

Stepanov v Down Jones & Co., Inc.

2013 NY Slip Op 33584(U)

April 18, 2013

Supreme Court, New York County

Docket Number: 150534/2012

Judge: Ellen M. Coin

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

-----X
MAXIM A. STEPANOV and MIDLAND,
CONSULT (CYPRUS) LTD.,

Index Number.: 150534/2012
Submission Date: November 7, 2012
Motion Sequence: 001

Plaintiffs,

-against-

DECISION and ORDER

DOW JONES & COMPANY, INC.,

Defendants.
-----X

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Papers considered in review of this motion to dismiss:

Papers	Numbered
Notice of Motion – Affirmation, Exhibits.....	<u>1</u>
Memorandum of Law in Support.....	<u>2</u>
Memorandum of Law in Opposition.....	<u>3</u>
Reply Affidavit in Support.....	<u>4</u>
Reply Memorandum of Law in Support.....	<u>5</u>

ELLEN M. COIN, J.:

Defendant Dow Jones & Company, Inc. (“Dow Jones”) moves to dismiss the complaint of plaintiffs Maxim A. Stepanov (“Stepanov”) and Midland Consult (Cyprus) Ltd. (“Midland Consult”) pursuant to CPLR § 3211(a)(1) and CPLR § 3211(a)(7), or in the alternative moves for summary judgment pursuant to CPLR 3212.

The underlying action concerns a news article run by Barron’s, a weekly newspaper

covering financial information and market developments, published by defendant, entitled *Crime and Punishment in Putin's Russia* by Bill Alpert on April 16, 2011 ("the article"). (Compl. para. 3). The article discussed the largest tax fraud in Russian history of \$230 million that involved the Moscow tax bureau, a group posing as the hedge-fund Hermitage Capital ("Hermitage"), and other entities involved in illegal activity including money-laundering. (Compl. para. 5). The article detailed the efforts of Hermitage and one of its lawyers, Sergei Magnitsky, to uncover the elaborate scheme involving Olga G. Stepanova ("Stepanova"), the head of the Moscow tax bureau, and money laundering efforts through Swiss bank accounts.

At issue in this case are several statements in the article concerning plaintiffs. Specifically, plaintiffs allege that the statement, "[n]ested inside the shell of Bristoll Export – like a Russian doll – was yet another shell company [Midland New Zealand] whose directors work at Midland Consult, a Russia-focused representative of offshore banks founded by a former Russian diplomat named Maxim A. Stepanov in Cyprus" is defamatory to plaintiffs when viewed in context of the article as a whole. The article stated that Bristoll Export had transferred \$3 million to Credit Suisse bank accounts that were linked to Stepanova and the tax fraud scheme. The article also mentioned that Bristoll Export was formed by GT Group, which had also formed other shell companies that had been used to launder Mexican drug cartel money and commission a plane that carried anti-aircraft missiles and rocket launchers from North Korea.

Plaintiffs contend that the article was false, disparaging, derogatory, and misleading to state or imply that Midland Consult was doing any business with GT Group in 2010; that Midland Consult was involved with companies connected to Mexican drug cartel money laundering or weapons shipments from North Korea; that Bristoll Export or its subsidiaries had

directors who work at Midland Consult; and that Stepanov was a diplomat because he served in the government long before Vladimir Putin assumed a leadership role in the Russian government. (Compl. paras. 25-28). After the article was published, plaintiffs sent a cease and desist letter to defendant demanding that defendant remove the article from all websites it controls but defendant refused. (Compl. para. 8).

Defendant argues that article is not defamatory as to plaintiffs. Rather, defendant argues that the article is substantially true in stating that plaintiffs had a connection to Bristoll Export. Defendant also argues that the statements at issue were either not “of and concerning” plaintiff or not capable of having a defamatory meaning, and therefore cannot support a cause of action for defamation. Alternatively, defendant argues that the statements are privileged under Civil Rights Law § 74 as a fair report of official proceedings in Switzerland.

In response, plaintiffs argue that the statements in the article concerning plaintiffs are defamatory per se when viewed in context or, in the alternative, defamatory by implication. In addition, plaintiffs argue that Civil Rights Law § 74 is inapplicable in this case. While plaintiffs do not allege that any statements were explicitly inaccurate, plaintiffs argue that the article does not include statements that would eliminate an inference that plaintiffs were involved with certain people and companies that were engaged in illegal activity. (Mem. in Opp. 1-2).

Defendant argues that under the First Amendment, publishers can only be held responsible for what they write, rather than what they do not write, and nothing in the article implied that plaintiffs were responsible for the wrongdoing of GT Group, Stepanova, or anyone else. In addition, defendant argues that its decision to include plaintiffs in the article is a “matter of editorial judgment in which the courts, and juries, have no proper function.” Finally,

defendant maintains that Civil Rights Law § 74 does apply here and the challenged statements are privileged from suit.

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]).

Civil Rights Law § 74

Members of the news media, among others, receive protection from defamation claims in the form of an absolute privilege with respect to publications reporting on official government proceedings. 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). In addition, minor discrepancies between what occurs in court and what is actually reported will still be characterized as “fair and true” within the meaning of the statute as long as the substance of the article is substantially accurate. (*Holy*

Spirit Ass'n for Unification of World Christianity v New York Times, Co., 49 NY2d 63, 67 [1979]).

However, this case presents a unique situation in that defendant's reliance on Civil Rights Law § 74 rests on a complaint (the "Hermitage Complaint") submitted to a *foreign* governmental entity, the Attorney General of Switzerland. As a preliminary matter, it is questionable that a complaint submitted to an attorney general (whether foreign or domestic), without more, constitutes "any judicial proceeding, legislative proceeding or other official proceeding" to which the privilege applies.¹ While the article reports on the Hermitage Complaint that outlines the alleged money laundering scheme relating to the tax fraud, the Hermitage Complaint standing alone is not a judicial, legislative, or official *proceeding*. Regardless, the fact that the Hermitage Complaint was submitted to a foreign governmental body distinguishes this case from cases involving U.S. judicial, legislative, or other official proceedings.

Although case law concerning whether the privilege should apply to a report on a foreign proceeding is sparse, the Fourth Circuit has stated that policy concerns militate against applying the privilege to foreign government activities. (*See Lee v Dong-A Ilbo*, 849 F2d 876, 879 [4th Cir 1988] [policy rationales supporting official report privilege –agency, public supervision, and the public's right to know – are not as persuasive in the context of foreign government activities]). In *Lee*, the court held that the official report privilege did not extend to defendants' republication of a Korean intelligence agency's report, widely publicized in South Korea, naming

¹ The Court notes that *Geiger v Town of Greece*, 2008 U.S. Dist. LEXIS 21190 [WDNY 2007] is distinguishable. In *Geiger*, the court applied the privilege to a newspaper report of the New York Attorney General's *own* investigation and the report mirrored a press release by the Attorney General that was released the day before the report was published. Here defendant relies only on the complaint of Hermitage submitted to the Attorney General of Switzerland, rather than upon any official conduct or investigation of the Attorney General himself. The fact that certain Swiss bank accounts were frozen as a result of the complaint is immaterial since Swiss law automatically triggers the freezing of accounts based on allegations of money laundering. (*See Mem. In Supp.* 6 n.8).

plaintiff as a spy. The court found that the agency rationale for extending the privilege was weak because the information was available only in Korea and not readily available to those who chose to inform themselves. Thus, the defendants were not acting as mere agents by reporting it. (*Id.*) In addition, the public supervision rationale applied only indirectly because the American public cannot influence the Korean government directly. Second, the court noted that the relationship we share with our government is special in that it is familiar, open, reliable and accountable, while foreign governments, like nongovernmental sources of information, are not necessarily so. (*Id.*) Finally, the court noted that “extending the privilege in a piecemeal fashion would be extremely difficult...[and] [r]easonable persons could differ as to which governments, besides our own, exhibit the openness and reliability that warrant an extension of the privilege.” (*Id.*) Thus, the court refused to extend the privilege.

For reasons similar to those cited by the Fourth Circuit, the Court denies extending Civil Rights Law § 74 to the present case.² Here, as in *Lee*, the agency rationale for extending the privilege is weak because the information in the Hermitage Complaint was only available to Swiss authorities and not readily available to those who chose to inform themselves. Thus, defendant was not simply acting as an agent by reporting on it. The supervision rationale is also weak because the American public cannot influence the Swiss government directly. Finally, the Court declines to decide whether the Swiss government “exhibit[s] the openness and reliability that warrant an extension of the privilege.”

Defendant’s argument that the article is comparable to reports based solely on pleadings

² *Daniel Goldreyer, Ltd. v Van de Wetering*, 217 AD2d 434, 435 [1st Dept 1995] [applying § 74 privilege to report of investigation by Dutch Ministry of Justice, cited by defendant for the proposition that § 74 applies to foreign investigations, is distinguishable. The report in *Daniel* was based on an official investigation and hearings by the Dutch Ministry of Justice, more analogous to the situation in *Geiger* where the report was based on an actual investigation by an agency.

filed in a U.S. court is unavailing. Filing a summons and complaint *commences* an action in court (*See* CPLR 304), while a complaint submitted to an Attorney General may or may not commence an investigation. More importantly, procedural rules and pleading requirements guard against the filing of frivolous or groundless complaints, while there is no indication that complaints submitted to the Attorney General of Switzerland are subject to such safeguards.³ Thus, whether the Hermitage Complaint was submitted with good intentions by reputable attorneys in this particular instance is immaterial. Finally, even if the report is based on a public issue, “the fact that the defamatory expression concerned a public issue should not [automatically] entitle the defendant to the common law protection of the official reports privilege.” (*Lee*, 849 F2d at 879). Therefore, the court finds that Civil Rights Law § 74 does not apply here and the article is not entitled to an absolute privilege.

Defamation

As an initial matter, “[t]he status of the plaintiff must be established before the appropriate standard of care can be determined.” (*Fairley v Peekskill Star Corp.*, 83 AD2d 294, 298 [2nd Dept 1981]). The Court notes that neither party discusses plaintiffs’ statuses, or whether the article is of a public or private concern. Because “[t]he burden of proof with respect to the status of the plaintiff is on the media defendant” (*Fairley*, 83 AD2d at 298), and the Court must afford the non-moving party all reasonable inferences, the Court will consider plaintiffs as private figures.

³ In this regard, this case is similar to the situation in *Abakporo v Sahara Reporters* (2011 U.S. Dist. LEXIS 109056 [EDNY 2011]), where the court held that § 74 did not apply to a report based on petitions submitted to two Nigerian crimes and corruption commissions. The court in *Abakporo* found that a private request for agency action, standing alone, was not an “official proceeding” under § 74. It noted that a petition to these agencies differed from a civil complaint filed in the U.S. in two significant respects: (1) a petition does not necessarily launch a formal investigation and (2) Federal Rule of Civil Procedure 11 authorizes sanctions against a party or attorney who submits a civil complaint containing factual allegations lacking a reasonable prospect of evidentiary support, while there was no indication that similar sanctions apply to groundless petitions submitted to these agencies.

With respect to whether the article is of a public or private concern, “allegedly defamatory statements ‘can only be viewed in the context of the writing as a whole, and not as disembodied words, phrases or sentences.’ [C]ourts must examine their ‘content, form, and context.’” (*Huggins v Moore*, 94 NY2d 296, 302 [1999] [citations omitted]). In addition, “[a]bsent clear abuse, the courts will not second-guess editorial decisions as to what constitutes matters of genuine public concern. [T]here is no ‘abuse of editorial discretion’ so long as a published report can be ‘fairly considered as relating to any matter of political, social, or other concern of the community.’” (*Id.* at 303 [citations omitted]). Here the Court finds that the article, in describing the largest tax fraud scheme in Russian history that garnered worldwide attention, related to a political or social concern and thus is a matter of public concern. Therefore, for purposes of this motion the Court considers the article relating to a public concern.

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). “A statement that tends to injure another in his or her trade, business or profession is defamatory per se.” (*Fuji Photo Film U.S.A., Inc. v McNulty*, 669 F Supp 2d 405, 411 [SDNY 2009] [internal quotation marks omitted]). A writing constitutes libel per se “‘if it tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society.’” (*Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 379, *cert denied* 434 US 969 [1977] [citations omitted]). With respect to special harm,

general claims of economic harm are insufficient. Plaintiff must specifically allege actual concrete losses and a causal link between such losses and defendant's statements. (*See Emergency Enclosures, Inc. v National Fire Adj. Co., Inc.*, 68 AD3d 1658, 1660 [4th Dept 2009]). Whether a statement can be found to be defamatory is a question of law for the court to decide. (*See Aronson v Wiersma*, 65 NY2d 592, 593-94 [1985]; *see also Silsdorf v Levine*, 59 NY2d 8, 12 [1983]). In addition, "the words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction." (*Dillon*, 261 AD2d at 38).

