UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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MITCHELL ROSLIN, M.D.,

Plaintiff,

-against-

MEMORANDUM DECISION AND ORDER

10-Civ-08634 (GAY)

SPIRIT AIRLINES, INC.,

Defendant(s).
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Plaintiff Mitchell Roslin ("plaintiff" or "Dr. Roslin") commenced the instant action against defendant Spirit Airlines ("defendant" or "Spirit") alleging defamation per se. Spirit moves for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure ("FRCP").[1] For the reasons that follow, Spirit's motion for summary judgment is granted and the complaint is dismissed.

I. BACKGROUND

On February 14, 2010, Dr. Roslin, his wife, and two children were passengers aboard Spirit Airlines Flight 601 scheduled to depart from New York's LaGuardia Airport to Fort Lauderdale, Florida. Defendant's Rule 56.1 Statement ("Def. Stmt."), ¶¶ 4, 5, 6. Flight 601 was initially delayed due to the inbound flight's late arrival and was further delayed due to mechanical problems. Id. ¶¶ 9, 10. During the wait, the cabins became very hot. Def. Stmt. ¶ 13; Plaintiff's Statement of Fact ("Pl. Stmt."), ¶¶ 4, 6. Dr. Roslin estimated the temperature inside the cabin at 90 degrees. Def. Stmt. ¶14.

Passengers began to complain about the temperature. Pl. Stmt. ¶¶ 4, 6. The

passengers complained to flight attendant Laura Reyes ("FA Reyes"), who spoke with the Captain. Pl. Stmt. ¶ 7. The Captain authorized the flight attendants to open the two rear doors. Id. About 10 to 15 minutes later, passengers near the rear door began complaining of being too cold. Id. ¶8. As a result, one of the doors was closed; and another 10 to 15 minutes after that, the second door was closed. Id. The temperature in the cabin rose once again. Id. Passengers requested water from the flight crew. Id. ¶ 4. Dr. Roslin requested free water and was informed that there was water for purchase. Id. ¶¶ 6, 11, 13. The passengers were informed that it was against the company policy to give water before the plane was in the air. Deposition of Mrs. Paula Roslin ("Mrs. Roslin Dep."), at 21:10-13. The flight attendants eventually offered the water for purchase. Mrs. Roslin Dep. at 15:17-19. Mrs. Roslin purchased water as soon as they were offered for sale. Id. at 15:13-23.

Dr. Roslin testified that during the wait, he joined a conversation between a male flight attendant and other passengers several rows ahead of him regarding the aircraft's conditions. Def. Stmt. ¶ 15; Plaintiff's Response to Defendant's Rule 56.1 Statement of Facts ("Pl. Resp. Stmt."), ¶ 15. Furthermore, during the wait, Dr. Roslin had several encounters with FA Reyes that were contentious. Def. Stmt. ¶ 19; Pl. Resp. Stmt. ¶ 19; Mrs. Roslin Dep. at 24:21-23. Dr. Roslin and Spirit General Manager, Larry Wright ("Mr. Wright") spoke three to four times; described as group conversations by Dr. Roslin. Def. Stmt. ¶ 18; Pl. Resp. Stmt. ¶ 18. Dr. Roslin testified that he made a statement to the effect that the service is so bad even terrorists would not fly it, in an effort to calm his son. Def. Stmt. ¶ 21. A fellow passenger who overheard the remark reportedly became

[1] This action is before me for all purposes on the consent of the parties, pursuant to 28 U.S.C. § 636(c).

upset and began crying. Deposition of Areyana Eskin at 40: 21-23; Deposition of Eva Baron at 38:21-25. Thereafter, Mr. Wright informed Dr. Roslin that he was being removed from the plane; however, his wife and children could remain onboard. Def. Stmt. ¶ 24; Pl. Resp. Stmt. ¶ 24. In the course of this discussion, Dr. Roslin's son kicked Mr. Wright in the groin area. Def. Stmt. ¶ 25. Mrs. Roslin told her husband that they would all leave together. Def. Stmt. ¶ 26; Mrs. Roslin Dep. at 39:3-11; Roslin Dep. at 87:4-9. The family exited the aircraft. Def. Stmt. ¶ 26

After the family exited the aircraft, Port Authority police spoke with Dr. Roslin. Roslin Dep. 89:24 - 90:4-5. Thereafter, Dr. Roslin was refunded the cost of the flight. Def. Stmt. ¶ 28. Mr. Wright unsuccessfully attempted to assist Dr. Roslin in finding another flight. Id. ¶ 29. During this time, Mr. Wright informed Dr. Roslin that the New York Post ("the Post") contacted him. Id. ¶ 30.

