

<b>Russian Am. Found., Inc. v Daily News, L.P.</b>
2012 NY Slip Op 33443(U)
December 17, 2012
Supreme Court, New York County
Docket Number: 151314/2012
Judge: Ellen M. Coin
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. ELLEN M. COIN

PRESENT: \_\_\_\_\_  
Justice

PART 63

Index Number : 151314/2012  
RUSSIAN AMERICAN FOUNDATION,  
vs.  
DAILY NEWS, L.P.  
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

MOTION IS DECIDED IN ACCORDANCE  
WITH THE ANNEXED DECISION  
AND ORDER.

*This constitutes the decision and order  
of the Court.*

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

Dated: 12/17/12

EA, J.S.C.  
HON. ELLEN M. COIN

- 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: CIVIL TERM: PART 63

----- X  
RUSSIAN AMERICAN FOUNDATION, INC.,  
MARINA KOVALYOV, and RINA KIRSHNER

Plaintiff,

Index Number 151314/2012  
Submission Date October 17, 2012  
Mot. Seq. No. 001  
DECISION AND ORDER

-against-

DAILY NEWS, L.P., ROBERT GEARTY,  
KEVIN CONVEY, and JOHN and/or  
JANE DOES 1-10,

Defendants.

----- X

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**Papers considered in review of this motion:**

<b>Papers</b>	<b>Numbered</b>
Notice of Motion with Attached Exhibits.....	1
Memorandum of Law in Support of Motion.....	2
Memorandum of Law in Opposition to Dismissal.....	3
Reply Memorandum of Law in Support of Motion.....	4

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**ELLEN M. COIN, J.:**

This defamation action arises out of headlines and articles published in the New York Daily News upon allegations contained in an FBI affidavit submitted in support of a search warrant in Federal Court. Defendants Daily News, L.P. (“Daily News”), Robert Gearty (“Gearty”), Kevin Convey (“Convey”) and John and/or Jane Does 1-10 now move for dismissal of the complaint of plaintiffs Russian American Foundation, Inc. (“RAF”), Marina Kovalyov

(“Kovalyov”) and Rina Kirshner (“Kirshner”) pursuant to CPLR § 3211(a)(1) and CPLR § 3211(a)(7). Defendants argue that the complaint fails to state a cause of action as a matter of law, because (1) the disputed statements in the article are absolutely privileged as fair reports of a judicial proceeding; (2) the editorial headline is non-actionable because it is not defamatory and constitutes non-actionable opinion; and (3) Convey was not negligently hired as there was no notice to Daily News of his alleged proclivity for defaming others.

The underlying action concerns two publications: (1) a news article defendants published on October 2, 2011, allegedly depicting plaintiffs as targets in an FBI investigation of the bribing of Senator Carl Kruger (“Kruger”) by local businesses in exchange for favors with permitting, licensing and government grants; and (2) a website headline published July 24, 2011, which allegedly associates plaintiffs with a rigged bidding scheme for New York City grants and contracts. (Compl. pg. 3).

Plaintiffs’ complaint includes nine causes of action. The first cause of action alleges that the October 2, 2011, headline in the Daily News Print Edition was false as it pertains to plaintiff Kovalyov. The complaint alleges that Kovalyov did not, either personally or in her capacity as an officer of RAF or Firebird Productions, Inc. (“Firebird”), make any payments to any firm associated with Kruger other than for actual and legitimate services, and that there were no FBI documents showing that she did. (Compl. paras. 52-55). The headline stated “FBI documents show many payments to B’kln pol’s shell firms” and is accompanied by photographs of Kovalyov, Kruger and Alex Forkosh. (Compl. paras. 16-17). Kovalyov alleges that this headline was defamatory and injurious to her reputation in that it accused her of complicity in bribery of a public official and alleged that she was the subject of an FBI investigation. (Compl.

paras. 56-57). She also alleges that the headline was not an accurate or fair and true report of any official judicial proceeding, and that defendants were acting with malice or reckless disregard for the truth by focusing on plaintiffs, instead of the other non-Russian American individuals and companies listed in the FBI affidavit. (Compl. para. 59). She contends that these statements resulted in harm to her reputation and standing in the community, as well as personal humiliation and mental anguish. (Compl. para. 60). The second cause of action repeats the aforementioned allegations for the same headline in the Daily News Digital Edition. (Compl. paras. 61-70).

The third and fourth causes of action allege that the caption published in the Daily News Print and Digital Edition alongside the photograph of Kovalyov was defamatory for the reasons listed in the first cause of action. (Compl. paras. 24, 71 -84). The caption alongside the photograph of Kovalyov states “Marina Kovalyov, of Firebird Productions, got \$50,000 in taxpayer grants from Kruger in 2007 & 2008.” (Compl. paras. 24-25).

The fifth cause of action alleges that statements and examples published in the October 2, 2011 article in the Daily News Print Edition were defamatory of plaintiffs Kirshner, Kovalyov and RAF. The relevant statements in the articles are: “Patel is part of a growing parade of locals the FBI believes bribed Kruger to win his political largesse, newly released court papers show”; “[t]he group includes a Russian arts group seeking taxpayer money....”; “[a]ll made payments to shell companies affiliated with Kruger, the longtime Brooklyn Democrat who faces federal charges of exacting bribes to grant political favors, court papers said”; “[a]s his case progresses, more evidence has emerged that paints a broader picture of his malfeasance, prosecutors said.” (Compl. para. 30). The examples are: “[a] Russian arts group in Manhattan got \$50,000 in taxpayer grants from Kruger in 2007 and 2008 while its affiliate made regular payments to

Olympian, . . . the FBI said”; “Marina Kovalyov and her daughter, Rina Kirshner, run the Russian American Arts Foundation, which got the taxpayer money, and Firebird Productions, which made \$199,000 in payments between 2006 and last year”; “I’ do not talk to reporters and my mother does not talk to reporter [sic],’ Kirshner said before hanging up.”; “Firebird’s lawyer, Maurice Sercarz, would say only that the company had a legitimate business relationship with Olympian [f]or a number of years.” (Compl. para. 30; emphasis deleted).

Plaintiffs allege that defendants’ suggestion of complicity in bribery of a public official and involvement in an FBI investigation were defamatory and detrimental to their reputations and standing in the community. (Compl. paras. 86-88). Plaintiffs assert that these statements are false, that RAF did not make any payments to Kruger, they were not investigated by the FBI, and there were no documents implicating plaintiffs in Kruger’s crimes. (Compl. paras. 89-92). Plaintiffs further allege that the statements were not a substantially accurate or fair and true report of any official judicial proceeding, and that defendants acted with malice and/or reckless disregard for the truth and/or gross negligence, as evidenced by their focus on plaintiffs rather than on non-Russian-American individuals and entities mentioned in the FBI affidavit. (Compl. para. 94). The complaint further alleges that as a result, Kirshner and Kovalyov suffered harm to their reputations and standing in the community as well as personal humiliation and mental anguish, and that RAF suffered serious impairment in its ability to raise funds, relationship with elected officials, ability to conduct normal business activity and ability to participate in other economic opportunities. (Compl. paras. 95-96). The sixth cause of action repeats the above allegations regarding the same statements and examples published in the Daily News Digital Edition. (Compl. paras. 97-109).

The seventh cause of action refers to the headline and statements in the electronic version of the October 2 article at nydailynews.com: “State Sen. Carl Kruger’s list of bribes for political favors continues to grow: FBI” (headline) and “FBI records show that State Senator Carl Kruger accepted payment to various shell companies in exchange for political favors” (caption). (Compl. paras. 30-32; 111).

The eighth cause of action alleges that the website heading posted on July 24, 2011 on nydailynews.com (“Editorial: The bids are rigged”) which could be found upon clicking on or searching for RAF, is defamatory and injurious to RAF’s reputation, suggesting that RAF participated in bid-rigging schemes involving the award of municipal contracts or grants. (Compl. paras. 42-43, 45, 124). The complaint alleges that the website headline was false and was not a substantially accurate or fair and true report of any official government or judicial proceeding. Further, it alleges that defendants acted with malice and/or reckless disregard for the truth as evidenced by their focus on RAF rather than on other entities that also received grants. (Compl. paras. 125-127).