Where the content of the article is arguably within the sphere of legitimate public concern, warranting public exposition, albeit directed at private individuals, the plaintiff must establish, by a preponderance of the evidence, 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." (*Chapadeau v Utica Observer-Dispatch, Inc.*, 38 NY2d 196, 199 [1975]; *see also Huggins v Moore*, 94 NY2d at 302).

The Court finds that the alleged defamatory statements in the article do not constitute defamation per se. Plaintiffs summarize their arguments as follows:

The article stated that Plaintiffs were connected to Bristoll Export, a New Zealand corporation, which allegedly made a suspicious money transfer, *but the article did not explain that there was no connection between Plaintiffs and Bristoll Export at the time of the money transfer.*

The article stated that employees of Plaintiff Midland Consult are directors of a company "nested inside the shell of Bristoll Export," *but the article did not state that the deposit of Bristoll Export funds to Credit Suisse, referred to in the article, took place before anyone affiliated with Plaintiffs had any management role with Bristoll Export or its affiliate.*

The article, about corruption in Vladimir Putin's Russia, stated that Plaintiff Stepanov was "a former Russian diplomat" *but fails to mention that he left government service long before Mr. Putin came to power.*

The article makes serious allegations against other persons named Stepanov, *i.e.*, Olga and her husband Vladlen, *but nowhere discloses that Plaintiff Maxim Stepanov is not related to them.* (emphasis added)

(Mem. In. Opp. 1-2). Plaintiffs do not argue that the above statements concerning plaintiffs are expressly false and on their face, expose plaintiffs to "public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society" that would constitute defamation per se. (*Rinaldi*, 42 NY2d at 379). Indeed, none of the express statements on their face can be construed as having a defamatory meaning that injures plaintiffs in their trade business or profession. (*See Fuji Photo Film U.S.A., Inc.*, 669 F Supp 2d at 411). Instead, each statement depends upon other allegedly material omitted facts, or depends upon inferences or suggestions in order to be defamatory. Because the express statements are not capable of a defamatory meaning, plaintiffs have failed to state a claim for defamation per se.

However, plaintiffs alternatively argue that the statements are defamatory by implication. "Defamation by implication is premised not on direct statements but on false suggestions, impressions and implications arising from otherwise truthful statements." (*Biro v Condé Nast*, 883 F Supp 2d 441, 464 [SDNY 2012] [citing *Armstrong v Simon & Schuster*, 85 NY2d 373 [1995] and *Herbert v Lando*, 781 F2d 298, 307 [2nd Cir 1986] [quotations omitted]]). Although the Second Circuit in *Biro* acknowledged that neither the New York Court of Appeals nor the Second Circuit has established the standard to be applied on a motion to dismiss a defamatory

implication claim, the court noted that several other Courts of Appeals have “express[ed] skepticism of a claim for defamation based on the omission of facts that may have cast the plaintiff in a different, more positive light, but would not otherwise render the expressed statements untrue.” (*Id.*) Thus, the *Biro* court adopted the Fourth Circuit’s standard in *Chapin v Knight-Ridder, Inc.* (993 F2d 1087, 1092 [4th Cir 1993]) for a defamation by implication claim that requires “an ‘especially rigorous showing’ that (1) the language may be reasonably read to impart the false innuendo, and (2) the author intends or endorses the inference.” (*Biro*, 883 F Supp 2d at 466).

Here plaintiffs argue that when viewed in the context of the whole article, the statements at issue suggest or imply that they were involved in the tax fraud scheme and other illegal activity. However, the Court finds that the language of the article cannot reasonably be read to impart such false innuendos and plaintiffs have failed to make a rigorous showing that defendant intended or endorsed such inferences. Therefore, plaintiffs’ argument that the statements are defamatory by implication also fails.

Plaintiffs allege that the article connects Stepanov to Vladimir Putin and the tax fraud scheme by describing Stepanov as a “former Russian diplomat.” But plaintiffs do not contest the fact that Stepanov is indeed a former Russian diplomat. Accurately describing someone as a former Russian diplomat is not, in and of itself, susceptible of a defamatory meaning. Thus, even though the context of the article related to the largest Russian tax fraud scheme in history, describing Stepanov as a former Russian diplomat is a neutral description that cannot reasonably be read to impart the false innuendo that he was necessarily involved in the tax fraud scheme.

Plaintiffs also allege that the article imparts the false innuendo that Stepanov was related

to Olga Stepanova and therefore was involved in the tax fraud scheme. But the only evidence of the false innuendo that Stepanov is related to Olga Stepanova is the fact that they share the same last name. However, plaintiffs' counsel even concedes that "Stepanov" is a very common last name in Russia, comparable to "Smith" in the United States. (Ex. F at 2, attached to Affirmation of Laura R. Handman dated May 4, 2012). The lone fact that Stepanov and Olga Stepanova share a common last name is too attenuated to support the implication that Stepanov is related Olga Stepanova and therefore was involved in the tax fraud scheme. As the First Department noted:

[t]o hold that a possible omission . . . by a reporter may be deemed defamatory would place upon the press the onerous and unreasonable burden of having to ascertain, whenever a news story is published, if something might conceivably have been left out which could be subject to misconception. . . . Whether or not a particular article constitutes unbalanced reporting is essentially a matter involving editorial judgment and is not actionable.

(*Biro*, 883 F Supp 2d at 466 [quoting *Sprecher v Dow Jones & Co., Inc.*, 88 AD2d 550, 551 [1st Dept 1982], *aff'd*, 58 NY2d 862 [1983]]). Thus, the Court finds that defendant cannot be held liable for its omission that Stepanov was not related to Stepanova. Moreover, there is no indication that defendant intended or endorsed an inference that they were in fact related.

Finally, plaintiffs allege that the two statements that connect plaintiffs to Bristoll Export falsely imply that plaintiffs were involved in the tax fraud scheme and other illegal activity. Plaintiffs argue that since the article stated Bristoll Export transferred money to a Credit Suisse bank account that was allegedly involved in the tax fraud scheme, the article implies that plaintiffs were also involved in the scheme because of their connection to Bristoll Export. In addition, plaintiffs argue that because Bristoll Export was formed by GT Group, the article also implies that plaintiffs were connected to criminal activity of other shell companies formed by GT

the statements in the article to the allegedly false implications that plaintiffs proffer.

First, an ordinary reader could not possibly connect plaintiffs to the criminal activity of other shell companies formed by GT Group, simply because plaintiffs had a connection to one shell company that GT Group formed, Bristoll Export. The article states that GT Group is a company-formation agency. But there is no indication in the article that shell companies formed by GT Group have any relationship with each other once they are bought by others. Thus, the language in the article cannot reasonably be read to impart the false innuendo that plaintiffs, having a connection to Bristoll Export, had anything to do with criminal activity of other shell companies formed by GT Group.

Similarly, an ordinary reader could not reasonably infer simply because plaintiffs had a connection to a shell company “nested inside” Bristoll Export, that plaintiffs were therefore involved in the alleged money laundering efforts of Bristoll Export. The article does not suggest or imply that plaintiffs had any control or influence over Bristoll Export that could lead an ordinary reader to infer that plaintiffs were involved in the tax fraud scheme. Instead, the article simply states that plaintiffs were connected to Bristoll Export through another shell company that was “nested inside” Bristoll Export. Thus, even if the language may be reasonably read to impart the false innuendo that plaintiffs were involved in the tax fraud scheme, plaintiffs nevertheless failed to make a rigorous showing that defendant intended or endorsed such an inference. Therefore, plaintiffs have not stated a valid claim for defamation by implication.

In accordance with the foregoing, it is hereby

ORDERED that the defendants’ motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) is granted and the complaint is dismissed in its entirety, with

ORDERED that the defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) is granted and the complaint is dismissed in its entirety, with costs and disbursements to defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendant.

This constitutes the decision and order of the court.

Dated: 4/18/10

ENTER:

EMC
Ellen M. Coin, A.J.S.C.

Case Disposed