Dr. Roslin stated that he called the Post five times on the day of the incident. Def. Stmt. ¶ 40; Alimonti Aff., Exhs. J, K. The first call occurred at 5:48 p.m. and the last one at 9:27 p.m. Id. Mrs. Roslin testified that her husband contacted the Post to "explain to them to tell them what went on because hopefully in order to publicize it so that the public knows." Mrs. Roslin Dep. at 46:22. The Post published an article on the incident citing Dr. Roslin as its source. Alimonti Aff., Exh. A. The article stated that Dr. Roslin was kicked off the Spirit Airline aircraft because he asked for some water for his pregnant wife[2]. Id. The Huffington Post and Gothamist both published the story, citing the Post as their sources. Id.

[2] Dr. Roslin testified that he did not ask for water for his wife or his family; rather he asked for water, globally, for all the passengers. Dr. Roslin Dep. at 22:22-25

The Post contacted Spirit after receiving a call from Dr. Roslin. Id. ¶ 39; Affidavit of Misty Pinson in Support of Spirit's Motion For Summary Judgment ("Pinson Aff."), Exh. H. Spirit conducted an internal investigation, which included obtaining statements from the flight attendants onboard the aircraft, Mr. Wright, and some of the passengers[3] as they exited the aircraft in Fort Lauderdale. After receiving the statements and reports, Spirit issued a statement:

> Spirit did not deny water to anyone. Beverages were offered for purchase just as we do on all of our flights. The real story is that Dr. Roslin was escorted off the flight for violating federal law for interfering with a flight crew. He was causing a disturbance and attempted to incite other passengers to the point that another passenger started to cry in fear as a result of his behavior. He made verbal references to terrorism. His continued disturbance caused further delays to the flight. His escalating behavior was a safety risk to the crew and other passengers. His son kicked a Spirit employee in the groin. He had to be removed from the aircraft by law enforcement.

Def. Stmt. ¶ 44; Alimonti Aff., Exh. A.

On February 16, 2010, the Post ran follow up articles about the incident, including some of Spirit's statements in the article. Pinson Aff., Exh. J; Alimonti Aff., Exh. A. On February 18, 2019, the Huffington Post also ran a follow up article containing all of Spirit's afore-mentioned statements, along with the original article. Alimonti Aff., Exh. A. The Gothamist also published a follow up article containing some of Spirit's statements. Id.

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[3] Spirit sent Station Manager Pasquale Nunnari to meet with the flight as the passengers deplaned and to interview the passengers seated near the Roslins. Def. Stmt. ¶ 40.

On September 2, 2010, Dr. Roslin initiated this action, alleging defamation per se. See Complaint ("Compl.") ¶ 24. Dr. Roslin alleges that some of Spirit's statements constitute defamation per se. These statements are:

> The real story is that Dr. Roslin was escorted off the flight for violating federal law for interfering with a flight crew. He was causing a disturbance and attempted to incite other passengers to the point that another passenger started to cry in fear as a result of his behavior. He made verbal references to terrorism. His escalating behavior was a safety risk to the crew and other passengers. He had to be removed from the aircraft by law enforcement. [4]

See Compl. ¶¶ 14-18.

Dr. Roslin only seeks per se damages and punitive damages, each in the amount of $1,000,000. Compl. ¶¶ 25, 26.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). "[T]he movant's burden will be satisfied if he can point to an absence of evidence to support an essential element of the nonmoving party's claim." Goenaga v. March of Dimes Birth Defects Found, 51 F.3d 14, 18 (2d Cir. 1995). If the moving party meets its burden, the burden shifts to the non-movant to present evidence sufficient to show that there is a genuine issue for trial. See Holcomb v. Iona Coll., 521 F.3d 130, 137 (2d Cir. 2008). The parties may satisfy their respective burdens by "citing to particular parts of materials in the record, including depositions,

[4] The February 16, 2010 updated article by the Post contained only some of these alleged defamatory statements. The Huffington Post February 18, 2010 article contained all of the alleged defamatory statements.

documents . . . affidavits or declarations . . . or other materials." Fed.R.Civ.P. 56(c)(1)(A). When deciding a summary judgment motion, the court must resolve all ambiguities and draw all factual inferences in favor of the party opposing the motion. McPherson v. Coombe, 174 F.3d 276, 280 (2d Cir. 1999). The question is whether, in light of the evidence, a rational jury could find in favor of the nonmoving party. Gallo v. Prudential Residential Servs., Ltd. Partnership, 22 F.3d 1219, 1224 (2d Cir. 1994).

