

<b>Pearlman v NYP Holdings, Inc.</b>
2015 NY Slip Op 32797(U)
May 11, 2015
Supreme Court, New York County
Docket Number: 157546/14
Judge: Donna M. Mills
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: DONNA M. MILLS  
*Justice*

PART 58

\_\_\_\_\_

JAMI PEARLMAN,

Index No. 157546/14

Plaintiff,

MOTION DATE \_\_\_\_\_

-v-

MOTION SEQ. NO. 001

NYP HOLDINGS, INC.,

MOTION CAL NO. \_\_\_\_\_

Defendant.

\_\_\_\_\_

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

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1,3

Answering Affidavits- Exhibits \_\_\_\_\_ 2

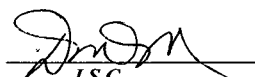
Replying Affidavits \_\_\_\_\_ 4

CROSS-MOTION: \_\_\_\_\_ YES  NO

Upon the foregoing papers, it is ordered that this motion

IS DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 5-11-15

  
J.S.C.  
**DONNA M. MILLS, J.S.C.**

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

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

-----  
JAMI PEARLMAN,

INDEX NO.  
157546/14

Plaintiff,

- against -

NYP HOLDINGS, INC.,

DECISION/ORDER

Defendant.  
-----

DONNA M. MILLS, J:

Pursuant to CPLR §§ 3211(a)(1), and (a)(7), defendant NYP Holdings, Inc., ("defendant or NYP"), moves to dismiss the verified complaint of plaintiff, Jami Pearlman in its entirety on the grounds that the libel claim alleged is barred by the substantial truth doctrine, by the fair report privilege of N.Y. Civil Rights Law § 74, and by the incremental harm doctrine.

BACKGROUND

On February 10, 2011, plaintiff and her co-conspirators Donald Hellinger, Ronald Hellinger, Michael Weisberg, Randy Trost, and Michele Quigley, were charged in a federal court indictment with, among other things, conducting a money laundering business. In the course of the criminal case, Donald Hellinger, Ronald Hellinger, and Michael Weisberg each pled guilty and were sentenced to 36 months imprisonment, 27 months imprisonment, and 22 months imprisonment, respectively.

On July 1, 2013, plaintiff, like her co-defendants, entered a guilty plea to Count Two of the indictment. While the sentencing judge noted that the crime that plaintiff committed was a very serious offense, he imposed a \$30,000 fine on plaintiff and sentenced her to a term of probation.

On June 27, 2014, NYP published in the New York Post a column discussing the sale of Nylon Magazine, which stated that "Ex-CEO Donald Hellinger and ex-Chief

Financial Officer Jami Pearlman both now reside in a federal prison for laundering others' offshore gambling winnings unrelated to their nine-year stewardship of the magazine.

Plaintiff commenced this libel action against NYP and alleged that because the June 27, 2014 article erroneously stated that plaintiff was imprisoned, it exposed her to hatred, contempt and aversion and induced an unsavory opinion of her in the minds of persons in the community. NYP admits that the plaintiff was not imprisoned, but contends that plaintiff cannot sustain her defamation claim on the basis of the substantial truth doctrine, New York Civil Rights Law § 74, and the incremental harm doctrine.

#### APPLICABLE LAW AND DISCUSSION

Upon the consideration of the parties' respected submissions, the court notes that on a motion to dismiss for failure to state a cause of action, the court must accept the allegations of the complaint as true and accord the plaintiff the benefit of every possible favorable inference (see *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court then must determine whether the facts as alleged by the plaintiff fit within any theory cognizable at law (see *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005]). In opposing such a motion, the plaintiff may rest upon the allegations made in the complaint, in which case the issue for the court is whether, within its four corners, the complaint sets forth the elements of a viable cause of action. Alternatively, the plaintiff may submit affidavits and other materials to remedy defects in the complaint and preserve unartfully pleaded but potentially meritorious claims (see *Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982], rearg denied and dismissed 57 NY2d 669, 674 [1982], cert denied 459 US 1146 [1983]). In that case, the plaintiff's additional submissions are likewise to "be given their most favorable intendment" (see *Arrington*, 55 NY2d at 442), and the court is to focus on whether the pleader has a cause of action rather than on merely whether he has properly stated one (see *Leon*, 84 NY2d at 88). In that analysis, "unless it has ben shown that a

material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

On the other hand, the complaint should be dismissed where documentary evidence authoritatively contradicts some critical allegation of the complaint or resolves all factual issues in the case, thereby conclusively disposing of the claim (see *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

