SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

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SUMMER ZERVOS,

Plaintiff,

-against-

DONALD J. TRUMP,

Defendant.

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DECISION AND ORDER

Index No. 150522/17

JENNIFER G. SCHECTER, J.:

In *Clinton v Jones*, 520 US 681 (1997), the United States Supreme Court held that a sitting president is not immune from being sued in federal court for unofficial acts. It left open the question of whether concerns of federalism and comity compel a different conclusion for suits brought in state court. Because they do not, defendant's motion to dismiss this case or hold it in abeyance is denied.

Background

On this motion to dismiss the complaint, the court must accept the facts alleged by plaintiff to be true (*Davis v Boeheim*, 24 NY3d 262, 268 [2014]).

In 2005, plaintiff Summer Zervos, a California resident, was a contestant on *The Apprentice*, a reality show starring and produced by defendant Donald J. Trump (Affirmation in Support [Supp], Ex 19 [Complaint] at ¶ 19). After defendant

"fired" her on the program, plaintiff continued to seek him out for advice and to pursue job opportunities (*id.* at ¶ 21).

In 2007, plaintiff met with defendant at his New York office. He allegedly kissed her twice on the lips, making her "uncomfortable, nervous and embarrassed" (*id.* at ¶ 26). The next time she saw defendant was after he called her and asked her to meet him at the Beverly Hills Hotel for dinner at a restaurant (*id.* at ¶ 27). When plaintiff arrived, she was escorted to defendant's bungalow and waited for him in the living-room area (*id.* at ¶ 28). After 15 minutes, defendant emerged from his bedroom, kissed Ms. Zervos "open mouthed" and pulled her toward him (*id.* at ¶ 29). He asked her to sit next to him, "grabbed her shoulder, again kissing her very aggressively, and placed his hand on her breast" (*id.* at ¶ 29). After plaintiff pulled back and walked away, defendant took her hand and led her into the bedroom (*id.* at ¶ 30). When plaintiff walked out, he turned her around and suggested that they "lay down and watch some telly telly" (*id.*). He embraced her and plaintiff pushed him away, telling him to "get real" (*id.* at ¶ 30). He then repeated plaintiff's words

back to her lasciviously and "began to press his genitals against her, trying to kiss her again" (*id.* at ¶ 30).

After plaintiff told defendant that she had come to see him for dinner, defendant "paced around the room and seemed angry" (*id.* at ¶ 31). The two had dinner, which abruptly ended when defendant stated that he needed to go to bed and told plaintiff to meet him the next day at his golf course (*id.* at ¶ 34). Plaintiff immediately went to discuss what had happened with her father and to get his advice (*id.* at ¶ 35). She decided to go ahead with the meeting (*id.*).

The following day, plaintiff had limited interaction with defendant who introduced her to the general manager of the golf course (*id.* at ¶ 36). Later that week, the manager offered plaintiff a job at half the salary that she had been seeking (*id.* at ¶ 38). Plaintiff called defendant and told him that she "was upset, because it felt like she was being penalized for not sleeping with him" (*id.* at ¶ 39).

In 2009 and 2010, plaintiff continued seeking employment within the Trump organization to no avail (*id.* at ¶ 40). She believed that defendant's "sexually inappropriate misconduct . . . at the Beverly Hills Hotel was either a test or an

isolated incident" (*id.* at ¶ 42). In 2016, plaintiff emailed defendant "that their past encounter had been hurtful and embarrassing" (*id.* at ¶ 43). She never received a response (*id.*).

In July 2016, defendant was selected as the presidential nominee for the Republican party (*id.* at ¶ 44).

On October 7, 2016, footage from the television show *Access Hollywood* was made public that depicted defendant telling the program's host: "'I just start kissing [women] . . . Just kiss. . .. I don't even wait. And when you're a star, they let you do it. You can do anything. . . . Grab them by the pussy. You can do anything'" (*id.* at ¶¶ 1, 4). During a presidential debate two days later, defendant denied engaging in the behavior that he had discussed on tape and characterized his words as "locker-room talk" (*id.* at ¶ 48).

Plaintiff subsequently "chose to come forward and to speak publicly . . .. She felt that telling the world of her specific experiences . . . was ethically the right thing to do, so that the public could evaluate Mr. Trump fully as a candidate for president" (*id.* at ¶ 50). On the afternoon of October 14, 2016, plaintiff along with her counsel held a

press conference at which she "publicly described her interactions with Mr. Trump in detail, including his unwanted sexual misconduct" (*id.* at ¶ 53).

That very day, defendant responded in a statement that was widely reported and appeared on his campaign website: "'To be clear, I never met her at a hotel or greeted her inappropriately a decade ago. That is not who I am as a person and it is not how I've conducted my life'" (*id.* at ¶ 55). Later on, at a North Carolina campaign rally, defendant stated "'these allegations are 100% false . . . They are made up, they never happened . . . It's not hard to find a small handful of people willing to make false smears for personal fame, who knows maybe for financial reasons, political purposes, or for the simple reason they want to stop our movement. They want to stop our campaign. Very simple. These claims defy reason, truth, logic, common sense. They're made without supporting witnesses. No witnesses. Hey you know, 28 years ago, 10 years ago, 14 years ago, 12 years ago. Not me. Believe me. Not me. Not me" (*id.* at ¶ 59; Supp, Ex 3 at 2-3).

At a rally in New Hampshire on October 15, 2016, defendant reported that plaintiff's cousin "wrote a letter that what she said is a lie" (Supp, Ex 8 at 2). He stated that many of the allegations against him had already been "proven so false," referred to another story in the media about him and insisted: "we can't let them get away with this . . .. Total lies. . .. [You've] been seeing total lies" (*id.*). He said "you have phony people coming up with phony allegations, with no witnesses whatsoever" (*id.* at 3).

He tweeted about "100% fabricated and made up charges" and that nothing "ever happened with any of these women. Totally made up nonsense to steal the election" (Complaint at ¶¶ 60, 63). He lamented over Twitter about losing large numbers of women voters "based on made-up events that never happened" (*id.* at ¶ 66).

On October 17, 2016, defendant tweeted: "Can't believe these totally phony stories, 100% made up by women (many already proven false) and pushed big time by press, have impact!" (Supp, Ex 12). He also re-tweeted a statement by someone else about plaintiff, which included a picture of her and set forth "this is all yet another hoax," adding his own

comment: "Terrible" (Complaint at ¶ 69; Supp, Ex 13). At 4:31 that afternoon, defendant tweeted: "New polls are good because the media has deceived the public by putting women front and center with made-up stories and lies, and got caught" (Supp, Ex 14).

At the next presidential debate, on October 19, 2016, defendant answered a question about reports by nine women of nonconsensual kissing or groping (Complaint at ¶ 73; Supp, Ex 17 at 19/37). He stated: "those stories are all totally false. . . . I didn't know any of these women. I didn't see these women. These women, the woman on the plane, the woman on the--I think they want either fame or [the Clinton] campaign did it. . . . I believe . . . [Hillary Clinton] got these people to step forward. If it wasn't, they get their ten minutes of fame, but they were all totally--it was all fiction. It was lies and it was fiction" (Complaint at ¶ 73; Supp, Ex 17 at 20/37).

Finally, on October 22, 2016, at a Pennsylvania rally, defendant declared: "Every woman lied when they came forward to hurt my campaign, total fabrication. The events never

happened. Never. All of these liars will be sued after the election is over" (Complaint at ¶ 74).

On January 17, 2017, plaintiff commenced this action, alleging that defendant made defamatory statements about her "knowing they were false and/or with reckless disregard for their truth or falsity" (*id.* at ¶ 78). She asserts that as a direct result of the false statements and being "branded a liar who came forward only for fame or at the manipulation of the Clinton campaign," she suffered emotionally and financially (*id.* at ¶¶ 80-82). She pleads that defendant's statements contained numerous false representations about her, "including that [her] description of being subjected to unwanted sexual touching by defendant was a lie, phony, a hoax and 'made up,' and that [she] was motivated by fame and/or directed by Clinton or the Democrats" (*id.* at ¶ 85). She contends that she "suffered at least $2,914" in financial losses because her restaurant lost business (*id.* at ¶ 81).

Three days after this action was filed, defendant became the 45th President of the United States. He now moves for dismissal or for a continuance of this case until he leaves office. Because there is no authority for delaying

adjudication and because plaintiff has stated a cause of action, defendant's motion is denied.

Analysis

No one is above the law. It is settled that the President of the United States has no immunity and is "subject to the laws" for purely private acts (*Clinton*, 520 US at 696). In *Clinton v Jones*, the United States Supreme Court made clear that "immunities are grounded in 'the nature of the function performed, not the identity of the actor who performed it'" (*id.* at 695 [citation omitted]). There, the Court required then-President William Jefferson Clinton to defend against a civil-rights action that included a state-law defamation claim in federal court. The Court concluded that the President was subject to suit because regardless of the outcome there was no "possibility that the decision [would] curtail the scope of the official powers of the Executive Branch" (*id.* at 701). It explained that the "litigation of questions that relate entirely to the unofficial conduct of the individual who happens to be the President poses no perceptible risk of misallocation of either judicial power or executive power"

(*id.*). In holding that the doctrine of separation of powers did not mandate a stay of all private actions against the President, the Court flatly rejected that "interactions between the Judicial Branch and the Executive, even quite burdensome interactions, necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions" (*id.* at 702).