The ninth cause of action alleges that Daily News was grossly negligent in hiring defendant Convey as its Editor-in-Chief, on the basis of his allegedly well known history of publishing false and defamatory matter in his prior employment by the Boston Herald. (Compl. para. 129).

On this motion defendants argue that (1) they qualify for the “fair and true report” privilege under Civil Rights Law § 74; (2) the bid-rigging headline is not actionable, as RAF is not named in the headline or accused of any wrongdoing in the article; and (3) the negligent hiring claim is frivolous because the complaint fails to allege facts that could constitute notice to

Daily News of Convey's proclivity towards defamation, and the claim is duplicative of their libel claim.

### **Discussion**

On a motion to dismiss a claim for failure to state a cause of action pursuant to CPLR § 3211(a)(7) the pleadings must be afforded a liberal construction (CPLR § 3026), the facts alleged must be accepted as true, the claimant must be accorded the benefit of every favorable inference and the court must determine only whether the facts as alleged fit within any cognizable legal theory. (CPLR § 3211; *see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see Morone v Morone*, 50 NY2d 481, 484 [1980]). CPLR § 3013 provides that "statements in a pleading shall be sufficiently particular to give...notice of the transactions, occurrences...and the material elements of each cause of action." Dismissing a claim pursuant to CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the claim as a matter of law. (CPLR § 3211(a)(1); *see Leon v Martinez*, 84 NY2d 83, 88 [1994]).

Plaintiffs' first through seventh causes of action concern the statements, caption and headline of the allegedly defamatory article about Kruger's bribery scheme. The elements of a cause of action for defamation brought by a private individual are "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se." (*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]; Restatement (Second) of Torts § 558). Where the content of the article is arguably within the sphere of legitimate public concern, warranting public exposition, albeit directed at private individuals, falsity is added as a necessary element, and the level of requisite fault is elevated to either actual malice or reckless disregard of

the truth “without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.” (*Chapadeau v Utica Observer-Dispatch, Inc.*, 38 NY2d 196, 199 [1975]; *see also Huggins v Moore*, 94 NY2d 296, 303 [1999]).

With respect to publications reporting on official government proceedings, members of the news media, among others, receive an additional layer of protection from defamation claims in the form of an absolute privilege. This privilege prohibits a civil action 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” (Civil Rights Law § 74).

Section 74 mandates dismissal of the instant complaint, because the subject publications expressly referenced relevant criminal proceedings. ( *See Cholowsky v Civiletti*, 69 AD3d 110, 114 [2<sup>nd</sup> Dept 2009]; *see also Lacher v Engel*, 33 AD3d 10, 17 [1st Dept 2006] ). The FBI affidavit for a search warrant falls within the section 74 privilege as it is part of an application for a court order. (*Lacher*, 33 AD3d at 17 [“[c]omments that essentially summarize or restate the allegations of a pleading filed in an action are the type of statements that fall within section 74’s privilege”]; *see also Bernacchi v County of Suffolk*, 2010 NY Slip Op 33164U, \* 10 [Sup Ct, Suffolk County 2010][report of arrest]). The headlines and caption that are the subject of the first through fourth causes of action and the statements forming the basis of the fifth and sixth causes of action are substantially similar to those in the FBI affidavit and are thus protected by section 74. As compared to the FBI affidavit, the headlines are a fair index of the article when read and evaluated in conjunction with the text they precede. (Civil Rights Law § 74; *see Mondello v Newsday, Inc.*, 6 AD3d 586, 587 [2d Dept 2004]).

The statements are also “fair and true” within the meaning of section 74, as they are a substantially accurate report of the contents of the FBI affidavit. (*See Holy Spirit Ass’n for Unification of World Christianity v New York Times Co.*, 49 NY2d 63, 67 [1979]). Both the statements and caption in the Daily News article and the information in the FBI affidavit leave the reader with substantially the same information: Kovalyov’s and Kirshner’s Firebird gave \$199,000.00 to Olympian , a company which the FBI believed had no legitimate purpose, and that RAF, also run by Kovalyov and Kirshner, received \$50,000.00 in taxpayer grants from Kruger. (Exhs. B, C to the Carroll Affirmation; FBI affidavit pg. 60 para. 69, pgs. 64-65 para. 69[o]). Any minor discrepancies between the FBI affidavit and the subject publications do not remove the statements from the section 74 privilege, since as “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.” (*Briarcliff Lodge Hotel, Inc. v Citizen-Sentinel Publs.*, 260 NY 106, 118 [1932]).