Applying this standard here, this Court concludes that plaintiff's cause of action for libel should not survive defendant's motion to dismiss. "The essence of the tort of libel is the publication of a statement about an individual that is both false and defamatory" (*Brian v. Richardson*, 87 N.Y.2d 46, 50–51, 637 N.Y.S.2d 347, 660 N.E.2d 1126). A defamatory statement is libelous per se if the statement "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 N.Y.2d 369, 379, 397 N.Y.S.2d 943, 366 N.E.2d 1299, cert. denied 434 U.S. 969, 98 S.Ct. 514, 54 L.Ed.2d 456). Additionally, a defamatory statement is libelous per se if it imputes fraud, dishonesty, misconduct, or unfitness in conducting one's profession ( see *Kotowski v. Hadley*, 38 A.D.3d 499, 500, 833 N.Y.S.2d 103; *Gjonlekaj v. Sot*, 308 A.D.2d 471, 473–474, 764 N.Y.S.2d 278; *Wasserman v. Haller*, 216 A.D.2d 289, 627 N.Y.S.2d 456).

NYP alleges that the particular article which stated that plaintiff now resides in a federal prison for laundering others' offshore gambling winnings is substantially true and/or privileged pursuant to Civil Rights Law § 74. NYP additionally argues that the libel cause of action should be dismissed on the basis of the incremental harm doctrine.

Truth is a complete defense to an action for libel, regardless of the harm done by

the statements ( *see, Bingham v. Gaynor*, 203 N.Y. 27, 96 N.E. 84; *De Gregorio v. CBS, Inc.*, 123 Misc.2d 491, 473 N.Y.S.2d 922). Provided that the defamatory material on which the action is based is substantially true, as is the case here, the claim to recover damages for libel must fail ( *see, Rinaldi v. Holt, Rinehart & Winston*, 42 N.Y.2d 369, 383, 397 N.Y.S.2d 943, 366 N.E.2d 1299, *cert. denied*, 434 U.S. 969, 98 S.Ct. 514, 54 L.Ed.2d 456).

With respect to the substantial truth defense, the test is whether the statement “as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced. When the truth is so near to the facts as published that fine and shaded distinctions must be drawn and words pressed out of their ordinary usage to sustain a charge of libel, no legal harm has been done’ ” ( *Fleckenstein v. Friedman*, 266 N.Y.19, 23 [1934] [internal citation omitted]; *see also Love v. Morrow & Co.*, 193 A.D.2d 586, 587–88 [2d Dept 1993] ).

Civil Rights Law § 74 provides, in relevant part, 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.” The Court of Appeals has noted that “[f]or a report to be characterized as fair and true within the meaning of the statute, thus immunizing its publisher from a civil suit sounding in [defamation], it is enough that the substance of the article be substantially accurate” ( *Holy Spirit Assn. For Unification of World Christianity v. New York Times Co.*, 49 N.Y.2d 63, 67 [1979] ). Moreover, “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 v. Citizen–Sentinel Publishers, Inc.*, 260 N.Y. 106 [1932] ). *McDonald v. East Hampton Star*, 10 AD3d 639, 639–40 [2d Dept 2004] ).

Under New York law, “it is not necessary to demonstrate complete accuracy to defeat a charge of libel. It is only necessary that the gist or substance of the challenged

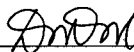
statements be true" ( *Jewell v. NYP Holdings, Inc.*, 23 FSupp2d 348 [SDNY 1998], citing *Printers II, Inc. v. Professionals Publishing, Inc.*, 784 F 2d 141, 146 [2d Cir1986]; see also *Korkala v. W.W. Norton & Co.*, 618 FSupp 152, 155 [SDNY1985] ).

Whereas the NYP mistakenly stated that plaintiff went to prison for her crime, she in fact received a \$30,000 fine and was able to avoid incarceration by receiving a sentence of probation. This Court, however, finds that the statement that plaintiff engaged in criminal behavior by laundering money and was currently residing in a federal prison was substantially true because she did plead guilty to a crime related to the laundering of money. The inaccurate assertion that she was imprisoned, as opposed to being on probation for her criminality, could not have had a different or worse effect on the mind of a reasonable reader than the truth ( *Fulani v New York Times Co.*, 260 AD2d 215, 216 [1<sup>st</sup> Dept 1999]). The challenged statement that plaintiff went to prison cannot conceivably cause any meaningful harm beyond the admitted truth that she is guilty of committing a serious felony.

Accordingly, defendant's motion to dismiss the action is granted and the complaint is dismissed in its entirety as against the defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant.

Dated: 5-11-15

So Ordered



---

Donna M. Mills, J.S.C.  
**DONNA M. MILLS, J.S.C.**