III. DEFAMATION PER SE

Under New York law, "[t]o state a claim for defamation . . . the plaintiff must allege (1) a false statement about the plaintiff; (2) published to a third party without authorization or privilege; (3) through fault amounting to at least negligence on [the] part of the publisher; (4) that either constitutes defamation per se or caused 'special damages.'" Thai v. Cayre Group, Ltd., 726 F. Supp.2d 323, 329 (S.D.N.Y. 2010) (inner citations omitted). Thus, to successfully plead a defamation claim, "the plaintiff must plead special damages unless the defamation falls into one of the categories of defamation per se." Kforce, Inc. v. Alden Personnel, Inc., 288 F. Supp.2d 513, 516 (S.D.N.Y. 2003).

A defamatory statement falls into the category of defamation per se if it is a statement: (1) charging an individual with a serious crime; (2) that tends to injure another in his or her trade, business, or profession; (3) that claims an individual has a "loathsome disease"; or (4) "imputing unchastity to a woman." Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC, 813 F. Supp.2d 489, 550 (S.D.N.Y. 2011) (citing Liberman v. Gelstein, 80 N.Y.2d 429, 435, 590 N.Y.S.2d 857, 605 N.E.2d 344 (1992)).

"Whether 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)(quoting Aronson v. Wiersma, 65 N.Y.2d 592, 493 N.Y.S. 2d 1006 (1985)). Federal courts follow standards developed by the New York Court of Appeals in determining whether a statement is defamatory. Id. Courts "must give the disputed language a fair reading in the context of the publication as a whole"; courts are not to "strain to interpret such writings in their mildest and most inoffensive sense to hold them nonlibelous"; and the "words are to be construed not with the close precision expected from lawyers and judges but as they would be read and understood by the public to which they are addressed." Id. (citations and internal quotations omitted).

IV. DISCUSSION

Plaintiff alleges that the defendant's statements defamed him by connoting that he committed a felony that placed others' safety at risk. As such, the Court will evaluate the alleged defamatory statements under the first category – a statement charging an individual with a serious crime. Pure Power Boot Camp, 813 F. Supp.2d at 550. Defendant argues that none of its statements accuse plaintiff of committing any crime, or a crime that would fall under the category of a serious crimes.

When determining whether an accusation of crime amounts to defamation per se, "the mere fact that a plaintiff is accused of a crime does not, per se, make out a defamation claim; rather, the test is whether, in the particular context, the words convey as a fact that the plaintiff undertook a criminal act." Daniels v. Provident Life and Cas. Ins. Co., No. 00-CV-0668, 2002 WL 31887800, at *5-6 (W.D.N.Y. Dec. 4, 2002) (citing

Huggins v. Moore, 253 A.D.2d 297, 689 N.Y.S.2d 21, 29 (App. Div. 1st Dep't), rev'd on other grounds, 94 N.Y.2d 296, 704 N.Y.S.2d 904, 726 N.E.2d 456 (1999)).

Under the Restatement of Torts, the crimes of murder, burglary, larceny, arson, rape and kidnapping are recognized as serious crimes within per se defamation. See Restatement (Second) of Torts § 571, cmt. g (1977); see also TC v. Valley Cent. School Dist., 777 F. Supp.2d 577, 603 (S.D.N.Y. 2011). In TC v. Valley Central School District, the Court relied on the crimes listed in the restatement of torts, to reject plaintiff's claim that "defendants' statements, that [plaintiff] is a racist and a bigot led his classmates and teachers to believe it to be true"; and as such, amounted to defamation per se. Id. The plaintiff in TC was suspended based on the allegedly defamatory statements. The Court rejected his claim that his suspension from school based on the alleged defamatory statement implies that he was charged with a serious crime. Id. The Court noted, "[a]ny allusion to an unnamed crime which plaintiff deduces from his suspension is simply too attenuated to constitute slander per se and qualify as actionable." Id.

