

Corso v NYP Holdings, Inc.

2007 NY Slip Op 32729(U)

August 30, 2007

Supreme Court, New York County

Docket Number: 0109820/2005

Judge: Barbara Kapnick

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

BARBARA R. KAPNICK

PRESENT.

PART 12

Index Number : 109820/2005

CORSO, KRYS

vs

NEW YORK POST

Sequence Number : 003

DISMISS

INDEX NO. 109820/05

MOTION DATE _____

MOTION SEQ. NO. 003

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

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED
SEP 04 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/30/07


BARBARA R. KAPNICK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

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

-----X
KRYC CORSO and MICHAEL CHODKOWSKI,

Plaintiffs,

-against-

NYP HOLDINGS, INC., MURRAY WEISS,
JOHN DOYLE, and JOHN DOES 1-5,

Defendants.

BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 109820/05
Motion Seq. No. 003

FILED
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COUNTY CLERK'S OFFICE

In this action, plaintiffs Kryc Corso and Michael Chodkowski seek to recover compensatory and punitive damages against defendants NYP Holdings, Inc., the publisher of the New York Post, its Criminal Justice Editor, Murray Weiss and a reporter, John Doyle for libel (first cause of action), libel per se (second cause of action), negligent infliction of emotional distress (third cause of action), intentional infliction of emotional distress (fourth cause of action) and negligence (fifth cause of action), based on false and defamatory statements allegedly made about plaintiffs in an article which was printed in the New York Post on July 20, 2004.

The "Exclusive" article, written by defendant Weiss along with defendant Doyle and others, reported on plaintiffs' arrest following an alleged incident at the BLVD nightclub, under the headline,

NIGHT CLUB RAPE
Waitress' Ordeal at new hot spot

The article read, in relevant part, as follows:

A cocktail waitress at one of Manhattan's hottest new nightspots was viciously raped by two men in a backstage VIP lounge after allegedly being drugged, The Post has learned.

A security guard at BLVD grabbed one suspect - a 6-foot-2, 225-pound man - after he and his accomplice allegedly attacked a helpless server and left her naked and unconscious in a private room.

The man was identified as Michael Chodkowski, 36, a Hicksville, L.I. contractor, who sources say has three prior arrests - one for grand larceny and two for driving under the influence, one in Nassau County, the other in Florida.

The other suspect was identified as Krys Corso, 39, of Park Ridge, N.J.

* * *

Police say the 23-year-old, blond-haired, blue-eyed victim was raped in a private lounge reserved exclusively for artists and musicians who perform there and friends of the owners and managers, sources say.

According to a criminal complaint filed by the Manhattan district attorney, the woman, who is married, was initially pinned down by the men and sexually mauled as she tried to push them "away while saying, 'No.'"

She then fell "unconscious" and was raped by Corso as "Chodkowski held the door to the room closed," the complaint says.

A fourth unidentified person was in the room during the attacks before Chodkowski allegedly ordered the witness "to leave."

* * *

Both suspects were charged with first-degree rape and first-degree sexual abuse.

The suspects were arraigned at 1 a.m. yesterday morning and released on bail. They are due back in court Thursday. Their lawyer, Nicholas Massimo, denied the allegations.

In September 2005, plaintiffs were acquitted, after trial, of the charges.

Plaintiffs' Complaint in this action alleges that

72. Defendants' reporting of the arrests of plaintiffs Corso and Chodkowski present a mixture of statements intended to make plaintiffs the objects of ridicule and to bring them public and personal humiliation. The large number of factual errors, incorrect speculations, innuendo, and out-and-out false statements contained in said publication indicate that defendants and those who republished defendants' statements failed to investigate the facts prior to publishing, and shows a reckless disregard or concern for the truth of said statements.

* * *

74. The above-mentioned statements were published and republished maliciously with the specific intent to harm the plaintiffs, by virtue of the defendants having adopted, espoused and speculated upon the allegations against plaintiffs, and with the specific intent of portraying such allegations to readers in the light least favorable to plaintiffs, and least consistent with a presumption of their innocence.

* * *

77. By virtue of the above-referenced conduct of said defendants, defendants, individually and collectively, acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.

Defendants now move for an order pursuant to CPLR §§ 3211(a)(7) and/or 3211(c) and/or 3212(b) dismissing the Complaint in the above-captioned action in its entirety, together with costs.

The motion is granted without opposition to the extent of dismissing the third, fourth and fifth causes of action.

Defendants argue that plaintiffs' first and second causes of action for libel and libel per se must also be dismissed on the grounds that: (i) the article is a fair and true report of a judicial proceeding and therefore absolutely privileged pursuant to Civil Rights Law § 74; (ii) the complained-of article is substantially true; and (iii) the defendants were not grossly irresponsible in publishing the article.

