

**Phramus, Inc. v Metropolitan Opera Assn., Inc.**

2019 NY Slip Op 30834(U)

March 25, 2019

Supreme Court, New York County

Docket Number: 651266/2018

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL PART 48

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PHRAMUS, INC., JAMES LEVINE,  
Plaintiffs,

- v -

METROPOLITAN OPERA ASSOCIATION, INC., PETER GELB,  
Defendants.

INDEX NO. 651266/2018

MOTION DATE 06/20/2018

MOTION SEQ. NO. 002

**DECISION AND ORDER**

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**MASLEY, J.:**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36, 37, 38, 44, 45, 46, 50, 51, 57

were read on this motion to/for DISMISS

Defendants Metropolitan Opera Association, Inc. aka Metropolitan Opera (Met) and Peter Gelb move, pursuant to CPLR 3211 (a) (7), to dismiss the fifth, sixth, and seventh causes of action in the amended complaint, dated June 7, 2018, of plaintiffs Phramus, Inc. (Phramus) and James Levine.

Plaintiffs' three defamation claims at issue on this motion arise from statements made by defendants' after published reports detailing allegations of sexual misconduct by Levine were published in the New York Post (Post) and New York Times (Times), as well as certain statements by the Met and its attorney upon termination of Levine's employment and commencement of this action, respectively.

The factual allegations in this decision and order are taken from Plaintiffs' June 7, 2018 amended complaint unless otherwise noted. Oral argument was held for this

motion and the so-ordered transcript of that proceeding is incorporated into this decision and order for all purposes.

### Background

Levine is a renowned professional conductor of musical performances whose services were employed by the Met since 1971; he served as the Music Director for many years until, in June 2016, the Met appointed him its Emeritus Music Director, and he was employed in that capacity until he was suspended without pay by the Met on December 3, 2017 and terminated on March 12, 2018 (*see* NYSCEF Doc No [Doc] 38 [amended complaint], ¶ 22). Gelb has been the Met's General Manager since 2006 (*id.* ¶ 25).

On December 2, 2017, articles were published in the Post and the Times reporting an individual's accusations that he was the subject of acts of sexual misconduct committed by Levine in the 1980s (*id.* ¶ 87). On December 3, 2017, the Times published a second article which reported similar accusations by two other individuals regarding past sexual misconduct by Levine (*id.* ¶ 88), and which discussed and quoted defendants' response to the December 2, 2017 reports. Specifically, the December 3, 2017 article announced that the Met had suspended Levine, and quoted Gelb as stating: "[t]his is a tragedy for anyone whose life has been affected" (*id.* ¶ 102). On December 4, 2017, defendants released a statement by email to "Supporters of the Met" (Supporters) which stated: "[t]his is a sad moment in the company's history and a tragedy for anyone whose life may have been affected" (*id.* ¶ 103; *see also* Doc 32 [exhibit 8 to amended compl] [Gelb 12/4/17 email]).

After its investigation into the accusations, the Met, on March 12, 2018, announced it had terminated Levine and issued the following statement on its website:

“The investigation uncovered credible evidence that Mr. Levine had engaged in sexually abusive and harassing conduct both before and during the period when he worked at the Met. The investigation also uncovered credible evidence that Mr. Levine engaged in sexually abusive and harassing conduct towards vulnerable artists in the early stages of their careers, over whom Mr. Levine had authority”

(Doc 32, ¶ 134).

An article published in the Times later that same day quoted from and reiterated portions the Met’s website statement (*id.* ¶ 138).

Plaintiffs commenced this action on March 15, 2018. That day, the Met’s counsel issued the following public response:

“The Met terminated Mr. Levine’s contract on March 12, following an in-depth investigation that uncovered credible and corroborated evidence of sexual misconduct during his time at the Met, as well as earlier. It is shocking that Mr. Levine has refused to accept responsibility for his actions, and has today instead decided to lash out at the Met with a suit riddled with untruths . . . . Nonetheless, the Met continued to support him in the position of Music Director Emeritus, a position created especially for him, and only suspended its relationship with him when Levine was accused of multiple acts of sexual misconduct, charges that have been corroborated following a more than three-month investigation” (*id.* ¶ 135).

