

Kondratick v Orthodox Church in Am.

2010 NY Slip Op 31034(U)

April 14, 2010

Supreme Court, Nassau County

Docket Number: 15320/08

Judge: Thomas P. Phelan

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 3
NASSAU COUNTY

ROBERT KONDRATICK,

Plaintiff(s),

-against-

ORTHODOX CHURCH IN AMERICA, FAITH
SKORDINSKI, and ANDREW JARMUS individually,

Defendant(s).

ORIGINAL RETURN DATE:02/11/10
SUBMISSION DATE: 03/04/10
INDEX No.: 15320/08

MOTION SEQUENCE #1

The following papers read on this motion:

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Motion by plaintiff for an order pursuant to CPLR 3212(c) granting plaintiff partial summary judgment against defendants only on the causes of action sounding in defamation, defamation *per se* and punitive damages is denied.

The fourth, fifth and sixth causes of action allege defamation and defamation *per se*. The twelfth cause of action alleges punitive damages. In answering the complaint containing 145 decretal paragraphs defendants interposed affirmative defenses alleging absolute privilege (eighth affirmative defense) and qualified privilege (ninth affirmative defense).

Plaintiff Robert Kondratick (Kondratick) was a former priest of the Orthodox Church in America (OCA). He served as a priest from 1967 until August 1, 2007, when he was removed from the priesthood because of his alleged role in a financial scandal involving the church. From 1989 until March 6, 2006, Kondratick served as the chancellor of the OCA and a member of the Metropolitan Council. He held the highest ranking non-hierarchical position within OCA.

Defendant OCA is an autocephalous church of the Eastern Orthodox Christian Faith. It traces its origins in North America back to 1794, when missionaries from the Orthodox Church of Russia established a mission in Alaska.

The OCA is comprised of thirteen (13) dioceses encompassing all of North America. It has approximately seven hundred (700) missions, parishes, cathedrals, monasteries and institutions located throughout North America. The central administrative offices of the OCA, known as the Chancery, are located in Oyster Bay Cove (Syosset), New York.

The officers of the OCA consist of the Metropolitan (a Bishop elected Primate of the OCA and who serves as the OCA's spiritual leader), the Chancellor, the Treasurer and the Secretary. They maintain offices at the Chancery. OCA is governed by three (3) inter-connected bodies: (i) a Holy Synod of Bishops, which meets regularly twice each year; (ii) a Metropolitan Council, which meets regularly twice a year; and (iii) an All-American Council, which meets once every three years. Between the triennial sessions of the All-American Council, the Metropolitan Council and the Holy Synod of Bishops together function as the OCA's board of trustees.

The Holy Synod of Bishops is comprised of the diocesan Bishops of the OCA and is the supreme canonical and ecclesiastical authority of the OCA. The Metropolitan Council is comprised of the officers of the OCA (the Metropolitan, Chancellor, Treasurer and Secretary), two representatives elected from each diocese and six other individuals elected by the All-American Council. The Metropolitan Council is the permanent executive body of the OCA which exists for the purpose of implementing the decision of the All-American Council. The All-American Council is comprised of the Holy Synod of Bishops, the members and alternate members of the Metropolitan Council, the priests of each parish and various other representatives of organizations and constituencies without the OCA. The All-American Council is the highest legislative and administrative body of the OCA. A Special Act of the New York State Legislature (Chapter 519 of the Laws of 1972) formally incorporated OCA.

Defendant Andrew Jarmus (Jarmus) is an ordained priest and served as Director of Ministries and Communication for defendant OCA from August, 2007, through the end of 2009. Defendant Faith Skordinski (Skordinski) was a member of OCA's Metropolitan Council as well as a member of the Special Commission that investigated the alleged financial wrongdoing of plaintiff.

In the fall of 2005, when Kondratick was Chancellor of the OCA, a former Treasurer and Secretary of the OCA accused Kondratick and a former Metropolitan (Metropolitan Theodosius) of engaging in serious financial wrongdoing. In response, the OCA retained a law firm (Proskauer Rose, LLP) and an accounting firm (Lambrides, Malos, Moulthrop, LLP) (Lambrides) to investigate the allegations. It also formed its own internal Special Commission to review and report on the investigation.

On or about March 16, 2006, in the midst of the investigation, Metropolitan Herman removed Kondratick as Chancellor. On March 13, 2007, the OCA's Special Commission issued a

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Preliminary Report. According to the Preliminary Report, the OCA's investigators found that Kondratick was involved in a financial scandal at the Chancery and responsible for significant financial misconduct while Chancellor of the OCA. The factual findings set forth in the Preliminary Report became the basis of an internal OCA Spiritual Court proceeding against Kondratick that was initiated by defendant Sklordinski under the OCA's by-laws.

An OCA Spiritual Court was empaneled to hear the charges against Kondratick, and a trial was held before the court on June 11 and July 6, 2007. Following the trial, the Spiritual Court issued a report and recommendation to the Holy Synod of Bishops, which, after reviewing the report and recommendation, removed Kondratick from the priesthood effective July 31, 2007. Defendants assert that Kondratick was the only OCA officer against whom internal charges were filed in connection with the financial scandal, to be summoned before a Spiritual Court and stripped of his priesthood.

Plaintiff alleges that defendant Jarmus defamed him on several occasions in or about August 2007. The Associated Press published an article on or about August 30, 2007, which contained statements specifically attributed to defendant Jarmus. Plaintiff alleges the article was further re-published and distributed by numerous other publications which include, but are not limited to, the following: The Washington Post, ABC News, Forbes.com and kxmc.com. Plaintiff also alleges the article was translated into other languages and published around the world. The AP article stated:

“By The Associated Press
Thursday, August 30, 2007; 12:05 PM

NEW YORK - a former chancellor of the Orthodox Church in America, who has been accused of longtime financial wrongdoing, has been ousted from the priesthood.

The verdict by an OCA spiritual court against Robert Kondratick took effect July 31. Kondratick has said he's innocent. He held the second-highest job in the denomination.

Financial controls in the church had been 'circumvented' at least since 1998, according to church leaders, and auditors uncovered a 'pattern of personal use of church money' for years. No dollar amount has been given. The issue became public last year after a former OCA treasurer alleged widespread financial misconduct involving millions of dollars. The treasurer had said Metropolitan Theodosius, the retired head of the church, was involved. But a church investigation concluded that Kondratick was solely responsible, said the Rev. Andrew Jarmus, an OCA spokesman.”

In further support of his motion for summary judgment, plaintiff asserts that defendant Skordinski e-mailed defendant Jarmus reminding Jarmus that he told Skordinski that he was misquoted and never stated that Kondratick was “solely” responsible and that he had “no clue where the numbers came from.” Plaintiff contends that because Jarmus never issued a clarification or retraction to correct the statements attributed to him, Jarmus was acting with malicious intent to harm plaintiff.

In *Toker v Pollak*, 44 NY2d 211 at page 219, the Court of Appeals in explaining the type of statements entitled to a qualified (as opposed to absolute) privilege stated that:

“In contrast, communications protected by a qualified privilege do not provide the communicant with an immunity against the imposition of liability in a defamation action. A qualified privilege does, however, negate any presumption of implied malice flowing from a defamatory statement, and places the burden of proof on this issue upon the plaintiff. A communication is said to be qualifiedly privileged where it ‘is fairly made by a person in the discharge of some public or private duty, legal or moral, or in the conduct of his own affairs, in a matter where his interest is concerned.’ ”

The common interest of members of religious, fraternal and charitable associations is recognized as sufficient to support a privilege for communicating between themselves concerning the qualifications of the officers and members and their participation in the activities of the organization. This is true even when the defamatory matter relates to alleged misconduct of some other member that makes him undesirable for continued membership. See *Lieberman v Gelstein*, 80 NY2d 429 [1992]; also Restatement of Law, Second Torts Section 596(e).

As long as the privilege is not abused, the flow of information between parties sharing a common interest should not be impeded, (*Lieberman v Gelstein, supra*) especially when it is in the best interests of the members of the OCA.

The privilege is not absolute but is qualified, which means that though the statements may be false, defendants are privileged to make them provided they were not made with malice. In *Loewinthan v LeVine*, 270 AD 512 citing *Pecue v West*, 233 NY 316 at page 322, the Court said:

“Malice, however, does not mean alone personal ill-will. It may also mean such a wanton and reckless disregard of the rights of another as is ill-will’s equivalent. This means more than mere negligence or mistaken action. (*Hemmens v Nelson*, 138 NY 517). If the defendant made the statements in good faith, believing them to be true, he will be protected, even if a man of wiser reasoning powers or greater skill in sifting evidence would have hesitated.” (*Clark v Molyneux*, 3 Q.B. Div. 237).

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried not to resolve it. *Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]. A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant. *Alvarez v Prospect Hosp.*, 66 NY2d 320 [1985]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Fox v Wyeth Labs., Inc.*, 129 AD2d 611 [2d Dept. 1987]; *Royal v Brooklyn Union Gas Co.*, 122 AD2d 133 [2d Dept. 1986]. Plaintiff has not made an adequate *prima facie* show of entitlement to summary judgment.

No discovery has yet taken place. In plaintiff's own submission, he acknowledges that defendant Jarmus denied making the statement. Moreover, plaintiff has not demonstrated that defendants acted with malice.

The thrust of plaintiff's argument is that he was not solely responsible for the alleged defalcation. With regard to defenses to defamation, truth provides a complete defense to an action alleging defamation. Substantial truth will also defeat an action for defamation. "When the truth is so near to the facts as published that fine and shaded distinctions must be drawn and words pressed out of their ordinary usage to sustain a charge of libel, no legal harm has been done." See *Fleckenstein v Friedman*, 266 NY19, 23 [1934], quoting *Cafferty v Southern Tier Pub. Co.*, 226 NY 87, 93.

The twelfth cause of action alleges punitive damages as to all defendants (§142-145). No separate cause of action for punitive damages lies for pleading purposes. *Paisley v Coin Device Corp.*, 5AD3d 748 [2d Dept. 2004]; *Crown Fire Supply Co., Inc., v Cronin*, 306 AD2d 430 [2d Dept. 2003]. The motion for summary judgment is denied.

To insure the expeditious completion of disclosure in this action, a Preliminary Conference shall be held.

Counsel are directed to appear on April 29, 2010 at 9:30 A.M. in the Preliminary Conference area, lower level of this courthouse, to obtain and fill out a Preliminary Conference Order.

This decision constitutes the order of the court.

Dated: 4-14-10

HON THOMAS P. PHELAN
[Signature]
ENTERED J.S.C.
APR 19 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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