Plaintiffs’ argument that the Daily News article attributes more serious conduct to plaintiffs than the FBI affidavit suggests is unavailing. “The case law has established a liberal interpretation of the ‘fair and true report’ standard of Civil Rights Law. § 74 so as to provide broad protection to news accounts of judicial or other official proceedings.” (Cholowski, 69 AD3d at 114). Plaintiff’s citations are distinct from the instant case, since the defamatory statements in those cases suggested that the misconduct attributed to the plaintiffs extended either temporally beyond the scope of the allegations in the proceeding, (*Zu Guo Yang v Shanghai Café Inc.*, 2012 WL 398641, \*8 [SDNY 2012]), or created the impression that the alleged wrongdoing was more extensive than that contained in the action (*Pisani v Staten Island*

*Univ. Hosp.*, 440 F Supp 2d 168, 177-78 [2006]). Plaintiffs assert that the statement, “part of a growing parade of locals the FBI believes bribed Kruger to win his political largess,” (Compl. para. 30), alleges more serious conduct by RAF than that alleged in the FBI affidavit. This argument cannot prevail, since the FBI affidavit alleged that Firebird made payments to Olympian, a company with no legitimate purpose, that Kruger granted member items to RAF, and that Firebird and RAF are run by Kovalyov and Kirshner. These statements are substantially similar and give the same impression to an ordinary reader as the article’s statement asserting that locals bribed Kruger in return for political favors. (FBI affidavit pg. 60 para. 69, pgs. 64-65 para. 69[o]; see *Daniel Goldreyer, Ltd. v Van de Wetering*, 217 AD2d 434, 435-36 [1st Dept 1995] [internal citations omitted] [statement must be “substantially accurate” and the test is whether the published account of the proceeding would have a different effect on the reader’s mind than the actual truth, if published]).

Plaintiffs also argue that the article suggests that the investigation was ongoing and extended beyond the information contained in the FBI affidavit, thereby alleging more serious conduct beyond its scope. However, the statements complained of (“growing parade of locals,” “more evidence has emerged that paints a broader picture of his malfeasance,” and “[m]uch of this shows up in an FBI Affidavit that surfaced in court only last month”) do not suggest more serious conduct by the plaintiffs, but rather more widespread and serious misconduct by Kruger, which would not leave a reasonable reader with a different impression than if he were to read the FBI affidavit. (Compl. para. 30; see *Daniel Goldreyer, Ltd. v Van de Wetering*, 217 AD2d 434, 435-36 [1st Dept 1995]). Moreover, plaintiffs’ contention that they were maliciously targeted as Russian-American individuals by defendants because of a discriminatory animus does not affect

or defeat the absolute privilege provided by section 74. (Compl. para. 94; *Panghat v New York State Div. of Human Rights*, 89 AD3d 597, 597-98 [1st Dept 2011]; see also *Saleh v New York Post*, 78 AD3d 1149, 1151 [2d Dept 2010], quoting *Glendora v Gannett Suburban Newspapers*, 201 AD2d 620 [2d Dept 1994] [“privilege afforded by the statute is absolute ‘and is not defeated by the presence of malice or bad faith.’”]).

Thus, the first through seventh causes of action are dismissed pursuant to CPLR § 3211(a)(7), because the subject statements and headlines are privileged pursuant to Civil Rights Law § 74.

The eighth cause of action, asserting that the editorial bid rigging headline that appears on the Daily News website is libelous as it pertains to RAF, fails to state a prima facie case.

