

<b>Linen v Hearst Corp.</b>
2007 NY Slip Op 34179(U)
December 13, 2007
Supreme Court, New York County
Docket Number: 0101144/2007
Judge: Shirley W. Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDGE SHIRLEY WERNER KORNREICH

PART 54

Index Number : 101144/2007

LINEN, ROBERT

vs

HEARST CORPORATION

Sequence Number : 001

DISMISS ACTION

INDEX NO. 101144/07

MOTION DATE 9/12/07

MOTION SEQ. NO. 1

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 4 were read on this motion to/for Dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
<u>1, 2</u>
<u>3</u>
<u>4</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

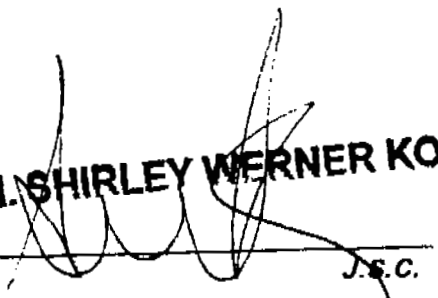
**MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.**

**FILED**

DEC 20 2007

NEW YORK COUNTY CLERK'S OFFICE

HON. SHIRLEY WERNER KORNREICH



J.S.C.

Dated: 12/12/07

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

12/19  
88

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

----- X  
ROBERT LINEN and KATHLEEN PERHAM,

Plaintiffs,

Index No.: 101144/07

-against-

DECISION  
and ORDER

THE HEARST CORPORATION and  
BRENDAN LYONS,

**FILED**

DEC 20 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Defendants  
-----  
KORNREICH, SHIRLEY WERNER, J.:

This defamation action is brought due to a newspaper article written by defendant Brendan Lyons ("Lyons"), a staff writer for the *Albany Times Union* ("Times Union"), on February 2, 2006 entitled "*Jail story possible key to killing: Former inmate says man who was suspected in Albany teen's death admitted guilt*" ("the Article"). Defendants, The Hearst Corporation ("Hearst"), the parent corporation which owns the Times Union, and Lyons, now move to dismiss the Verified Complaint pursuant to CPLR § 3211(a)(7) and request fees, costs and sanctions pursuant to CPLR § 8303-a. Plaintiffs oppose.

1. *Background*

The Article was written about new information allegedly obtained by the Albany Police Department regarding the May 2005 murder of then 14-year-old Gretchen Perham ("Gretchen"). Gretchen, who was plaintiff Robert Linen's ("Linen") sister and plaintiff Kim Perham's daughter, was murdered on May 13, 2005, when she was stabbed to death on her way to school. The Article begins by stating "[a] serial rapist [Darius T. Ashley ("Ashley")] who terrorized Albany last year as he committed a series of violent attacks on young women allegedly confessed

[\*3 ]

to another inmate that he murdered a 14-year-old honors student whose slaying remains unsolved...The new information has reignited the investigation into the murder of Gretchen Perham.”

The Article then discusses how the police originally suspected Ashley in Gretchen’s murder, but were unable to connect him to her killing. However, the statements of an ex-convict who was incarcerated with Ashley at Albany County jail sparked renewed interest in Gretchen’s murder. In pertinent part, Lyons writes:

During an interview Wednesday, the man said he and Ashley have known each other since childhood and had grown up in the same neighborhood. He said they were transported from the jail to the Albany County Courthouse last November for hearings in their cases when Ashley began recounting what happened as they sat alone together in a cell.

“He broke the whole story down,” said the man, who is much older than Ashley and once served 10 years for robbery in state prison. “He said she [Gretchen] was trying to get out of the car. He said he’d picked her up a couple times (before) when he wanted to (have intercourse)...she was not hearing it. He grabbed her. He wound up taking the sex with a condom on. She tried to run and he stabbed her.

The man’s assertions about the condom may be significant because Ashley raped a woman last July while wearing a condom...

Law enforcement sources told the Times Union that the angles of [Gretchen’s] wounds to her chest and hands indicated she appeared to have been stabbed by someone who was sitting to her left, probably in a car. According to the jailhouse informant, Ashley said he panicked and started stabbing [Gretchen] because he was concerned about being caught.

“It was actually like: ‘I’ve got to either kill her or ‘I’ll get a rape charge on me,’ “ the man re-counted of their conversation. “He probably didn’t mean to do it.”

The remainder of the Article discusses what led to the informant’s release from prison and the previous crimes committed by Ashley.

Plaintiffs’ Verified Complaint sets forth four causes of action. In its first for defamation, plaintiffs allege that the Article contains falsehoods and was published with a reckless disregard

for the truth. Specifically, plaintiffs allege that Hearst reported the following false statements of fact: that Ashley confessed to another inmate that he murdered a 14-year-old honors student whose slaying remains unsolved; and that this new information reignited the investigation into Gretchen's murder and brought a renewed interest in the case. Plaintiffs also allege that "[i]n the [Article] the [Times Union] wrote and published that [Gretchen] was having a sexual relationship with serial rapist and 29 year old adult Darius Ashley...gave the impression, suggested and stated as fact that [Ashley] had an ongoing consensual sexual relationship with [Gretchen]...indicated that [Gretchen] was not a virgin...[and]...repeatedly or regularly had sexual intercourse." Finally, the alleged "false and reckless reporting also indicated that [Gretchen] and the plaintiffs were at fault,...responsible or partially responsible for causing [Gretchen's] death."

In the second cause of action, plaintiffs allege they have suffered intentional infliction of emotional distress since the Article would be considered "shocking to a right minded person." The third cause of action for negligence was withdrawn by plaintiffs during oral argument of this motion on September 12, 2007. Plaintiff's final cause of action is for "discovery" of any and all individuals who leaked this alleged erroneous information to defendants.

## II. *Conclusions of Law*

In considering a motion to dismiss, a court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *McGill v. Parker*, 179 A.D.2d 98, 105 (1992); *see also Cron v. Harago Fabrics*, 91 N.Y.2d 362, 366 (1998); *Monroe v. Monroe* 50 N.Y.2d 481, 484 (1980). The court is not authorized to assess the merits of the complaint or any of its factual allegations, but only to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action. *See e.g. Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration. *Caniglia v. Chicago Tribune-New York News Syndicate*, 204 A.D.2d 233 (1994).

*Skillgames, L.L.C. v. Brody*, 1 A.D.3d 247, 250 (1st Dept. 2003).

*A. Defamation*

It is black letter law that a parent or relative cannot bring a defamation claim on behalf of an alleged defamed family member. *Sarwer v. Conde Nast Publ's Inc.*, 237 A.D.2d 191 (1<sup>st</sup> Dept 1997) (New York does not recognize tort of libel by relation); *Rose v. Daily Mirror, Inc.*, 284 N.Y. 335, 337 (1940) (libel or slander upon memory of deceased person which makes no direct reflection upon his relatives gives them no cause of action for defamation); *Cruz v. Latin News Imatico Newspaper*, 237 A.D.2d 191 (1<sup>st</sup> Dept 1997); *Geddes v. Princess Properties Int'l*, 88 A.D.2d 835 (1<sup>st</sup> Dept 1982); *Zucker v. County of Rockland*, 111 A.D.2d 325, 326 (2<sup>nd</sup> Dept 1985) (article at issue not defamatory as to plaintiff's parents since they were neither mentioned nor otherwise identified). Plaintiffs cause of action for defamation, therefore, is dismissed.

Even were there a defamation case here, the statements which are the subject of this action are quotes by Ashley's ex-cellmate at the Albany County jail, not allegations made by defendants. The words of the Article construed as a whole raise the possibility that based upon newly acquired information, the police believe Ashley may have indeed raped and murdered Gretchen.

*B. Intentional Infliction of Emotional Distress*

It is a long standing principle that publication of a single allegedly false or defamatory article regarding an individual does not constitute extreme and outrageous conduct. *Bement v. N.Y.P. Holdings, Inc.*, 307 A.D.2d 86, 92 (1<sup>st</sup> Dept 2003). Consequently, plaintiffs' second cause of action is dismissed.

*C. Discovery*

Plaintiffs final cause of action is really a request for discovery of who allegedly leaked

and distributed the information used to publish the Article. This request is deemed as moot since plaintiffs substantive causes of action have been dismissed.

*D. Sanctions*

CPLR § 8303-a(a) permits the imposition of costs and reasonable attorneys' fees, not in excess of \$10,000, against an attorney found to have brought a *frivolous action* in bad faith or as a means of harassing opposing counsel. *Nyitray v. New York City Athletic Club*, 274 A.D.2d 326, 327 (1<sup>st</sup> Dept 2000); *Entertainment Partners Group v. Davis*, 198 A.D.2d 63, 64 (1<sup>st</sup> Dept 1993). The sanction provisions of this section are intended to prevent litigants from wasting judicial resources and to reduce expenses associated with the filing of frivolous claims. *Grasso v. Matthew*, 164 A.D.2d 476, 480 (3<sup>rd</sup> Dept 1991). An action is deemed frivolous if it is "commenced and continued without any reasonable basis in law or fact, and without any good-faith argument for an extension, modification or reversal of existing law." *Id.*; CPLR 8303-a(a)(ii). Once the court determines frivolous conduct exists, sanctions are mandatory. *Nyitray*, 274 A.D.2d at 327; *Grasso*, 164 A.D.2d at 480; *Mitchell v. Herald Co.*, 137 A.D.2d 213, 220 (4th Dept 1988).

Here, none of the causes of action pleaded by plaintiffs contained any reasonable basis in law or fact. *See supra*. Further, plaintiffs counsel's assertions in the Verified Complaint about defendants racially motivated polices and supposed collusion with the Albany Police Department in an attempt to gain positive publicity are completely baseless and only serve to harass defendants. Accordingly, it is

ORDERED that the motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

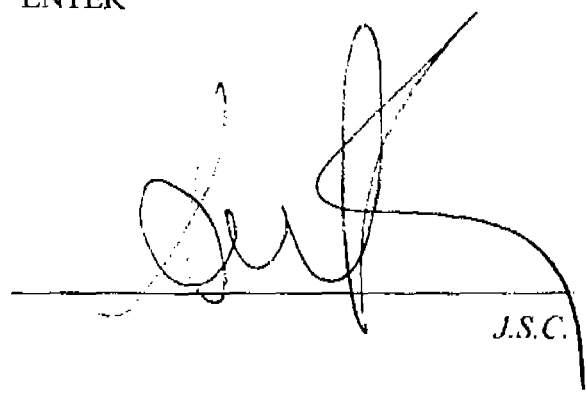
ORDERED that defendants' motion for sanctions is granted solely to the extent that the

issue of the reasonable attorneys' fees and costs incurred by defendants due to plaintiffs' counsels conduct in bringing this action is referred to a Special Referee to hear and report with recommendations; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119) to arrange a date for the reference to a Special referee; and it is further

ORDERED that the Clerk shall notify all relevant parties of the date of the hearing.

ENTER

  
J.S.C.

DATE: December 13, 2007  
New York, NY

**FILED**  
DEC 20 2007  
NEW YORK  
COUNTY CLERK'S OFFICE