

FILED - 2
2009 JUN 10 PM 4:50
IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

JAY PENSLER, M.D.,

Plaintiff,

v.

ELAINA BENDER,

Defendant.

) DOROTHY P. DEW
) JURY DEMANDED FOR ALL
) CLAIMS TRIABLE BY JURY
)
) Case No. **09CH18628**
)
) Judge
)
)

COMPLAINT

Plaintiff Jay Pensler, M.D. ("Dr. Pensler" or "Plaintiff"), by his attorneys Novack and Macey LLP, as and for his Complaint against Defendant Elaina Bender ("Defendant"), alleges as follows:

NATURE OF THE ACTION

1. This lawsuit arises out of Defendant's unwarranted attempts to ruin the professional reputation of a well respected plastic surgeon, through false and defamatory statements. Beginning on November 9, 2008, Defendant embarked on a malicious campaign to undermine and destroy Dr. Pensler's professional reputation, by posting false and defamatory reviews on two internet review boards, Yelp.com and Citysearch.com. Through this action, Dr. Pensler seeks to: (a) vindicate his reputation; (b) enjoin Defendant from posting any future defamatory reviews about Dr. Pensler; and (c) recover damages incurred as a result of Defendant's conduct.

PARTIES

2. Dr. Pensler is an individual who resides in Cook County, Illinois. He is a plastic surgeon who has a private practice in Chicago and an excellent professional reputation.

3. Defendant is an individual who resides in Chicago, Illinois.

JURISDICTION AND VENUE

4. Jurisdiction is vested in this Court pursuant to sections 209(b)(2) and 209(c) of the Code of Civil Procedure (735 ILCS 5/2-209(b)(2) and (c) (West 2007) because Defendant is and was a resident of the State of Illinois when the cause of action arose.

5. Venue is proper in this Court pursuant to section 101 of the Code of Civil Procedure (735 ILCS 5/2-101 (West 2007)) because: (a) Defendant resides in Cook County; and (b) the transaction out of which this matter arose, or a substantial part thereof, occurred in Cook County, Illinois.

BACKGROUND FACTS

The November 9, 2008 Review

6. On or about November 9, 2008, on the Yelp.com internet review boards, an individual identifying himself/herself as John N., posted a review (the "November Review") that made a number of false and defamatory statements about Dr. Pensler, his surgical abilities, and his treatment of two patients. (A copy of the November Review is attached hereto as Exhibit A.)

7. The November Review states in relevant part:

"Very bad plastic surgeon, avoid him at all costs, please!! RUN, RUN, RUN!!!! As fast as possible, I am giving a fair warning. If you don't listen to this and let him touch you ANYWHERE with a scalpel, chances are you will be sorry you didn't take this warning seriously. My girlfriend and her sister both went to this HORRIBLE MAN on the same day for cosmetic surgery, they both had HORRIBLE results. Due to the nature of the surgery, whenever they went to him for post operative visits, he shrugged off their concerns with....Oh, no it's too soon to see the results and he would literally, walk out the door ... i[sic] have visited the office several times with my girlfriend and her sister. They both have to have surgery AGAIN to FIX HIS HORRIBLE, disfiguring work ... Now let me say it is not only the fact that he disfigured these poor girls, it is the way he handled the situation after wherein enough time had passed after their surgeries where he couldn't say it was too soon to see the REAL results. He actually pretended 1

year after their surgeries that they LOOKED GREAT!! LIAR
Bottom line, he said that their problems could be fixed through
MORE SURGERY and you guessed it!!!! More \$\$\$\$\$\$\$\$, a lot
more money! To fix his mistakes???"

8. The November Review contains at least the following false and defamatory statements:

- a) Dr. Pensler is a "Very bad plastic surgeon;"
- b) Dr. Pensler made surgical "mistakes" that caused "HORRIBLE" results to and "disfigured" the author's girlfriend and her sister;
- c) Dr. Pensler "shrugged off" the concerns of these two patients;
- d) Dr. Pensler is a "LIAR" who "pretended a year after their surgeries that they looked great;" and
- e) both the girlfriend and her sister needed additional surgery to fix Dr. Pensler's "HORRIBLE, disfiguring work."

9. Among other things, Dr. Pensler has never performed surgery on two sisters on the same day. He has no patients that fit the description in the November Review. Nor did any such patients have horrible or disfiguring surgical results or require additional surgery to correct any alleged mistakes or disfigurement. Dr. Pensler also never lied to any such patients nor did he show a lack of concern for them or pretend that their results looked great when they did not. The November Review is blatantly false.

10. Shortly after the November Review appeared, Dr. Pensler read the November Review, and on November 18, 2008, he complained to Yelp.com about the false and defamatory statements it contained, requested that it be removed, and requested the identity and address of the "John N." who had posted it.

11. On November 20, 2008, Yelp.com advised Dr. Pensler that, after having conducted its own investigation, it was immediately removing the November Review from its website. However, Yelp.com did not provide Dr. Pensler with any information about the true

identity or address of the so-called "John N." whose November Review had remained posted on the Yelp.com internet website for at least ten days.

12. Within a few days of learning about the November Review on Yelp.com, it came to Dr. Pensler's attention that the November Review had also been posted on the Citysearch.com internet review boards for Chicago, Illinois, by an individual identifying himself/herself as Johnny Nelson. (A copy of the November Review posted on Citysearch.com is attached hereto as Exhibit B.)

13. On November 26, 2008, Dr. Pensler complained to Citysearch.com about the November Review's false and defamatory statements, noted that the same review had been removed from another website, requested that the November Review be removed from Citysearch.com's website, and requested the true identity and address of the so-called "Johnny Nelson" who had posted it.