That response further stated that “[t]he Met only transitioned [Levine] from Music Director to Music Director Emeritus at the end of the 2015-16 season when it became obvious that Levine was no longer physically capable of carrying out his duties as Music Director” (*id.* ¶ 163).

Plaintiffs’ fifth, sixth, and seventh causes of action against defendants assert: (5) defamation for the December 3 and 4, 2017 statements that Levine created a tragedy for individuals (*id.* ¶ 192-199); (6) defamation for the March 12 and 15, 2018 statements that that the Met’s investigation uncovered credible evidence that Levine engaged in sexual misconduct (*id.* ¶ 200-205); and (7) defamation for the March 15, 2018 statement that Levine was not physically capable of carrying out his duties as Music Director when

he was given the Emeritus position in 2016 (*id.* ¶ 206-211). Defendants now move, pursuant to CPLR 3211 (a) (7), to dismiss those three defamation claims.

#### Discussion

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. [The court] accept[s] the facts as alleged in the complaint as true, [and] accord[s] plaintiff[] the benefit of every possible favorable inference” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citation omitted]).

“Defamation is the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society” (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014] [internal quotation marks and citations omitted]). “To prove a claim for defamation, a plaintiff must show: (1) a false statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm, unless the statement is one of the types of publications actionable regardless of harm,” such as defamation per se (*id.* at 34 [internal quotation marks and citations omitted]; *see Gentile v Grand St. Med. Assoc.*, 79 AD3d 1351, 1354 [3d Dept 2010] [statements that on their face “allege a serious crime or relate to a matter of significance and importance in her profession” constitute defamation per se]).

Whether a statement is defamatory is “a legal question to be resolved by the court in first instance” (*Kramer v Skyhorse Publ., Inc.*, 45 Misc 3d 315, 322 [Sup Ct, NY County 2014]). “Loose, figurative or hyperbolic statements, even if deprecating the plaintiff, are not actionable” (*Jacobus v Trump*, 55 Misc 3d 470, 474 [Sup Ct, NY County 2017], *affd* 156 AD3d 452 [1st Dept 2017], *lv denied* 31 NY3d 903 [2018]). “On a motion

to dismiss a defamation claim, the court must decide whether the statements, considered in the context of the entire publication, are reasonably susceptible of a defamatory connotation, such that the issue is worthy of submission to a jury” (*Stepanov*, 120 AD3d at 34 [internal quotation marks and citations omitted]). “[I]n order to survive a motion to dismiss, a defamation plaintiff need only meet the minimal standard of pointing to any reasonable view of the stated facts that would permit recovery” (*id.* [internal quotation marks and citations omitted]).

#### Fifth Claim Regarding December 3 and 4, 2017 Statements

Defendants contend that the fifth claim must be dismissed as they are not defamatory—rather, they are a reasonable and non-defamatory response to serious allegations made publicly—and comprise the Met’s inactionable opinion as to the circumstances, not a true or false statement of fact or statement of mixed opinion and fact. Further, defendants contend that the statements are too vague to constitute defamation as “tragedy” is an opinion which remarks on the circumstances.

Specifically, the December 2, 2017 articles reported, according to the complaint, false accusations of long-past sexual misconduct made by one unidentified man against Levine (Doc 38, ¶¶ 87-90). In the December 3, 2017 article, those allegations were repeated, as well as information that two more persons had made similar accusations (falsely, according to plaintiffs) against Levine (*id.*).

The December 3, 2017 article states in sum:

“The Metropolitan Opera suspended James Levine, its revered conductor and former music director, on Sunday after three men came forward with accusations that Mr. Levine sexually abused them decades ago, when the men were teenagers.