The rule is no different for suits commenced in state court related to the President's unofficial conduct. Nothing in the Supremacy Clause of the United States Constitution even suggests that the President cannot be called to account before a state court for wrongful conduct that bears no relationship to any federal executive responsibility. Significantly, when unofficial conduct is at issue, there is no risk that a state will improperly encroach on powers given to the federal government by interfering with the manner in which the President performs federal functions. There is no possibility that a state court will compel the President to take any official action or that it will compel the President to refrain from taking any official action.

To be sure, in pointing out that proceedings in state court may warrant a different analysis from those in federal court, each and every one of the concerns that the United States Supreme Court raised implicates unlawful state intrusion into federal government operations (*id.* at 691 n 13, citing *Hancock v Train*, 426 US 167 [1976] [federal agencies' operations could not be conditioned on obtaining state permits]; *Mayo v United States*, 319 US 441, 445, 447 [1943] [a state cannot lay fees or exact money on a United States instrumentality as "the federal function must be left free"]; *see also Matter of Armand Schmoll, Inc. v Federal Reserve Bank of N.Y.*, 286 NY 503, 509 [1941] [a state court may not "control the manner in which a federal agency performs or attempts to perform its functions and duties. . .. Assumption of such power would hamper orderly government and ignore the division of fields of government of state and nation created by the Constitution"] *cert denied* 315 US 818 [1942]).[1] Those

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[1] The cases defendant relies on are no different (*see Tennessee v Davis*, 100 US 257, 267 [1879] [statute authorizing removal of actions against federal officers engaged in official duties is "no invasion of state domain"]; *Tarble's Case*, 80 US 397 [1871] [state judge could not intrude with operations of federal government by discharging a prisoner held under the authority of the

concerns are nonexistent when only unofficial conduct is in question.

Nor is there any legitimate fear of local prejudice in state court when the actions under review bear no relationship to federal duties (*Clinton*, 520 US at 691, citing 28 USC § 1442[a] [authorizing removal from state to federal court of actions against officials "for or relating to any act under color of such office"]; *Mesa v California*, 489 US 121, 139 [1989] [explaining that in cases where "true state hostility may have existed, it was specifically directed against federal officers' efforts to carry out their federally mandated duties"]; *see also Watson v Philip Morris Cos., Inc.*, 551 US 142, 150 [2007] [purpose of removal statute is to "protect the federal government from the interference with its 'operations'"]).

There is no reason, moreover, that state courts like their federal counterparts will be "either unable to accommodate the President's needs or unfaithful to the

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United States]; *McClung v Silliman*, 19 US 598, 605 [1821] [state court cannot issue writ of mandamus compelling federal officer to take governmental action]).

tradition . . . of giving 'the utmost deference to Presidential responsibilities'" (*Clinton*, 520 US at 709). State courts can manage lawsuits against the President based on private unofficial conduct just as well as federal courts and can be just as mindful of the "'unique position in the constitutional scheme' that the office occupies" (*id.* at 698).

Additionally, and for the very same reasons articulated in *Clinton v Jones*, a stay for the duration of the Trump presidency must be denied. A lengthy and categorical stay is not justified based on the possibility that, at a moment's notice, the President may have to attend to a governmental or international crisis. If and when he does, of course, important federal responsibilities will take precedence.

In the end, there is absolutely no authority for dismissing or staying a civil action related purely to unofficial conduct because defendant is the President of the United States. Resolution of an action unrelated to the President's official conduct is the responsibility of a state court and is not impermissible "direct control . . . over the President" (*Clinton*, 520 US, 691 n 13). Congress, moreover, has enacted legislation deferring civil litigation under

circumstances it felt appropriate (*see* 11 USC § 362 [bankruptcy stay]; 50 USC § 3901 *et seq.* [staying proceedings against servicemembers during military service]). Even after *Clinton v Jones*, decided more than 20 years ago, Congress has not suspended proceedings against the President of the United States and there are no compelling reasons for delaying plaintiff's day in court here.

