Friedman v Folkenflik
2020 NY Slip Op 34802(U)
May 14, 2020
Supreme Court, Nassau County
Docket Number: Index No. 009802/14
Judge: Randy Sue Marber
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE TRIAL/IAS PART 6

_______________________________________X

RUSSELL FRIEDMAN,

Plaintiff,

Index No.: 009802/14
Motion Sequence…04
Motion Date…02/14/20

-against-

MAX FOLKENFLIK, ROBERT W. SEIDEN, FOLKENFLIK & MCGERITY LLP, DAVID GRAFF, ANDERSON KILL P.C., SEIDEN INVESTIGATIONS & SECURITY, INC., CONFIDENTIAL SECURITY & INVESTIGATIONS,

Defendants.

_______________________________________X

Papers Submitted:
Notice of Motion……..……..…………....x
Affidavit in Support……………………..x
Memorandum of Law in Support………..x
Affirmation in Opposition………………..x
Memorandum of Law in Opposition……..x
Reply Memorandum of Law…………….x

Upon the foregoing papers, the motion (Seq. 04) by the Defendants, MAX FOLKENFLIK and FOLKENFLIK & MCGERITY LLP, seeking an Order, pursuant to CPLR § 2221, for leave to reargue and renew Justice Bruno's[1] Decision and Order, dated

[1] This matter was previously assigned to Justice Bruno. After the unfortunate passing of Justice Bruno, the matter was reassigned to this Court.

August 19, 2019, and entered on August 27, 2019 (hereinafter "Prior Order"), which denied Defendants' summary judgment motion (Mot. Seq. 03) on the grounds that it was not supported by an affidavit, and upon reargument or renewal, granting the underlying motion, is decided as hereinafter provided.

This action arises out of the execution of a search warrant on October 11, 2011, where the Defendant, MAX FOLKENFLIK, made allegedly defamatory statements during the search. The moving Defendants herein previously filed a motion for summary judgment (Mot. Seq. 03), which was denied by Justice Bruno because the Defendant, MAX FOLKENFLIK, who is an attorney, submitted an affirmation pursuant to CPLR 2103, as opposed to a sworn affidavit (See Prior Order at p. 2). The Court found that "[a]s parties to the action, although attorneys by profession, the FOLKENFLIK Defendants were required to submit an affidavit in support of their motion CPLR 2106(a)." Thus, the Court never reached the merits of the Defendants' motion.

In support of the instant application, the Defendants cure the defect by submitting a duly sworn affidavit by MAX FOLKENFLIK.

Based on the Defendants' submission of a sworn affidavit in support of their motion, the Court will grant renewal and consider the merits of the summary judgment motion.

The Plaintiff asserts causes of action for slander and libel, prima facie tort and abuse of process, arising out of the execution of a search warrant at the Plaintiff's law

firm, for information about the assets of an individual named Andrew Bressman ("Bressman"). The Defendants apparently obtained a search warrant as a result of an ex parte application relating to a judgment possessed by Defendants' client (the "Search Warrant"). The Order granting the Search Warrant was signed by Federal District Court Judge Edgardo Ramos, and was based upon representations made by Defendant FOLKENFLIK in an Affidavit to the Federal Court. As a result of the Search Warrant, the Defendant was permitted to search the records of Plaintiff's firm to assist in Defendants' client's judgment collection efforts.

On the date of the execution, the Defendant presented at Plaintiff's law offices with three armed U.S. Marshals and a group of computer experts to search the electronic and paper files of the firm for information, which could assist him in his judgment collection efforts. The gravamen of the Plaintiff's claims is the Defendant's conduct during the execution of the Search Warrant. Specifically, the Plaintiff alleges that FOLKENFLIK uttered the following slanderous statements about Plaintiff to the employees and associates of Plaintiff: "your boss is a crook"; "Mr. Friedman was involved with some bad people"; "men like him [Friedman] should not practice law"; "your boss is a bad guy"; and "we are here because he [Friedman] was breaking the law".

One of the bases upon which the Defendants seek summary judgment is res judicata, arguing that a prior proceeding involving the statements made in the application for the warrant bars the claims asserted herein. In particular, the Defendants submit that

"Judge Ramos found that none of the statements in the application for the warrant were false." Notably, the Defendants do not proffer any Orders or transcripts of proceedings from such proceeding. In any event, the Court agrees with the Plaintiff that the statements and conduct at issue here are not the procurement of the Search Warrant, but rather, the alleged defamatory statements made during the execution of the Search Warrant while the Defendant was present at the Plaintiff's law firm for the search.