Whenever a libel action is brought against a newspaper, the courts are called upon to strike a balance between the individual's right to protect his good name and the guarantees of the First Amendment which safeguard the people's right to an active, thriving and untrammelled press, an indispensable component of any free and democratic society (citation omitted).

Gurda v. Orange County Publications Division of Ottaway Newspapers, Inc., 81 A.D.2d 120, 130 (2nd Dep't 1981), opinion dissenting in part, concurring in part, adopted by the Court of Appeals, 56 N.Y.2d 705 (1982).

"Among the most significant functions served by the First Amendment is to protect the right of free access to information concerning the workings of our public institutions." Gurda, supra at 131.

In recognition of the importance of this purpose, the State has enacted Civil Rights Law § 74 which provides, in relevant part, as follows:

A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published.

"For a report to be characterized as 'fair and true' within the meaning of the statute, thus immunizing its publisher from a civil suit sounding in libel, it is enough that the substance of the article be substantially accurate." Holy Spirit Assoc. for the Unification of World Christianity v. New York Times Co., 49 N.Y.2d 63, 67 (1979). See also, Misek-Falkoff v. American Lawyer Media, Inc., 300 A.D.2d 215 (1st Dep't 2002), lv. to app. den., 100 N.Y.2d 508 (2003), rearg. den., 100 N.Y.2d 616 (2003), cert. den., 541 U.S. 939 (2004).

When determining whether an article constitutes a "fair and true" report, the language used therein should not be dissected and analyzed with a lexicographer's precision. This is so because a newspaper article is, by its very

nature, a condensed report of events which must, of necessity, reflect to some degree the subjective viewpoint of its author.

Holy Spirit Assoc., *supra* at 68.

Defendants argue that the statements contained in the article are privileged because they constitute a fair and true report of the criminal proceedings brought against plaintiffs; i.e., the substance of the article was a "substantially accurate" rendering of the claims contained in the criminal complaint.

Plaintiffs argue that defendants are not immune from a civil suit for libel because the article, and specifically the headline, did not merely report on those judicial proceedings, but falsely represented without including the word, "allegedly", that a heinous and despicable crime occurred,¹ and included material which was not contained in the criminal complaint.

However, the headline of the article "must be read and evaluated in conjunction with the text it precedes (citations omitted). If the headline is a fair index of an accurate article, it does not give rise to a cause of action (see, e.g., *Gunduz v New York Post Co.*, 188 AD2d 294 [1st Dep't 1992])." Von Gerichten v.

¹ Plaintiffs cite to critical postings on one website, www.rhythmism.com, which republished the report and which plaintiffs claim demonstrates that the allegations of the New York Post article were interpreted by readers as true.

Long Island Advance, 202 A.D.2d 495, 496 (2nd Dep't 1994). See also, Kamalian v. Reader's Digest Assoc., Inc., 29 A.D.3d 527 (2nd Dep't 2006).

Moreover, where, as here, "the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition," the party defamed may recover only if he is able to "establish, by a preponderance of the evidence, that the publisher 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, Inc., 38 N.Y.2d 196, 199 (1975). See also, Weiner v. Doubleday & Co., Inc., 74 N.Y.2d 586 (1990), cert. denied, 495 U.S. 930 (1990); Morsette v. "The Final Call", 309 A.D.2d 249 (1st Dep't 2003), app. dismiss'd, 5 N.Y.3d 756 (2005).

Defendants contend that plaintiffs cannot meet their burden of showing by a preponderance of the evidence that they acted in a "grossly irresponsible manner", since defendant Weiss has detailed in a sworn affidavit his efforts to gather and verify information prior to the publication of the article which included (i) calling the Public Information Office for the New York County District Attorney's Office ("the DA's Office") on or about July 18 or 19, 2004 to obtain details of the arrest and to obtain a copy of the criminal complaint, and (ii) contacting the Press Office for the


New York City Police Department ("NYPD") to obtain additional information regarding the plaintiffs' arrests and to confirm the information which he received from the DA's Office.²

Although plaintiffs argue that there are triable issues of fact as to whether The Post acted in a grossly irresponsible manner, (see, e.g., Hawks v. Record Printing & Pub. Co., 109 A.D.2d 972 [3rd Dep't 1985]), plaintiffs have not submitted any evidence to refute defendant Weiss' affidavit.

Accordingly, based on the papers submitted and the oral argument held on the record on January 31, 2007, this Court finds that the statements contained in the article in question do not give rise to an actionable claim for libel or libel per se.

Defendants' motion is, therefore, granted. The Clerk may enter judgment dismissing plaintiffs' Complaint with prejudice and without costs or disbursements.

This constitutes the decision and order of this Court.

Dated: August 30, 2007 
BARBARA R. KAPNICK
J.S.C.

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J.S.C.

² Weiss further presents that, "As best as I can recall, I also spoke with an individual in the Sex Crimes Unit of the DA's Office regarding the charges against Messrs. Corso and Chodkowski.