Dismissal of the complaint for failure to state a cause of action is also denied as the "pleading meets the minimal standard necessary" to proceed (*see Davis*, 24 NY3d at 268).[2] Plaintiff's complaint is based on assertions made by defendant, that if proven false, form the predicate for a

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[2] New York law applies. Defendant has not established that there is a conflict between substantive New York and California defamation law (*K.T. v Dash*, 37 AD3d 107, 111 [1st Dept 2006]). The only difference defendant points out is California's anti-SLAPP provision, which is a procedural statute enacted as part of California's code of civil procedure and has no applicability here (*see* Cal Civ Proc Code § 425.16[j][1] [requiring transmission of papers to California's Judicial Council]; *see also Liberty Synergistics Inc. v Microflo Ltd.*, 718 F3d 138, 154 [2d Cir 2013] [explaining that "California courts have repeatedly held . . . that California's anti-SLAPP rule is 'procedural' in nature" and applies in California courts regardless of which source of law governs a plaintiff's substantive claim]; *Kibler v Northern Inyo County Hosp. Dist.*, 39 Cal 4th 192, 202, 46 Cal Rptr 3d 41, 47, 138 P3d 193, 198 [2006] [anti-SLAPP statute is a "procedural device"]).

maintainable defamation action (*Gross v New York Times Co.*, 82 NY2d 146, 154 [1993]).

A false statement tending "to expose a person to public contempt, hatred, ridicule, aversion or disgrace constitutes defamation" (*Davis*, 24 NY3d at 268). In *Davis v Boeheim*, the Court of Appeals determined that a defamation action could be maintained against a defendant who called individuals claiming to have been victims of sexual abuse liars and stated that he believed that they were motivated by money to go public (*Davis*, 24 NY3d 262 [reinstating defamation action against someone who *may* have known undisclosed facts about alleged sexual abuse]). The Court concluded that the statements were susceptible to a defamatory connotation because they communicated that defendant had information unknown to others that justified his statements that the individuals were neither credible nor victims of abuse (*id.* at 272). Defendant in *Davis* "appeared well placed to have information about the charges" and the context of the statements suggested that he "spoke with authority and that his statements were based on facts" (*id.* at 273).

The statements here weigh even more heavily against dismissal of the complaint. Defendant--the only person other than plaintiff who knows what happened between the two of them--repeatedly accused plaintiff of dishonesty not just in his opinion but as a matter of fact. He not only averred that plaintiff told "phony stories" and issued statements that were "totally false" and "fiction," he insisted that the events "never happened" and that the allegations were "100% false [and] made up."[3] A reader or listener, cognizant that defendant knows exactly what transpired, could reasonably believe what defendant's statements convey: that plaintiff is contemptible because she "fabricated" events for personal gain (*see Divet v Reinisch*, 169 AD2d 416 [1st Dept 1991] [libelous character of statement "derives from the fact that it charges

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[3] Accepting the allegations in the complaint as true, the challenged statements were "of and concerning" plaintiff. Some of the statements referred to "every woman" who came forward--"a particular, specifically-defined group of individuals" that a jury could find included plaintiff (*see Three Amigos SJL Rest., Inc. v CBS News Inc.*, 28 NY3d 82, 86-87 [2016]; *see also Gross v Cantor*, 270 NY 93, 96 [1936]). The context of other statements--some of which were made days after plaintiff's press conference, related to allegations raised at her press conference or mentioned plaintiff and her family--similarly raise jury questions as to whether they pertained to her.

(individuals) in writing with being liars and is thus actionable on its face"]).

Defendant used "specific, easily understood language to communicate" that plaintiff lied to further her interests (*Davis*, 24 NY3d at 271). His statements can be proven true or false, as they pertain to whether plaintiff made up allegations to pursue her own agenda (*id.*). Most importantly, in their context, defendant's repeated statements--which were not made through op-ed pieces or letters to the editor but rather were delivered in speeches, debates and through Twitter, a preferred means of communication often used by defendant--cannot be characterized simply as opinion, heated rhetoric or hyperbole.[4] That defendant's statements about plaintiff's veracity were made while he was campaigning to become President of the United States, does not make them any less actionable (*see Silsdorf v Levine*, 59 NY2d 8, 16 [1983] [explaining that "concern over undue limitations upon

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[4] *Contrast Jacobus v Trump*, 156 AD3d 452, 453 (1st Dept 2017) (holding that the statement that plaintiff, a political strategist, "begged" for a job, was "too vague, subjective and lacking in precise meaning . . . to be actionable [and that its] immediate context would signal to a reasonable reader or listener" that it was an opinion and not fact).

expression in the course of political campaigns" by allowing a defamation action to proceed was "misplaced"], *cert denied* 464 US 831 [1983]).[5]

Because there is a reasonable view of the claim upon which plaintiff would be entitled to recover for defamation, the complaint sufficiently states a cause of action (*Davis*, 24 NY3d at 274).

Accordingly, it is

ORDERED that defendant's motion is denied; it is further

ORDERED that defendant is to answer within 10 days of notice of entry of this order (*see* CPLR 3211[f]).

This is the decision and order of the court.

Dated: March 20, 2018

HON. JENNIFER G. SCHECTER

[5] Plaintiff's complaint, like the one in *Silsdorf*, sufficiently alleges actual malice (*Silsdorf*, 59 NY2d at 17).