The Plaintiff highlights that the Search Warrant issued by Judge Ramos was vacated; so too was the underlying judgment that the Defendant utilized in procuring the Search Warrant. In this regard, the Plaintiff points to the Federal Bankruptcy Court's finding that FOLKENFLIK had defrauded the Court in the procurement of the underlying judgment. The Federal District Court of New Jersey reviewed the findings of the Bankruptcy Court and affirmed the holding that FOLKENFLIK had defrauded the Court. On appeal, the Third Circuit stated:

> Folkenflik made a deceptive representation to the court in his affidavit, obtained a default judgment, had it trebled, and was awarded interest and attorneys' fees. We have no trouble concluding that his failure to disclose the settlement reflects his intent to commit fraud on the court.
>
> ***
>
> The ex parte nature of the proceedings was not a license for Folkenflik to deceive the court by deliberately failing to bring the material fact of the settlement to the court's attention.
>
> ***
>
> In fact, Folkenflik's duty to deal with the court honestly and with integrity was particularly important in light of the non-adversarial nature of the ex parte proceedings. In such a

> proceeding, the court depends on the integrity of appearing counsel because only he can ensure that the court has received the full scope of information pertinent to the merits of its considerations. Folkenflik was not only obligated to submit truthful information, but he was also required to disclose to the court any material information of which he was aware. Because his failure to do so has sufficiently undermined the judicial process, we conclude that a finding of fraud on the court will lie.
>
> ***
>
> The facts here demonstrate 'a deliberately planned and carefully executed scheme to defraud…' In his affidavit supporting his petition for a default judgment, Folkenflik omitted that Bressman's co-defendants had settled their claims in one of the New York actions: conduct which is incapable of innocent explanation. Folkenflik, in his capacity as an officer of the court, made sworn averments to obtain a default judgment and damages. Knowing that the averments had omitted a material fact, Folkenflik nevertheless allowed the Bankruptcy Court to rely upon their truthfulness. The court's reliance on the affidavit impugned its integrity.
>
> ***
>
> We conclude that the misconduct at issue here is sufficiently egregious. Because there is clear, unequivocal, and convincing evidence showing that Folkenflik committed fraud on the court, we will affirm the judgment of the District Court.

(See 874 F.3d 142 [3d Cir. 2017], annexed to Affirmation in Opposition as Exhibit "C", at p. 18-19). Based on the above clear and unequivocal findings by the Third Circuit Court of Appeals, this Court finds unavailing the Defendant's argument that the doctrine of res judicata applies to any degree. The prior proceedings, before the Federal District Courts, the Bankruptcy Court, and the Third Circuit, did not address, in any fashion, the Defendant's conduct or statements occurring after the Search Warrant was

issued, and the alleged defamatory statements complained of here during its execution while a search of the Plaintiff's law firm was underway. Accordingly, the res judicata argument patently fails.

The Plaintiff alleges that his law firm, in its prior configuration, Friedman Harfenist Kraut & Perlstein, had been in existence for twenty years. The Plaintiff claims that he enjoyed a close personal and professional relationship with his partners and staff. Immediately after the raid, however, Plaintiff claims that the relationships with his partners chilled dramatically; and that after the defamatory statements were made, and up until the firm's dissolution, the other partners stated that they could no longer trust Friedman due to Folkenflik's assertions. Plaintiff asserts that the other partners expressed that they were embarrassed to be affiliated with Friedman; that the defamatory statements had created mistrust amongst the employees for the partnership on the whole; hampered the functionality of the firm; and disrupted the operation of the firm.

With regard to damages, the Plaintiff asserts that following the breakup of the Plaintiff's firm on March 7, 2014, the Plaintiff's income suffered a precipitous drop of approximately $311,616.00 from its previous levels while a partner of the firm during the years 2011, 2012 and 2013.

Legal Analysis

At the outset, the Court notes that the Plaintiff has either withdrawn or abandoned all causes of action except the First Cause of Action for slander and the Second

Cause of Action for slander per se. The Defendants assert in their reply memorandum of law that the Plaintiff has agreed to stipulate to withdraw the remaining claims and that the stipulation will be filed prior to the return date of the motion. While the Court has not received any such stipulation, the Plaintiff does not address any claims other than slander and slander per se in his opposition papers. As such, the Court will restrict its analysis to the first two causes of action.

Defamation is the making of a false statement which 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" [internal quotations omitted] (Foster v. Churchill, 87 NY2d 744, 751 [1996], citing Rinaldi v Holt, Rinehart & Winston, 42 NY2d 369, 379 [1977], citing Sydney v Macfadden Newspaper Publ. Corp., 242 NY 208, 211-212 [1926]).

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' " (Geraci v Probst, 61 A.D.3d 717, 718 [2d Dept. 2009], citing Salvatore v Kumar, 45 AD3d 560, 563 [2007], quoting Dillon v City of New York, 261 AD2d 34, 38 [1999]). A false statement constitutes defamation per se when it charges another with a serious crime or tends to injure another in his or her trade, business, or profession (See Liberman v Gelstein, 80 NY2d 429, 437-438 [1992]; Matovcik v Times

Beacon Record Newspapers, 46 AD3d 636, 637 [2007]).

Whether particular statements are considered defamatory per se is a question of law (Geraci v. Probst, 15 NY3d 336, 344 [2010], citing Golub v. Enquirer/Star Group, 89 N.Y.2d 1074, 1076 [1997]). "Generally, a written statement may be defamatory 'if it tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number of the community' " (Geraci v. Probst, 15 NY3d at 344, citing Golub, 89 N.Y.2d at 1076, quoting Mencher v. Chesley, 297 N.Y. 94, 100 [1947]). Damages will likewise be presumed for statements that charge a person with committing a serious crime or that would tend to cause injury to a person's profession or business (Id.).

Here, the Defendants have failed to establish their prima facie entitlement to judgment as a matter of law. The Defendants do not argue the defense of truthfulness, nor do they dispute that the statements were published to third parties. Rather, the Defendants advance two arguments in support of their motion, to wit: (i) that the statements regarding the Plaintiff were mere expressions of "opinion"; and (ii) that the statements do not constitute defamation per se thus requiring the Plaintiff to plead and prove special damages.

Contrary to the Defendant's assertions, the statements made by the Defendant, FOLKENFLIK, can certainly be perceived in the minds of right-thinking persons as attacking the Plaintiff's character and questioning his fitness to practice in his profession as an attorney, including, inter alia, alleged defamatory statements such as

"your boss is a crook", "Mr. Friedman was involved with some bad people", "men like him should not practice law", and "your boss is a bad guy. We are here because he was breaking the law." The statements were uttered when the Defendant was present at the Plaintiff's law firm, accompanied by Federal Marshals and forensic computer experts, to execute a Search Warrant. Employees were forced to back away from their computers in the middle of a workday and not permitted to use their phones; and they were told that the doors would be kicked down if they did not cooperate. The Defendants' contention that a person hearing those statements under the circumstances would conclude that they were "imaginative expression" or "rhetorical hyperbole", is entirely misplaced.

When considering the "context and surrounding circumstances" as well as its "immediate and broader social context", as we must do here, the Court finds that a reasonable listener is likely to understand the remarks made about the Plaintiff as an assertion of provable fact, not merely "opinion" or "hypotheses" (Gross v. N.Y. Times Co., 82 NY2d 146 155 [1993]; Mann v. Abel, 10 NY3d 271, 276 [2008]).

In sum, the Defendants have wholly failed to establish their prima facie entitlement to summary judgment dismissing the Plaintiff's First and Second Causes of Action for slander and slander per se, respectively.[2]

The Defendants' remaining contentions are without merit.

Accordingly, it is hereby

[2] In light of the Court's determination herein, the Order (Mot. Seq. 05) issued by this Court staying the trial of this matter pending the hearing and determination of the instant motion shall be lifted.

ORDERED, that the motion by the Defendants, MAX FOLKENFLIK and FOLKENFLIK & MCGERITY LLP, seeking an Order pursuant to CPLR 2221, for leave to renew the denial of their underlying motion for summary judgment, is **GRANTED**, and upon renewal, the Defendants' summary judgment motion is **DENIED**, in its entirety; and it is further

ORDERED, that the Order (Mot. Seq. 05) staying the trial of this matter pending the hearing and determination of the instant motion is hereby **LIFTED**.

All matters not specifically addressed herein are **DENIED**.

This constitutes the decision and order of this Court.

Dated: Mineola, New York
May 14, 2020

/S/
Hon. Randy Sue Marber, J.S.C

ENTERED
May 18 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE