

Lederer v Daily News, L.P.

2016 NY Slip Op 31394(U)

July 8, 2016

Supreme Court, New York County

Docket Number: 650400/15

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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JEFFREY LEDERER

Plaintiff

v

DAILY NEWS, L.P. and NEW YORK DAILY NEWS
COMPANY

Index No. 650400/15

MOTION SEQ. 001, 002

DECISION AND ORDER

Defendants;

SPLASH NEWS AND PICTURE AGENCY, CORBIS
CORPORATION, and LAWRENCE SCHWARTZWALD,

Third-party defendants.

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NANCY M. BANNON, J.:

I. INTRODUCTION

The plaintiff, Jeffrey Lederer, commenced this action to recover damages for defamation against Daily News, L.P., and New York Daily News Company (the News defendants), alleging that they repeatedly published photographs of him in the Daily News with captions and headlines that falsely identified him as a person known to the public to be a sex offender. The News defendants commenced a third-party action for contribution and common-law indemnification against Lawrence Schwartzwald, the photographer who took the photographs, and for contribution, common-law indemnification, and contractual indemnification against Splash

News and Picture Agency and Corbis Corporation (together Corbis), the agency that licensed the photos for use by the News defendants. Schwartzwald and Corbis separately move, pre-answer, pursuant to CPLR 3211(a) to dismiss the third-party complaint insofar as asserted against each of them. Corbis alternatively moves to sever and stay the third-party action against it. The court grants those branches of the motions which are to dismiss the causes of action for common-law and contractual indemnification, and otherwise denies the motions.

II. BACKGROUND

Sometime in 2013 or 2014, Schwartzwald surreptitiously took several photographs of the plaintiff exiting a private social club in Manhattan, and uploaded them to Corbis's web site to make them available for licensing to media outlets, such as the Daily News. The third-party complaint alleged that Schwartzwald incorrectly informed Corbis that the photos of the plaintiff were actually photos of one Jeffrey Epstein, a registered sex offender who had previously been reported in various media outlets as a confidant of the British Prince Andrew. Corbis made the photos available for licensing on its web site, and included the caption "EXCLUSIVE: Jeffrey Epstein, Billionaire and former pal of Prince Andrew, seen heading into Exclusive NYC Social Club, the Harmonie Club, one of Manhattan's most exclusive social clubs." During

January 2015, the News defendants published six print articles and one electronic article that identified the photos of the plaintiff as depictions of Epstein, and employed the photos to illustrate the content of the articles, which discussed Prince Andrew, Epstein, Epstein's history as a sex offender who had engaged in sexual misconduct with underage girls, and the relationship between Andrew and Epstein. The plaintiff thereafter commenced this action against the News defendants to recover damages for defamation. The News defendants impleaded Schwartzwald and Corbis, seeking contribution and common-law indemnification, and additionally seeking contractual indemnification from Corbis. The third-party defendants now move to dismiss the third-party complaint insofar as asserted against each of them.

III. DISCUSSION

A. CONTRIBUTION

On a motion to dismiss a third-party complaint pursuant to CPLR 3211(a)(7), the pleading should be construed liberally, and the facts as alleged in the complaint are presumed to be true and accorded the benefit of every possible favorable inference. See Sigmund Strauss, Inc. v East 149th Realty Corp., 104 AD3d 401, 403 (1st Dept 2013); Scott v Bell Atlantic Corp., 282 AD2d 180, 183 (1st Dept 2001). The standard "is whether, within the four

corners of the complaint, any cognizable cause of action has been stated." Scott v Bell Atlantic Corp., *supra*, at 183; *see* Siegmund Strauss, Inc. v East 149th Realty Corp., *supra*, at 403. The third-party complaint alleges, among other things, that the third-party defendants had a duty to take steps to verify the identity of the subject of the photos and correctly identify him, and that, since they failed take any steps in this regard, Schwartzwald breached that duty when he provided the photo to Corbis, Corbis breached the duty when it licensed them to the News defendants, and the News defendants reasonably relied on the accuracy of the identification of the subject of the photos.

