

Udell v NYP Holdings Inc.

2016 NY Slip Op 33043(U)

March 30, 2016

Supreme Court, Queens County

Docket Number: 1251/15

Judge: Valerie Brathwaite Nelson

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HONORABLE VALERIE BRATHWAITE NELSON IA PART 7
Justice

-----X
BERNARD UDELL AND BERNADETTE
BAYNE,

Plaintiff(s),

-against-

NYP HOLDINGS INC., ET AL.,

Defendant(s).
-----X

Index No.: 1251/15

Motion Date: 3/17/15

Motion Calendar No.: 145

Motion Sequence No.: 1

AMENDED ORDER

2016 APR 13 AM 11:15

QUEENS COUNTY CLERK
FILED

THIS ORDER AMENDS THE COURT'S ORDER DATED FEBRUARY 22, 2016.

The following papers numbered 1 to 8 read on this motion by defendants NYP Holdings, Inc., Christina Carraga-Woodby and Ellis Kaplan to dismiss the plaintiffs' complaint pursuant to CPLR 3211(a)(1)(7) and (8)¹.

	PAPERS NUMBERED
Notice of Motion - Affidavits - Exhibits.....	1-4
Memorandum of Law in Support.....	5
Memorandum of Law in Opposition.....	6
Memorandum of Law in Reply	7
Stipulation.....	8

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Upon the foregoing papers, it is ordered that this motion is determined as follows:

Plaintiffs Bernard Udell and Bernadette Bayne commenced this action seeking damages for injuries allegedly sustained as a result of a libelous publication. Plaintiffs allege that on June 2, 2014, the New York Post newspaper published an article containing the headline, "Judge's Hubby Takes Space for Prisoner's Van." Inside

¹Pursuant to stipulation dated December 1, 2015, the branch of the within motion by defendants NYP Holdings, Inc., Christina Carraga-Woodby and Ellis Kaplan to dismiss the plaintiffs' complaint pursuant to CPLR 3211 (a)(8), was withdrawn.

the article, which is attached to the complaint, it was reported that Mr. Udell, the lawyer husband of Brooklyn Supreme Court Justice Bernadette Bayne, admittedly uses his wife's car, which has judicial plates, to park in a special area behind the Queens Supreme Court building that's reserved for cops transporting prisoners. The article states that Mr. Udell admitted to the Post that he parks there when he has business in the Kew Gardens courthouse, usually with permission from the court officers on duty there, but admitted that he did not have permission on this occasion and conceded that he took his chances parking without permission. The article reports that Patrick Cullen, the president of the Supreme Court Officers' union, stated that such use of the parking area forces police officers to park farther away and then escort their cuffed prisoners a longer distance, putting the public in danger, and that Mr. Cullen places much of the blame for the unauthorized parking on judges. Specifically, Mr. Cullen is quoted as saying, "[t]his is an example of the continued cavalier attitude from members of the judiciary system who feel they are over others and can do what they want, disregarding public safety, which is supposed to be most important. The spaces around the courthouse are specifically used for officers to transport prisoners. Not being able to park in those spots leaves the possibility of a prisoner escaping and putting the public's safety at risk." Citing an unnamed source, the article also states that Mr. Udell probably wasn't cited because officers are afraid to ticket judges. Specifically, the source is quoted as saying, "[i]f a court officer writes a ticket for a judge, they can forget about their position back there." The article is accompanied by photographs taken of Mr. Udell standing beside the car, on which a Supreme Court license plate is affixed, parked beside an NYPD Police van. Underneath the photograph is a caption beginning with the word "Plategate," and a sub-headline stating "'Objection!' to parking sneak." It is alleged that defendants NYP Holdings Inc. is the publisher of the New York Post newspaper, that Christina Carrega-Woodby was the reporter of the article, and that Ellis Kaplan was the photographer who took the photographs of the scene (the Post defendants).

Plaintiffs allege twelve separate claims for damages plaintiffs sustained by the publication of the "Libelous Article." The first four causes of action assert claims by Mr. Udell against the Post defendants for injury to his name and reputation, the fifth and sixth causes of action assert respective claims by Mr. Udell against Patrick Cullen and John or Jane Doe for slander and/or libel per se causing injury to his name and reputation, the seventh through tenth causes of action assert claims by Justice Bayne against the Post defendants for injury to her name and reputation, and the eleventh and twelfth causes of action assert respective claims by Justice Bayne against Patrick Cullen and John or Jane Doe for slander and/or libel per se causing injury to her name and reputation.

Plaintiffs claim that the statement that Mr. Udell takes space for prisoner's van was understood and intended to be understood as a statement that he deprived the police department of a space reserved for them to transport prisoners; that the word "special area" and "that's reserved for cops transporting prisoners" are commonly used, were understood and intended to be understood as a statement that such "special area" for cops transporting prisoners actually existed, and that Mr. Udell was aware of it and willfully disregarded it; that the statement "police officers are forced to park farther away and then escort their prisoners a longer distance, putting the public in danger" was understood and intended to be understood as a statement that there is a special parking area reserved for police transporting prisoners, that plaintiffs were aware of it and that the position of their car impeded police vehicles escorting prisoners while another vehicle parked in that spot by a judge would not; that the statement that plaintiffs' car was spotted "in the small eight-spot area" was understood and intended to be understood as a statement that such a special area actually existed, that it was "reserved" for police vans and that the public and plaintiffs in particular were aware of its existence and willfully chose to place a vehicle therein thus putting the public in danger; that the statement that Mr. Udell concluded he took his chances parking without permission was understood and intended to be understood as a statement that Mr. Udell knew that the car was illegally parked and chose to sneak in and out as distinguished from showing court officers the courtesy of identifying himself and asking permission; that the statement by the source, identified herein as John Doe or Jane Doe, that "Mr. Udell probably wasn't cited because officers are afraid to ticket judges," was understood and intended to be understood as a statement that Justice Bayne is an arrogant and corrupt jurist, that the statement "[i]f a court officer writes a ticket for a judge, they can forget about their position back there," was understood and intended to be understood as a statement that Justice Bayne will succeed in an unlawful vendetta indicative of her vindictive nature, and that the plaintiffs were aware of the court officers' fear and thereby willfully abused power; that the statement that "[t]his is an example of the continued cavalier attitude from members of the judiciary system who feel they are over others and can do what they want, disregarding public safety, which is supposed to be most important," was understood and intended to be understood as a statement that Justice Bayne has a cavalier attitude towards public safety, over which she places her own interests; that the statement that "[t]he spaces around the courthouse are specifically used for officers to transport

prisoners. Not being able to park in those spots leaves the possibility of a prisoner escaping and putting the public's safety at risk," was understood and intended to be understood as a statement that the space that plaintiffs' vehicle occupied and all the spaces around the courthouse are only for officers to transport prisoners, are reserved for that purpose, which plaintiffs were aware of but conspired to enhance the possibility of a prisoner escaping; that the term "parking sneak" was understood and intended to be understood as a statement that the plaintiffs were thieves; that the term "plategate" was understood and intended to be understood as a statement that the plaintiffs are criminal conspirators; and that the word "exclusive" was understood and intended to be understood as a statement that the plaintiffs willfully and for their own purposes conspired to create a major disaster.

Plaintiffs assert further that the words in the statements are false and that the areas in question contain proof disproving the veracity of the article and statements contained therein, as were the photographs which, plaintiffs assert, were manipulated to contribute to the defamatory meaning of the article, by statement and implication.

The instant motion to dismiss the complaint was filed by the Post defendants in lieu of an answer. On a CPLR 3211(a)(7) motion to dismiss, the court's role is to determine whether the claim states a cause of action. "The motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law'" (511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 152 [2002]). To carry out this task, the court must liberally construe the pleadings and accept as true the facts alleged therein and any submissions in opposition to the dismissal motion and accord the non-moving party the benefit of every possible favorable inference (*id.*).

Plaintiffs ask the court to find libel not based solely on the factual statements expressly contained in the article, but based on their inflammatory impressions and implications as well. The Post defendants maintain that they reported truthfully, and have a certain amount of leeway in the way in which they report.

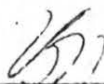
"The elements of a cause of action for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence

standard, and it must either cause special harm or constitute defamation per se" (Salvatore v. Kumar, 45 A.D.3d 560 [2d Dept 2007]). In order to maintain a cause of action for libel, the language complained of must be reasonably susceptible of a defamatory meaning as to the plaintiff (see James v. Gannett Co., 40 N.Y.2d 415 [1976]). Whether particular words are reasonably capable of being read as defamatory is a threshold question of law to be determined by the court (*id.*). Truth is a complete defense to an action to recover damages for libel, regardless of the harm done by the statement (see Love v. William Morrow & Co., 193 A.D.2d 586, 587 [2d Dept 1993]). Truth need not be established to an extreme literal degree (*id.*). Provided that the defamatory material on which the action is based is substantially true (minor inaccuracies are acceptable), the claim to recover damages for libel must fail (*id.*). Here, there is no dispute that Mr. Udell had neither authority nor permission to park his vehicle in the subject parking spot. Moreover, the article does not state that the area in which plaintiffs' vehicle was parked is formally reserved for the police.

In order to maintain a cause of action for libel the language complained of must be reasonably susceptible of a defamatory meaning as to the plaintiff (see James v. Gannett Co., 40 N.Y.2d 415 [1976]). Thus, for the statement to be actionable, "falsity is not sufficient. The statement must also be defamatory (Fairley v. Peekskill Star Corp., 83 A.D.2d 294, 295-296 [2d Dept 1981]). New York courts have frequently deferred to editorial judgments holding that "[d]etermining what editorial content is of legitimate public interest and concern is a function for editors (see Gaeta v. New York News, Inc., 62 N.Y.2d 340 [1984]). "Where the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition, the party defamed...must establish...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 N.Y.2d 196, 199 [1975]; see Love v. William Morrow & Co., 193 A.D.2d 586, *supra*). Here, looking at the nature of the offending communication in the subject news story, it is clear that the content of the communication is within the sphere of legitimate public concern warranting public exposition. Furthermore, the headlines and caption were a fair index of the article with which they appeared (see Mondello v. Newsday, Inc., 6 A.D.3d 586 [2d Dept 2004]).

Accordingly, the moving defendants' motion to dismiss the complaint pursuant to CPLR 3211 (a)(7) is granted, and the complaint asserted against them is dismissed.

Dated: 3/30/16



VALERIE BRATHWAITE NELSON, J.S.C.

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