Chau v. Lewis, et al, 13-1217-cv

WINTER, Circuit Judge, dissenting:

I respectfully dissent.[1]

Michael Lewis's book describes appellant as admitting to acts that a jury could easily find to have breached his obligations to investors in the fund that employed him and to have constituted civil or criminal fraud. Although the authority my colleagues cite demonstrates that it is axiomatic that allegedly defamatory statements must be viewed by reading the document as a whole, Sydney v. MacFadden Newspaper Publ'g Corp., 242 N.Y. 208, 214 (1926), their conclusion that certain statements are not defamatory is reached only by evaluating those statements in hermetic isolation from the context in which they were made. They conclude that certain statements can have only a single and non-defamatory meaning even where the book clearly conveyed a different and defamatory meaning that was adopted by the book's readership. And while opinions are protected so long as the facts underlying them are set forth or the opinions

[1] This being a dissent, I see no need to prolong matters by examining every statement alleged to be defamatory. I will limit my remarks to what seem to me to be the most seriously defamatory allegations.

do not imply facts that can be disproved, see Steinhilber v. Alphonse, 68 N.Y. 2d 283, 289-92 (1986), my colleagues apply this rule in a fashion that renders opinions protected regardless of implied facts.

a) Overall Context

The chapter of the book at issue portrays CDO managers, in pre-crisis times, as selling interests in funds holding portfolios of risk-laden derivatives, the value of which was dependent on the value of residential mortgages. The Big Short at 136-59. The investors in these funds relied on the managers to monitor the portfolios to reduce risk. In the book's words, the managers were paid "to select the Wall Street firm to supply [the] . . . bonds that served as the collateral for CDO investors, [and to] . . . . monitor[] the hundred or so individual subprime bonds inside each CDO, and [to] replac[e] the bad ones, before they went bad, with better ones." Id. at 141.

While the CDO managers purported to be trained specialists in such management risk, they had little specialized knowledge. Indeed, the chapter asserts that the less knowledgeable

the managers, the fewer questions that were asked of "the big Wall Street firms" that put the various investment packages together, and the more likely those managers were to be patronized by those firms. Id. While the CDO managers purported to manage, they actually did very little. According to the book, the managers were actually indifferent to the risks because they were paid by the volume of managed assets. Id. at 142. As it turned out, of course, the investors were left with worthless interests, causing or contributing to the ensuing economic crisis.

This portrait is the context to the book's portrayal of appellant, to which I now turn.

b) Context of Specific Defamatory Statements

A trier of fact could easily find the following.

Appellant is the only CDO manager mentioned by name in the relevant chapter of the book and is depicted as the poster child for the CDO managers described above. Appellant is portrayed as lining his own pockets and foisting doomed-to-fail portfolios upon investors. Although he was paid to monitor the amount of risk in the fund's portfolio, he worried only about volume because he was paid by volume. And, knowing that the default rate of residential

mortgages was sufficient to wipe out the fund's holdings, appellant sold all his interests in the fund, passing all the risk to the fund's investors, who believed he was monitoring that risk. The portrayal of the appellant is particularly graphic because it purports to show his state of mind and his actions out of his own mouth.

The book states that appellant managed a fund controlling "roughly $15 billion, invested in nothing but CDOs backed by the triple-B tranche of a mortgage bond," described as "dog shit." Id. at 140. The book states that appellant had little training or background in CDO management because he had "spent most of his career working sleepy jobs at sleepy life insurance companies." Id. at 139. While appellant was paid to manage these investments to reduce risk, "he actually didn't spend a lot of time worrying about what was in CDOs." Id. at 142. Indeed, the book portrays appellant as not caring about how much risk was borne by the fund's investors. Appellant is said to have stated that "he would rather have $50 billion in crappy CDOs than none at all, as he was paid mainly on volume." Id. at 144.

