SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 2
NASSAU COUNTY

NASSAU REGIONAL OFF-TRACK BETTING CORPORATION,

Plaintiff,

INDEX No. 11310/09

MOTION DATE: Feb. 23, 2010
Motion Sequence # 003

-against-

THE NEW YORK RACING ASSOCIATION, INC. and CHARLES HAYWARD,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Affidavit in Opposition..... XX
Memorandum of Law..... XX
Memorandum of Law in Reply..... X

This motion, by defendants for an order pursuant to Rule 3212 of the Civil Practice Law and Rules of the State of New York, granting summary judgment in favor of defendant New York Racing Association, Inc., and for such other, further and different relief as to this Court seems just and proper, is determined as hereinafter set forth.

FACTS

This action arose out of a contract between Nassau Regional Off-Track Betting

Corporation ("NROTB") and the New York Racing Association ("NYRA"), which granted NROTB the non-exclusive right to cable broadcast NYRA's horse races to Nassau residents. This practice of broadcasting horse races is known as in home simulcasting. Cablevision provided the services of disseminating the simulcasts into the Nassau residents' homes. The simulcasting contract was originally entered into on January 5, 2001 and was extended several times until December 31, 2009.

NROTB maintains a website that allows users who have opened accounts with NROTB to place bets on horse races throughout the country via the internet. Users may view live video streams of various races throughout the country and view replays of others. NYRA has given NROTB permission to show race replays but not live video streams of NYRA's races.

In April 2009, NYRA learned that NROTB began broadcasting NYRA's horse races live on the NROTB website. NROTB never obtained the consent of NYRA or the New York State Racing and Wagering Board ("Racing Board"). As a result, on June 3, 2009, NYRA terminated the simulcast contract and prevented NROTB's television broadcasts. Upon terminating the broadcast signal, NYRA issued a statement accusing NROTB of deliberate piracy by broadcasting the horse races live over the internet.

NROTB brought an action for breach of contract for the termination of the simulcast contract and defamation for NYRA's statement.

DEFENDANT'S CONTENTIONS

NYRA contends NROTB failed to show that a valid and enforceable contract existed between the parties. NYRA argues the terms of the contract clearly and unambiguously required approval by the Racing Board. Paragraph SEVENTEENTH states, "This agreement is subject to the approval of the New York State Racing and Wagering Board, pursuant to the provisions of Article X of the Racing Law." NYRA notes that Racing Law § 1003 requires Racing Board approval for all "in-home" simulcast agreements; and that the Racing Board never approved the contract. The defendant presents a March 23, 2009 letter by the Racing Board to NROTB, which stated the Racing Board was reviewing the status of NROTB's simulcasts and requested copies of the simulcast contract and the contract with the disseminating company. NYRA contends that since the contract was never valid, its motion for summary judgment should be granted and NROTB's claim for breach of contract should be dismissed.

NYRA argues that its motion for summary judgment should be granted and NROTB's defamation claim must be dismissed because a public benefit corporation cannot maintain an action for defamation. NYRA reasons a public benefit corporation cannot maintain an action for defamation because the Supreme Court has held that the public is free to comment on the government without fear of a lawsuit.

PLAINTIFF'S CONTENTIONS

NROTB argues that issues of fact still exist as to whether a contract existed between the parties. NROTB asserts that NYRA failed to show the contract was not approved by the Racing Board; that the only evidence NYRA presented to show the contract was not approved was the March 23, 2009 letter by the Racing Board requesting a valid contract between the parties. NROTB interprets Racing Law § 1003 to require the Racing Board to approve the plan of operation for simulcasting and not necessarily the contract itself. NROTB contends the Racing Board was aware of the simulcasting in Nassau County over the eight-year period it occurred; and that the Racing Board approved of the simulcasting. Dino Amoroso, President of NROTB, provided an affidavit in opposition to the motion and stated the Racing Board presided over a mediation between NYRA and NROTB to restore the simulcasts. NROTB contends that such evidence supports its position that the Racing Board had previously approved the simulcasts.

In the alternative, if the contract was not approved by the Racing Board, NROTB asserts that NYRA got in the way of approval. In March 2009, the Racing Board stated it would formally approve the simulcasting if it receives a copy of the contract between NYRA and Cablevision. NROTB argues additional discovery is needed to see if NYRA provided the Racing Board with this contract, and whether NYRA delayed in doing so.

NROTB also contends that since NYRA performed and received benefits under this contract for over eight years, it cannot now claim it to be invalid to escape liability.

NROTB avers that it has a right to bring a claim for defamation because the government criticism immunity does not apply here. NROTB argues it is not the type of entity the principle was intended to include, and the statements made by NYRA were not matters of public concern.

DEFENDANT'S REPLY

NYRA argues that the plain language of the March 23, 2009 letter supports

NYRA's position that the contract was invalid. Further, NYRA contends that NROTB used hearsay evidence to support its contention that the Racing Board would formally approve the simulcasting if NYRA sent a copy of its contract with Cablevision to the Racing Board; and that NROTB has not proven that NYRA prevented the Racing Board from approving the contract, and further discovery is not needed because NROTB could have obtained a document from the Racing Board to prove or disprove this contention.

Finally, NYRA provides further support for its contention that NROTB is not permitted to bring a claim for defamation. NROTB is a public benefit corporation and should be treated like any other government entity. NROTB should not be permitted to bring a claim for defamation because the public is free to criticize the government without fear of suit. NROTB replies that NYRA made its accusation with the hope the public would demand the problem was resolved.

DECISION

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in (**Stewart Title Insurance Company, Inc. v Equitable Land Services, Inc.**, 207 AD2d 880, 616 NYS2d 650, 651, 1994):

> "It is well established that a party moving for summary judgment must make a **prima facie** showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (**Winegrad v New York Univ. Med. Center**, 64 NY2d 851, 853, 487 NYS2d 316, 476 NE2d 642; **Zuckerman v City of New York**, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (**State Bank of Albany v McAuliffe**, 97 AD2d 607, 467 NYS2d 944), but once a **prima facie** showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (**Alvarez v Prospect Hosp.**, 68 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572; **Zuckerman v City of New York**, **supra**, 49 NY2d at 562,

427 NYS2d 595, 404 NE2d 718)".

Paragraph THIRTEENTH of the contract states, "This agreement is subject to the approval of the New York State Racing and Wagering Board, pursuant to the provisions of Article X of the Racing Law." NYRA contends that the contract itself must be approved by the Racing Board.

The defendant herein has demonstrated, by submission of the March 23, 2009 letter from the Racing Board that it (the Board) was "reviewing. .the status of. . . simulcasting". That proof shows that no approval was granted as of that date. The mandatory language of Racing, Pari-Mutual Wagering and Breeding Law §1003(2) & (4) requires approval from the Board to operate a simulcast facility.

> "Before it may grant such license, the board shall review and approve a plan of operation submitted by such applicant".
>
> * * *
>
> "No racing association or corporation or regional off-track betting corporation shall be allowed to operate a simulcast facility except according to the provisions of an approved plan of operation". (emphasis supplied)

Accordingly, the defendant has demonstrated its **prima facie** entitlement to summary judgment on the cause of action for Breach of Contract.

However, the simulcasting contract was formed on January 5, 2001. Dino Amoroso, the President of NROTB, stated in his affidavit that "At all times, the Board was aware of, and approved formally or informally, the in home simulcasting of NYRA races to Nassau County." In view of the parties' course of performance, plaintiff has shown a triable issue as to whether the simulcasting contract was approved by the New York State Racing and Wagering Board. Defendant's motion for summary judgment

dismissing the complaint is **denied** as to plaintiff's breach of contract claim.

If a corporation's reputation is damaged, it may bring an action for defamation. However, if the corporation is a "public figure," the defendant will have a qualified privilege and the defendant must establish actual malice (***Friends of Animals v Assoc. Fur Manufacturers***, 46 NY2d 1065 [1979]). The issue of whether a public benefit corporation may bring a defamation claim has not been addressed by the New York appellate courts, and has only been addressed by the Supreme Court of Schenectady County. (**Capital District Regional Off-Track Betting Corp. v. Northeastern Harness Horseman's Association**, 92 Misc.2d 232, 234 399 N.Y.S.2d 597, 598 Sup. Ct. Schenectady County, 1977). The facts of **Capital District Regional** are similar to the present case. The plaintiff, a public benefit corporation engaged in pari-mutuel off-track betting, brought a defamation claim against a not-for-profit corporation, which distributed a newsletter that accused the plaintiff of "flagrant violations of law." (***Id.*** at 233.) The court cited the reasoning of The Supreme Court of the United States, which stated there is no place for prosecutions for libel on the United States Government. (***Id.*** citing **New York Times v. Sullivan**, 376 U.S. 254, 291, 84 S.Ct. 710, 732, 1964). The **Capital District Regional** court held this policy is not limited to municipal corporations and includes public benefit corporations like the Capital District Regional Off-Track Betting Corporation. (**Capital District Regional, supra** at 234, citing 45 A.L.R.3d 1315). As a public benefit corporation, the plaintiff was not permitted to bring an action for defamation. (***Id.***).

The defendants' motion for summary judgment dismissing the plaintiff's defamation cause of action is **granted** . It is clear that NROTB is a public benefit corporation. Pursuant to Racing Law § 502, each regional off track betting corporation is established as a public benefit corporation. NROTB also acknowledged it was a public benefit corporation in its complaint. A public benefit corporation, due to its status as a governmental corporation, cannot maintain a defamation action. (**Capital District Regional, supra** at 234). Moreover, plaintiff has not established actual malice.

For all of the reasons stated, the defendant's motion for summary judgment is **granted** as to plaintiff's claim for defamation but **denied** as to plaintiff's claims for breach of contract.

Dated 6 April '10

ENTERED
APR 14 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Stephen A. Bucaro
J.S.C.