The third-party complaint sufficiently states a cause of action for contribution against both Schwartzwald and Corbis.

The court must first inquire "whether the third-party defendant owed a duty to the plaintiff which was breached and which contributed to or aggravated plaintiff's damages." Rosner v Paley, 65 NY2d 736, 738 (1985). "[T]he breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought" (Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp., 71 NY2d 599, 603 [1988]; *see* Nelson v Chelsea GCA Realty, Inc., 18 AD3d 838, 840-841 [2nd Dept 2005]; Trump Vill. Section 3, Inc. v New York State Hous. Fin. Agency, 307 AD2d 891, 896 [1st Dept 2003]), and will lie whether or not the culpable parties are allegedly liable for the

injury under the same or different theories (see Raquet v Braun, 90 NY2d 177 [1997]), and "whether or not the party from whom contribution is sought is allegedly responsible for the injury as a concurrent, successive, independent, alternative, or even intentional tort-feasor." Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp., supra, at 603. Moreover, a cause of action for contribution may also be stated where it is alleged a contributor breached a duty owed to the defendant whom the plaintiff seeks to hold liable, even if no duty exists between the contributor and the injured plaintiff. See Raquet v Braun, supra, at 182; Sommer v Federal Signal Corp., 79 NY2d 540, 593 NE2d 1365 (1992); Darzimanova v Le Clere, 122 AD3d 421, 422 (1st Dept 2014). Accordingly, a valid cause of action for contribution exists here if the third-party defendants owed and breached a duty either to the plaintiff or to the News defendants to properly verify the identity of individuals depicted in the photographs they either took or made available for use by the media.

To impose liability in a defamation action commenced by a person who is not a public figure, "the party defamed must establish by 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, 38 NY2d 196, 199 (1975); see Huggins v Moore, 94 NY2d 296, 299 (1999); Farber v Jefferys, 103 AD3d 514, 515 (1st Dept 2013). A person is grossly irresponsible in this regard when he or she fails to verify the accuracy or veracity of information before disseminating it (see Matovcik v Times Beacon Record Newspapers, 108 AD3d 511, 511 [2nd Dept 2013]) or evinces an inability or unwillingness to take any steps to obtain such a verification. See Fraser v Park Newspapers of St. Lawrence, Inc., 246 AD2d 894, 896 (3rd Dept 1998).

In assessing whether the third-party defendants owed a duty either to the plaintiff or the News defendants, the court must look to whether the relationship between the parties is such as to give rise to a duty of care, and whether, under the circumstances, the plaintiff or the third-party plaintiff was within the zone of reasonably foreseeable harm. See Di Ponzio v. Riordan, 89 NY2d 578, 583 (1997).

The court need not determine at this juncture whether the third-party defendants owed a common-law duty of care to the News defendants, since they owed a duty directly to the plaintiff. The relationship between a commercial freelance news photographer and a photographic licensing agency, on the one hand, and the subject of a photograph taken or licensed by them, on the other, is such that the miscaptioning of a photograph to depict an individual as a sex offender would result in foreseeable harm to

the person so depicted. See generally Thomas v Journal Register Co., 24 AD3d 988, 990 (3rd Dept 2005).

Applying the Chapadeau standard to the facts of this case, the News defendants have pleaded facts sufficient to allege that Schwartzwald acted in a grossly irresponsible manner in taking no steps whatsoever in verifying the identity of subject of the photos that he took and misidentifying the plaintiff as Epstein without further investigation as to the identity of the subject, and that Corbis acted in a grossly irresponsible manner in failing to verify the correct identity of the person depicted in the photos by inquiring of Schwartzwald as to the accuracy of his information, and making available the photos, as erroneously captioned, for downloading by and licensing to a newspaper. See id. In fact, the record is devoid of any assertion that either Schwartzwald or Corbis engaged in any attempt to verify the correct identity of the person depicted in the photos, and the statement of counsel at oral argument that Schwartzwald simply called out the name "Jeffrey" falls far short of an attempt at verification sufficient to take the conduct out of the realm of gross irresponsibility. Thus, the third-party complaint alleges facts sufficient to state a cause of action that the third-party defendants owed and breached a duty to the plaintiff, thus contributing to the plaintiff's damages. For this reason, and because there is no showing that prosecution of the third-party

action would delay the resolution of the main action or prejudice any party, there no basis for severing or staying the third-party action against Corbis. See CPLR 603.