Peter Gelb, the general manager of the Met, announced that the company was suspending its four-decade relationship with Mr. Levine, 74, and

canceling his upcoming conducting engagements after learning from The New York Times on Sunday about the accounts of the three men, who described a series of similar sexual encounters beginning in the late 1960s. The Met has also asked an outside law firm to investigate Mr. Levine's behavior.

'While we await the results of the investigation, based on these news reports the Met has made the decision to act now,' Mr. Gelb said in an interview, adding that the Met's board supported his actions. 'This is a tragedy for anyone whose life has been affected' "

(Michael Cooper, Met Opera Suspend James Levine After New Sexual Abuse Accusations, NY TIMES [Dec. 3, 2017], <https://www.nytimes.com/2017/12/03/arts/music/james-levine-met-opera.html>).

On December 4, 2017, Gelb's emailed the Supporters, stating:

"I'm sure you have read news reports over the past 48 hours detailing allegations of sexual misconduct on the part of James Levine, the Met's Music Director Emeritus. The Board of Directors and I are deeply disturbed by these reports, and I want to assure you that we are committed to a complete investigation. This is a sad moment in the company's history and a tragedy for anyone whose life may have been affected, and we are prepared to take whatever measures are called for. We will keep our loyal audience apprised of any developments as they happen, and in the meantime, I thank you for your support of the Met. I also want to assure you that we will never lose focus on our artistic mission to continue to deliver performances of the highest artistic level"

(Doc 9).

The court disagrees with plaintiffs that the "only . . . plausible interpretation" of those December 2017 statements is that Levine did, in fact, commit the accused acts of sexual misconduct (*see* Doc 44 at 10-11 [mem in opp]). An average, reasonable person reading the December 2017 statements in their totality and in the context of the December 2, 2017 press reports of accusations against Levine—a famous public figure—would understand, as is explicit in defendants' statements, that the Met was promptly launching an investigation into the accusations, and that defendants were not commenting on the truth or falsity of the accusations. Rather, the plausible implication

to be drawn from a fair reading of the entire statements is that the Met was not aware whether the accusations were true or false.

Additionally, defendants' statements that it was a "sad moment in the company's history" and "a tragedy for anyone whose life may have been affected" are both vague and equivocal statements, neither of which denounce Levine or constitute a defamatory statement that held Levine up to "contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society" (*Stepanov*, 120 AD3d at 34). Instead, the court agrees with defendants that those statements are comments about the circumstances—involving allegations of sexual misconduct, as reported in the December 2, 2017 articles—and the Met's commitment to investigate those accusations, which the Met did not take lightly. In fact, the reasonable interpretation of those statements under the circumstances is that the Met's position was that it would not brush off those accusations.

Further, it is clear that the Met's statement imparted its position that the accusations, whether true or false, are troubling, and mark "sad day" for the entity—a response that does not constitute defamation under the circumstances. While defendants stated that the situation was a "tragedy" for those affected—even assuming that the word "tragedy" is sufficiently precise to support a defamation claim—is plainly equivocal. The reasonable interpretation of those statements by an average reader in the whole context is that, true or false, defendants were sympathetic to anyone negatively affected or harmed in connection with the accusations; that is, the situation was "trag[ic]" whether the accusers were harmed by alleged misconduct or Levine and the Met, Levine's long-time employer, were harmed by false accusations in the press.



In any event, the average reader would not understand the December 2017 statements to mean that Levine had actually committed any crime or engaged in sexual misconduct. The December 2017 statements plainly reflect defendants' purported commitment to investigate the accusations in earnest, and their expression of sympathy for anyone whose life or livelihood may have been affected by the published accusations.

Accordingly, the challenged December 2017 statements are not defamatory under the circumstances and the fifth cause of action is dismissed.

