

Cusack v 60 Minutes Div. of CBS, Inc.

2001 NY Slip Op 30092(U)

June 20, 2001

Sup. Ct, New York

Docket Number: 600060/98

Judge: Barbara R. Kapnick

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. **BARBARA R. KAPNICK** PART 12
Justice

Lawrence X Cusack, III, et al.

INDEX NO. 600060/98

- v -

MOTION DATE _____

60 Minutes Division of CBS, Inc, et al,

MOTION SEQ. NO. 009

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE DATED: _____ J.S.C.

Dated: 6/20/01

[Signature] J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION
BARBARA R. KAPNICK

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IA PART 12

-----X
LAWRENCE X. CUSACK, III, et al.,

Plaintiffs,

DECISION/ORDER

Index No. 600060/98
Motion Seq. Nos 009 & 010

- against -

60 MINUTES DIVISION OF CBS, INC., CBS,
INC., DON HEWITT, ED BRADLEY, MICHAEL
RADUTZKY, JONATHAN H. WELLS, DUAYNE J.
DILLON, SEYMOUR M. HERSH, ROBERT L. WHITE,
JOHN DOE 1-5, and MARY DOE 1-5,

Defendants.

-----X

BARBARA R. KAPNICK, J.:

Motion sequence nos. 009 and 010 are consolidated for disposition.

In motion sequence no. 009, defendants CBS Broadcasting, Inc. ("CBS") (sued herein as "60 Minutes Division of CBS, Inc."), Don Hewitt, Ed Bradley, Michael Radutzky, Jonathan H. Wells and Duayne J. Dillon (collectively "the CBS defendants") move pursuant to CPLR § 3212(a), for summary judgment dismissing the second amended complaint. Defendant Robert L. White joins in the motion and seeks summary judgment dismissing the complaint against him on the same grounds.

Plaintiffs cross-move for an order: (i) pursuant to CPLR § 3212(f) allowing them to engage in discovery; or (ii) pursuant to CPLR §§ 2201 and 2214 staying this action for 90 days, so as to afford plaintiff Cusack an opportunity to move pursuant to 28 USC

§ 2255 for a new criminal trial and/or dismissal of the indictment;¹ (iii) granting them partial summary judgment on their first, fifth and sixth causes of action, which allege, respectively, fraud, breach of contract, and breach of the implied covenant of good faith and fair dealing; and (iv) permitting them to serve and file copies of Cusack's executed affidavit no later than five business days prior to service of defendants' reply papers.

In motion sequence 010, defendant Seymour M. Hersh moves for summary judgment dismissing the second amended complaint against him, and plaintiffs cross-move for the same relief that they seek in motion sequence no. 009.

Background

This action arises out of a November 23, 1997 broadcast of *60 Minutes* (the "Program") concerning a large body of documents (the "Cusack Papers" or "Documents") that purportedly implicated President John F. Kennedy, as well as certain other individuals, including Marilyn Monroe, Robert F. Kennedy and Joseph P. Kennedy, Sr., in various scandals. Plaintiffs Lawrence X. Cusack III, Jennifer Rush Cusack, and their company, Geneva Archives, Inc.

¹ Plaintiff Cusack has since filed a petition and amended petition pursuant to Section 2255. The matter is not scheduled to be fully submitted before Judge Denise L. Cote of the United State District Court for the Southern District of New York, until June 22, 2001. Plaintiff now requests that this Court stay all proceedings until Judge Cote has vacated the criminal judgment against Cusack or has denied Cusack's petition.

("Geneva"), sold the Cusack Papers, through plaintiff Thomas G. Cloud (a dealer in rare documents), to plaintiff investors for more than \$7 million, of which Cusack's share exceeded \$5 million. The Program intimated that the Documents had been fabricated and suggested that Cusack might have forged them. Plaintiffs allege that the Program defamed them and libeled the Cusack Papers.

In addition, plaintiffs allege (although plaintiffs, other than the Cusacks, Cloud, Robert C. Losure, Gary F. Vick, and the companies that the Cusacks and Cloud control, lack standing to do so) that the CBS defendants failed to keep certain promises that they had made to the Cusacks, Cloud, Losure, and Vick about the Program, that Cusack and Cloud provided documents from the Cusack Papers, and that Cusack, Cloud, Losure, and Vick otherwise cooperated in the preparation of the Program, in reliance upon those promises. Plaintiffs also allege that defendant Hersh breached a contract that he had entered into with Cusack and Cloud, and that he defamed plaintiffs during interviews on two CNBC television programs that were broadcast subsequent to the *60 Minutes* Program.

Defendants Hewitt, Radutzky and Wells are employed by CBS and were involved in planning and preparing the Program. Dillon, an expert in the analysis of handwriting who was retained by CBS, and White, a collector of memorabilia associated with President Kennedy, were interviewed on the Program. Hersh was writing a book about the Kennedy Presidency and was eager to gain access to the

Cusack Papers. Cusack, in turn, was eager to have Hersh discuss the Documents in his forthcoming book because he anticipated that the publicity that would attend the publication of Hersh's book would greatly increase the value of the Documents. Hersh initially believed that the Documents were genuine, but he was subsequently persuaded that they had been fabricated.

On September 25, 1997, the ABC News program *20/20* broadcast a report in which Cusack was interviewed and in which the Cusack Papers were described as forgeries that had been perpetrated by Cusack. Claiming that Cusack had been "ambushed" by the *20/20* program, one of the investor plaintiffs herein, and an individual who was working as a paralegal in the office of Cusack's attorney, approached CBS in the hope that it would criticize the *20/20* report and present Cusack's and Cloud's view of the Cusack Papers.²

60 Minutes retained Dillon on the recommendation of the United States Postal Service and the FBI. After studying the documents provided by Cusack and Cloud and comparing the handwriting thereon to that on documents at the Kennedy Library, Dillon concluded that the documents that had been provided by plaintiffs were forgeries.³ White, whom plaintiffs had expected to vouch for the authenticity of the Cusack Papers (in conformance with his earlier opinion),

² Apparently, the paralegal who approached CBS is the wife of Cusack's attorney.

³ The *20/20* program had focused on the typewritten portions of the documents.

stated on the Program (or was quoted as having stated) that while he had earlier opined that the handwriting on certain of the Documents was that of President Kennedy, he was not a forensic handwriting expert, and he had not examined any of the Documents under a microscope. When he was asked why Cusack and Cloud had presented him as the person who would certify that the handwriting on certain of the documents was authentic, White replied, "I can only say that desperate people at some point do desperate things." Hersh was neither interviewed nor quoted on the Program, but the Program reported that Hersh had deleted from his forthcoming book, The Dark Side of Camelot, the chapter that he had written on the basis of the Cusack Papers.

On April 30, 1999, a jury in the United States District Court for the Southern District of New York convicted Cusack on 13 counts of mail and wire fraud. United States v Cusack, 98 CR 691 (SDNY). In her Opinion and Order dated September 17, 1999, Judge Denise L. Cote, who had presided over the trial, explained that "[t]he evidence at trial conclusively demonstrated that all of the Cusack Documents are indeed fakes and were authored by Cusack." (66 F. Supp.2d 493, 498). While rejecting the prosecution's argument that Cusack obstructed justice by commencing this action, as well as a similar action against ABC in the Southern District of New York (Thomas G. Cloud, et al., v. ABC, Inc., et al., 97 Civ. 8702), which was subsequently dismissed by order of Judge John S. Martin, Jr. dated October 26, 1999, Judge Cote noted at the sentencing

hearing held on September 17, 1999 that "the complaints are facially outrageous in light of the overwhelming evidence at trial that Mr. Cusack was the author of the documents at issue and that he had invented out of whole cloth a relationship between his father and President Kennedy, motivated by a desire to earn millions of dollars." Judge Cote sentenced Cusack to 115 months in prison and three years supervised release, and ordered him to pay full restitution to the ultimate purchasers of the Cusack Papers, in the approximate amount of \$7 million.

The judgment was affirmed by the United States Court of Appeals for the Second Circuit on October 13, 2000. (229 F.3d 344).

Discussion

A. Defamation and Trade Libel

1. Collateral Estoppel

Defendants contend that all of the plaintiffs are collaterally estopped from bringing their claims alleging defamation and trade libel, by virtue of Cusack's criminal conviction.

"Collateral estoppel, an equitable doctrine, is based upon the general notion that a party, or one in privity with a party, should not be permitted to relitigate an issue decided against it (citations omitted)." D'Arata v. New York Central Mutual Fire Insur. Co., 76 N.Y.2d 659, 664 (1990).

"The party seeking the benefit of collateral estoppel has the burden of demonstrating the identity of the issues in the present litigation and the prior determination" (Kaufman v. Eli Lilly & Co., 65 N.Y.2d 449, 456 [1985]) and that the issues "have been necessarily decided in the prior proceeding" (Capital Tel. Co. v Pattersonville Tel. Co., 56 N.Y.2d 11, 17 [1982]). "[T]he party attempting to defeat its application has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action." Kaufman v. Eli Lilly & Co., *supra* at 456. See also, Color by Pergament v. O'Henry's Film Works, 278 A.D.2d 92, (1st Dep't 2000).

Plaintiffs contend that the conviction is not final, that Cusack's trial failed to meet minimum Constitutional requirements (as a result of prosecutorial misconduct and ineffective assistance of counsel on the part of Cusack's trial counsel), that Cusack's conviction on mail fraud and wire fraud charges did not necessarily entail a finding that Cusack had forged the Cusack Papers, and that, in any event, none of the plaintiffs (including Cusack) had any control over the litigation of the criminal charges against Cusack.

a. Finality/Full and Fair Opportunity to Litigate

Plaintiffs' contention that Cusack's conviction is not final rests on the pendency of Cusack's appeal and his pending petition for a new trial pursuant to 28 USC § 2255.

However, as this Court has already noted, Cusack's appeal has since been determined pursuant to the decision of the United States Court of Appeals for the Second Circuit on October 13, 2000, affirming Cusack's conviction.

"In any event, it is well established that the pendency of an appeal does not affect the use of an order or judgment as an estoppel (citations omitted)." Matter of Capoccia, 272 A.D.2d 838, 847 (3rd Dep't 2000), lv. to app. dismiss'd, 95 N.Y.2d 887 (2000).

Similarly, the pendency of Cusack's petition for a new trial does not affect the use of the criminal judgment as an estoppel in this case.

Moreover, plaintiffs have failed to meet their burden of establishing to this Court the absence of a full and fair opportunity to litigate the issues raised herein in the criminal action.

b. Issue Necessarily Found in First Action

The indictment on which Cusack was prosecuted charged that:

[b]eginning in or about 1993, [Cusack] commenced a fraudulent scheme. The scheme involved (1) causing the purported signatures and/or purported handwriting of President John F. Kennedy (hereinafter, "Kennedy") and others to be forged on hundreds of documents, (2) falsely and fraudulently representing to prospective buyers, investors, and others that his father had a secret and previously undisclosed relationship as advisor to Kennedy, that he had found these documents among his father's files, and that the purported signatures and/or handwriting of Kennedy and others were present on the documents at the time he found them, [and] (3) marketing the documents for sale, and selling many of them on the same false and fraudulent pretense that they were authentic,

Each count in the indictment charged Cusack with having devised:

a scheme to obtain money from purchasers of the Kennedy documents and others based on the false and fraudulent representations and pretenses that the documents came from the files of Cusack Sr. and contained the genuine handwriting of John F. Kennedy and/or other persons,....

Inasmuch as (1) Cusack was convicted on every count in the indictment, (2) Judge Cote found that there had been overwhelming and conclusive evidence that Cusack had forged the Documents, and (3) there was no evidence that anyone other than Cusack had forged them, or had an opportunity to do so, plaintiffs' argument that the jury's verdict did not necessarily decide that Cusack had forged the Documents, is frivolous.⁴

⁴ Although, as plaintiffs point out, the Government introduced only a small portion of the Cusack Papers in evidence in Cusack's trial, plaintiffs' argument in this action, that the Cusack Papers are authentic, is targeted precisely at the arguments that the Government made with regard to the Documents that were at issue in the criminal trial. Plaintiffs make no case for distinguishing between those Documents and the rest of the Cusack Papers.

c. Control of the Litigation

There is no dispute that none of the plaintiffs, except Cusack, was a party to Cusack's trial, or exercised any control over it.⁵ Defendants argue, nonetheless, that all of the plaintiffs were in "privity" with Cusack, and are, therefore, collaterally estopped from proceeding with this action by Cusack's criminal conviction. See, Watts v. Swiss Bank Corp., 27 N.Y.2d 270 (1970).

As the Appellate Division, First Department, recently noted,

[p]rivity has been described as "an amorphous term not susceptible to ease of application" (Gramatan Home Investors Corp. v. Lopez, 46 N.Y.2d 481, 486, 414 N.Y.S.2d 308, 386 N.E.2d 1328). The doctrine extends to "persons who were not parties to the previous action but who were connected with it to such an extent that they were treated as if they were parties" (*id.*). "What is controlling is the identity of the issue which has necessarily been decided in the prior action or proceeding" (Ryan v. New York Tel. Co., 62 N.Y.2d 494, 500, 478 N.Y.S.2d 823, 467 N.E.2d 487).

All Terrain Properties v. Hoy, 265 A.D.2d 87, 93 (1st Dep't 2000).

See also, Buechel v. Bain, 275 A.D.2d 65 (1st Dep't 2000).

"Generally, to establish privity the connection between the parties must be such that the interests of the nonparty can be said to have been represented in the prior proceeding (citations omitted)." Green v. Santa Fe Indus., Inc., 70 N.Y.2d 244, 253 (1987). Thus, individuals and the corporations that they control

⁵ Plaintiffs' claim that Cusack himself had no control over the litigation of his case is untenable, inasmuch as Cusack freely chose his trial attorney, and never sought to discharge him.

have been held to be in privity. See, Rainaldi v. Moran, 214 A.D.2d 836 (3rd Dep't 1995); Hernandez v. Nelson, 143 A.D.2d 632 (2nd Dep't 1988). Similarly, a principal and agent are generally considered to be in privity. See, Schneider v. Lazard Freres & Co., 159 A.D.2d 291 (1st Dep't 1990).

Plaintiffs Cusack and Jennifer Rush Cusack (Cusack's wife) are the founders, officers and principals of Geneva, through which they offered and sold the Documents. Accordingly, both Geneva and Jennifer Rush Cusack are in privity with Cusack (Rainaldi v. Moran, 214 A.D.2d 836, supra; see also, A to Z Assocs. v. Cooper, 161 Misc.2d 283 [Sup. Ct., N.Y. Co. 1993]) and are, therefore, barred from raising any claim that presupposes that Cusack did not fabricate the Documents.

Plaintiff Cloud is the founder, president and sole shareholder of plaintiffs Cloud & Associates Consulting, Inc. ("CAC") and National Historical Autographs, Inc. ("NHA"). While acting for their own benefit, Cloud, CAC and NHA also acted as Cusack's agents in the marketing of the Cusack Papers. Consequently, Cloud, CAC and NHA are also bound by Cusack's conviction. See, Schneider v. Lazard Freres & Co., 159 A.D.2d 291, supra.

Defendants contend that the investor-plaintiffs are also in privity with Cusack because they claim to be third-party beneficiaries of Cusack's purported contract with CBS.

It is well settled that

"the identity of a third-party beneficiary need not be set forth in the contract or, for that matter, even be known as of the time of its execution (citation omitted), that the intention which controls in determining whether a stranger to a contract qualifies as an intended third-party beneficiary is that of the promisee, ... (citation omitted), and that, where, ... , a genuine issue exists as to the parties' intention to benefit another, a triable issue of fact is presented which is not appropriate for summary disposition (citation omitted)."

MK West Street Co. v. Meridien Hotels, 184 A.D.2d 312, 313 (1st Dep't 1992).

Here, however, there is no contractual language or other circumstances indicating that either Cusack or Cloud had any specific intention to benefit the investor plaintiffs when they agreed to co-operate with CBS. Accordingly, despite their claim to the contrary, the investor plaintiffs are not third-party beneficiaries of any contract between Cusack and Cloud and any of the defendants. First Capital Asset Mgt., Inc. v. N.A. Partners, L.P., 260 A.D.2d 179 (1st Dept 1999), app. den., 93 N.Y.2d 817 (1999).

In addition, although the monetary value of the Documents that were purchased by the investor plaintiffs was decisively affected by Cusack's conviction, the rights asserted by those plaintiffs in this action are not "conditioned in one way or another on, or derivative of," (D'Arata v New York Central Mut. Fire Ins., Co.,

supra at 664) Cusack's rights at his trial. Accordingly, there is no basis for the investor plaintiffs to be bound by the judgment against Cusack.

For the foregoing reasons, Cusack, Jennifer Rush Cusack, Geneva, Cloud, CAC and NHA, but not the investor plaintiffs, are collaterally estopped from raising their claims of defamation and trade libel.

2. The Merits

a. Defamation

It is axiomatic that a plaintiff who alleges defamation must show that the statement objected to is false and defamatory, and that it concerns the plaintiff. Foster v. Churchill, 87 N.Y.2d 744 (1996); Weldy v. Piedmont Airlines, Inc., 985 F.2d 57 (2nd Cir. 1993). The investor-plaintiffs' claim alleging defamation must be dismissed because these plaintiffs have not shown that any allegedly defamatory statement in the Program, or in the CNBC broadcasts, is about them.

b. Trade Libel

By choosing to appear on the Program, plaintiffs Losure and Gary F. Vick became public figures for the limited purpose of the Program. See, Daniel Goldreyer, Ltd. v. Dow Jones & Co., 259 A.D.2d 353 (1st Dep't 1999), app. withdrawn, 93 N.Y.2d 1013 (1999); Dameron v. Washington Magazine, Inc., 779 F.2d 736 (U.S. Ct. App.,

D.C. Cir. 1985), cert. den. 476 U.S. 1141 (1986). As such, they must prove "that a reasonable jury might find that actual malice ha[s] been shown with convincing clarity." Daniel Goldreyer, Ltd., supra at 353 (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 257 [1986]). "'Actual malice' has been defined as making an alleged false statement with knowledge that it was false or with reckless disregard as to whether it was false or not (New York Times Co. v. Sullivan, 376 U.S. 254, 279-280; Thanasoulis v. National Assn. for Specialty Foods Trade, 226 A.D.2d 227, 228-229)." Daniel Goldreyer, Ltd. v. Dow Jones & Co., supra at 353.

The CBS defendants and Hersh are media publishers. The Program indisputably discussed a matter of public concern. Accordingly, in order to prevail on their claim against the CBS defendants or Hersh for trade libel, plaintiffs must show both that the statements to which they object are false, and that the defendants "acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." Chapadeau v. Utica Observer-Dispatch, 38 N.Y.2d 196, 199 (1975). See also, Gaeta v. New York News, 62 N.Y.2d 340 (1984); Crucey v. Jackall, 275 A.D. 258 (1st Dep't 2000). Plaintiffs have failed to show either.

A party opposing summary judgment must show by evidence in admissible form that there is a genuine issue of material fact.

Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Although plaintiffs have submitted letters from a number of document examiners, who have certified that certain of the Documents are authentic, not one of these certifications is sworn to.⁶ The only probative evidence in admissible form that plaintiffs have presented to show that the documents were not forged by Cusack, as the Program and Hersh arguably implied, are the affidavits of Nicholas J. Montano, Robert J. Phillips and Robert F Slatzer.⁷ At Cusack's trial, the Government proved, in part through the testimony of Dillon, that Cusack had fabricated the Documents and forged the purported handwriting of President Kennedy (and that of other individuals) which ostensibly appeared upon them. Dillon testified, inter alia, that certain characteristics of the handwriting, purported to be President Kennedy's, bore certain

⁶ One such certification was written by John Darvick, a long-time dealer in items associated with President Kennedy and Marilyn Monroe. Mr. Darvick has also provided an affidavit, in which he refers to his earlier certification, and states that he still believes that the Documents that he had examined are authentic. However, Mr. Darvick does not claim to be a graphologist.

