

Smigo v NYP Holdings, Inc.

2008 NY Slip Op 33034(U)

November 6, 2008

Supreme Court, New York County

Docket Number: 108756/08

Judge: Jane S. Solomon

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

PRESENT: Jane S. Solomon ✓

PART 55

Justice

Index Number : 108756/2008

SMIGO, LYNSI

VS.

NYP HOLDINGS, INC.,

SEQUENCE NUMBER : # 001

DISMISS

INDEX NO. 108756-08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

ere read on this motion to ~~for~~ dismiss.

PAPERS NUMBERED

1-3

0

0

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 is decided in accordance with the annexed Decision and Order.

NB 12-22-08 at noon P.C.
set at end of attached.

FILED

NOV 12 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/6/08

JANE S. SOLOMON J.S.C.

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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 55

-----X
LYNSI SMIGO,

Plaintiff,

-against-

NYP HOLDINGS, INC., RICHARD JOHNSON,
COLLINS COMMUNICATIONS, INC. T/A
STEPPIN' OUT MAGAZINE AND STEVEN P.
DOWSETT AKA CHAUNCE HAYDEN,

Defendants.

JANE S. SOLOMON, J.:

INDEX NO.108756/08

DECISION AND ORDER

FILED
NOV 12 2008
COUNTY CLERK'S OFFICE
NEW YORK

INTRODUCTION

Plaintiff Lynsi Smigo ("Smigo" or "Plaintiff"), the fiancé of a popular New York radio personality, commenced suit for allegedly libelous and slanderous reports of a sex tape involving her and an MTV star. Defendants NYP Holdings, Inc. ("NYPH") and Richard Johnson ("Johnson") (collectively, "Defendants") move to dismiss the following causes of action: third (Intentional Infliction of Emotional Distress), fourth (New York Civil Rights Law §§ 50-51), sixth (Negligent Supervision) and eighth (Respondeat Superior). As set forth below, Defendants' motion is granted to the extent that the third, fourth and sixth causes of action are dismissed as against Defendants.

FACTS

Smigo is engaged to be married to Gregg Hughes, who is known as "Opie" on the popular "Opie and Anthony" radio program. NYP Holdings, Inc. ("NYPH") is the owner and publisher of the *New York Post* (the "*Post*"), a daily newspaper that is principally distributed in New York. *Page Six* is a section of the *Post* which contains information on celebrity gossip. Defendant Richard Johnson ("Johnson") is an employee of the *Post* and the editor of *Page Six*. Defendant Collins Communications transacts business as *Steppin' Out Magazine* (collectively "Steppin' Out"). Steven P. Dowsett a/k/a Chaunce Hayden ("Hayden") is a columnist for *Steppin' Out* and has been quoted in *Page Six*.

On April 23, 2008, the *Post* published an article in *Page Six* entitled "Opie fiancee in sex video" (the "Article"). The Article reads:

THE sex-mad "Opie & Anthony" radio show is facing its own carnal comeuppance. **Gregg "Opie" Hughes** is said to be livid over an X-rated romp starring his stunning blond fiancee, known by her first name, **Lindsay**, and MTV wildman **Bam Margera**. A disgruntled ex-employee of the radio duo recently acquired the rights to the video from Margera and it's soon to be released on a pay-for-play Web site, reports *Steppin' Out's* **Chaunce Hayden**. "They're doing the nasty - and I mean nasty," Hayden says.

Exhibit "C" to the Affidavit of Slade R. Metcalf in Support of Motion to Dismiss.

On or about April 24, 2008, Bam Margera expressly denied that he was involved in making a sex video with Plaintiff on the Opie & Anthony radio program saying, "I think it's nonsense . . . there is no tape." Plaintiff's Verified Complaint at ¶10. On April 30, 2008, Steppin' Out published an article authored by Hayden in which Hayden stated that he was contacted by a former Opie & Anthony staff member who told him of the existence of the sex tape referred to in the Article. Hayden further stated, "Since the Page Six item came out, all parties involved have denied the tape exists.[sic] Which I tend to believe since nobody has come forward to present the tape to the media." Exhibit "B" to Plaintiff's Verified Complaint.

On May 5, 2008, the *Post* published a retraction entitled "for the record" which reads:

On April 23 we reported that the fiancée of **Gregg "Opie" Hughes**, one half of the Opie and Anthony radio show, was involved in an X-rated sex video with MTV star **Bam Margera**. We reported that Hughes was taking legal action against a disgruntled ex-employee of the radio duo who had acquired the rights to the video. We have since learned that this information, supplied by Steppin' Out's **Chaunce Hayden**, was entirely incorrect. There is no sex tape. Further, Hughes' fiancée has never met the MTV star. The *Post* sincerely regrets the error.

Exhibit "D" to the Affidavit of Slade R. Metcalf in Support of Motion to Dismiss.

DISCUSSION

1. Intentional Infliction of Emotional Distress

The tort of intentional infliction of emotional distress "has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress." *Howell v. New York Post Co.*, 81 N.Y.2d 115, 121 (1993). Courts have observed that these elements are "'rigorous and difficult to satisfy'". *Ava v. NYP Holdings, Inc.*, No. 115597/07, 2008 WL 2522631 (Table), at *5 (Sup. Ct. N.Y. Co. June 24, 2008) (quoting *Howell*, 81 N.Y.2d at 122). "The first element, 'extreme and outrageous' conduct is by far the most elusive." *Id.* at *5. In order to survive a motion to dismiss a plaintiff must have alleged conduct that is "'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'". *Seltzer v. Bayer*, 272 A.D.2d 263, 264 (1st Dept. 2000) (quoting *Fischer v. Maloney*, 43 N.Y.2d 553, 557 (1978)).

Here, the Defendants' publication of the Article does not rise to the level of "extreme and outrageous" conduct as "it is long settled that publication of a single, purportedly false or defamatory article regarding a person does not constitute

extreme and outrageous conduct as a matter of law." *Bement v. NYP Holdings, Inc.*, 307 A.D.2d 86, 92 (1st Dept. 2003). Additionally, Plaintiff cannot establish a separate cause of action for emotional distress where the conduct complained of falls completely within the scope of the factual allegations asserted in her libel cause of action. See *Manno v. Hembrooke*, 120 A.D.2d 818, 820 (3rd Dept. 1986); *Ava*, 2008 WL 2522631 at *5 (citing *Hirschfeld v. Daily News L.P.*, 269 A.D.2d 248 (1st Dept. 2000)). Accordingly, the third cause of action is dismissed as against Defendants.

2. New York Civil Rights Law §§ 50-51

"The elements of a privacy claim under Civil Rights Law §§ 50-51 are: (1) use of plaintiff's name, portrait, picture or voice, (2) for advertising purposes or for trade, (3) without consent, and (4) within the State of New York." *Nussenzweig v. DiCorcia*, No. 108446/05, 2006 WL 304832, at *5 (Sup. Ct. N.Y. Co. Feb. 8, 2006), *aff'd*, 38 A.D.3d 339 (1st Dept. 2007), *aff'd*, 9 N.Y.3d 184 (2007).

New York Courts have made clear that Civil Rights Law §§ 50-51 "do not apply to reports of newsworthy events or matters of public interest." *Messenger v. Gruner*, 94 N.Y.2d 436, 441 (2000); *Howell*, 81 N.Y.2d at 123; *Stephano v. News Group Publs.*, 64 N.Y.2d 174, 184 (1984). This exception has been "broadly

construed" and encompasses "not only descriptions of actual events but also articles concerning political happenings, social trends or any subject of public interest." *Messenger*, 94 N.Y.2d at 441-42 (citations omitted). Indeed, Courts have held:

The scope of the subject matter which may be considered of "public interest" or "newsworthy" has been defined in most liberal and far-reaching terms. The privilege of enlightening the public is by no means limited to dissemination of news in the sense of current events but extends far beyond to include all types of factual, educational and historical data, or even entertainment and amusement, concerning interesting phases of human activity in general.

Paulsen v. Personality Posters, Inc., 59 Misc.2d 444, 448 (Sup. Ct. N.Y. Co. 1968), *quoted in De Gregorio v. CBS, Inc.*, 123 Misc.2d 491, 493 (Sup. Ct. N.Y. Co. 1984).

Under these guidelines, the Article must be considered newsworthy and a report on a matter of interest to the public due to Mr. Hughes' status as a popular radio personality and because the Article also concerned an MTV celebrity. Accordingly, the Plaintiff's fourth cause of action is dismissed as against Defendants.

3. Negligent Supervision

Defendants correctly contend that Plaintiff cannot maintain a separate negligent supervision cause of action against NYPH. That claim is based on the very same factual allegations that underlie her libel claim and is dismissed on that basis.

See *Themed Restaurants, Inc. v. Zagat Survey, LLC*, 21 A.D.3d 826, 827 (1st Dept. 2005); *Colon v. City of Rochester*, 307 A.D.2d 742, 744 (4th Dept. 2003); *Butler v. Delaware Otsego Corp.*, 203 A.D.2d 783, 785 (3rd Dept. 1994).

4. Respondeat Superior

Under the doctrine of respondeat superior, an employer may be held liable for a tort committed by an employee acting within the scope of his or her employment. The eighth cause of action seeks to hold NYPH liable for Johnson's role in the preparation and publication of the Article. This cause of action is completely dependent upon Plaintiff's libel claim against Johnson which is asserted in the first cause of action. Contrary to Defendants' argument, Plaintiff is not alleging that NYPH is liable for a separate and non-existent tort of respondeat superior. Plaintiff is merely using the doctrine as a vehicle to show the vicarious liability of NYPH for Johnson's allegedly libelous conduct through the first cause of action.

CONCLUSION

Based on the foregoing, it is


ORDERED that Defendants' motion to dismiss is granted to the extent that the third, fourth and sixth causes of action are dismissed as against Defendants; and it is further

ORDERED that Defendants shall serve an Answer to Plaintiff's

Verified Complaint within 20 days of service of a copy of this Decision and Order with notice of entry; and it is further **ORDERED** that a preliminary conference will be held in Part 55 on December 22, 2008 at noon and Plaintiff shall notify all other appearing parties of the same forthwith.

Dated: November 6, 2008

ENTER:



J.S.C.

JANE S. SOLOMON

FILED
NOV 12 2008
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NEW YORK