Sixth Cause of Action Regarding the Met's March 12 and 15, 2018 Statements

The March 12, 2018 statement by defendants, published on the Met's website, and March 15, 2018 statement by the Met's attorney in a press statement, both stated that the Met's investigation revealed "credible evidence" that "corroborated" the accusations against Levine (Doc 38, ¶¶ 201-206).

Defendants assert that the sixth claim against the Met is not actionable because what is or is not "credible" evidence is the Met's opinion, not fact. Whether a statement is opinion or fact depends on three factors:

(1) whether the allegedly defamatory words have a "precise meaning" that is "readily understood"; (2) whether the statement can be proven as 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 or listeners that what is being read or heard is likely to be opinion, not fact"

(*Thomas H. v Paul B.*, 18 NY3d 580, 584 [2012] [quotation marks and citations omitted]).

Plaintiffs respond that the March 2018 statements convey factual assertions that evidence exists that Levine engaged in specific sexually abusive or harassing conduct,

and that evidence was “credible.” The court agrees with plaintiffs that these statements are actionable mixed opinion and fact, at least on a motion to dismiss under CPLR 3211 (a), as the statements are presumably “based upon facts which justify the opinion but are unknown to those reading or hearing it” (*Steinhilber v Alphonse*, 68 NY2d 283, 289-290 [1986]). “The actionable element of a ‘mixed opinion’ is not the false opinion itself—it is the implication that the speaker knows certain facts, unknown to [the] audience, which support [the] opinion and are detrimental to the person about whom he [or she] is speaking” (*id.*)

Accepting the non-conclusory allegations in the complaint as true, the Met’s statements are mixed opinion and fact and, under the circumstances, are sufficiently defamatory. An average reader of these statements—that the Met “uncovered credible evidence that Mr. Levine had engaged in sexually abusive and harassing conduct both before and during the period when he worked at the Met” and that the evidence was “corroborated”—would plainly infer that the Met’s investigation uncovered “credible,” “corroborated” “evidence” that Levine had engaged in a series of incidents of sexual misconduct. At the very least, the statements imply that the Met’s mixed opinion was based upon an unstated knowledge of fact(s) demonstrating the veracity of the accusations.

Nevertheless, the court agrees with defendants that the March 15, 2018 statement of the Met’s attorney, made on the day that this action was commenced, is protected by the litigation privilege as a response to plaintiffs’ commencement of this action that is clearly pertinent to the claims. The court does not agree, at this juncture, that the same privilege extends to and protects the March 12, 2018 statement made by the Met on its public website before this case was filed.

“Statements made in connection with a proceeding before a court are privileged if material and pertinent to the questions involved. . . . In light of [the public and policy] interests [underpinning privilege], the privilege is liberally applied irrespective of an attorney’s motive for making the challenged statement, notwithstanding the merits of the underlying action, and whether the challenged statement is made by the attorney or by a party. The determination of whether a statement made in the course of judicial proceedings is pertinent to the proceeding also constitutes a question of law for the court.

Given the interest in permitting free inquiry, the test for determining whether a statement is at all pertinent to the litigation is extremely liberal. Thus, if, by any view or under any circumstances, [a statement] may be considered pertinent, it is pertinent”

(*Peck v Peck*, 2018 NY Slip Op 30990[U] [Sup Ct, NY County 2018] [internal citations and quotation marks omitted] [first and second alteration added]).

While New York courts have found that statements made in anticipation of litigation—such as cease and desist letters sent, ostensibly, to prevent unnecessary litigation (*see Front, Inc. v Khalil*, 24 NY3d 713, 720 [2015])—that privilege is not in every instance absolute. Other courts applying New York law have found that application of the privilege to statements may be precluded where there are issues of fact whether the remarks were made in good faith anticipation of litigation (*e.g. Lambe v Kahlon*, CV 13-3126, 2016 WL 6948456, at \*2, 2016 US Dist LEXIS 5442 [EDNY Jan. 14, 2016]).

