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CENTRAL DISTRICT OF CALIFORNIA

ELLEN L. BATZEL,)	CV 00-9590 SVW (AJWx)
)	
Plaintiff,)	ORDER DENYING DEFENDANT'S ANTI-
)	SLAPP MOTION
v.)	
)	
ROBERT SMITH, et al.,)	NOTICE OF ENTRY
)	ACQUIRED BY TROP, RULE 77(d).
Defendants.)	

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

I. Background

Plaintiff Batzel is an attorney with a substantial art and entertainment practice. Batzel hired Defendant Robert Smith to paint and repair her home in North Carolina. Plaintiff alleges that during the course of this employment relationship Batzel and Smith had a falling out when Batzel refused to give a script written by Smith to her entertainment industry clients.

Smith sent an email to Defendant Cremers and MSN alleging that he believed Plaintiff had stolen Nazi art in her home and that he heard Plaintiff make statements that she was a decedent of Nazi officials.¹ Cremers published the e-mail and related updates under

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1. Smith's email read:
 I am a building contractor in Asheville, North Carolina, USA. A month ago, I did a remodeling job for a woman, Ellen L. Batzel who bragged to me about being the grand daughter of "one of Hitler's right-hand men." At the time, I was concentrating on performing my

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the headings of "Nazi loot" and "stolen art" on five occasions in September 1999 allegedly without investigating the veracity of the information.

Batzel learned of the publication of this information from an anonymous emailer on January 4, 2000. She contacted MSN and Mosler, MSN's corporate sponsor, and requested a retraction. None was published. MSN also did not advise people who inquired that the allegations were false. As a result of the publication of Smith's story, Batzel alleges that she lost several prominent clients and the North Carolina Bar investigated her.

II. Analysis

Defendant Cremers has moved to dismiss this suit under Cal. Civ. Proc. Code § 425.16. This statute requires a Plaintiff to show probability of success on the merits where the activities upon which the suit is based are "in furtherance of [the person's] right of petition or free speech under the United States or California Constitution in connection with a public issue. . ." The Plaintiff can show the probability of success required by this statute if she

tasks, but upon reflection, I believe she said she was the descendant of Henrich Himmler.

Ellen Batzel has hundreds of older European paintings on her walls, all with heavy carved wooden frames. She told me she inherited them.

I believe these paintings were looted during WWII and are the rightful legacy of the Jewish people. . . .
Complaint at 7, lines 22-27, and 8, lines 1-5.

submits admissible evidence supporting all elements of her prima facie case. See, e.g., Metabolife Inc v. Wornick, 72 F. Supp. 2d 1160 (S.D. Cal. 1999); Wilcox v. Superior Court, 27 Cal. App.4th 809 (1994).

As outlined by the Court's June 5, 2001 order requesting further briefing, Plaintiff is a private person but the subject matter of the statements at issue here is a matter of public concern. Accordingly, the elements Plaintiff must show in her prima facie case are: 1) a defamatory statement which injured the Plaintiff; 2) publication; 3) falsity; and 4) negligence as to the veracity of the statement.² Cal. Civ. Code §45; Gertz v. Welch, 418 U.S. 323, 351 (1974); Khavar v. Globe Inc., 19 Cal. 4th 254, 265; Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986); In re IBP Confidential Bus. Documents Litigation, 797 F.2d 632 (8th Cir. 1986); Nizam-Aldine v. City of Oakland, 47 Cal. App. 4th 364, 373-74, 54 Cal. Rptr. 2d 781, 786-87 (Ct. App. 1996); Brown v. Kelly Broadcasting Co., 48 Cal. 3d 711, 742 (1989).

There is no serious dispute that an allegation that someone bragged about Nazi ancestry and possessed art stolen by Nazis is defamatory. It also had a particular tendency to injure Plaintiff in her occupation because of her client base and art and entertainment industry practice. It was the cause of inquiry by the state bar of

2. Plaintiff will have to show a higher standard of culpability on the part of Cremers if she seeks to recover presumed or punitive damages. Gertz, 418 U.S. at 350.

1 North Carolina and prompted her to move from her house in North
2 Carolina. Batzel Decl. It is clear that Cremers published the
3 statement when he put it in his newsletter and on his website. Thus,
4 the locus of the inquiry regarding admissible evidence is the falsity
5 and negligence aspects of the case. See Plaintiff's June 19, 2001
6 Brief at 2-4.

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that neither of Batzel's parents possessed any art painted prior to 1950. Decl. of Lizabeth DeStefano.

Smith also testified to the following in his deposition: Plaintiff actually did not tell him that she inherited all of her paintings but rather indicated that she had purchased some of them; she did not have hundreds of European paintings with heavy carved wooden frames hanging on her walls; and he did not see any of Plaintiff's paintings hanging on her walls - they were wrapped in bubble wrap in Plaintiff's garage when he saw them. Smith Depo. at 29-30; 101-104.

Thus, Plaintiff has submitted admissible evidence that Smith's statements are false.

B. Negligence

Cremers did not conduct any investigation of Smith's statement or even find out whether or not Smith was a real person prior to publication of the email. He also never followed up on the FBI investigation. Plaintiff's Opposition to Motion, App., Ex 59, 10. Cremers further admitted that he was wrong and not cautious in publishing Smith's email. App., Ex 36 and 19. Thus, Cremers himself seemingly acknowledges negligence.

Failure to investigate is not negligent where the source of the information is reliable and there are other circumstantial indicia of reliability. Reader's Digest Assn. v. Superior Court of

Marin County, 37 Cal. 3d 244, 259 (1984). Here however Cremers not only had no basis for determining that Smith was reliable but in fact questioned whether the source was even being truthful about his identity. The email was sent without any accompanying circumstances to suggest reliability. Plaintiff has produced admissible evidence that Cremers did not conduct any investigation or make any inquiries before publishing Smith's statement and that Smith's statements are false.

Since Plaintiff has produced admissible evidence on all elements of her case, she has satisfied the Cal. Civ. Proc. Code § 425.16 requirement that Batzel demonstrate a probability of success on the merits.

Defendant's Motion to Strike is DENIED.

IT IS SO ORDERED.

DATED: _____

7/25/2001



STEPHEN V. WILSON

UNITED STATES DISTRICT JUDGE