B. COMMON-LAW INDEMNIFICATION

"In the classic [common-law] indemnification case, the one entitled to indemnity from another committed no wrong, but by virtue of some relationship with the tortfeasor or obligation imposed by law, was nevertheless held liable to the injured party." D'Ambrosio v City of New York, 55 NY2d 454, 461 (1982). Common-law, or implied, indemnification "permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of another." Mas v Two Bridges Assoc., 75 NY2d 680, 690 (1990). Here, the News defendants repeatedly published photos of the plaintiff, identifying him as Epstein, to accompany articles implying that he engaged in illegal and immoral conduct, which reached thousands of readers. Since the standard for common-law indemnification requires that the party claiming entitlement to indemnity be without fault, the News defendants have not pleaded facts sufficient to make out such a cause of action, since they do not and cannot allege that they are entirely without fault (see D'Ambrosio v City of New York, supra, at 461). Nor have they alleged facts tending to show that a special relationship existed

between the third-party defendants and them that would constitute an exception to the rule. See id. at 462.

C. CONTRACTUAL INDEMNIFICATION

Contractual indemnification clauses must be “construed as to achieve the apparent purpose of the parties” (Hooper Associates, Ltd. v AGS Computers, Inc., 74 NY2d 487, 491 [1989]; see Arrendal v Trizechahn Corp., 98 AD3d 701, 703 [2nd Dept 2010]), and are enforced only where “the intention to indemnify can be clearly implied from the language and purposes of the entire agreement, and the surrounding facts and circumstances.” Campos v 68 E. 86th St. Owners Corp., 117 AD3d 593, 595 (1st Dept 2014), quoting Margolin v New York Life Ins. Co., 32 NY2d 149, 153 (1973); see Drzewinski v Atlantic Scaffold & Ladder Co., 70 NY2d 774, 777 (1987). In a licensing agreement dated August 16, 2013, Corbis agreed to indemnify the News defendants from any and all loss and damage arising out of any claim by a third party based on the Corbis’s breach of any warranty it made in the agreement. Pursuant to § 6(c) of the agreement, caption information provided by the Corbis defendants is to be accepted by a licensee “as is . . . without warranty,” and Corbis expressly “does not warrant that such information is accurate.” Section 6(b) provides that “Corbis makes no warranties, nor shall Corbis be liable, for any claims related to or arising from Licensee’s use of Content . . .

except for the explicit warranties stated in Section 6(a)," pursuant to which Corbis warranted that the content it provides to licensees will not infringe on the rights of a copyright holder, will not violate an individual's right to commercially exploit his or her own likeness, and will not violate an individual's tangible property rights. In light of these explicit disclaimers, documentary evidence conclusively establishes a defense to the cause of action for contractual indemnification (see CPLR 3211[a][1]), since the indemnification provision relied upon by the News defendants is inapplicable to the facts of this case.

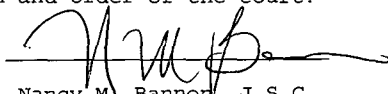
IV. CONCLUSION

Accordingly, it is

ORDERED that those branches of the motion of the defendants Splash News and Picture Agency and Corbis Corporation which were to dismiss the causes of action for common-law indemnification and contractual indemnification against them, and that branch of the separate motion of the defendant Lawrence Schwartzwald which was to dismiss the cause of action for common-law indemnification against him, are granted, and the motions are otherwise denied.

This constitutes the Decision and Order of the court.

Dated: July 8, 2016


Nancy M. Bannon, J.S.C.
HON. NANCY M. BANNON