Allyn v Schwarz
2013 NY Slip Op 34212(U)
June 19, 2013
Supreme Court, Bronx County
Docket Number: 22039/12E
Judge: Jr., Alexander W. Hunter

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 23A

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Glenn B, Allyn,

Index No.: 22039/12E

Plaintiffs,

Decision and Order

-against-

John M. Schwarz, John M. Schwarz attorney at law, and Law Offices of John M. Schwarz and/or John Doe business entity under which John M. Schwarz practices law as a business Business, or professional entity,

Defendants.

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HON. ALEXANDER W. HUNTER, JR.

Defendants' motion for an order pursuant to C.P.L.R. 3211(a)(5) and (7), dismissing the complaint, is granted.

Plaintiff seeks compensatory and punitive damages against defendants for libel and invasion of privacy. Plaintiff asserts that defendants "published false and defaming information about [him] in internet advertising on or about August 10, 2010 and continuing up and until and after the date of this pleading, September 6, 2012." (verified complaint, 4, ¶ 5).

After an investigation conducted by the Rockland County Special Investigations Unit and the New York State Banking Department's Criminal Investigations Bureau, plaintiff was arrested and charged with one count of grand larceny in the third degree on June 21, 2010 for allegedly stealing a check in the amount of $5,000.00. Plaintiff, a former attorney, worked with a company in Rockland County assisting homeowners facing foreclosure. Defendant John M. Schwarz is an attorney who works with distressed homeowners in Rockland County. Defendants reposted a June 21, 2010 press release from the New York State Department of Financial Services ("the Press Release") regarding plaintiff's arrest on their website under the current events page. The Press Release is still publically available on the New York State Department of Financial Services' website at: http://dfs.ny.gov/about/press/pr100621.htm.

Defendants assert that plaintiff's causes of action for libel and invasion of privacy are barred by the one year statute of limitations. The Press Release was posted on defendants' website on August 10, 2010. Under the single publication rule, plaintiff only has one cause of action for defamation even if the publication may have been seen by many people on different occasions. A cause of action for invasion of privacy accrues when the material is published. Since plaintiff did not commence the instant action until September 6, 2012, defendants argue that the complaint must be dismissed as time-barred.

Defendants also assert that the Communications Decency Act ("CDA"), 47 U.S.C. § 230, bars any cause of action against defendants as the operator of the website on which the allegedly defamatory statements were published. The CDA immunizes owners of websites from defamation liability so long as the content is provided by another party. Moreover, government officials are entitled to a constitutional privilege where they will not be liable for defamation on matters in which they are involved in an official capacity. Since defendants wholly relied upon information provided by government officials, defendants argue that they should not be liable for posting the Press Release.

Assuming arguendo that this court determines that the CDA and the constitutional privilege are inapplicable in this case, defendants argue that the statements contained in the Press Release are either public fact or expressions of opinion by the writer. Statements of public fact or pure opinion are not actionable.

Defendants assert that plaintiff's cause of action for invasion of privacy must also be dismissed. A cause of action for invasion of privacy protects any person whose name, portrait, or picture is used within this state for advertising purposes or trade without the person's consent. Contrary to plaintiff's allegations, the Press Release was posted on defendants' website under the educational current events section for current clients. There was no commercial use. In his affidavit, defendant John M. Schwarz states, "The article that the plaintiff's complaint references was posted on August 10, 2010 for the benefit of my clients who might fall victim to the type of activity described in the press release. The article was published only once on my website." (Schwarz aff, 2 ¶ 4).

In opposition, plaintiff argues that the instant action is not time-barred because defendants' publication of the Press Release was copyrighted in 2012. Plaintiff also asserts that this case involves a republication where the statute of limitations begins to run anew upon republication. Plaintiff further notes that defendants republished the Press Release to at least three separate audiences in Valparaiso, Indiana, Scarsdale, New York, and Elmsford, New York. (plaintiff's exhibits 1 and 3; verified complaint, exhibit A).

Plaintiff further argues that defendants are not protected by the CDA. Plaintiff stresses that this cause of action does not arise out of the August 10, 2010 posting of the Press Release. Instead, defendants incorporated the Press Release onto their copyrighted website and various advertisements. In doing so, defendants acted as both the publisher and the speaker of the allegedly defamatory statements and therefore, defendants are not free from liability.

Contrary to defendants' arguments, plaintiff contends that the publication of the Press Release is not protected as opinion. Plaintiff argues that when the Press Release was published on defendants' website in 2012, he had been acquitted after a jury trial in October 2011. As such, the publication of the Press Release detailing plaintiff's arrest constituted a publication of false information. Plaintiff argues that without verifying the truth of the statements contained in the Press Release, defendants posted the allegedly defamatory material in advertising material to

solicit business as foreclosure attorneys.

Plaintiff withdraws his causes of action for defamation per quod and invasion of privacy under Civil Rights Law §§ 50 and 51.

Defendants note that plaintiff has failed to cite to any case law in support for his proposition that the copyright date of 2012 is dispositive evidence of republication. Defendants assert that each viewing of the Press Release on a website is not considered a republication thereby retriggering the statute of limitations. Defendants reiterate all of their arguments that were first set forth in their affirmation in support of the instant motion.