14. On December 10, 2008, Citysearch.com advised Dr. Pensler that the November Review had been removed from its website. However, no information about the true identity or address of the so-called "Johnny Nelson" was provided. The November Review remained posted on the Citysearch.com internet website for at least 30 days.

The Petition to Learn the Identity of the Person Who Posted the November Review

15. On December 10, 2008, Dr. Pensler filed a Rule 224 Verified Petition for Presuit Discovery, Pensler v. Yelp!, Inc., et al., Case No. 08 L 013658, in the Circuit Court of Cook County (the "Petition"), to learn the identity of the person or persons (the "Poster") responsible for posting the November Review.

16. On January 26, 2009, Judge Lynn Egan held a hearing on the Petition. The Petition was granted and Yelp! and Citysearch.com were ordered to provide, on or before

February 9, 2009, identifying information about the Poster, including the Poster's real name, address, phone numbers, IP addresses, ISP information, credit card numbers, any payment information, communications and any other identifying information.

17. Yelp! and Citysearch.com provided some responsive information regarding the Poster, but not enough to determine his/her identity. Yelp! and Citysearch.com both identified the Poster as John Nelson – which was not the Poster's real name – and provided the Poster's email address, which is johnnelson34@sbcglobal.net. In addition, Yelp! and Citysearch.com provided an IP address (69.211.98.88) for the Poster.

18. On March 5, 2009, Dr. Pensler filed a Second Amended Rule 224 Verified Petition for Presuit Discovery (the "Second Amended Petition") to learn, among other things, the true identity of the Poster.

19. On March 31, 2009, Judge Egan held a hearing on Dr. Pensler's Second Amended Petition, granted the Petition and ordered AT&T Global Services, Inc. ("AT&T"), the Poster's internet provider, to provide, on or before April 28, 2009, identifying information about the persons who registered the email address johnnelson34@sbcglobal.net and/or have the IP address 69.211.98.88, including the person's real name, address, phone numbers, IP addresses, ISP information, credit card numbers, any payment information, communications and any other identifying information.

20. On April 28, 2009, AT&T provided the basic subscriber information for the person who registered the email address johnnelson34@sbcglobal.net and had the IP address 69.211.98.88 on November 9, 2008 at the time the Review was posted on Yelp.com and Citysearch.com. The person was identified as Defendant Elaina Bender, of 6216 N. Fairfield Ave., Chicago, Illinois 60659, a former patient of Dr. Pensler.

21. The November Review posted by Defendant was false when made. Defendant is not a male. Defendant's "girlfriend" and "her sister" did not have surgery by Dr. Pensler and any comments regarding surgery or post operative care to these persons were known to be false at the time that they were made.

COUNT I

Defamation Per Se

22. Dr. Pensler hereby realleges and incorporates by reference Paragraphs 1-21 above as and for Paragraph 22 of this Count I.

23. The statements set forth in the November Review and identified in Paragraphs 7-8 above are false.

24. The statements set forth in the November Review and identified in paragraphs 7-8 above constitute defamation per se in that they disparage Dr. Pensler in his trade or business.

25. Defendant published the statements set forth in the November Review and identified in Paragraphs 7-8 knowing that they were false and deliberately intending to injure Dr. Pensler's professional reputation.

26. Defendant was not privileged to publish the statements set forth in the November Review and identified in Paragraphs 7-8 above and published such statements without regard to Dr. Pensler's rights.

27. Damage to Dr. Pensler's reputation from the statements set forth in the November Review and identified in Paragraphs 7-8 above is presumed because such statements are defamatory per se.

WHEREFORE, Plaintiff Jay Pensler, M.D. respectfully requests that the Court enter judgment in his favor and against Defendant Elaina Bender as follows:

- A. Awarding Dr. Pensler compensatory damages in an amount to be determined at trial in excess of \$50,000;
- B. Awarding Dr. Pensler punitive damages sufficient to deter future similar conduct, in an amount to be determined at trial in excess of \$50,000;
- C. Awarding Dr. Pensler his costs and expenses incurred herein, including reasonable attorneys' fees for this action and the legal efforts that were needed to determine Defendant's true identity; and
- D. Granting Dr. Pensler such other and further relief as the Court deems just and appropriate.

COUNT II

Injunctive Relief

28. Dr. Pensler hereby realleges and incorporates by reference Paragraphs 1-21 above as and for Paragraph 28 of this Count II.

29. Dr. Pensler has a protectable interest in maintaining a good reputation among his colleagues, patients and potential patients.

30. Defendant's false and defamatory reviews have adversely, and materially affected Dr. Pensler's professional reputation and harmed his practice.

31. Unless Defendant is enjoined from posting false and defamatory reviews on internet review boards, Dr. Pensler will suffer immediate and irreparable harm.

32. Dr. Pensler has no adequate remedy at law.

WHEREFORE, Plaintiff Jay Pensler, M.D. respectfully requests that the Court enter judgment in his favor and against Defendant Elaina Bender as follows:

- A. Permanently enjoining Defendant from posting any additional defamatory statements concerning Dr. Pensler;
- B. Ordering Defendant to take all steps necessary to have the November Review and any other false statements made by Defendant that concern Dr. Pensler removed from any and all public internet sites and message boards;

- C. Ordering Defendant to publish one or more retractions regarding the November Review on the Yelp.com and Citysearch.com internet message boards;
- D. Awarding Dr. Pensler his costs and expenses incurred herein, including his reasonable attorneys' fees for this action and the legal efforts that were needed to determine Defendant's true identity; and
- E. Granting Dr. Pensler such other and further relief as the Court deems just and appropriate.

JURY DEMAND

Plaintiff hereby demands a jury trial for all claims that are triable by a jury.

Respectfully submitted,

JAY PENSLER, M.D.

By: 

One of His Attorneys

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