

Highland Capital Mgt., L.P. v Dow Jones & Co., Inc.
2018 NY Slip Op 32412(U)
September 26, 2018
Supreme Court, New York County
Docket Number: 151322/2018
Judge: William Franc Perry
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. W. FRANC PERRY **PART** **IAS MOTION 23EFM**

Justice

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HIGHLAND CAPITAL MANAGEMENT, L.P.,

Plaintiff,

- v -

DOW JONES & COMPANY, INC., MATTHIEU WIRZ, AARON
KURILOFF, DOES 1-20

Defendant.

INDEX NO. 151322/2018

MOTION DATE 08/02/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for

DISMISS

This defamation action arises out of an article that was published on November 26, 2017, by the Wall Street Journal on its website, entitled *Highland Capital Used False Pretexts in Ousting of Portfolio Manager, Panel Finds* and published in its print edition the following day, which was entitled *Highland Loses Ruling on Ouster*. According to the complaint, plaintiff Highland Capital Management, LP, (“Highland” and/or “plaintiff”) is an investment adviser registered with the United States Securities and Exchange Commission; defendant Dow Jones & Company, Inc. is the publisher of the Wall Street Journal, defendant Matthieu Wirz is the author of the article and defendant Aaron Kuriloff is the editor of the article. (Complaint, ¶¶9, 10, 11 and 15). The complaint contains a second cause of action, alleging intentional interference with contractual relations. (Complaint, ¶¶30-45). Defendants have filed a pre-answer motion to dismiss the complaint pursuant to CPLR §3211 (a)(1) and §3211 (a)(7).

CONTENTIONS

Plaintiff contends that defendants defamed plaintiff by falsely reporting that three former judges issued a \$7.9 million arbitration award against Highland, when the award was actually issued against two other parties to the arbitration, in a dispute allegedly involving breaches of fiduciary duty; plaintiff claims that the overall impression of the article falsely portrays Highland as a company that cheats investors by transferring funds in breach of fiduciary duties and covers up the misconduct by making up false claims against employees who oppose it. Plaintiff alleges that defendants tortiously interfered with Highland's confidentiality agreements with current and former employees, when defendants solicited confidential information for the allegedly defamatory article, in breach of those confidentiality agreements. In opposition to defendants' motion to dismiss, plaintiff claims that defendants intentionally interfered with Highland's contractual relations, as retribution for Highland's legal efforts to hold defendants' source responsible for unlawfully disseminating Highland's confidential information in violation of the confidentiality agreement.

Defendants contend that this lawsuit is part of an ongoing effort by plaintiff to silence any negative press coverage of plaintiff's actions and to unilaterally control every detail of its own press coverage, notwithstanding the First Amendment and New York's absolute privilege for the publication of fair reports of judicial proceedings. Defendants contend that the subject article is a straightforward summary of judicial proceedings and documents filed in court and is absolutely privileged under New York Civil Rights Law §74. Additionally, defendants contend that plaintiff's cause of action claiming intentional interference with contractual relations must be dismissed because Highland cannot base such claims on the exercise of First Amendment rights to gather and report the news. Defendants claim that plaintiff is attempting to stifle

legitimate reporting on the activities of an investment advisor that manages billions of dollars in investors' money. For the reasons that follow, defendants' motion to dismiss is granted and the complaint is dismissed with prejudice.

STANDARD OF REVIEW/ANALYSIS

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, 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, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]; see *Morone v Morone*, 50 NY2d 481, 484, 413 N.E.2d 1154, 429 N.Y.S.2d 592 [1980]). 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, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 832 N.E.2d 26, 799 N.Y.S.2d 170 [2005].)

To state a claim for defamation, a plaintiff must allege: (1) a false statement that is (2) published to a third party (3) without privilege or authorization (4) constituting fault as judged by, at a minimum, a negligence standard and that (5) causes harm, unless the statement constitutes defamation per se (in which case damages are presumed). (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34, 987 N.Y.S.2d 37 [1st Dept. 2014]; *Dillon v City of New York*, 261 AD2d 34, 38, 704 N.Y.S.2d 1 [1st Dept. 1999].) "Whether particular words are defamatory presents a legal question to be resolved by the court in the first instance." (*Aronson v Wiersma*,

65 NY2d 592, 593, 483 N.E.2d 1138, 493 N.Y.S.2d 1006 [1985].) "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." (Id.)

Civil Rights Law § 74 provides, in pertinent part, as follows: "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, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published." "The purpose of Civil Rights Law § 74 is the protection of reports of judicial proceedings which are made in the public interest" (*Cholowsky v Civiletti*, 69 AD3d 110, 114, 887 N.Y.S.2d 592 [2d Dept. 2009], quoting *Williams v Williams*, 23 NY2d 592, 599, 246 N.E.2d 333, 298 N.Y.S.2d 473 [1969]). "The case law has established a liberal interpretation of the 'fair and true report' standard of Civil Rights Law § 74 so as to provide broad protection to news accounts of judicial or other official proceedings" (*Cholowsky*, 69 AD3d at 114, quoting *Becher v Troy Publ. Co.*, 183 AD2d 230, 233, 589 N.Y.S.2d 644 [1992]).