“Defamatory head lines are actionable though the matter following is not, unless they fairly indicate the substance of the matter to which they refer, and ... unless they are a fair index of the matter contained in a truthful report.” (*Schermerhorn v Rosenberg*, 73 AD2d 276, 286 [2d Dept 1980] quoting *Lawyers' Co-op Pub. Co. v West Pub. Co.*, 32 App Div 585, 590 [4th Dept 1898]). To determine whether a headline is a fair index of the article with which it appears, both must be considered together. (*Cole Fischer Rogow, Inc. v Carl Ally, Inc.*, 29 AD2d 423, 426 [1st Dept 1968], *affd* 25 NY2d 943 [1969]). Plaintiffs have conceded that “[t]he July 24, 2011 Editorial does not itself accuse RAF of any wrongdoing” and allege only that the bid rigging headline is defamatory as to RAF. (Memorandum of Law in Opposition to Dismissal at 10 n. 6).

Plaintiffs’ contention that the use of bid-rigging in the headline is improper and therefore is not a fair index of the contents of the article is insufficient to state a defamation cause of action. The headline, “Editorials: The bids are rigged,” must be considered with the subheading

appearing in smaller print beneath it, which states, “[w]hen city government puts contracts or grants out to bid, New Yorkers have every right to expect that all qualified applicants will have the same chance of winning an award.” This sub-headline clarifies the meaning of the headline and gives it a much more restricted meaning, correcting any misunderstandings from the use of the words “bid” and “rigged” and making the headline a fair index of the article’s contents.

(*Gunduz v New York Post Co., Inc.*, 188 AD2d 294, 294-95 [1st Dept 1992]; see *Gambuzza v Time, Inc.*, 18 AD2d 351, 353 [1st Dept 1963]). Viewing plaintiff’s contentions as correct, that a reader may not go beyond the search page to read the article, the headline with subheading is not actionable as it is a fair index of the article it precedes.

Even assuming, *arguendo*, that the headline were not a fair index of the article, the headline would not be actionable since it does not name RAF. A headline that does not directly name plaintiff is not independently actionable. (*Trudeau v Plattsburgh Publ. Co.*, 11 AD2d 852, 852 [3rd Dept 1960]; *White v Berkshire-Hathaway, Inc.*, 10 Misc3d 254, 256 [Sup Ct, Erie County 2005]; *Chaiken v VV Publishing Corp.*, 907 F Supp 689, 698 [SDNY 1995], *affd* 119 F3d 1018 [2d Cir 1997], *cert. denied* 522 US 1149 [1998]). Accordingly the eighth cause of action is dismissed pursuant to CPLR § 3211(a)(7).

Plaintiffs’ ninth cause of action asserted against the Daily News for the negligent hiring of defendant Convey also fails. Liability for negligent hiring arises from the employer “having placed the employee in a position to cause foreseeable harm, harm which the injured party most probably would have been spared had the employer taken reasonable care in making its decision concerning the hiring and retention of the employee.” (*Sheila C. v Povich*, 11 AD3d 120, 129 [1st Dept. 2004]). The “underlying requirement in actions for negligent [hiring] is that the


employee is individually liable for a tort or guilty of a claimed wrong against a third person, who then seeks recovery against the employer.” (*Primeau v Town of Amherst*, 303 AD2d 1035, 1036 [4th Dept 2003] [internal citation and quotation omitted]). Since this Court has determined to dismiss the underlying tort causes of action against Convey, the negligent hiring claims against Daily News must be dismissed as academic. (*Cotter v Summit Sec. Servs.*, 14 AD3d 475, 476 [2d Dept 2005] [dismissing negligent hiring claim when there was no evidence the employee committed the tort which the negligent hiring claim was premised upon]; *Perez v State*, 33 Misc3d 1221[A] \*10 [New York Ct Cl, 2011]; *Rodriguez v New York City Trans. Auth.*, 33 Misc3d 1206[A] \*4 [Sup Ct, New York County 2011]).

In accordance with the foregoing, it is hereby

ORDERED and ADJUDGED that defendants’ motion to dismiss pursuant to CPLR § 3211(a)(7) is granted in its entirety and this action is hereby dismissed with prejudice.

This constitutes the decision and order of the Court.

Dated: December 17, 2012  
New York, New York

ENTER:  
  
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 Ellen M. Coin, A.J.S.C.