On a motion to dismiss pursuant to C.P.L.R. 3211(a)(5) on the ground that the cause of action is barred by the statute of limitations, the burden lies with defendant to establish a prima facie showing that the action is time-barred. **Kennedy v. Fischer, 78 A.D.3d 1016 (2nd Dept. 2010).** Once such a showing is made, then the burden shifts to plaintiff to raise a question of fact as to the applicable statute of limitations. **DeStaso v. Condon Resnick, LLP, 90 A.D.3d 809 (2nd Dept. 2011).**

In **Gregoire v. Putnam & Son's, 298 N.Y. 119, 123 (1948)**, the Court of Appeals first adopted the single publication rule. "Under that rule, the single publication of a defamatory comment, regardless of the number of copies the comment appears in or the range of the publication's distribution, constitutes only one publication and gives rise to only one cause of action." **Rare 1 Corp. v. Moshe Zweibel Diamond Corp., 13 Misc.3d 279, 281 (Sup Ct, N.Y. County 2006)**. The single publication rule is designed "to prevent a multiplicity of actions, leading to potential harassment and excessive liability, and draining of judicial resources." **Firth v. State of New York, 98 N.Y.2d 365, 369-370 (2002)**. In **Firth**, the Court of Appeals applied the single publication rule to postings on internet websites. The statute of limitations for a cause of action for defamation is one year and it accrues on the date the statement was first published. **C.P.L.R. 215(3)**. Republication, an exception to the single publication rule, occurs when the defamatory statement is republished in a different format. The republication of the defamatory statement must be intended to and reach another audience. **Rinaldi v. Viking Penguin, 52 N.Y.2d 422 (1981)**. Republication starts the statute of limitations anew. **Firth, 98 N.Y.2d at 371.**

There is no dispute that the Press Release was first posted verbatim on defendants' website on August 10, 2010. The Press Release remained on the website, unchanged, until at least September 6, 2012, the date this action was commenced. Each day the Press Release was available for viewing on defendants' website does not create a distinct cause of action. The copyright date of defendants' website is of no consequence to the applicability of the single publication rule. Plaintiff failed to commence this action within one year after the date the Press Release was first posted on defendants' website. Therefore, this action must be dismissed as time-barred.

On a motion to dismiss pursuant to C.P.L.R. 3211(a)(7), "a complaint should not be dismissed on a pleading motion so long as, when the plaintiff is given the benefit of every favorable inference, a cause of action exists." **Rovello v. Orofino Realty, Co., 40 N.Y.2d 633, 634 (1976); see also, Leon v. Martinez, 84 N.Y.2d 83 (1994).** "The test is whether the pleadings give adequate notice to the court and the adverse party of the transactions or occurrences intended to be proved." **Stern v. Consumer Equities Assocs., 160 A.D.2d 993, 994 (2nd Dept. 1990).**

In order to plead a cause of action for defamation, a plaintiff must allege: 1) a false statement of and concerning plaintiff; 2) publication without privilege or authorization to a third party; 3) constituting fault as judged by, at least a negligence standard; and 4) it must cause special harm or constitute defamation *per se*. **Dillon v. City of New York, 261 A.D.2d 34 (1st Dept. 1999).** Defamation *per se* applies in cases where the statements tend to injure another in their trade, profession, or business. **Epifani v. Johnson, 65 A.D.3d 224 (2nd Dept. 2009).** "In determining whether a complaint states a cause of action to recover damages for defamation, the dispositive inquiry is whether a reasonable listener or reader could have concluded that the statements were conveying facts about the plaintiff." **Goldberg v. Levine, 97 A.D.3d 725, 725 (2nd Dept. 2012).**

This court notes that the statements contained in the Press Release are either statements of fact or expressions of pure opinion. "It is a settled rule that expressions of an opinion 'false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions.'" **Steinhilber v. Alphonse, 68 N.Y.2d 283, 286 (1986), *quoting* Rinaldi v. Holt, Rinehart & Winston, 42 N.Y.2d 369, 380 (1977), *cert. denied* 434 U.S. 969 (1977); see also, Weiner v. Doubleday and Co., 74 N.Y.2d 586 (1989), *cert denied* 495 U.S. 930 (1990).** Expressions of pure opinion are not actionable and are wholly protected under the First Amendment. **Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).** A question of whether a statement is an expression of fact or opinion is a matter of law. **Rinaldi, 42 N.Y.2d at 381.** The statements contained in the Press Release were made solely by Rockland County District Attorney Thomas P. Zugibe and New York State Banking Department Superintendent Richard H. Neiman concerning the arrest of plaintiff and another individual after an investigation conducted by the Rockland County Special Investigations Unit and the New York State Banking Department's Criminal Investigations Bureau. Defendants relied upon the Press Release issued by the New York State Department of Financial Services and they had no reason to doubt the veracity of the statements contained in the Press Release. **See, James v. Gannett Co., 40 N.Y.2d 415 (1976).** The remainder of the Press Release consists of true statements of fact. Plaintiff does not deny that he was in fact charged with one count of grand larceny in the third degree in 2010. The fact that he was later acquitted of the charge does not render the Press Release false. Based on the foregoing, plaintiff has failed to state a cause of action for defamation.

This court finds the parties' remaining contentions are without merit.

Accordingly, defendants' motion to dismiss the verified complaint is granted and the verified complaint is dismissed in its entirety as against defendants with costs and disbursements to defendants.

Movants are directed to serve a copy of this order with notice of entry on plaintiff and file proof thereof with the clerk's office.

This constitutes the decision and order of this court.

Dated: June 19, 2013

ENTER:

J.S.C.

ALEXANDER W. HUNTER JR