This letter should be filed. So ordered per 6/Koeltl U.S.D.J. 11/4/19.

VLADECK, RASKIN & CLARK, P.C.

October 30, 2019

BY HAND
The Honorable John G. Koeltl
United States District Court, Southern District of New York
500 Pearl Street
New York, New York 10007-1312

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

Dear Judge Koeltl:

We represent the plaintiff in the above action. We write in response to the letter dated October 17, 2019 ("Def. Ltr." ECF 135) from defendant Barnes & Noble, Inc., and in anticipation of the November 4, 2019 conference for consideration of its proposed motion for partial summary judgment on the defamation and good faith and fair dealing claims. B&N argues that the possibility of partial summary judgment will somehow conserve the resources of the Court and the parties. The opposite is true; the evidence at trial on the firing without cause contract claim, which is not the subject of a dispositive motion, will also establish the defamation claim, that is, the falsity of the press release announcing plaintiff's dismissal and the board's gross irresponsibility in publishing that announcement. Since, as shown below, there are material disputed facts on the defamation and good faith and fair dealing claims, it will also be wasteful for the Court to consider those facts on the proposed motion and again at the bench trial.

Defendant first contends that the statements in the press release are true, and therefore non-defamatory. Defendant is wrong. The statement that the board "announced the termination of . . . Parneros . . . for violations of the Company's policy" cannot as a matter of law be read as simply repeating the board's articulated reason for the firing. See Celle v. Filipino Reporter Enter., Inc., 209 F.3d 163, 177 (2d Cir. 2000) ("challenged statements are not to be read in isolation, but must be perused as the average reader would against the whole apparent scope and intent of the writing.") The press release is fairly read as falsely contending that Parneros, in fact, violated company policy, and multiple witness and press reports so understood the publication. Indeed, the press release which disclaimed financial wrongdoing by Parneros and touted the Paul Weiss firm's legal advice on the immediate firing without severance, led multiple readers to the false conclusion that plaintiff had violated a policy prohibiting sexual harassment. (See Palmer Dep. (recruiter) 127, 149; Ferrara Dep. (board member) 341-43; Executive Assistant Dep. (whom Parneros allegedly harassed) 301, 308-09; Lindstrom Dep. (CFO) 399-400, 404-06)[1]

Moreover, even if it is given the cabined purportedly true construction defendant advocates, the press release still is actionable as defamation by implication. "Under this doctrine, libel may occur where a combination of individual statements which in themselves may not be defamatory might lead the reader to draw an inference that is damaging to the plaintiff." Agbimson v. Handy, No. 17 Civ. 9252, 2019 WL 3817207, at *6 (S.D.N.Y. Aug. 14, 2019) (quoting Herbert v. Lando, 781 F.2d 298, 307 (2d Cir. 1986)). As in Keough v. Texaco Inc., the press reports that followed B&N's publication demonstrated its defamatory implication, even if

[1] Plaintiff will provide the record evidence upon the Court's request.

its dissected portions appear true. See No. 97 Civ. 5981, 1999 WL 61836, at *6 (S.D.N.Y. Feb. 10, 1999) ("Whether . . . Texaco's statements are facially defamatory, we . . . know from the wording of subsequent press reports that Texaco's statements may be 'reasonably read to import a false innuendo.'"). Accordingly, more than sufficient evidence demonstrates the defamatory nature of the press release and underscores the wastefulness of the proposed motion.

Like falsity, the issue of culpability also presents material factual disputes. B&N erroneously contends that its investigation of Parneros's alleged wrongs meets the standard of Chapadeau v. Utica Observer-Dispatch, 38 N.Y.2d 196 (1975), noting that a "company's reliance on a through, responsible investigation in announcing employee misconduct" absolves it of liability.[2] (Def. Ltr. 2). Here, the evidence is not of a "thorough responsible investigation," but a few slipshod meetings that do not deserve the label "investigation." Defendant claims that Chair Leonard Riggio and SVP of Communications Mary Ellen Keating conducted the investigation at the direction of in-house counsel.[3] However, Riggio denied he conducted any part of the investigation, which he testified was done by the legal department. (Riggio Dep. 175) Keating had no relevant training and had never conducted or assisted in a corporate or sexual harassment investigation. (Keating Dep. 69-70) The so-called investigation consisted of a meeting with the Executive Assistant to hear her contentions and brief conversations with Parneros who was asked no questions. No other employees were questioned, not even his Chief of Staff, with whom he spent considerable time. After a meeting among Parneros, the Executive Assistant, and Keating in early June 2018, both Riggio and Keating told Parneros the meeting had gone well and the matter was closed.[4]

The board was also ill-equipped to determine that Parneros had allegedly violated company policy, as they could not describe the policies, and often had not even bothered to read them for several years, if ever. (Guenther Dep. 274-75; Ferrara Dep. 190-94, 238-40; Riggio Dep. 48, 294-96; Van Der Zon Dep. 251-52, 304, 351) Riggio, who was a major source of the information the board relied upon, had not read the policies in roughly 20 years and could not identify the policy purportedly violated that triggered B&N's refusal to pay severance. (Riggio Dep. 48, 294-96)

Finally, B&N erroneously contends that as a matter of law Parneros is not entitled to certain damages. Not only has Parneros made an extensive showing of actual damages from the defamatory press release, but, as B&N acknowledges (Def. Ltr. 3 n.6), where a plaintiff proves defamation per se and actual malice, damages are presumed. Because the press release damaged Parneros in his profession, it constituted defamation per se, Celle, 209 F.3d at 179, and, as described above, substantial evidence demonstrates actual malice, see DiBella v. Hopkins, 403

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[2] Ordinarily, the Chapadeau standard is also met by demonstrating actual malice, that the speaker knew the statement was false or probably false. See Konikoff v. Prudential Ins. Co., 234 F.3d 92, 104 (2d Cir. 2000).

[3] Because B&N has cloaked in privilege counsel's participation—which did not involve attorneys actually interviewing the relevant parties—it cannot now claim that participation as mitigating the irresponsible nature of defendant's flawed inquiry. Cf. Konikoff, 234 F.3d at 103 (attorney interviews of 85 witnesses and review of 50,000 documents); Kamfar v. New World Rest. Grp., Inc., 347 F. Supp. 2d 38, 43 (S.D.N.Y. 2004) (2,200 attorney hours spent on investigation) (Def. Ltr. 2).

[4] If defendant is claiming that its statement about violating company policy referred to Parneros's alleged treatment of the CFO or his conduct at a meeting with the Potential Acquirer, there was no investigation whatsoever on these issues, certainly none that involved speaking with Parneros.

F.3d 102, 110 (2d Cir. 2005). Parneros thus has actual and presumptive damages.

Plaintiff has also adduced evidence supporting punitive damages as there is evidence of actual and common law malice. After the demise of the potential sale, which Riggio had viewed as his graceful exit from B&N, Riggio became hostile to Parneros. When Riggio fired Parneros, he threatened that if Parneros went "to the press," B&N would make his "life miserable." [redacted] B&N deviated from its prior practices with the intent to and result of significant harm to Parneros, justifying punitive damages.

Similarly wasteful would be the proposed motion for breach of the covenant of good faith and fair dealing. B&N does not dispute that had it waited less than two weeks to fire plaintiff, he would have received a new grant of $3.6 million in equity, which he earned over the course of many months. B&N thus acted with the effect of destroying Parneros's right to receive the fruits of the contract. See Longhi v. Lombard Risk Sys., Inc., 18-CV-8077(VSB), 2019 WL 4805735, at *9-10 (S.D.N.Y. Sept. 30, 2019) (allowing addition of claim that defendant breached its duty by undermining plaintiff's ability to earn the full contractual bonus); Fischkoff v. Iovance Biotherapeutics, Inc., No. 17 Civ. 5041 (AT)(GWG), 2018 WL 4574890, at *7 (S.D.N.Y. July 5, 2018) (holding that employer manufacturing "cause" for termination to deny plaintiff retention bonus met standard for claim). The evidence contradicts defendant's sole argument on this claim: that the board did not act in bad faith in its rush to fire plaintiff. First, members of the board had approved Parneros's agreements and thus can be presumed to have remembered their terms. In addition, although defendant has withheld their advice, the multiple lawyers advising B&N necessarily were aware of the contract terms. Most significantly, the B&N board certainly knew there was no need to expedite Parneros's dismissal: the alleged harassment incident had been resolved a month earlier and even if the failed acquisition was plaintiff's fault—which it was not—the timing of any action by the board would not have revived that possibility and there was no need to act before anyone had even discussed the matter with plaintiff.

The courts have recognized that even when a contract gives a party discretion as to timing, that discretion must be exercised in good faith. See Sandler v. Montefiore Health Sys., Inc., 2018 WL 4636835, at *16 (S.D.N.Y. Sept. 27, 2018) ("[Defendant's] alleged failure to timely notify [plaintiff] of deficiencies in his performance may not have violated the express terms of his contract, but it may nonetheless have had 'the effect of destroying or injuring' his right to 'receive the fruits of the contract.'") (quoting Dalton v Educ. Testing Serv., 87 N.Y.2d 384, 389 (1995)); Maddaloni Jewelers, Inc. v. Rolex Watch U.S.A., Inc., 41 A.D.3d 269, 270 (1st Dept. 2007) ("Although the . . . Agreement made . . . the timing of deliveries subject to Rolex's discretion, the implied covenant obligated Rolex to exercise such discretion in good faith, not arbitrarily or irrationally"). Plainly these material disputed facts will all be heard during the trial, which makes a motion for summary judgment on the good faith and fair dealing claim a particularly wasteful exercise.

Respectfully submitted

Delia d'R

cc: Counsel of record (by email)