civil procedure and has no applicability" here (*see Zervos v Trump*, 59 Misc 3d 790, 798 n 2 [Sup Ct, NY County 2018]).

notice of them, plaintiffs' cross-motion to amend the SAC is granted and Kesha's motion to strike the Amended BOP is denied. Accordingly, it is

ORDERED that Kesha's motion to strike the Amended BOP is denied and plaintiffs' cross-motion for leave to amend is granted; and it is further

ORDERED that plaintiffs must file their third amended complaint within three days of the entry of this order on NYSCEF and Kesha shall answer it within two weeks thereafter.

Dated: August 31, 2018

ENTER:

Jennifer G. Scheeter, J.S.C.