As in *Lambe*, and as the Court of Appeals cautioned in *Front, Inc.*, the court declines to apply, as a matter of law, the litigation privilege to the Met’s March 12, 2018 website statement at this early stage of the litigation as there are issues of fact as to the Met’s good faith anticipation of litigation, the purpose of publishing those statements on its public website, and the pertinence of those statements to an action that was not yet filed. In the interest of prudence, to avoid overapplication of the litigation privilege, and in furtherance of the justice-seeking policy underpinning the litigation privilege itself, the court declines to apply the privilege to the March 12, 2018 statements at this time.

Accordingly, the sixth cause of action is dismissed only insofar as it seeks relief for the March 15, 2018 statement of counsel.

Seventh Cause of Action Regarding the Met's March 15, 2018 Statement as to Levine's Physical Health

The seventh cause of action for defamation concerns the Met's statement, through its counsel on March 15, 2018 in response to the commencement of this action, that Levine was not physically capable of carrying out his duties as Music Director when the Met removed him from that position (Health statement) (Doc 38, ¶¶ 206-211).

Defendants contend that the Health statement is opinion, not fact, and protected by the litigation privilege under New York Civil Rights Law § 74 and the common law. The court disagrees that the statement, made in response to the commencement of this litigation, is a purely inactionable opinion, as the full response states, among other things:

"There is no basis for Mr. Levine's assertion that the Met was on a vendetta against him, when in fact the Met supported him through prolonged and repeated periods of illness that kept him from the podium, at one point spanning two entire seasons (2011-12 and 2012-13). The Met only transitioned him from Music Director to Music Director Emeritus at the end of the 2015-16 season when it became obvious that Levine was no longer physically capable of carrying out his duties as Music Director. Nonetheless, the Met . . . only suspended its relationship with him when Levine was accused of multiple acts of sexual misconduct, charges that have been corroborated following a more than three-month investigation" (Metropolitan Opera Issues Response to Lawsuit Filed by James Levine, OPERA NEWS (Mar. 15, 2018), [https://www.operanews.com/Opera\\_News\\_Magazine/2018/3/News/Metropolitan\\_Opera\\_Issues\\_Response\\_to\\_Lawsuit\\_Filed\\_by\\_James\\_Levine.html](https://www.operanews.com/Opera_News_Magazine/2018/3/News/Metropolitan_Opera_Issues_Response_to_Lawsuit_Filed_by_James_Levine.html)).

The statement, if not factual, is mixed opinion which can be the basis for a defamation claim; however, as with the other March 15, 2018 statement above, the litigation privilege extends to and protects the Health statement, warranting dismissal of the seventh claim.

The Met's attorney's public response to commencement of the litigation is plainly within the broad purview of pertinence to the action as it concerns not only the reason for Levine's termination and the nature of the allegedly false statements that comprise the defamation claims, but also whether defendants acted with malice, a necessary element of a defamation claim when asserted by a public figure such as Levine (*e.g.* *Peck*, 2018 NY Misc LEXIS 2011, at \*12-13).

Accordingly, it is

ORDERED that the motion to dismiss of Defendants Metropolitan Opera Association, Inc. aka Metropolitan Opera and Peter Gelb is granted in part; and it is further

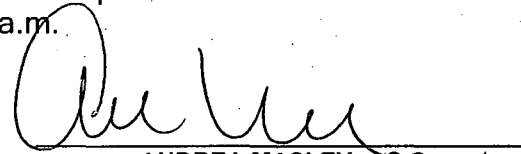
ORDERED that the Fifth and Seventh Causes of Action are dismissed from the amended complaint of Plaintiffs Phramus, Inc. and James Levine; and it is further

ORDERED that the portion of the Sixth Cause of Action asserting defamation for the March 15, 2018 statement is dismissed from the amended complaint; and it is further

ORDERED that the parties shall appear for a compliance conference at 60 Centre Street, Room 242, on April 16, 2019 at 10 a.m.

3/25/2019

DATE



HON. ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE