

Tradition (North America) Inc. v Bernhardt

2009 NY Slip Op 30493(U)

February 27, 2009

Supreme Court, New York County

Docket Number: 111936/08

Judge: Marilyn Shafer

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

PRESENT: Marilyn Shafer

PART 8

Index Number : 111936/2008
TRADITION (NORTH AMERICA) INC.
 vs.
BERNHARDT, DONALD
 SEQUENCE NUMBER : 001
 DISMISS ACTION

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

his 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 to dismiss is granted
in accord with the annexed memorandum.

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

FILED
 MAR 06 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

MARILYN SHAFER

Dated: 2/27/09

[Signature]
 J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

PRESENT: HON. MARILYN SHAFER PART 8
Justice

TRADITION (NORTH AMERICA) INC., and TRADITION ASIEL SECURITIES, INC.,
Plaintiffs,

INDEX NO. 111936/08

MOTION SEQ. NO. 001

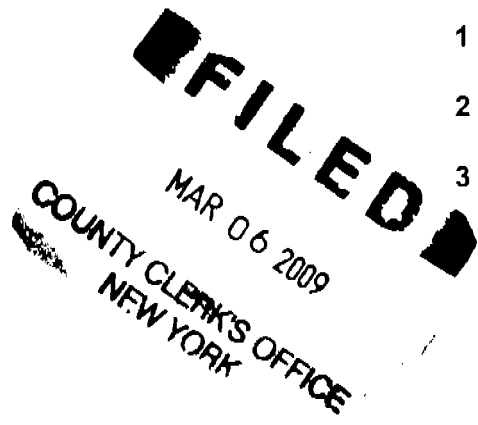
-against-

DONALD BERNHARDT and CHARLES JOSEPH,
Defendants.

The following papers, numbered 1 to 4, were read on this motion to dismiss the complaint:

PAPERS NUMBERED

- Notice of Motion - Affirmation – Exhibits 1
- Memorandum of Law in Support 2
- Memorandum of Law in Opposition – Exhibits 3
- Reply Memorandum of Law



Cross-Motion: Yes No

Upon the foregoing papers, the motion by defendants to dismiss the complaint is granted.

Introduction

This is a motion to dismiss a libel claim arising out of a lawsuit by a terminated employee.

Background

The record shows that defendant Donald Bernhardt's employment was terminated by plaintiff Tradition (North America) (TNA), an over-the-counter broker. Following his termination, Bernhardt, represented by defendant Charles Joseph, filed a complaint with the US Department of Labor, claiming violations of the Sarbanes-Oxley Act. The complaint was dismissed.

Bernhardt next filed a breach of contract action, *Donald Bernhardt v Tradition North America and Tradition Asiel Securities, Inc*, 08 Civ 7333 [SDNY 1908]. Bernhardt alleges, in relevant part, that plaintiffs "were engaging in elaborate illegal securities schemes involving buy-backs, parking and artificial pricing, in violation of United States Securities laws;" that they "tried to pressure [him] to participate in these illegal securities transactions;" that "fearing for his and his family's safety" he reported the illegal activity to the SEC;¹ and that he was terminated in retaliation for his refusal to participate in the illegal transactions and for "his attempts to stop violations of securities laws."

Bernhardt's complaint was noticed by the financial and general press and , on August 19, 2008, Bloomberg News published a report about the lawsuit. After speaking with lawyers for both parties, the report included the allegations of the complaint; plaintiffs' general counsel, Chaim Levin's, response to the complaint; and Bernhardt's response to Levin's remarks. Levin was quoted::

"The allegations are false in all respects. ... This is a frivolous lawsuit by a broker who long ago stopped being productive. He is no longer able to produce business

¹ The SEC has never contacted plaintiffs regarding this complaint.

and seeks to extort money from the company.” ... Levin said Bernhardt never had a contract with the company and that there’s no evidence he ever spoke to the SEC. “The products involved are not securities,” he said. “We will vigorously defend against this lawsuit, including applying for appropriate sanctions.”

Bernhardt, through Joseph, responded:

The allegations in the complaint are true and we can prove each and every one of them. ... The fact that he spoke to the SEC is backed by incontrovertible documentary evidence. He was an excellent performing broker and we have witnesses as to precisely when and why he was fired. He was a full-time employee of at least one of the defendants. The contract that the complaint refers to is an implied contract under New York law. The products involved are regulated and integral to the securities market.

On August 29, 2008, plaintiffs initiated this action against Bernhardt and Joseph for defamation. Plaintiffs term Berhardt’s complaint “frivolous” and “without basis in law or fact.” It accused Bernhardt and Joseph of filing the complaint in an effort to “publicize false and defamatory accusations” based upon “a series of knowingly false allegations,” with the goal of “attempting to extort a settlement.”

Defendants move to dismiss the complaint on the basis that statements made in a complaint and in a report of a judicial proceeding are privileged.

Plaintiffs argue that defendants’ malicious institution of a false and defamatory lawsuit and Joseph’s statements in the Bloomberg article are beyond the scope of privilege.

Discussion

Absolute privilege affords a speaker or writer immunity from liability for an otherwise defamatory statement to which the privilege applies, regardless of the motive with which the statement was made. (*Park Knoll Assoc. v Schmidt*, 59 NY2d 205 [1983]; *see also* Prosser and Keeton, Torts § 114, at 816 [5th ed] [absolute privilege applies “without regard to purpose or

motive, or reasonableness of conduct”]; 2 Dobbs, Torts § 412, at 1153 [2001] [absolute privilege “is not defeated by the defendant's malice”]). Thus, the protection of an absolute privilege, unlike a qualified privilege, “is not conditioned upon the honest and reasonable belief that the defamatory matter is true or upon the absence of ill will on the part of the actor” (3 Restatement [Second] of Torts, at 243).

Judicial proceedings are among the settings in which an absolute privilege is recognized. The rule is that “a statement made in the course of legal proceedings is absolutely privileged if it is at all pertinent to the litigation. (*Sexter & Warmflash, PC v Margrabe*, 38 AD3d 163 [1st Dept 2007]) The principle underlying the absolute privilege for judicial proceedings is that the proper administration of justice depends upon freedom of conduct on the part of counsel and parties to litigation, which freedom tends to promote an intelligent administration of justice. As a matter of public policy, the possible harm to individuals barred from recovering for defamatory statements made in connection with judicial proceedings is deemed to be far outweighed by the need to encourage parties to litigation, as well as counsel and witnesses, to speak freely in the course of judicial proceedings. [Id]

This Court finds that plaintiffs’ allegations of malice and falsity, even if they are true, are insufficient to strip Bernhardt’s complaint of the protection of the absolute privilege accorded to judicial proceedings.

Moreover, NY Civil Rights Law § 74, provides that 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.” 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 Ass'n for the Unification of World Christianity v New York Times Co.*, 49 NY2d 63 [1979]) A fair and true report admits of some liberality; the exact words of every proceeding need not be given if the substance be substantially stated. [*Id*] Whether a statement is privileged under § 74 presents a threshold question of law for the court to determine at the pleading stage. (*Ford v Levinson*, 90 AD2d 464 [1st Dept 1982])

This Court finds that Joseph's remarks in the Bloomberg report, on their face, constitute a fair and true report of the lawsuit, even when the remarks are read out of context, as they appear in the complaint.

Finally, plaintiffs' attempt to apply the privilege exception articulated in *Williams v Williams*, 23 NY2d 592 [1969] to the article is unpersuasive. In *Williams*, the defendant distributed copies of his summons and complaint to members of the trade in which he and the plaintiff were engaged. Based upon his intentional dissemination of the pleadings, the Court held "it was never the intention of the Legislature in enacting § 74 to allow any person to maliciously institute a judicial proceeding alleging false and defamatory charges and then to circulate a press release or other communication based thereon and escape liability by invoking the statute."

There is no indication that the defendants actively attempted to disseminate the complaint. Plaintiffs' complaint clearly states that, "the financial and general press picked up on the Complaint."

New York courts favor early adjudication of libel claims to protect freedom of speech from the chilling effect of unwarranted claims. (*Batra v Wolfe*, No 116059/04, NYLJ Mar 25, 2008 [NY Cty 2008], quoting, *Immuno AG v Moor-Jankowski*, 145 AD2d 114 [1st Dept], *aff'd*, 74 NY2d 548 [1989], *vacated*, 497 US 1021 [1990], *aff'd*, 77 NY2d 235 [1991], *cert denied*, 500

US 954 [1991]). This Court finds that the defendants' statements are absolutely privileged and cannot form the basis of a defamation claim. Plaintiffs' accusations of malicious institution of a false and defamatory lawsuit are more properly raised in a motion for sanctions, pursuant to Rule 11 of the Federal Rules of Civil Procedure, in the Federal action.

We have considered the other arguments raised by the parties and find them without merit.

Accordingly, it is hereby

ORDERED that the motion by defendants to dismiss the complaint is granted.

This reflects the decision and order of this Court.

Dated: 2/27/09

MARILYN SHAFER
J.S.C.

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