Moreover, the book depicts appellant as believing that the fund's portfolio was so risky that he had taken all his personal wealth out of the fund. When confronted by a dinner partner who knew that the rates of mortgage defaults were "already sufficient to wipe out [the fund's] entire portfolio," and who noted to appellant that he "must be having a hard time," appellant is quoted as responding, "No, . . . I've sold everything out." Id. at 141. Although the book states that CDO managers generally keep a piece of the investment so as to assure investors that the manager's interests are aligned with the investors, appellant is said to have "almost giddily . . . explained . . . that he simply passed all the risk [of] . . . default on to the big investors who had hired him to vet the bonds." Id. at 142. This statement thus portrays appellant as happily and knowingly putting his interests before those of the fund's investors whose interests he was paid to protect.

c) The Merits

The book's author admits that he does not use a fact checker, and much of what the book says about the appellant is known even now (before a trial) as false. For example,

appellant's fund did not manage "nothing but CDOs backed by the triple-B tranche of a mortgage bond." Id. at 140. In fact, 38% of the assets were more highly rated. For another example, appellant spent only two of his 12-year career at life insurance companies, sleepy or not, and had substantial experience in CDO management. He did not make $26 million annually; his income was one-tenth of that.

These falsehoods provide the scenic background for the portrayal of the appellant as engaging in conduct that a trier of fact could find amounted to fraud in order to line appellant's own pockets. This portrayal can be described as non-defamatory only by declining to view it as a whole; by taking some of the statements and quotations entirely out of the context in which they were made; by finding that some statements have only a single and non-defamatory meaning when the book clearly intended a different and defamatory meaning, one adopted by readers, or so a trier could find; and by labeling some statements as opinion without regard to the facts that they imply.

For example, the chapter describes appellant as being paid vast sums "to be the CDO expert," id. at 142, and "to vet" the fund's portfolio, and in the book's words, to "monitor[] the . . . bonds inside each CDO, and [to] replac[e] the bad ones, before they went bad, with better ones," id. at 141. However, the chapter states that in reality appellant "actually didn't spend a lot of time worrying about what was in [the] CDOs." Id. at 142. The description of appellant as being paid $26 million by investors to monitor risk while deliberately not doing so is considered, without discussion, not to be defamatory by my colleagues.

The claim that appellant did not monitor the risk in the fund's portfolio is made even worse by the charge that he failed to do so in order to increase his fees. Appellant is quoted as saying that he would "rather have $50 billion in crappy CDOs than none at all, as he was paid mostly on volume." Id. at 144. This remark is said by my colleagues to be non-defamatory because $10 worth of lousy stock (or $50 billion in crappy CDOs) is worth more than none at all. That is not the single possible meaning of the quote; in fact, it is not even a plausible meaning. The quoted remark was not that $50 billion is worth more than nothing; the plain meaning was that

a high volume of CDOs led to a higher income for appellant without regard to the increased peril to investors. The book does not portray investors as believing they were choosing between (much less ended up with) $50 billion of crappy CDOs or nothing; they are portrayed as believing they were investing in a fund with ongoing monitoring of its portfolio. Instead, the book states that the monitoring extended only to the maximizing of appellant's fees. The book itself shows no doubt about this point; the paragraph that describes appellant's indifference to investors' risk quotes Eisman as thinking, "*You prick, you don't give a fuck about the investors* . . . ." Id. at 143.

As noted, the book erroneously describes the fund as holding "nothing but CDOs backed by the triple-B tranche . . . ." Id. at 140. My colleagues find this falsehood to be irrelevant because the "average reader" would not believe the difference between A-/A-3 rated securities and triple-B-rated securities to be significant. However, the book itself treats the distinction as of great significance by quoting Eisman to the effect that the triple-B tranche of a mortgage is "the engine of doom," id. at 140, and "the equivalent of three levels of dog-shit lower than the

original bonds." Id. My colleagues inconsistently find these passages to be either not defamatory because the average reader would know undisputed facts that render the statements insignificant or opinions protected because the facts cannot be disproven.[2]

The book goes further and portrays appellant as knowing the risk had become so great that he took his personal wealth out of the fund. The assertion that "I've sold everything out," id. at 141, is regarded by my colleagues as non-defamatory. This view simply ignores the context in which the purported statement was made: in response to a question of whether appellant was having a hard time because the mortgage default rate was so great as to wipe out the fund's entire portfolio. One could as easily say that a statement that a person took money handed him by a bank teller is not defamatory because one can ignore a prefatory statement about a concealed firearm and hold-up note.

