

Muhammad v NYP Holdings, Inc.

2012 NY Slip Op 30031(U)

January 9, 2012

Supreme Court, New York County

Docket Number: 103184/2011

Judge: Saliann Scarpulla

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

PRESENT: SALIANN SCARPULLA
Justice

PART 19

Index Number : 103184/2011
MUHAMMAD, SALAHUDDIN
vs.
NYP HOLDINGS, INC.
SEQUENCE NUMBER : 001
DISM ACTION/INCONVENIENT FORUM

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this 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 *is decided in accordance with the accompanying memo and oral decision.*

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

FILED

JAN 11 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/9/12

Saliann Scarpulla
SALIANN SCARPULLA *s.c.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

-----X
SALAHUDDIN MUHAMMAD,

Plaintiff,

Index No.: 103184/2011

-against-

NYP HOLDINGS, INC., THE NEW YORK
POST and PATRICK DUNLEAVY,

DECISION AND ORDER

Defendants.

-----X

For Plaintiff:
Ahmad Naqvi Rodriguez LLP
22 Cortlandt Street, Suite 1628
New York, NY 10007

For Defendants:
Hogan Lovells US LLP
875 Third Avenue
New York, NY 10022

Papers considered in review of this motion to dismiss:

Notice of Motion	1
Mem of Law in Support of Motion	2
Aff of Slade R. Metcalf, Mark Cunningham and Patrick Dunleavy	3
Affirmation in Opposition	4
Reply Mem of Law	5

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JAN 11 2012

NEW YORK
COUNTY CLERK'S OFFICE

HON. SALIANN SCARPULLA, J.:

In this defamation action stemming from a New York Post article (the "article"), defendants NYP Holdings, Inc. ("NYP"), The New York Post (the "Post"), and Patrick Dunleavy ("Dunleavy") (collectively "defendants") move pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint.

On September 2, 2010, the New York Post (the "Post") printed an article written by Dunleavy in the paper's "Post Opinion" section. The article, entitled "Converts to Terror" raised the issue of "how the four accused [of bombing synagogues in the Bronx] were radicalized to the point where they'd even *consider* plotting to bomb synagogues in The Bronx and shoot down aircraft with missiles" (emphasis in original).

In his article, Dunleavy noted that the four accused men were all former inmates and after release, all four inmates attended a mosque in Newburgh, NY. Muhammad was one of three imams at this mosque. Muhammad and his two fellow imams also worked for the Department of Corrections as prison chaplains. The article states that the three were hired by Warith Deen Umar, who in the past had made disparaging comments about Israel and who was a member of the Wahabbi/Salafist sect of Islam which, according to the article, "views Jews and other groups and nonbelievers as infidels and enemies of Islam." The article also states that Muhammad had "hired several inmates with known radical Islamic ties as clerks in the chaplain's office" and had "allowed the inmates to use his office phone to call the Middle East and North Africa." Dunleavy concluded by recommending that the connection between the prison system, radicalization of inmates, and the Newburgh mosque be investigated further.

Muhammad commenced this action on February 10, 2011, alleging four causes of action: two cases of action for libel *per se* based on the column itself, and two causes of action for libel by implication. Muhammad argues that the article itself is libelous

because it is false, defamatory and “leads the reasonable reader to believe that, in his capacity as a Muslim chaplain in the New York prison system, [Muhammad] ‘radicalizes’ prison inmates, possibly including the four ‘Newburgh defendants’, and encourages inmates to undertake acts of terrorism.” In his cause of action for libel by implication, Muhammad contends that the entire column, including its title, when read together implies “to a reasonable reader, the patently false accusation that plaintiff engages in the radicalization of prison inmates and encourages them to engage in acts of terrorism.”

Defendants now move to dismiss the complaint for failure to state a cause of action. Defendants argue that the specific language in the article, its appearance and overall connotation show that the article is a protected opinion and does not report fact, and as such Muhammad may not maintain a defamation cause of action. Defendants further argue that Muhammad is a public official and has failed to allege that defendants acted with the required “constitutional malice” to be liable for defamation.

Dunleavy also moves to dismiss the action against him, individually, for lack of personal jurisdiction pursuant to CPLR 3211(a)(8). Dunleavy asserts that CPLR 302(a)(2) and (3) contain defamation exceptions applicable to him and that CPLR 302(a)(1) does not apply because the article is the only business that he has transacted in New York. Dunleavy further avers that he has had only sporadic contacts with New York since his retirement and departure from the state in 2005, thus there can be no basis for personal jurisdiction.

In opposition, Muhammad argues that the mere placement of the article does not make it a protected opinion, and that the defendants made multiple false statements of fact in the article to support their conclusion. Muhammad maintains that, in any event, the article accuses him of criminal activity and as such, is not a constitutionally protected opinion. Muhammad further argues that defendants' summary judgment motion as to whether they acted with constitutional malice should be denied as premature and lacking in merit. In opposition to Dunleavy's motion to dismiss for lack of personal jurisdiction, Muhammad argues that Dunleavy's act of writing and granting NYP authority to publish the article is a sufficient business transaction to establish jurisdiction pursuant to CPLR 302(a)(1).

Discussion

On a motion to dismiss pursuant to CPLR §3211, the pleading is to be afforded a liberal construction. Under CPLR §3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the claims as a matter of law. *See Leon v. Martinez*, 84 N.Y.2d 83 (1994); *Jones Lang Wootton USA v. LeBoeuf, Lamb, Greene & Macrae*, 243 A.D.2d 168 (1st Dept. 1998). On a motion to dismiss a pleading under CPLR §3211(a)(7), the sole inquiry is whether, according to the facts alleged in the complaint every favorable inference, any cognizable cause of action can be made out. *See Leder v. Spiegel*, 31 A.D.3d 266 (1st Dept. 2006) *aff'd* 9 N.Y.3d 836 (2007); *Franklin v. Winard*, 199 A.D.2d 220 (1st Dept. 1993).

This is not the first time this Court has reviewed the article and ruled on defamation claims with respect to it. In *Rashada v. New York Post*, 2011 N.Y. Misc. LEXIS 4079 (Sup. Ct., N.Y. County 2011), this Court held that Dunleavy's conclusion – that we should further investigate the connection between the radicalization of prisoners and these prisoners' connection to a particular mosque in Newburgh – is constitutionally protected opinion. The Court adheres to its reasoning in the *Rashada* decision in this action. Thus, to the extent that Muhammad claims, based upon concededly true facts, that the article accuses him by implication of “radicalizing inmates,” the article is constitutionally protected, non-actionable opinion.¹

In his opposition to the motion to dismiss, Muhammad alleges that the following specific factual statements in the article are false: 1) Muhammad was hired by Warith Deen Umar, 2) he knew the prison clerks he hired had radical Islamic ties, and 3) he allowed inmates to make phone calls from his office phone to the Middle East and North Africa.

Upon review of these factual allegations, however, one of them may not form the basis of a libel cause of action. On this motion Muhammad claims that the statement that Muhammad was hired by Warith Deen Umar is false, but he did make that allegation in

¹ The Court notes that, unlike *Rashada*, Muhammad was quoted in the article, stating that there was little evidence of radicalization of prisoners, and that if he saw such evidence, he would “stomp it out.” Thus, in the article Muhammad had the opportunity to, and did, voice his own opinion about the issue of radicalization of prisoners.

his complaint. Thus, he may not now allege the falsity of this statement to avoid dismissal.

Muhammad also argues that in the article Dunleavy falsely states the false fact that while at Fishkill State Prison, Muhammad hired several clerks with known ties to radical Islam. Finally, Muhammad argues that the statement that he improperly allowed inmates to make phone calls to the Middle East and North Africa is false. As these statements, if false, may support a libel claim notwithstanding that the article expresses an opinion, these allegations are sufficient to require denial of the pre-answer motion to dismiss. *See Silsdorf v. Levine*, 59 N.Y.2d 8, 10 (1983); *Chalpin v. Amordian Press*, 128 A.D.2d 81, 85 (1st Dept. 1987).

Further, defendants have not shown that Muhammad was required to plead constitutional malice to maintain this cause of action. “Constitutional” or “actual” malice, which is making a false statement “with knowledge that it was false or with reckless disregard of whether it was false or not,” *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964), is required to maintain a defamation cause of action only where the plaintiff is a public official. *See Sweeney v. Prisoners’ Legal Svcs.*, 84 N.Y.2d 786, 898-99 (1995).

Though it is well-accepted that prison wardens and other law enforcement personnel are public officials, *see Sweeney*, 84 N.Y.2d at 898-99 (1995), defendants have not shown, by sufficient proof in evidentiary form, that chaplains hold a similarly

“substantial responsibility for or control over the conduct of governmental affairs.”

Rosenblatt v. Baer, 383 U.S. 75, 85 (1966).

Defendants argue that the chaplain’s authority exceeds that of the prison warden, as the chaplain may conduct religious services and allow emergency phone calls. Though in certain instances the chaplain’s authority may be greater than the warden’s, the Court does not find these isolated general examples sufficient to render Muhammad a “public official” as a matter of law.

Finally, the individual cause of action against Dunleavy must be dismissed for the reasons this Court set forth in its *Rashada* decision. *See Rashada*, 2011 N.Y. Misc. LEXIS 4079, at *7.

In accordance with the foregoing, it is

ORDERED that the motion to dismiss the complaint by defendants NYP Holdings, Inc. and the New York Post is granted in part and denied in part, as set forth above; and it is further

ORDERED that the motion to dismiss the complaint by defendant Patrick Dunleavy is granted and the Clerk of the Court is directed to sever and dismiss the complaint as to defendant Patrick Dunleavy.

This constitutes the decision and order of the Court.

Dated: January 9, 2012

FILED

JAN 11 2012

ENTER:

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Saliann Scarpulla
Hon. Saliann Scarpulla, J.S.C.