"When determining whether an article constitutes a 'fair and true' report, the language used therein should not be dissected and analyzed with a lexicographer's precision" (*Alf v Buffalo News, Inc.*, 21 NY3d 988, 990, 995 N.E.2d 168, 972 N.Y.S.2d 206 [2013], [internal quotation marks omitted]). Rather, the relevant inquiry is whether the article "provided substantially accurate reporting" (id.; see also *Saleh v New York Post*, 78 AD3d 1149, 1151 [2d Dept. 2010], lv denied 16 NY3d 714, 948 N.E.2d 930, 924 N.Y.S.2d 323 [2011]). "For 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 libel, 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 NY2d 63, 67, 399 NE2d 1185, 424 NYS2d 165 [1979]). A fair and true report is one that is substantially accurate; minor inaccuracies do not remove it from the protection of Civil Rights Law § 74. (*Bouchard v Daily Gazette Co.*, 136 AD3d 1233, 25 N.Y.S.3d 730 [3d Dept. 2016]).

A careful review of the subject article and the arbitration decision, confirm that the former is an accurate report of the latter and application of a liberal interpretation of the "fair and true report" standard of Civil Rights Law § 74, favored by the legal precedent, indicates that plaintiff's defamation claim must be dismissed. (See Complaint, Ex. A, Bolger Aff., Ex. F). Based on a review of the record and after hearing oral argument, the court finds that the substance of the subject article is substantially accurate. See, *Holy Spirit Ass'n for Unification of World Christianity v. New York Times*, 49 N.Y.2d 63, 67, 424 N.Y.S.2d 165, 167 (1979) (explaining that to qualify as a "fair and true" report under § 74 "it is enough that the substance of the article be substantially accurate"); *Freeze Right Refrigeration & Air Conditioning Servs. v. City of N.Y.*, 101 A.D.2d 175, 183, 475 N.Y.S.2d 383, 389 (1st Dep't 1984) ("[a] verbatim account or even a precisely accurate report of an official proceeding" is not required under Section 74).

Plaintiff's contention that three former judges issued a \$7.9 million arbitration award against Highland, or that the subject article suggests that Highland engaged in more serious conduct than the arbitration panel found, ignores the essence of the fair report privilege and the "dual public policy interest of ensuring the free flow of true information without fear of being sued, and public dissemination of judicial decisions and proceedings for proper administration of justice." *Rakofsky v. Washington Post*, 39 Misc. 3d 1226(A), 971 N.Y.S.2d 74 (Sup. Ct. N.Y. Cty. 2013) (citing *Beary v. West Publ'g Co.*, 763 F.2d 66 (2d Cir. 1985)). Moreover, the

arbitration panel, in a comprehensive decision, explicitly found and detailed the substantial wrongdoing on the part of Highland that formed the basis for the award and the subject article is an accurate report of the Panel's findings and conclusions. (Bolger Aff., Ex. F).

Likewise, plaintiff's claim that the subject article omitted positive details about Highland, does not compel a different result. To the contrary, New York courts have consistently reaffirmed that, in reporting on judicial proceedings, "there is 'no requirement that [a] publication report the plaintiff's side of the controversy.'" *Tenney v. Press-Republican*, 75 A.D.3d 868, 869, 905 N.Y.S.2d 356 (3d Dep't 2010) (quoting *Cholowsky v. Civiletti*, 69 A.D.3d 110, 115 (2d Dep't 2009)).

Additionally, plaintiff's second cause of action alleging tortious interference with contract must also be dismissed with prejudice. The alleged interference is "merely incidental to defendants' exercise of their constitutional right to [report] newsworthy information," the defendants are acting with a "legitimate" purpose and cannot be held liable for tortious interference. *Huggins v. Nat'l Broad. Co.*, No. 119272/95, 1996 WL 763337, at *4 (Sup. Ct. N.Y. Cty. Feb. 7, 1996) (finding "[a]ny interference that occurred was merely incidental to defendants' exercise of their constitutional right to broadcast newsworthy information . . . [and therefore] Defendants' purpose was a legitimate one and did not involve an intent to unjustifiably interfere with the confidentiality agreement.").

CONCLUSION

Based upon the foregoing, it is hereby,

ORDERED that defendants' motion, pursuant to CPLR 3211 (a) (1), and (a) (7), dismissing plaintiff's complaint, with prejudice, is granted and the complaint is hereby dismissed

in its entirety with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the clerk is directed to enter judgment accordingly; and it is

ORDERED that defendants shall serve a copy of this Decision and Order with Notice of Entry on plaintiff and the County Clerk who shall enter judgment accordingly.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

9/26/2018
DATE


W. FRANC PERRY, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED				GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE