

# ORIGINAL

SHORT FORM ORDER

INDEX No. 622252/2023  
CAL No. \_\_\_\_\_

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 74 - SUFFOLK COUNTY

## PRESENT:

Hon. ALISON J. NAPOLITANO  
Justice of the Supreme Court

MOTION DATE 11-17-2023, 1-29-2024  
SUBMIT DATE 3-18-2024  
Mot. Seq. # 01 - MG; Mot. Seq. # 02 - MD;

-----X  
PERFECT BODY IMAGE, LLC,

Plaintiff,

-against-

DESTINY PLATZ,

Defendant.  
-----X

**DOREEN J. SHINDEL & ASSOCIATES, PC**  
*Attys. for Plaintiff*  
325 Middle Country Road, Suite 6  
Selden, New York 11784

**MORITT HOCK & HAMROFF LLP**  
*Attys. for Defendants*  
400 Garden City Plaza  
Garden City, New York 11530

Upon the following papers numbered 1 to 71 read on this motion to Dismiss; Notice of Motion/ Order to Show Cause and supporting papers 32 - 43 ; Notice of Cross Motion and supporting papers 47 - 53 ; Answering Affidavits and supporting papers 54 - 58; 62 - 64 ; Replying Affidavits and supporting papers 59 - 61; 69 - 71 ; Other \_\_\_\_; (~~and after hearing counsel in support and opposed to the motion~~) it is,

In motion enumerated as motion number 1, defendant Destiny Platz, moves for an order 1) dismissing the plaintiff's Complaint pursuant to CPLR §3211 (a) (1), (7) and (g); 2) awarding to defendant damages against the plaintiff pursuant to New York Civil Rights Law §§ 70-a(1) and 76-a; and 3) imposing sanctions against the plaintiff and its counsel, Doreen J. Shindel & Associates, P.C. and Doreen J. Shindel, Esq. The plaintiff opposes that motion and, in its cross motion enumerated as motion number 2, moves for an order disqualifying defense counsel and the firm he works for. The defendant opposes this cross motion.

On September 6, 2023, by summons and verified complaint, the plaintiff commenced an action for defamation against the defendant, Destiny Platz, related to a published "Google" review of scar reduction laser treatments the plaintiff provided to the defendant. The 46 page complaint alleges that the defendant published defamatory statements and acted with malice by deliberately and knowingly posting false statements in the form of a Google review. The plaintiff alleges that the defendant published two statements, one in November of 2022, which was removed, and one statement posted in June of 2023 as an "updated review". The two reviews were substantially similar. In the June "updated" review, the defendant is alleged to have published the following:

I wrote a review a while back but am deciding to write an updated review on my experience at Perfect Body Laser and Aesthetics. The

Perfect Body v. Platz

Index #622252/2023

Page 2

facility itself is beautiful and clean. The girls who operate the lasers are very sweet. However, unfortunately, I was just not satisfied with my overall results. I originally went in for a laser scar removal consultation, for a scar on my knee. The prices were very expensive. I was hesitant at first but I was willing to pay good money for good results. They sold me on a package of 4 laser treatments. I was told that I would see significant results and would be extremely happy with my investment. They estimated about an 80% improvement in the scar. You are supposed to wait a certain amount of time between the laser treatments for the best results. (I believe it is 6-8 weeks). I was a week or two late on some of the follow up appointments due to work, but I was told that would not make a difference in the results. After the initial package I was not satisfied with the results. I did not see the significant results that I was promised. I was told by the manager if I wanted to see greater results I would have to buy more individual treatments. Even though a lot of time had passed after my last laser treatment, I was told the individual treatments would still provide good results. Again I was hesitant but I got several more individual treatments over time, with no great result. I maybe see a 30-40% improvement after all those treatments and spending thousands of dollars. Upset with how much money I spent for such minor results I contacted the manager again. She then told me that the knee it is a hard area to treat and the scar may not get better than this. I was never made aware of this during my consultation or before any of my continuous purchases. I feel like I was pushed to buy more treatments and was continuously convinced that my scar would get better, until this point. She said there was nothing more that could be done unless I wanted to buy and try more treatments. Afterwards, I wrote a review about my experience and then the manager reached out and apologized. She offered me a free session using a different laser and asked me to take down my review until I saw the new results. Although I appreciate that, I still have not seen results. I can not speak on their other services but in my personal opinion I would not recommend this facility for laser scar removal. I do not believe they were transparent with me about the potential results before I made my purchases Overall I do not believe the price of the treatments was worth the outcome. This is my real experience and I just want to make others aware so they can make an informed decision before making a purchase.

Perfect Body v. Platz

Index #622252/2023

Page 3

The plaintiff alleges in its 46 page complaint that:

201. Defendant published the Defamatory Statements, despite knowing the falsity of the statements.

202. Defendant acted with malice, comprising a knowing disregard of the Defamatory Statements' falsity, as well as sinister and deliberate falsification, when the false and untrue statements were published by her.

203. Defendant's Defamatory Statements are readily interpreted as imparting to the public that Perfect Body Image and its employees are con artists, liars and that their services yield no results whatsoever.

204. Defendant's Defamatory Statements injured and/or tend to injure Plaintiff Perfect Body Image, LLC, and their employees in the aesthetic services they provide to individuals inside and outside their community as well as injure the profession they practice and the businesses reputation.

The plaintiff contends that as a direct result of the defendant's online Google review, their business's reputation is exposed to "distrust and lack of integrity about their services, pricing, and financing terms". Throughout the complaint and the plaintiff's motion papers, the business relationship is summarized through a recounting of events leading up to the first review and subsequent interactions up to and including the secondary "updated" review. Perfect Body Image, LLC., has attached to the complaint, opposition papers and cross motion papers, a number of exhibits including the sales contracts, consult notes, affidavits, and various forms used in the course of their business conduct. The plaintiff claims that the negative review left by the defendant is defamatory in nature and the business is therefore entitled to recover monetary damages as a result.

The defendant moves to dismiss the entirety of the complaint claiming that her actions are protected by the New York State anti-SLAPP (Strategic Lawsuit Against Public Participation) law, under Civil Rights Law §§ 70-a and 76-a. Civil Rights Law 76-a states:

1. For purposes of this section:

(a) An "action involving public petition and participation" is a claim based upon:

(1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or

(2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition.

(b) "Claim" includes any lawsuit, cause of action, cross-claim, counterclaim, or other judicial pleading or filing requesting relief.

Perfect Body v. Platz

Index #622252/2023

Page 4

(c) “Communication” shall mean any statement, claim, allegation in a proceeding, decision, protest, writing, argument, contention or other expression.

(d) “Public interest” shall be construed broadly, and shall mean any subject other than a purely private matter.

**2. In an action involving public petition and participation, damages may only be recovered if the plaintiff, in addition to all other necessary elements, shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue.**

3. Nothing in this section shall be construed to limit any constitutional, statutory or common law protections of defendants to actions involving public petition and participation. [Emphasis added]

The defendant argues that the basis of the plaintiff’s action is to make an end run around what she alleges to be an illegal gag-clause contained in a form general release and effectively use the court to police the “comment and review” section of the internet with the ultimate goal being to scrub the internet of any negative commentary or publicity against Perfect Body Image, LLC.

In the submitted opposition papers, the plaintiff concedes that the defendant’s reviews are within the purview of New York’s Anti-SLAPP laws and therefore may be subject to dismissal pursuant to CPLR §3211(a)(7) and (g).

To succeed on a motion to dismiss pursuant to CPLR §3211 for failure to state a cause of action, the court must determine whether, accepting as true the factual averments of the complaint and granting plaintiffs every favorable inference which may be drawn from the pleading, plaintiffs can succeed upon any reasonable view of the facts stated (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 754 NE2d 184, 729 NYS2d 425 [2001]; see also *Fowler, Rodriguez, Kingsmill, Flint, Gray & Chalos LLP v Island Prop., LLC*, 307 AD2d 953, 763 NYS2d 481 [2d Dept 2003], *Bartlett v Konner*, 228 AD2d 532, 644 NYS2d 550 [2d Dept 1996]). If the pleading states a cause of action and if, from its four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion for dismissal will fail (see *Wayne S. v County of Nassau Dept. of Social Services*, 83 AD2d 628, 441 NYS2d 536 [2d Dept 1981]). The documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim (see *Estate of Menon v Menon*, 303 AD2d 622, 756 NYS2d 639 [2d Dept 2003], citing *Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511, *Roth v Goldman*, 254 AD2d 405, 406, 679 NYS2d 92).

Pursuant to CPL §3211(g), “a motion to dismiss based on paragraph seven of subdivision (a) of this section, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation as defined in paragraph (a) of

Perfect Body v. Platz

Index #622252/2023

Page 5

subdivision one of section seventy-six-a of the civil rights law, shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law”. As the plaintiff conceded that this action does fall within the parameters of the Anti-SLAPP laws, “damages may only be recovered if the plaintiff, in addition to all other necessary elements, shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue”. (see *Mable Assets v. Rachmanov*, 192 A.D.3d 998)

The Court must now determine whether the statement constitutes defamation. The making of a false statement which tends to expose a person to public contempt, ridicule, aversion, or disgrace constitutes defamation (*Thomas H. v Paul B.*, 18 NY3d 580, 584, 942 NYS2d 437 [2012]; *Foster v Churchill*, 87 NY2d 744, 751, 642 NYS2d 583 [1996]). Generally, only statements of fact can be defamatory because statements of pure opinion cannot be proven untrue (see *Thomas H. v Paul B.*, 18 NY3d 580, 584, 942 NYS2d 437). Non-actionable “pure opinion” is a statement of opinion accompanied by recitation of facts upon which it is based, or, if not accompanied by such factual recitation, the statement must not imply that it is based upon undisclosed facts (*Steinhilber v Alphonse*, 68 NY2d 283, 508 NYS2d 901 [1986]). The difficult task of distinguishing an actionable statement of fact from a protected statement of opinion is a question of law for the court (see *Mann v Abel*, 10 NY3d 271, 276, 856 NYS2d 31 [2008]). This task involves an examination of three factors: (1) whether the allegedly defamatory words have a “precise meaning” that is “readily understood”; (2) whether the statement can be proven true or false; and (3) whether in the context of the communication or the either broader social context signal to that what is being read or heard is likely to be opinion, not fact (see *Mann v Abel*, *supra* at 276; *Steinhilber v Alphonse*, *supra* at 292). Indeed, context is often the key consideration in categorizing a statement as fact or opinion (see generally *Immuno AG. v Moor-Jankowski*, 77 NY2d 235, 254, 566 NYS2d 906 [1991]).

The question before the Court becomes whether the Google review statements made by the defendant are “ones of fact or opinion and depends on whether a reasonable reader or listener would understand the complained-of assertions as opinion or statements of fact”. ( see *Millus v. Newsday, Inc.*, 89 N.Y.2d 840) In the world of online reviews and public discourse, this Court concludes that a reasonable reader would find the Google reviews posted by the defendant to be nothing more than the published opinions of a dissatisfied customer. One can easily read that, in the context of the review taken as a whole, it reads as a recitation of what the defendant perceived as her own personal experience. Throughout the review, the defendant utilizes words and phrases such as “I feel”, “I believe”, and “in my own personal opinion”. The defendant describes other instances of what she *believes* was verbalized to her.

When considering whether a statement rises to the level of defamation, the Court must determine whether “it exposes an individual ‘to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or . . . induce[s] an evil opinion of one in the minds of right-thinking persons, and . . . deprive[s] one of their confidence and friendly intercourse in society’” (see *Chau v. Lewis*, 771 F.3d 118 (2d Cir. 2014)). This Court finds here, that the even-toned and highly opinionated Google review posted by the defendant, does not expose Perfect Body Image, LLC., to public



Perfect Body v. Platz  
Index #622252/2023  
Page 6

hatred, contempt, ridicule, etc. As further outlined below, this Court cannot find malicious intent within the words of this review let alone something that would evince feelings of public hatred or an “evil opinion” in the mind of society regarding the Perfect Body business.

The Court determines that Perfect Body Image has “failed to demonstrate, with convincing clarity, that [the] defendant acted with actual malice--that is, with knowledge that the allegedly defamatory statement was false or with reckless disregard for the truth or falsity of the statement”. (see *Millus, supra*) Although the plaintiff attaches various documents used in the business relationship to try and show that the defendant made the statement with reckless disregard for the truth or falsity, the Court finds it difficult to deduce such malice in a review where the defendant directly compliments the facility and the employees of the business, signals to the reader that the business provides other services and is only offering an assessment on one service received not the overall business or other services provided. The records provided by the plaintiff do not show that the defendant’s independent recollection of what transpired was in some way a concocted statement made with a reckless disregard for the truth. The Court strains to see where commentary on pricing and an individualized valuation of cost verse benefit to the reviewer would be construed as malicious. Nor does the court find malice in the defendant relaying what she believed was conveyed regarding the success or failure of the treatment.

Based on the foregoing, the Court concludes that, accepting as true the factual averments of the complaint and granting the plaintiff every favorable inference which may be drawn from the pleading, the plaintiff has not pled a cause of action cognizable at law as against the defendant for defamation. The defendant’s motion to dismiss is granted.

The defendant’s remaining requests, including costs, attorney fees and sanctions, are denied.

As the court has granted defendant’s motion to dismiss, plaintiff’s motion enumerated at motion number 2 regarding the exclusion of defense counsel from the case, is denied as moot.

The foregoing constitutes the Decision and Order of this Court.

Dated: April 3, 2024

  
\_\_\_\_\_  
HON. ALISON J. NAPOLITANO  
J.S.C.

  X   FINAL DISPOSITION           NON-FINAL DISPOSITION