⁷ Lou Ann Horstman has also submitted an affidavit. Ms. Horstman is employed by plaintiffs' current attorney. As such, she may not be a fact witness. Moreover, insofar as her purported fact testimony pertains to the question of the authenticity of the Cusack Papers, it is addressed to the typewritten portions of those documents, i.e., the subject of the 20/20 program.

Plaintiffs also have submitted two affidavits of Marcel B. Matley. Mr. Matley, a forensic graphologist, criticizes the trial testimony of Dillon and of the Government's other expert, Gus Robert Lesnevich, but he does not purport to conclude either that any of the Documents is authentic, or that, if they are not, it was not Cusack who forged them.

indicia of forgery.⁸

Mr. Montano, a graphologist who specializes in the study of the effects of biology on penmanship, states that the characteristics discussed by Dillon may be due to the hypoglycemic condition of the writer, and that Addison's disease, which President Kennedy has been reported to have had, can cause hypoglycemia.

Mr. Phillips, also a graphologist, states that he analyzed three of the Documents, and that his analysis "strongly suggests" that they were written by the same person who wrote documents known to have been written by President Kennedy. He also concludes that the writer of the three Documents may have been in poor health at the time that those documents were written.

Mr. Slatzer states that he was married briefly to Marilyn Monroe in 1952, and that they remained good friends until Ms. Monroe's death. He further contends that the references to Ms. Monroe in the Documents are historically accurate, and that they include information that, he believes, Cusack could not have known.

⁸ This was only one of several forms of proof by which the Government persuaded the jury that Cusack was guilty of the crimes with which he was charged. See, Sentencing Opinion, at 6.

Neither the hypothetical statements of Mr. Montano nor the inconclusive and speculative statements of Phillips and Slatzer suffice to raise a genuine dispute as to the truth of defendants' claims that the Documents were forged by Cusack.⁹

Nor have plaintiffs shown that defendants acted in a grossly irresponsible manner. By plaintiffs' own account, defendants Hersh and White initially believed the Cusack Papers to be authentic, and the CBS defendants believed that the 20/20 broadcast had exemplified bad journalism. Defendant Hersh, however, had come to believe that the Documents had been fabricated, and the Program correctly reported that he had concluded that he could not rely upon them. Defendant White, who is not and has never claimed to be a forensic graphologist, retracted his earlier endorsement of certain of the Documents upon learning that Dillon had concluded that the handwriting that appeared upon them had been forged.¹⁰

Although plaintiffs contend that CBS should not have relied upon an expert who had been recommended by the Postal Service, Cusack had not yet been indicted at the time that CBS retained

⁹ At Cusack's trial, the Government proved, inter alia, that the Cusack Papers included documents that had been stolen from Cusack's father's files, from the New York County Surrogate's Court, and from the Archdiocese of New York, which had then been altered by the addition of handwriting.

¹⁰ Plaintiffs contend that Dillon complained after the Program that his views had been misrepresented, but this contention is based upon a hearsay statement of Don Wolfe. Moreover, Dillon went on to become one of the Government's two handwriting experts who testified against Cusack at his trial.

Dillon. Moreover, plaintiffs have not shown that CBS had any reason to think that Dillon might, at some future time, be a witness against Cusack. In short, plaintiffs have failed to show that the CBS defendants, Hersh or White acted irresponsibly, let alone in a grossly irresponsible manner.

As for Dillon, plaintiffs do not claim that he acted irresponsibly in concluding that the handwriting on the Documents that he examined was forged. Rather, they seek to hold him liable "on the basis that he acted in concert with the other CBS defendants."

However, New York does not recognize a tort of conspiracy to libel. "[T]he allegation of conspiracy is allowed only to connect a defendant to an otherwise cognizable tort." McGill v. Parker, 179 A.D.2d 98, 105 (1st Dep't 1992).

For the foregoing reasons (and for the reason given below), plaintiffs' claims alleging libel and trade libel/disparagement of property/libel affecting value of property (counts 2 and 3 of the Second Amended Complaint) will be dismissed.

B. The Other 11 Causes of Action

Plaintiffs' causes of action alleging fraud -- "fraudcast" journalism (count 1), interference with contractual relations and advantageous relations (count 4), breach of contract or inducing

breach of contract (count 5), breach of implied covenant of good faith and fair dealing or inducing the breach thereof (count 6), breach of confidential and fiduciary relationship and breach of third-party beneficiary contract (count 7), deceptive business practices in violation of General Business Law § 349 (count 8), false advertising in violation of General Business Law § 350 (count 9), false designation of origin and unfair competition in violation of Section 47(a) of the Lanham Act (count 10), intentional or negligent infliction of emotional stress (count 11), malicious instigation or continuation of a frivolous grand jury investigation (count 12) and unjust enrichment (count 13) all rest on plaintiffs' contention that the CBS defendants (other than Dillon) falsely promised Cusack and Cloud that the Program would be "fair" to them. Plaintiffs contend that their reputations were consequently harmed and the value of the Documents in their possession was diminished.

All of these causes of action fail because the damages that plaintiffs claim to have suffered were not proximately, or even indirectly, caused by the actions that the CBS defendants are alleged to have taken. Rather, plaintiffs' alleged damages were caused by Cusack's fabrication of the documents. Even had the *60 Minutes* Program criticized the ABC *20/20* broadcast, and even had it reported that it appeared that the Documents were authentic, the indictment and the subsequent conviction of Cusack would have brought about exactly the harm that plaintiffs claim to have suffered.

Moreover, there are independent reasons to grant defendants summary judgment as to the first, fourth and seventh through twelfth causes of action, as well as those branches of their fifth and sixth causes of action, that are alleged against White, Hersh and Dillon.

Plaintiffs' count one alleging fraud fails as it is well settled that a cause of action for fraud does not arise where, as here, the only fraud alleged merely relates to a party's intent to breach a promise. See, Caniglia v. Chicago Tribune-New York News Syndicate, 204 A.D.2d 233 (1st Dep't 1994).

That branch of plaintiffs' count four, alleging interference with contractual relations, fails because plaintiffs have failed to allege the terms of any contract that defendants may have interfered with.

That branch of count four that alleges interference with economic advantage fails to state a cause of action as plaintiffs do not contend that "defendants were motivated solely by malice or effected the interference by unlawful means." Matter of Pamilla v. Hospital for Special Surgery, 223 A.D.2d 508, 509 (1st Dep't 1996). On the contrary, plaintiffs acknowledge that the CBS defendants "were at least partially motivated by their own self interest" (Id. at 509) in preparing the news broadcast.

Plaintiffs' breach of contract claim against White is predicated on White's repudiation of his earlier authentications of a number of the Documents. Plaintiffs contend, that "[s]uch authentications constitute contracts by White which he cannot walk away from." Plaintiffs further contend that White's consideration was the opportunity to obtain a list of potential buyers of items from his own collection.

However, plaintiffs do not dispute White's averment that he never asked for, and never received, a list of the purchasers of those Documents that he had authenticated. Moreover, even assuming that there was a contract between White and Cloud or Cusack, plaintiffs fail to explain how that contract could have required that White authenticate any Document (as distinguished from giving his opinion as to its authenticity) or how White's change of mind as to the authenticity of the Documents can constitute a breach of such contract. Finally, contrary to plaintiffs' contention, White did not deny on the Program that he had previously stated that certain of the Documents were genuine.

