

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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HOWARD K. STERN,	:	
	:	No. 07 Civ. 8536 (DC)
Plaintiff,	:	
	:	
- against -	:	ECF CASE
	:	
RITA COSBY and HACHETTE BOOK GROUP	:	
USA, INC., d/b/a Grand Central Publishing, and	:	
JOHN or JANE DOE,	:	
	:	
Defendants.	:	
-----	X	

**DEFENDANT RITA COSBY’S MEMORANDUM OF LAW
IN SUPPORT OF LIMITED MOTION FOR
RECONSIDERATION AS TO STATEMENTS 1 AND 2
BASED ON PLAINTIFF’S ADMITTED LACK OF SPECIAL DAMAGES**

Defendant Rita Cosby (“Cosby”), by her attorneys, Davis Wright Tremaine LLP, hereby submits this memorandum of law in support of her limited motion for reconsideration as to Statements 1 and 2 based on Plaintiff’s admitted lack of special damages, pursuant to Federal Rule of Civil Procedure 59(e) and Southern District of New York Local Rule 6.3.

PRELIMINARY STATEMENT

In its August 12, 2009 Opinion, the Court ruled that Statements 1 and 2 in plaintiff Howard K. Stern’s (“Stern”) Complaint were not defamatory per se and that Stern must prove special damages as to each of these Statements. Yet Stern never pled special damages and has unequivocally admitted that he does not have and could not prove special damages. For this reason, his claim on Statements 1 and 2 fails as a matter of law. Because the Court overlooked Stern’s admission, which mandates a different outcome, Cosby moves for reconsideration and for dismissal of both Statements 1 and 2.

STATEMENT OF FACTS

Stern's Complaint does not allege that he suffered any actual economic or pecuniary losses whatsoever as a result of any of the Statements at issue, including Statements 1 or 2. *See* Compl. ¶¶ 92-146, 386-389. Further, Defendant Cosby established in her motion for summary judgment (Mov. Br. at 17) and her reply brief (Reply Br. at 2) that Stern conceded during discovery that he has no economic damages. *See* McN. Decl. ¶ 8 (Stern Dep. 553:24 – 561:4). Indeed, his deposition included the following testimony:

Q: Do you claim that you have lost any income because of the publication of the book *Blonde Ambition*?

MR. WOOD: You talking about actual income?

Q: Actual income.

MR. WOOD: We don't make that claim in the complaint, do we?

A: We're not making that claim.

McN. Decl. ¶ 8 (Stern Dep. 560:19-561:04).

Indeed, when pressed by the Court at oral argument on the summary judgment motions, Stern's counsel admitted that Stern cannot make a showing of special damages as to Statements 1 and 2:

THE COURT: If I find it is not defamatory per se is there evidence of special damages?

WOOD: Well, **there are not special damages, no.** Not in connection with that accusation.

See Summ. J. Hr'g Tr. 42, July 7, 2009 (emphasis added).

ARGUMENT

I.

STANDARD FOR MOTION FOR RECONSIDERATION

“To prevail on a motion for reconsideration, the movant must demonstrate that a court overlooked factual matters or controlling decisions that might reasonably be expected to alter the conclusion reached.” *Hedgero, LLC v. Schneider*, No. 08 Civ. 494, 2009 WL 1309782, at *2 (S.D.N.Y. May 7, 2009) (internal citation omitted) (granting motion for reconsideration of denial of summary judgment motion where the court overlooked facts relevant to whether plaintiff could prove that it suffered damages, an essential element of each of the three remaining claims).

Although the “standard for granting such a motion is strict,” *Shrader v. CSX Transportation, Inc.*, 70 F.3d 255, 257 (2d Cir. 1995) (finding no error where lower court granted motion for reconsideration), the court will grant such a motion where it failed to take account of evidence which, if considered by the court, would have mandated a different result. *See e.g., Microsoft Corp. v. AGA Solutions, Inc.*, No. 05 Civ. 5796, 2009 WL 1033784, at *3-4 (E.D.N.Y. April 17, 2009) (granting motion for reconsideration of denial of summary judgment where movant directed the court’s attention to additional evidence, submitted initially on the summary judgment motion); *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of America Securities, LLC*, 617 F. Supp. 2d 216, 218 (S.D.N.Y. 2009) (granting motion for reconsideration of summary judgment decision where the court “overlooked” relevant evidence that was in the papers but had not been drawn to the court’s attention regarding the cause of action at issue); *Chenette v. Kenneth Cole Prods., Inc.*, No. 05 Civ. 4849, 2008 WL 4344588, at *1 (S.D.N.Y. Sept. 16, 2008) (granting motion for reconsideration and dismissing sole remaining claim on summary judgment where court’s opinion had omitted analysis of the facts relating to two elements of a claim).

