SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

---X

VIP PET GROOMING STUDIO, INC.,

Plaintiff,

-against-

ROBERT SPROULE and SARAH SPROULE,

Defendants.

---X

IAS Part 8
Index No. 612337/2020
Mot. Seq. No. 002

DECISION AND ORDER

LEONARD D. STEINMAN, J.

The following submissions, in addition to any memoranda of law, were reviewed in preparing this Decision and Order:

Defendants' Notice of Motion, Affirmation & Exhibits..1
Plaintiff's Affirmation in Opposition & Exhibits...2
Defendants' Reply...3

In March 2020, defendants brought their dog to plaintiff, VIP Pet Grooming Studio, Inc. ("VIP"), for grooming. The dog fell ill and subsequently died. Thereafter, defendant Robert Sproule posted statements on popular review sites on the internet stating that VIP caused the dog's death. VIP brought this action for injunctive relief and compensatory and punitive damages related to defendants' allegedly defamatory statements. Defendants now move to dismiss the action pursuant to CPLR 3211 (a)(7) and (g). For the reasons set forth below, the motion is denied.[1]

[1] Because VIP's claim survive dismissal, defendants' application to dismiss VIP's third cause of action for compensatory and punitive damages on the basis that it is not a cognizable independent cause of action is moot.

BACKGROUND

On March 4, 2020, defendants left their dog with VIP to be bathed and groomed. Defendants admit that they told VIP's groomer that their dog suffered from anxiety. According to VIP, the dog behaved normally while being bathed, but became agitated while being groomed. As a result, VIP contacted defendants to retrieve the dog before grooming was complete. Defendants claim that when they arrived home, the dog was shaking, panting heavily and vomiting, requiring defendants to bring the dog to the veterinary hospital.

The dog remained hospitalized until March 6 when defendants decided to euthanize him. According to defendants, prior to their decision to euthanize, the veterinarian advised them that a chest x-ray showed "increasing" fluid in the dog's lungs and opined that the prognosis was not good. Defendants allege that the veterinarian attributed the dog's symptoms to a "traumatic event at the groomer," likely from either: (a) electrocution from chewing on a wire, (b) strangulation from the groomer's restraints or (c) drowning during the bathing process. The veterinarian's notes, however, indicate that the fluid in the dog's lungs could also have been the result of "generalized seizure activity."

Shortly after the dog's death, by letter dated March 9, defendants' counsel (who is also Robert's mother) informed VIP that "there was no question" VIP caused the dog's death. Defendants demanded reimbursement from VIP in the amount of $20,000. The letter concluded: "If we do not hear from you within seven business days, we will commence a legal action.…[A]s you are well aware, the negative publicity that comes along with a law suit against a business in a small community such as Wantagh, can be devastating."

In early May 2020, Robert Sproule posted a statement on both Yelp and Google, that read:

> I would strongly caution you against using this business. A grooming visit on March 4, 2020 ultimately **ended with us having to put our 4-month old puppy to sleep** two days later **as a result of their negligence or incompetence.** When we brought our happy healthy puppy in for a bath and cut, we specifically discussed our concerns regarding our puppy's hesitance to being bathed and the use of the clippers. We told the groomer that if there was any issue to stop and we would come get our puppy. Instead the groomer pushed our puppy through the process and only stopped and called us when it

> became very apparent that there was something physically wrong with our puppy. When we picked him up, he was clearly in distress, and we rushed him to the emergency vet. He had water in his lungs that **the vet said could only have come from a dramatic physical accident at the groomer**. Despite two days at the vet on a ventilator he continued to decline and we had to make the hard decision to let him go. We tried to discuss the situation with the groomer. They have taken no responsibility and in fact were abusive. They have threatened us financially and legally regarding telling our story. We will be pursuing legal recourse against this business when the courts reopen. You would be best finding another groomer. (Emphasis added).

After VIP refused to pay any damages, defendants commenced an action against VIP in Nassau County District Court in August 2020 for "actual damages" and "loss of companionship," totaling $14,921.32.

VIP claims that Robert Sproule's statements on Yelp and Google are false and were published "maliciously, intentionally, willfully and in gross disregard" of VIP's rights, with the intent to injure VIP's business and reputation.

LEGAL ANALYSIS

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must accept as true the facts "alleged in the complaint and submissions in opposition to the motion, and accord ... the benefit of every possible favorable inference," determining only "whether the facts as alleged fit within any cognizable legal theory." *Sokoloff v. Harriman Estates Development Corp.*, 96 N.Y.2d 409, 414 (2001); *see People ex rel. Cuomo v. Conventry First LLC*, 13 N.Y.3d 108 (2009); *Polonetsky v. Better Homes Depot*, 97 N.Y.2d 46, 54 (2001).

Notably, on a motion to dismiss, a party is not obligated to demonstrate evidentiary facts to support the allegations contained in the complaint (*see, Stuart Realty Co. v. Rye Country Store, Inc.*, 296 A.D.2d 455 (2d Dept. 2002); *Paulsen v. Paulsen*, 148 A.D.2d 685, 686 (2d Dept. 1989) and "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19 (2005); *International Oil Field Supply Services Corp. v. Fadeyi*, 35 A.D.3d 372 (2d Dept. 2006). "In assessing a motion under CPLR 3211(a)(7), a Court may freely consider affidavits submitted by a party to remedy any defects in the complaint," and

if the court does so, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Leon v. Martinez*, 84 N.Y.2d 83 (1994); *see also Uzzle v. Nunzie Court Homeowners Ass'n, Inc.*, 70 A.D.3d 928 (2d Dept. 2010).

In moving to dismiss VIP's complaint, defendants argue, among other things, that this action is barred by the recently amended New York Civil Rights Law ("NYCRL") §76-a, commonly referred to as the anti-SLAPP (strategic lawsuits against public participation) statute. SLAPP actions are characterized as having little legal merit but are filed nonetheless to burden opponents with legal defense costs and the threat of liability and to discourage those who might wish to speak out in the future. *600 W. 115th St. Corp. v. Von Gutfeld*, 80 N.Y.2d130 (1992). To provide safeguard for the exercise of free speech, New York State enacted a law specifically aimed at broadening the protection of citizens facing litigation arising from their public petition and participation. *See* NYCRL §76-a (L.1992, c. 767).

At the time the statements at issue were made and when this action was commenced, the anti-SLAPP statute only applied to a plaintiff that was a "public applicant or permittee" with claims that concerned a communication that was "materially related" to the defendants' efforts to report on, comment on or oppose the plaintiff's application. In November 2020, the anti-SLAPP law was expanded to cover an "action involving public petition and participation" based upon "any communication in a place open to the public or a public forum in connection with an issue of public interest" and imposed the requirement that a plaintiff establish by clear and convincing evidence that the communication was made with "actual malice." The legislative intent of the amendment was to protect citizens' exercise of the rights of free speech and petition about *matters of public interest*. *See* Sponsor Memo. NYCRL §76-a(1)(d) instructs that the term "public interest" should be construed broadly, but does not encompass a purely private matter.

Defendants argue that Robert Sproule's on-line statements: (a) constitute protected communication that falls within the newly amended anti-SLAPP law and (b) the anti-SLAPP

amendment should be applied retroactively in this case.[2] It is unnecessary for this court to determine whether the amendment should be given retroactive effect since Sproule's online statements are not protected communications made in connection with an issue of public interest since they involve a purely private matter.

The private nature of Sproule's statements is facially apparent from their subject matter: VIP's treatment of the defendants' anxious dog. Neither the statements nor the context in which they were made reflect that the Sproules' experience was shared by others or that the conduct discussed related to or was aimed at the public at large. *Cf. Wilner v. Allstate Insurance Co.*, 71 A.D.3d 155 (2d Dept. 2010)(alleged conduct that impacts consumers at large not a private dispute under the Deceptive Trade Practices Act, General Business Law §349).

Since the New York anti-SLAPP amendments are in their infancy, this court shall look to decisions in other jurisdictions with similar anti-SLAPP laws for guidance on the issue of what constitute matters of "public interest."[3] To determine whether statements were made in connection with an issue of "public interest," the courts in Nevada and California consider the following principles: (1) "public interest" does not equate with mere curiosity; (2) a matter of public interest should be something of concern to a substantial number of people; a matter of concern to a speaker and a relatively small specific audience is not a matter of public interest; (3) there should be some degree of closeness between the challenged statements and the asserted public interest—the assertion of a broad and amorphous public interest is not sufficient; (4) the focus of the speaker's conduct should be the public interest rather than a mere effort to gather ammunition for another round of private controversy; and (5) a person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people. *See Piping Rock Partners, Inc., v. David Lerner Associates, Inc.*, 946 F.Supp 2d 957 (N.D. Cal. 2013), *citing*

---

[2] The court in *Palin v. New York Times*, 2020 WL 711593 (S.D.N.Y 2020), found that §76-a is a "remedial statute" that should be given retroactive effect. *See also Sackler v. American Broadcasting Companies, Inc.*, 2021 WL 969809 (Sup. Ct., New York County).

[3] Both VIP and defendants cite to out-of-state case law in support of their respective positions for the same reason.

Weinberg v. Feisel, 110 Cal App. 4th 1122 (2003); *see also Stark v. Lackey,* 136 Nev. 38 (Sup. Ct. 2020).

In *FilmOn.com Inc. v. DoubleVerify Inc.*, 7 Cal.5th 133, 145 (2019), California's Supreme Court recently cautioned that courts should engage in a relatively careful analysis of whether a particular statement constitutes speech made in connection with an issue of "public interest." Specific considerations identified by the court include whether the subject of the speech (1) was a person or entity in the public eye, (2) could affect large numbers of people beyond the direct participants, (3) occurred in the context of an ongoing controversy, dispute or discussion or (4) affected a community in a manner similar to that of a governmental entity.

Here, it cannot be concluded that allegations of a single act of alleged negligence concerning one pet by a small, privately-owned pet grooming business is a matter of public interest affecting a substantial number of people. *See Consumer Justice Center v. Trimedica International, Inc.*, 107 Cal. App. 4th 595 (2003)(speech about a specific product was not a matter of public concern). The ability of an individual to write a review concerning a single experience with a private merchant is not a license to defame with impunity that merchant—as alleged by VIP—and potentially destroy its reputation. That the defamation may be accessed by a large number of people does not transform this private beef into a matter of public interest. Any other conclusion would immunize every defamatory on-line review unless made with malice.

Despite defendants' contention, the facts here are easily distinguishable from *Wong v. Jing*, 189 Cal. App.4th 1354 (2010), where the defendant's alleged defamatory statement consisted of a Yelp review of a dentist following treatment of her son. In *Wong v. Jing*, the Yelp review by Jing went beyond the scope of a private experience and concerned the broader issue of the use of nitrous oxide and mercury dental fillings in treating children.

Applying the above stated principles, it cannot be said that this matter is one of "public interest."

Defendants also contend that VIP's claims must be dismissed because the statements at issue constituted "pure opinion" rather than fact. "The elements of a cause of action [to recover damages] for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se." *Martino v. HV News, LLC*, 114 A.D.3d 913 (2d Dept. 2014), *quoting Epifani v. Johnson*, 65 A.D.3d 224 (2d Dept. 2009). A "libel action cannot be maintained unless it is premised on published assertions of fact." *Brian v. Richardson*, 87 N.Y.2d 46 (1995).

Whether a particular statement constitutes an opinion, or an objective fact is a question of law. *Mann v. Abel*, 10 N.Y.3d 271 (2008). Expressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation. *Id.* In distinguishing between statements of opinion and fact, the factors to be considered are: (1) whether the specific language at issue has a precise, readily understood meaning; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal readers that what is stated is likely to be opinion, not fact. *Gross v. New York Times Co.*, 82 N.Y.2d 146 (1993). It is necessary to consider the writing as a whole, including its tone and apparent purpose, as well as the overall context of the publication, to determine whether the reasonable reader would have believed that the challenged statements were conveying facts about the plaintiff. *Mann v. Abel*, 10 N.Y.3d 271 (2008).

Applying the aforementioned principles, it cannot be said, as a matter of law, that the statements posted online by Robert Sproule were pure opinion. Sproule stated that their dog was put to sleep as a result of VIP's "negligence or incompetence." Presumably, defendants can prove this fact. Further, defendant's claim that the veterinarian told them that the water in the dog's lungs could only have resulted from a "dramatic physical accident" at the groomer can also be established through admissible evidence.

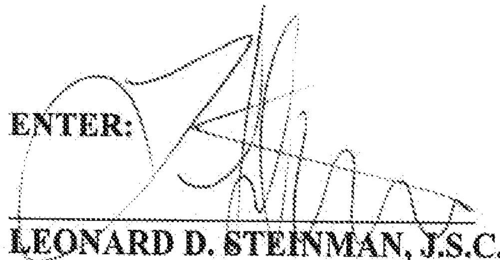
Therefore, defendants' motion to dismiss is denied.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of this court.

Dated: May 20, 2021
Mineola, New York

ENTER:



LEONARD D. STEINMAN, J.S.C.

ENTERED
May 24 2021
NASSAU COUNTY
COUNTY CLERK'S OFFICE