The list of crimes in the restatement of torts, however, is not exhaustive. In Liberman v. Gelstein, 80 N.Y.2d 429, 435, 590 N.Y.S.2d 857, 605 N.E.2d 344 (1992), the court held that a statement accusing plaintiff of committing bribery accused him of committing a serious crime. The court noted that "[n]ot every imputation of unlawful behavior, however, is slanderous per se. . . . the law distinguishes between serious and relatively minor offenses, and only statements regarding the former are actionable without proof of damage." Id. The crimes of theft and forgery have also been recognized as serious crimes amounting to defamation per se. Atkins v. Bohrer, No. 11

Civ. 4939, 2011 WL 6779311, at *7 (S.D.N.Y. Dec. 23, 2011) ("The alleged accusations that Atkins is a thief, has stolen Lynn's money and jewelry, or that he forged healthcare documents all charge him with a serious crime. Because these statements constitute slander per se, Atkins need not plead special damages.").

Here, the Court concludes that defendant's statements do not convey as a fact that plaintiff committed any serious crime. Plaintiff alleges that the statements imply that he was an "out of control dangerous criminal." However, upon evaluating all of the allegedly defamatory statements, reaching such conclusion would require the Court to make a strained construction of the statements. See DiFolco v. MSNBC Cable L.L.C., 831 F. Supp.2d 634, 644 (S.D.N.Y. 2011) ("If the statement is 'not reasonably susceptible of a defamatory meaning, [it is] not actionable and cannot be made so by a strained or artificial construction. . . ").

The only part of defendant's statement which makes any mention of violation of a law is the statement that "[t]he real story is that Dr. Roslin was escorted off the flight for violating federal law for interfering with a flight crew." See Compl. ¶ 14. Plaintiff alleges that the interference with flight crew is a felony punishable by imprisonment and, as such, defendant's statement accuses him of committing a felony. However, there are both criminal and civil statutes or regulations governing interference with flight crews. The civil statutes or regulations governing interfering with flight crews are found at 49 U.S.C. §46318 (2011), 14 C.F.R. Part 91.11 (2013), and 14 C.F.R. Part 131 (2012). The criminal statute relating with interference with flight crew calls for imprisonment for not more than 20 years. See 49 U.S.C. §46504 (2013). When read in the context of the

articles, Spirit's statement, including that plaintiff violated federal law by interfering with the flight crew, does not as a fact accuse plaintiff of violating the criminal statute.

In any event, the mere allegation of a violation of law does not automatically amount to an accusation of a serious crime. See Sharratt v. Hickey, 20 A.D.3d 734, 735-736, 799 N.Y.S.2d 299 (2005) ("[a]llegations of violating town ordinances or the environmental laws at issue here do not constitute defamation per se because they do not allege serious crimes, but instead "constitute the imputation of unlawful behavior amounting to no more than minor offenses which are not actionable without proof of damages."). Moreover, when construed "in the context of the entire statement or publication as a whole, tested against the understanding of the average reader," the statements do not accuse plaintiff of committing a serious crime. DiFolco, 831 F.Supp.2d at 644. Courts consider "the over-all context and the circumstances in which defendant's statements were made," to determine whether defendant's statement constituted defamation per se. Torain v. Liu, No. 06 Civ. 5851, 2007 WL 2331073, at *2-4 (S.D.N.Y. Aug 16, 2007), aff'd, 279 Fed. Appx. 46 (2d Cir. 2008). In Torain, the court concluded that in considering the overall context, no reasonable person would have believed that defendant's statement allegedly calling plaintiff a "racist pedophile" was actually accusing the plaintiff of committing an act of pedophilia. Id.

Here, plaintiff alleges that when read together the statements imply that he was an "out-of control, dangerous criminal," who committed a felony and put others' safety at risk. Plaintiff further alleges that the statement that he was removed by law enforcement further reinforces this. Spirit argues that in assessing whether a statement is defamation

per se, the court must construe the statement according to its plain meaning and must not allow for innuendos to enlarge the meaning beyond the significance expressed by the words. See Nunez v. A-T Fin. Info., Inc., 957 F.Supp. 438, 441 (S.D.N.Y. 1997). Spirit further alleges, and this Court agrees, that taken in the complete context, the average reader would conclude that Dr. Roslin was simply removed from the flight after creating a disturbance on the aircraft. The initial articles cited only to Dr. Roslin's account of the incident. The updated articles provided Spirit's "side of the story" along with Dr. Roslin's account of the incident. As such, when viewed in the context of the entirety of each publication as a whole, tested against the understanding of the average reader, this Court concludes that the average reader would view the statements as "part of . . . accusations, and counter-accusations" concerning the incident on the plane; and not any accusation that a serious crime was committed. See Samuels v. Berger, 191 A.D.2d 627, 629, 595 N.Y.S.2d 231 (2d Dep't 1993).