The decision to grant or deny a motion for reconsideration lies within the sound discretion of the district court. *See Figueroa v. City of New York*, No. 00 Civ. 7559, 2002 WL 31163880, at *1 (S.D.N.Y. Sept. 27, 2002) (granting motion for reconsideration where the court overlooked several facts that were before it on a motion for summary judgment), *aff'd*, 118 Fed. Appx. 524 (2d Cir. 2004).

II.

BECAUSE STERN DID NOT PLEAD, AND CANNOT SHOW. SPECIAL DAMAGES, THE COURT SHOULD RECONSIDER ITS DECISION DENYING SUMMARY JUDGMENT AS TO STATEMENTS 1 AND 2

The fact that Stern has not pled, and cannot prove, special damages mandates that his claim as to Statements 1 and 2 fails as a matter of law. As the Court found in its August 12, 2009 Opinion, because Statements 1 and 2 do not constitute libel per se, Stern must “prove special damages as to each of these Statements.” Op. at 30. Indeed, it is axiomatic that where the alleged defamatory statements do not constitute libel per se, special damages are an element of the claim itself, and the plaintiff “must plead and prove that he or she has sustained special damages.” *Rufeh v. Schwartz*, 50 A.D.3d 1002, 1004 (2d Dep’t 2008) (granting motion to dismiss where plaintiff failed to allege special damages). Because special damages “goes to the cause of action itself and not merely to the recovery ... a **plaintiff will be denied even nominal or punitive damages if he cannot show special damage**, since in such a case no cause of action at all is established.” *Kirby v. Wildenstein*, 784 F. Supp. 1112, 1116 (S.D.N.Y. 1992) (emphasis added, internal quotation marks and citation omitted) (dismissing claim of product disparagement based on failure to allege required element of special damages).¹

¹ The Court’s observation that New York law allows a plaintiff to seek vindication, even if only of one dollar, is correct as to any libel per se statements. Op. at 30 n.12, *citing Sharon v. Time*, 599 F. Supp. 538, 586 (S.D.N.Y. 1984) (statements implying that Sharon was responsible for a massacre were defamatory per se). Yet, when the statements are not defamatory per se, as here,

“Special damages consist of the loss of something having economic or pecuniary value.” *Matherson v. Marchello*, 100 A.D.2d 233, 235 (2nd Dep’t 1984) (internal quotation marks and citation omitted). Special damages *do not* include “harms such as impairment of reputation and personal humiliation.” *DelleFave v. Access Temporaries, Inc.*, No. 99 Civ. 6098, 2001 U.S. Dist. LEXIS 97, at *10 (S.D.N.Y. Jan. 10, 2001) (dismissing complaint where plaintiff failed to plead special damages), *aff’d*, 37 Fed. Appx. 23 (2d Cir. 2002). “To satisfy the special damages requirement, a plaintiff must set forth an itemized account of his losses.” *Agnant v. Shakur*, 30 F. Supp. 2d 420, 426 (S.D.N.Y. 1998). Round figures or general allegations of a dollar amount as to special damages “do not suffice. It is well settled law in New York that special damages must be fully and accurately defined with sufficient particularity to identify actual losses. In all cases that are libel per quod, failure to plead special damages is a fatal defect.” *Idema v. Wager*, 120 F. Supp. 2d 361, 368 (S.D.N.Y. 2000) (internal citation omitted), *aff’d*, 29 Fed. Appx. 676 (2d Cir. 2002).

Here, Stern, has not attempted to plead special damages, much less with the specificity required by New York law. His Complaint does not include any allegation that he incurred actual economic or pecuniary losses whatsoever, nor does it provide an itemized account of his losses. *See* Compl. ¶¶ 92-146, 386-389. It is far too late for him to alter his pleadings now, and even if he could, Stern has admitted on two occasions that “there are not special damages” as to Statements 1 and 2. Summ. J. Hr’g 42; *see also* McN. Decl. ¶ 8 (Stern Dep. 553:24 – 561:4). These admissions are fatal. Put simply, he has failed to plead or prove the required elements of

special damages are an element of the claim. *See Hahn v. Konstanty*, 257 A.D.2d 799, 800 (3d Dep’t 1999) (special damages are a required element of a libel claim unless plaintiff pleads libel per se, and claim must be dismissed where none are alleged).

his libel claim as to Statements 1 and 2. And he cannot save the claim by seeking nominal or punitive damages.

Because the Court failed to take into account Stern's admission that he does not have special damages, which was before it in connection with Cosby's motion for summary judgment, and was even admitted by Stern's counsel during argument on the motion, the Court should reconsider its ruling and dismiss Stern's libel claim as to Statements 1 and 2.

CONCLUSION

For the foregoing reasons, this Court should grant summary judgment in favor of Cosby and dismiss the Complaint as to Statements 1 and 2 with prejudice.

Dated: August 18, 2009
New York, New York

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