

Smartmatic USA Corp. v Fox Corp.
2022 NY Slip Op 33813(U)
November 9, 2022
Supreme Court, New York County
Docket Number: Index No. 151136/2021
Judge: David B. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID B. COHEN PART 58

Justice

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INDEX NO. 151136/2021

SMARTMATIC USA CORP., SMARTMATIC INTERNATIONAL HOLDING B.V., and SGO CORPORATION LIMITED,

MOTION SEQ. NO. 012

Plaintiffs,

- v -

FOX CORPORATION, FOX NEWS NETWORK LLC, LOU DOBBS, MARIA BARTIROMO, JEANINE PIRRO, RUDOLPH GIULIANI, and SIDNEY POWELL,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 012) 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 1025, 1042

were read on this motion to/for REARGUMENT/RECONSIDERATION.

In this defamation action, plaintiffs Smartmatic USA Corp. ("SUSA"), Smartmatic International Holding B.V. ("SIH"), and SGO Corporation Limited ("SGO") move, pursuant to CPLR 2221(d), for an order granting Smartmatic leave to reargue the branches of defendant Rudolph Giuliani's motion seeking to dismiss the complaint (motion sequence 009) which sought dismissal of all claims asserted by plaintiffs SIH and SGO against said defendant, as well as the dismissal of the third, fifth, and ninth causes of action against him and, upon reargument, denying Giuliani's motion to dismiss in its entirety.

FACTUAL AND PROCEDURAL BACKGROUND

The facts of this case are set forth in detail in the decision and order of this Court entered March 8, 2022 ("the 3/8/22 order"), which decided motion sequence numbers 001-004 and 008-009. Docs. 856-861. In the 3/8/22 order, this Court dismissed plaintiffs' third, fifth and ninth

causes of action against Giuliani on the ground that they were product disparagement claims for which plaintiffs failed to properly allege special damages. Docs. 856-861 at 57-58. However, those causes of action were dismissed with leave for plaintiffs to replead within 21 days after service of the order with notice of entry. Docs. 856-861 at 60. Plaintiffs did not move to replead.

This Court also granted Giuliani's motion to the extent that it dismissed the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, and fifteenth causes of action asserted by SIH and SGO, sounding in defamation, on the ground that Giuliani's statements were not "of and concerning" those two plaintiffs. Docs. 856-861 at 58-60.

Plaintiffs now move, pursuant to CPLR 2221(d) seeking the relief set forth above. In support of their motion, plaintiffs assert that this Court erred in dismissing the aforesaid claims against Giuliani. Doc. 976. They argue that, since their defamation claims were "of and concerning" all three plaintiffs, said claims by SIH and SGO should not have been dismissed. Doc. 976. Specifically, they maintain that this Court misinterpreted their allegations by deeming the allegations by "Smartmatic" in the complaint to refer only to SUSA. Doc. 976. Additionally, plaintiffs claim that this Court erred in dismissing their third, fifth and ninth cause of action against Giuliani since they sufficiently pleaded special damages. Doc. 976. They further contend that this Court erred in dismissing those causes of action since they set forth claims of defamation per se for which special damages did not have to be pleaded.

In opposition to the motion, Giuliani argues that a reasonable reader would not plausibly believe that plaintiffs' allegations related to SIH and SGO. Doc. 1025. He further maintains that the third, fifth and ninth causes of action set forth product disparagement claims and that they were properly dismissed since plaintiffs failed to adequately plead special damages. Doc. 1025.

In reply, plaintiffs SIH and SGO argue that Giuliani's statements were "of and concerning" them since, "[w]hen Giluiani spoke about "Smartmatic," people who kn[e]w SGO, [SIH] and SUSA understood that he was referring to all three companies." Doc. 1042. They further assert that Giuliani defamed them all since he referred to "Smartmatic software", which they all made or sold. Doc. 1042. Further, plaintiffs maintain that their third, fifth and ninth causes of action should not have been dismissed on the ground that they were product disparagement claims deficiently pleaded because they did not allege special damages. Doc. 1042. They also assert that these causes of action set forth claims of defamation per se since Giuliani made statements which injured them in their business and/or profession. Doc. 1042.

LEGAL CONCLUSIONS

"A motion for leave to reargue is addressed to the sound discretion of the court and is properly granted upon a showing that the facts . . . or law were overlooked or misapprehended by the court in determining the prior motion" (*Cascade Bldrs. Corp. v Rugar*, 154 AD3d 1152, 1154 [3d Dept 2017] [citation omitted]; see CPLR 2221 [d] [2]; *Mendez v Queens Plumbing Supply, Inc.*, 39 AD3d 260, 260 [1st Dept 2007]). However, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided" (*Matter of Setters v AI Props. & Devs. (USA) Corp.*, 139 AD3d 492, 492 [1st Dept 2016] [internal quotation marks and citations omitted]; see *Mangine v Keller*, 182 AD2d 476, 477 [1st Dept 1992]; *Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]).

Dismissal Of Plaintiffs' Third, Fifth And Ninth Causes Of Action

"[A]lthough defamation and disparagement in the commercial context are allied in that the gravamen of both are falsehoods published to third parties, there is a distinction. Where a statement impugns the basic integrity or creditworthiness of a business, an action

for defamation lies and injury is conclusively presumed. Where, however, the statement is confined to denigrating the quality of the business' goods or services, it could support an action for disparagement, but will do so only if malice and special damages are proven” (*Ruder & Finn, Inc. v Seaboard Sur. Co.*, 52 NY2d 663, 670-671 [1981] [citations omitted]).

