

<b>Gong v Dow Jones &amp; Co., Inc.</b>
2012 NY Slip Op 33220(U)
July 25, 2012
Supreme Court, New York County
Docket Number: 652905/11
Judge: Anil Singh
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. ANIL C. SINGH  
SUPREME COURT JUSTICE

PRESENT:

PART 61

Index Number : 652905/2011  
GONG, SHAOFAN  
vs  
DOW JONES & CO. INC. T/ATHE  
Sequence Number : 001  
DISMISS ACTION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

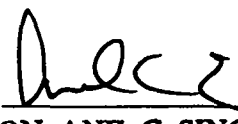
Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the annexed memorandum opinion.*

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

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

Dated: 7/25/12

  
HON. ANIL C. SINGH  
SUPREME COURT JUSTICE

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 61

-----X

SHAOFAN GONG,

Plaintiff,

Index No. 652905/11

-against-

DOW JONES & COMPANY, INC. (T/A "THE  
WALL STREET JOURNAL"), DAILY NEWS, L.P.  
(T/A "DAILY NEWS"), NYP HOLDINGS, INC.  
("NEW YORK POST"), TIME WARNER CABLE,  
INC. (T/A "NY1.com"), CBS RADIO, INC.  
(T/A "CBS RADIO"), and NEW YORK CITY  
POLICE DEPARTMENT (NYPD) C/O THE CITY  
OF NEW YORK,

Defendants.

-----X

Anil C. Singh, J.:

Motions bearing sequence numbers 001, 002, 003 and 004 are consolidated for disposition.

This is an action for defamation by plaintiff Shaofan Gong, arising from certain police reports and subsequent newspaper and television reports which stated that he was the perpetrator of a murder-suicide in Queens, New York. Defendants New York City Police Department (NYPD), Dow Jones & Company, Inc. (Dow Jones), Daily News, L.P. (Daily News), NYP Holdings, Inc. (NY Post), Time Warner Cable, Inc. (Time Warner), and CBS Radio, Inc. (CBS Radio) move, pursuant to CPLR 3211 (a) (7), for an order dismissing the

complaint. For the reasons stated below, the motions are granted and the complaint is dismissed.

### Background

On October 24, 2010, the NYPD issued a press release regarding a fire that occurred the prior day in Flushing, Queens. The initial press release stated:

On Saturday October 23, 2010 at approximately 1449 hrs inside of 136-79 Roosevelt Avenue, within the confines [of] the 109 Precinct, Police responded to a 911 call of a fire. FDNY responded and extinguished the fire when two unidentified males were discovered in a third floor office. EMS also responded to the scene and pronounced Victim #1, a M/A, DOA at the scene. Victim #2, also a M/A, was transported to Booth Memorial Hospital where he listed in critical condition. The Medical Examiner will determine the cause of death. The Fire Marshal will determine the cause of the fire. The investigation is ongoing.

Later that day, the NYPD issued an updated press release, stating: "Victim #1 has been identified as Hu, Chang-Xin M/A/42 4112 Union Street Queens. The second individual was pronounced [sic] at 2024 hours at Booth Memorial Hospital. His identity is still pending. The incident is still under investigation."

The press release was updated a second time on October 24th, stating: "As a result of an investigation, the death of victim #1

has been reclassified as a homicide. The second DOA (who died at Booth Memorial Hospital) has been identified as: Gong, Shao-Fan M/A/27 Unknown address. The address of the first DOA (pronounced at the scene of the fire) has been corrected: Hu, Chang Xin M/A/42 136-79 Roosevelt Ave., Queens.

Thereafter, on October 25<sup>th</sup>, various media outlets, including defendants, reported on the events, including an identification of the second deceased man as Shaofan Gong. Each of the defendants, with the exception of CBS Radio, reported that plaintiff had killed the second individual before setting fire to the apartment and then committing suicide. The CBS Radio report, as quoted in the complaint, states that the first individual's death was considered to be a homicide, and allegedly implies that plaintiff was responsible, by stating that the two men had gotten into a fight.

In each case, the articles attributed the information to the NYPD. The Wall Street Journal and Time Warner (through NY1.com) eventually issued corrections.

Plaintiff commenced this action on October 21, 2011, asserting claims for defamation, false light, and intentional infliction of emotional distress based on the police report and the reporting of the event by the media defendants. Plaintiff also seeks punitive damages and injunctive relief in the form of an order from the

court requiring all defendants to publish a correction and an apology.

**Motion sequences 001, 002 and 003**

Dow Jones, the Daily News, the NY Post, Time Warner and CBS Radio, each move to dismiss the complaint for failure to state a cause of action.

**A. Defamation**

Plaintiff's first cause of action is for defamation. It is undisputed that plaintiff is a private individual, not a public one. However, "a private person's alleged criminal conduct and the operation of the criminal justice system with respect to the disposition of the charges against such an individual are matters of legitimate public concern." *Pollnow v Poughkeepsie Newspapers*, 107 AD2d 10, 15 (2d Dept 1985), *aff'd* 67 NY2d 778 (1986); see *Maloney v Anton Community Newspapers, Inc.*, 16 AD3d 465 (2d Dept 2005); *Von Gerichten v Long Is. Advance*, 202 AD2d 495 (2d Dept 1994). "[A] private person in a defamation action involving an issue of public concern must plead and prove that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination

ordinarily followed by responsible parties." *Porcari v Gannett Satellite Info. Network, Inc.*, 50 AD3d 993, 994 (2d Dept 2008) (citation and internal quotation marks omitted); see *Morsette v The Final Call*, 309 AD2d 249 (1<sup>st</sup> Dept 2003).

Here, the complaint fails to allege any facts to demonstrate that any of the defendants acted in a grossly irresponsible manner. The complaint itself alleges that each of the news reports at issue derived from information provided by the NYPD, including the information set forth in the press releases from the NYPD. Moreover, each of the news account states that the information in such account is based on police sources and police statements.

It has been held that news reporters are entitled to rely on reports supplied by law enforcement officials, including unsworn statements, so long as the reporter has no reason to doubt the accuracy of such information. See e.g. *Robart v Post-Standard*, 52 NY2d 843 (1981); *Von Gerichten v Long Is. Advance*, 202 AD2d at 496; *Mitchell v Herald Co.*, 137 AD2d 213, 217 (4<sup>th</sup> Dept 1988); *Carlucci v Poughkeepsie Newspapers*, 88 AD2d 608, 609 (2d Dept 1982), *aff'd* 57 NY2d 883 (1982). In such cases, the reporter cannot be said to have been grossly irresponsible, even when the information provided by the police later proves to be inaccurate.

Here, the complaint alleges no facts to suggest that any of

the defendants knew, or had any reason to suspect, that the information provided by the NYPD, including the press releases, would later prove to be inaccurate with respect to plaintiff. As such, the complaint fails to allege that any of the defendants' actions were grossly irresponsible and, therefore, fails to state a cause of action for defamation.

In any event, the complaint would be dismissed pursuant to Civil Rights Law § 74, which 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, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published.

See *Akpinar v Moran*, 83 AD3d 458, 459 (1<sup>st</sup> Dept 2011).

The definition of what constitutes an official proceeding has been broadly construed. In general, a media report "is protected as long as it concerns activities which are within the prescribed duties of a public body. The test is whether the report concerns action taken by a person officially empowered to do so." *Freeze Right Refrig. & A.C. Servs. v City of New York*, 101 AD2d 175, 182 (1<sup>st</sup> Dept 1984) (citation and internal quotation marks omitted).

"Judicial interpretation of section 74 has made it clear that an article need not be a verbatim account or even a precisely

accurate report of an official proceeding to be a fair and true report of such a proceeding." *Id.* at 183 (citation and internal quotation marks omitted). Moreover, a reporter is protected even if information in the official proceeding later proves to be inaccurate. "Section 74, however, was designed precisely to protect the publisher of a fair and true report from liability for just such an error and to relieve it of any duty to expose the error through its own investigation." *Id.*

Here, it is not disputed that the NYPD is an entity officially empowered to investigate the underlying events at issue here. Moreover, the complaint does not set forth any facts to demonstrate that the defendants did not fairly or accurately report the facts as set forth by the NYPD. The fact that certain facts proved to be inaccurate does not change the outcome here.

## 2. False Light

Plaintiff's second cause of action asserts that defendants placed plaintiff in a "false light." However, "New York does not recognize a tort...for placing someone in a 'false light.'" *Cruz v Latin News Impacto Newspaper*, 216 AD2d 50, 51 (1<sup>st</sup> Dept 1995), quoting *Arrington v New York Times Co.*, 55 NY2d 433, 442 (1982) cert denied 459 US 1146 (1983); see *Sarwer v Conde Nast*

*Publications, Inc.*, 237 AD2d 191, 191 (1st Dept 1997). Therefore, this cause of action is dismissed.

### 3. Emotional Distress

Plaintiff's third cause of action, for intentional and reckless infliction of emotional distress, is also dismissed. "In order to establish intentional infliction of emotional distress, the plaintiff must prove four elements: (1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and injury; and (4) severe emotional distress." *Capellupo v Nassau Health Care Corp.*, \_\_\_ AD2d \_\_\_, \_\_\_ NYS2d \_\_\_, 2012 WL 2819354, \*4 (2d Dept 2012). The tort arises from conduct which 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". *Id.* (citations and internal quotation marks omitted).

Here, plaintiff has not alleged any conduct by any of the defendants which satisfies the standard for intentional infliction of emotional distress. Nor has plaintiff alleged any reckless conduct by defendants. At most, the complaint alleges that defendants published accounts of the incident which were based on

police reports that they reasonably believed to be accurate. The fact that the reports later proved to be inaccurate does not render defendants' conduct reckless, and plaintiff has not set forth any facts to demonstrate that defendants knew, or should have known, that the police reports were inaccurate, or that they had a duty to investigate the accuracy of the police reports. Therefore, this claim is dismissed.

#### 4. Punitive Damages and Preliminary Injunction

The complaint also seeks punitive damages and a preliminary injunction in the form of an order from the court requiring all defendants to publish a correction and an apology. Both of these requests are dismissed, in light of the dismissal of the complaint.

#### New York City Police Department - Motion Sequence 004

The NYPD moves to dismiss the complaint on the ground that, among other things, it is not a proper party to this action. It also states that, in any event, plaintiff failed to timely file a notice of claim.

##### 1. Proper Party

As a threshold matter, the NYPD argues that it is a mayoral agency, and, therefore, under the New York City Charter (Charter),

not a legal entity that is amenable to suit.

Section 396 of the Charter provides that "[a]ll actions and proceedings for the recovery of penalties for the violation of any law shall be brought in the name of the City of New York and not in that of any agency, except where otherwise provided by law." See *Funt v Human Resources Admin. of the City of N.Y.*, 68 AD3d 490, 490 (1<sup>st</sup> Dept 2009) (Human Resources Administration not a proper party); *Siino v Department of Educ. of City of N.Y.*, 44 AD3d 568, 568 (1<sup>st</sup> Dept 2007) (Department of Investigation not a proper party).

It has previously been held that the NYPD is not an entity amenable to suit. See *Verponi v City of New York*, 31 Misc 3d 1230(A) 2011 NY Slip Op 50908(U) (Sup Ct, Kings County 2011); *Aldas v City of New York*, 401422/2009 (Sup Ct, NY County), citing *Lauro v Charles*, 219 F3d 202, 205 n 2 (2d Cir 2000); see *Bailey v New York City Police Dept.*, 910 F Supp 116, 117 (ED NY 1996). Moreover, plaintiff puts forth no case law and cites to no statutes which provide otherwise. Therefore, this action is dismissed as against the NYPD.

## 2. Notice of Claim

The complaint states, in the caption, that this action was commenced against the NYPD, "c/o The City of New York." As set forth above, the NYPD is not a proper party. However, even if the

court were to construe the complaint as having been brought against the City of New York, the action would still be dismissed for failure to timely file a notice of claim.

General Municipal Law 50-e (1) (a) provides that:

In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation ... the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises.

A notice of claim must be timely filed in defamation cases. See e.g. *Hale v Scopac*, 74 AD3d 1906 (4<sup>th</sup> Dept 2010); *Matter of La Barbera v Town of Woodstock*, 29 AD3d 1054, 1057 (3d Dept 2006).

Here, the NYPD press releases were dated October 24, 2010 and the media reports were dated October 25<sup>th</sup>. As such, plaintiff's claim accrued at least as of October 25, 2010, and the notice of claim had to be filed in January of 2010. However, it is undisputed that plaintiff has not yet filed a notice of claim.

Nor has plaintiff timely sought leave to file a late notice of claim. "A petition for leave to serve a late notice of claim upon a public authority may not be made more than one year and 90 days after the happening of the event upon which the claim is based, unless the statute has been tolled." *Matter of Alvarez v New York City Hous. Auth.*, \_\_\_ AD3d \_\_\_, 2012 WL 2819322, \*1 (2d Dept 2012).

Here, plaintiff has not sought leave to file a late notice of claim and does not address the issue in its opposition to defendant's motion.

Accordingly, it is

ORDERED that the motion to dismiss the complaint by defendant CBS Radio, Inc. (sequence 001), is granted and the complaint is dismissed; and it is further

ORDERED that the motion to dismiss the complaint by defendants Dow Jones & Company, Inc., Daily News, L.P. and NYP Holdings, Inc. (sequence 002), is granted and the complaint is dismissed; and it is further

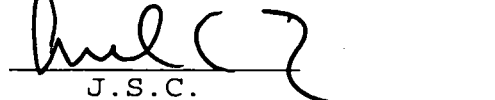
ORDERED that the motion to dismiss the complaint by defendant Time Warner Cable, Inc. (sequence 003), is granted and the complaint is dismissed; and it is further

ORDERED that the motion to dismiss the complaint by defendant New York City Police Department, sequence 004, is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the action with costs and disbursements as taxed by the Clerk.

DATED: 7/25/12

ENTER:



J.S.C.

HON. ANIL C. SINGH  
SUPREME COURT JUSTICE