In Samuels, the statement at issue was "Samuels feels he can do whatever he pleases ... he violates the law every day." Samuels, 191 A.D.2d at 628. This statement was contained in an article discussing the ongoing public controversy regarding the New York State Department of Environmental Conservation's Region I policies. Id. at 629. In rejecting plaintiff's defamation claim, the court considered the statement in the context of the whole article; and concluded that the statements were not defamatory. Id.

In the case herein, the initial February 14, 2010 article written by the Post states that according to Dr. Roslin, he and his family were kicked off the plane for asking for water for his pregnant wife. See Compl., Exh. A. The article cited to Dr. Roslin as its

only source. Id. The next day, both the Huffington Post and the Gothamist published the story citing to the Post as their source. Id. Upon receiving Spirit's statements, the Post published a follow up article stating that Dr. Roslin's statement that he was kicked off the aircraft for asking for water was not so according to Spirit. The Post then included a paragraph from Spirit's statement that: "He refused and continued to cause a disturbance and tried to incite other customers . . . . After his son kicked our station manager, the family was removed." See Compl. Exh. B. The article then stated that Dr. Roslin "says his son, 9, was disciplined." Id.

Similarly, the Huffington Post published an updated article stating that in response to the reports that Dr. Roslin and his pregnant wife were kicked off for asking for water, Spirit airline has responded with their "side of the story. " Id. The article then proceeds to give a bullet-point list of Spirit's statements. Id. Included with the updated article is the original story that Dr. Roslin was kicked off the aircraft for asking for water. Id.

Finally, the Gothamist published an updated article on the story, noting, *inter alia*, that Spirit stated that Dr. Roslin was offered water for purchase, claimed that he made verbal references to terrorism, he was escorted off the plane by law enforcement, and that his son kicked an employee in the groin. Id. The Gothamist also included the statement "albeit, this could mean he just said 'I'm not a terrorist' at some point," after the statement that Dr. Roslin made verbal references to terrorism; and "[a] shame no one on the flight captured such comedy gold on video"; after the statement that Dr. Roslin's son kicked the Spirit employee. Id. An article published by Hip-Hop Wired also carried the statements of the plaintiff and Spirit. Id.

Based on the aforementioned articles, the Court finds that an average reader of the alleged defamatory statements in the context of the whole articles would reasonably conclude that Dr. Roslin was simply escorted off the plane because he caused a disturbance. To the extent plaintiff argues that the statement that he was escorted off the plane by law enforcement for causing a disturbance supports a reading that he was accused of committing a serious crime, said argument is not persuasive. In Toussie v. County of Suffolk, 806 F.Supp. 2d 558, 591-92 (E.D.N.Y. 2011), the court rejected plaintiff's argument that defendant's statement that the police asked him to leave amounted to defamation per se. In Toussie, plaintiff alleged that defendant's statement to a Newsday reporter that "Suffolk County police asked [Toussie] to leave the auction because he was being disruptive" was defamatory. Id. Despite involving the police, the court noted that this statement does not charge plaintiff with committing a serious crime. Id. at 592. Here, defendant's statement that plaintiff was removed from the plane by law enforcement for, *inter alia*, causing a disturbance does not accuse plaintiff of committing a serious crime under any reasonable interpretation.

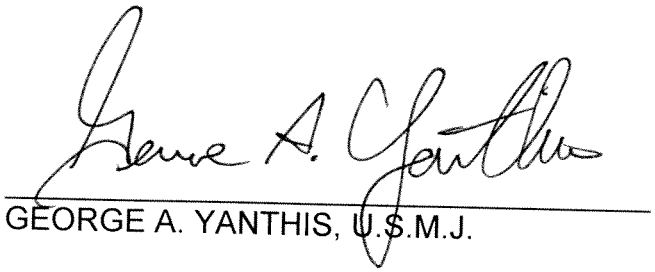
V. CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment is GRANTED.

The Clerk of the Court is respectfully requested to terminate the pending motion (Docket #26) and enter judgment accordingly.

Dated: September 27, 2013
White Plains, New York

SO ORDERED:



GEORGE A. YANTHIS, U.S.M.J.