In their third cause of action, plaintiffs alleged Giuliani and other defendants defamed plaintiffs by stating that their “election technology and software were used to rig, fix and steal the 2020 U.S. election.” Doc. 1 at par. 552. Plaintiffs did not allege who Giuliani stated had used the technology and software for this purpose.

In their fifth cause of action, plaintiffs alleged that Giuliani and other defendants defamed them by stating that plaintiffs’ “election technology and software were compromised and hacked during the 2020 U.S. election.” Doc. 1 at par. 582.

In their ninth cause of action, plaintiffs alleged that Giuliani and other defendants defamed them by stating that plaintiffs’ “election technology was designed and used to fix, rig and steal elections.” Doc. 1 at par. 642.

In its March 8, 2022 order, this Court dismissed plaintiffs’ third, fifth, and ninth causes of action on the ground that they sounded in product disparagement stating, inter alia, that:

The third, fifth and ninth causes of action, sounding in product disparagement, are dismissed against Giuliani since they seek damages in connection with lost customers but plaintiffs fail to plead special damages with the requisite specificity (*Prince v Fox Tel. Stas., Inc.*, 93 AD3d 614, 615 [1st Dept 2012] citing *Drug Research Corp.*, 7 NY2d at 440-441; *Christopher Lisa Matthew Policano, Inc. v North Am. Precis Syndicate*, 129 AD2d 488, 490 [1st Dept 1987]). Plaintiffs merely plead, inter alia, that they will sustain lost profits of \$500-690 [million] during the 5 years ending December 31, 2025 (Doc. 1 at par. 471); that SUSA’s parent company, SGO, will lose more than \$843.3 million in decreased revenues and increased expenses during the next five years (Doc. 1 at par. 494 n. 42), and that plaintiffs sustained actual, consequential and special damages “in an amount to be determined at trial, but no less than \$2.7 billion” Doc. 1 at par. 754. Since these round figures are insufficient to state a claim for special damages, this Court dismisses plaintiffs’ claim for product disparagement against Giuliani. However,

this dismissal is without prejudice and this Court, in its discretion, grants plaintiffs the right to replead the product disparagement claim (*See Franklin v Daily Holdings, Inc.*, 135 AD3d 87, 92-93 [1st Dept 2015]). Leave to replead is warranted under the circumstances given the quantity and seemingly outrageous character of the accusations made by Giuliani.

Docs. 856-861 at 57-58.

This Court declines to disturb its ruling regarding the third and fifth causes of action since they both clearly sound in product disparagement and plaintiffs did not allege special damages. Nor did they move to replead these two causes of action, despite being given the opportunity to do so.

However, the ninth cause of action by SUSA should not have been dismissed. Although this cause of action refers to plaintiffs' product, i.e., "election technology" the gravamen of this claim is that Giuliani and other defendants defamed plaintiffs by claiming that the said "election technology was designed and used to fix, rig, and steal elections". Doc. 1 at par. 642. Since such a defamatory statement impugns the basic integrity of SUSA's business, "an action for defamation lies and injury is conclusively presumed." (*Ruder & Finn, Inc. v Seaboard Sur. Co.*, 52 NY2d at 670). Thus, reargument is granted and, upon reargument, the ninth cause of action by SUSA as against defendant Giuliani is reinstated.

Dismissal Of Claims Against Giuliani By SIG and SGO

In dismissing the defamation claims against Giuliani by SIH and SGO, this Court stated that:

Giuliani correctly asserts that the defamation claims against him by SIH and SGO must be dismissed since the statements he made were not "of and concerning" them. Although a plaintiff suing for defamation need not be specifically named in a defamatory publication, it "must plead and prove that the statement referred to [it] and that a person hearing or reading the statement reasonably could have interpreted [the statement] as such" (*Three Amigos SJL Rest., Inc. v CBS News Inc.*, 28 NY3d 82, 86 [2016]). "This burden is not a light one, and the question of whether an allegedly defamatory statement could reasonably be interpreted to be 'of and

concerning' a particular plaintiff is a question of law for the courts to decide" (*Three Amigos*, 28 NY2d at 86-87). Since neither SIH nor SGO pleaded this allegation, their defamation claims against Giuliani must be dismissed.

Docs. 856-861 at 58-59.

The foregoing clearly demonstrates that this Court carefully analyzed whether Giuliani's statements were "of and concerning" SIH and SGO and determined that they were not. Although SIH and SGO pleaded that a person hearing or reading the defendants' allegedly defamatory statements could reasonably have interpreted the said statements to be about them, they did not specifically plead that defendants' comments specifically referred to either or both of them. Therefore, the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, and fifteenth causes of action by SIH and SGO as against Giuliani were properly dismissed (*See Three Amigos SJJ Rest., Inc. v CBS News Inc.*, 28 NY3d at 86).

The parties' remaining contentions are either without merit or need not be addressed in light of the findings above.

Accordingly, it is hereby:

ORDERED that the motion of plaintiffs Smartmatic USA Corp., Smartmatic International Holding B.V., and SGO Corporation Limited for leave to reargue the motion to dismiss by defendant Rudolph Giuliani (mot. seq. 012) is granted to the extent that this Court grants reargument as to the dismissal of the ninth cause of action as against said defendant; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that, upon reargument, the ninth cause of action by Smartmatic USA Corp. as against defendant Rudolph Giuliani is reinstated; and it is further