Similarly, plaintiffs' breach of contract claim against Hersh rests on their theory that Hersh's agreement to refrain from using the Documents for any purpose other than as material for his forthcoming book and/or from disclosing the source of the Documents, required Hersh to use the Documents even after he concluded that they had been fabricated, or barred him from

disclosing his view that they had been fabricated. It is abundantly clear, however, that the intent of the parties was no more than to insure that if Hersh used the Documents, he would give due credit to Cusack and Cloud who, because of the publicity that Hersh's book was expected to garner, would be able to sell the Documents at greater prices than they could receive absent such publicity.

Plaintiffs also allege that Hersh did, in fact, use the Documents, albeit without attribution. Hersh avers, however, that "once it became apparent that the Documents were forged, I not only stopped work on the draft chapter making reference to the Documents from the book I was writing, but I also took steps to assure that none of the rest of my work was based on the Documents." Plaintiffs offer no evidence in admissible form to dispute this claim, but assert instead that they need to depose Hersh. However, plaintiffs have not demonstrated why such a need cannot be met by reference to Hersh's book.

Plaintiffs' breach of contract claim against Dillon fails because no contract between Dillon and any plaintiff is alleged.

Plaintiffs' claim alleging breach of the covenant of fair dealing (Count 6) fails as against Hersh, White and Dillon for the same reasons that plaintiffs' breach of contract claims against them must be dismissed.

Plaintiffs' breach of confidential and fiduciary relationship claim (Count 7) fails because plaintiffs have not alleged any facts showing a fiduciary relationship between any of them and the CBS defendants. The mere fact that those plaintiffs who co-operated with CBS expected the Program to be favorable to Cusack does not create a fiduciary relationship between those plaintiffs and CBS.

Plaintiffs' claims alleging violation of General Business Law §§ 349 and 350 (Counts 8 and 9) fail because those statutes pertain to commercial activity and "were never intended to encompass the type of editorial comment at issue herein and, indeed, could not constitutionally do so." New York Public Interest Research Group, v. Insurance Information Institute, 161 A.D.2d 204, 205 (1st Dep't 1990).

Similarly, plaintiffs' claim under the Lanham Act (Count 10) fails because that Act applies to false and misleading commercial speech and was not intended "to limit political speech, consumer or editorial comment, ... , or other constitutionally protected material..." Groden v. Random House, 61 F.3d 1045, 1052 (2nd Cir. 1995), quoting 135 Cong. Rec. H1217 (daily ed. April 13, 1989) (Statement of Rep. Kastenmeier).

Plaintiffs' claim for intentional infliction of emotional distress (Count 11) must fail as defendants' alleged conduct is not "...so outrageous in character, and so extreme in degree, as to go

beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community' (citation omitted)." Howell v. New York Post Co., 81 N.Y.2d 115, 122 (1993).

Similarly, that branch of Count 11 alleging negligent infliction of emotional distress must fail, as the Court of Appeals has held that "there is no duty to protect from emotional injury a bystander to whom there is otherwise owed no duty, and, even as to a participant to whom a duty is owed, such injury is compensable only when a direct, rather than [as alleged here] a consequential, result of the breach." Kennedy v. McKesson Co., 58 N.Y.2d 500, 506 (1983).

Plaintiffs' Cross-Motion for a Stay

Plaintiffs' cross-motion, and supplemental application for a stay of this action pending a determination of plaintiff Cusack's petition in federal court for a new trial is denied as the interests of justice demand a resolution of this lawsuit.

Accordingly, it is hereby

ORDERED that plaintiffs' cross-motion is granted to the extent that the executed copy of Cusack's affidavit is deemed to have been timely served and filed, and the cross-motion is otherwise denied; and it is further

ORDERED that the motion by defendants *60 Minutes* Division of CBS, Inc., Don Hewitt, Ed Bradley, Michael Radutzky, Jonathan H. Wells and Duayne J. Dillon for summary judgment is granted and the complaint against them is dismissed with prejudice; and it is further

ORDERED that the application by defendant Robert L. White for summary judgment is granted and the complaint against him is dismissed with prejudice; and it is further

ORDERED that the motion by defendant Seymour M. Hersh for summary judgment is granted and the complaint against him is dismissed with prejudice; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of this Court.

Dated: June 20, 2001



BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.