[2] Perhaps the book's 28-week presence on the New York Times's best-seller list was due to sales to below-average readers.

The book's statement that the appellant had "almost giddily" made about "pass[ing] all the risk . . . to the big investors who had hired him to vet the bonds," id. at 142, is held to be non-defamatory again only by ignoring the context. The inference clearly intended by the author was that appellant was well aware of the risks of "crappy CDOs," id. at 144, and concluded that they were too great for him to take personally. My colleagues find this non-defamatory because, they say, passing risk is the business of money managers; but the book alleges far more than informed risk passing. It describes the appellant as not doing the monitoring of risk he was paid to do, privately caring only about volume rather than reducing risk because he was paid by volume, and, as he learned of the growing number of defaults in amounts that wiped out the fund's portfolio, selling his interests in the fund to pass all risk on to buyers who were deceived into believing that the risk was being vetted. This description could easily serve as the opening statement in a civil or criminal fraud trial. See Capital Mgmt. Select Fund Ltd. v. Bennett, 680 F.3d 214 (2d Cir. 2012) ("Private actions may succeed under Section 10(b) if there are particularized allegations that the contract itself was a misrepresentation, i.e., the plaintiff's loss

was caused by reliance upon the defendant's specific promise to perform particular acts while never intending to perform those acts."). Appellant's purported statements would then provide the evidence of knowing fraud. Id. However, my colleagues' view that only innocent meanings could as a matter of law be found by a trier of fact would render the admissions irrelevant.

The book's use of the adverb "giddily" in modifying appellant's purported description of his conduct suggests glee at accomplishing the fraud. My colleagues find this use as protected opinion because it does not imply facts that can be disproven. The book's use of the word "giddily" does not purport to be a quotation from Eisman, and my colleagues state that it is protected whether the opinion is Eisman's or Lewis's. "Giddily" in my view implies an observable, describable, physical manifestation that either occurred or did not, i.e., a provable event. However, even conceding that the issue may be close with regard to Eisman's opinion, the issue is not at all close if it is Lewis's opinion. Such an opinion surely implies first-hand observation, and Lewis was admittedly not present at the conversation.

As my colleagues point out, a statement is defamatory if it exposes the individual "to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace . . . ." Kimmerle v. N.Y. Evening Journal, 262 N.Y. 99, 102 (1933). Whether a statement is defamatory is an issue of fact to be determined by a jury if it is "reasonably susceptible [to] a defamatory connotation." Davis v. Ross, 754 F.2d 80 (2d Cir. 1985) (quoting James v. Gannett Co., 40 N.Y. 2d 415, 419 (1976)). Appellant has offered, in his opposition to summary judgment, evidence that since The Big Short was published, he has been professionally shunned as a result of its defamatory statements. For example, prior to the publication of the book, appellant was involved in marketing two real estate investment funds. However, because of the book, appellant's business partners, fearing that his involvement would discourage investors, asked appellant to step aside. Moreover, since November 2011, appellant was the Chief Financial Officer of a company that developed communications platforms. After several potential investors voiced concerns about appellant based on the book, the CEO asked appellant to step down from his role. This is sound evidence

that the innocent meanings adopted as a matter of law by my colleagues are hardly the sole meaning intended by the author or understood by the book's readership.

Were the statements attributed to appellant described above introduced in a civil or criminal fraud trial in which he was the defendant, they would not be excluded on relevance grounds. And if the claims made by the book were proven in such a trial, we would unanimously affirm by summary order admission of the statements and a resultant judgment against appellant.

I, therefore, respectfully dissent.