Charcholla v Channel 13 News
2024 NY Slip Op 34626(U)
January 10, 2024
Supreme Court, Monroe County
Docket Number: Index No. E2020006583
Judge: Elena F. Cariola

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE

DANIEL CHARCHOLLA,

Plaintiff,

vs.

DECISION, ORDER & JUDGMENT

Index No.: E2020006583

CHANNEL 13 NEWS A/K/A 13 WHAM, DEERFIELD MEDIA (ROCHESTER), INC.,

Defendants.

APPEARANCES: **VIVEK JOHN THIAGARAJAN, ESQ.**
AARON M. GAVENDA, ESQ.
Attorneys for Plaintiff

JACQUELYN N. SCHELL, ESQ.
CHAD R. BOWMAN, ESQ.
Attorney for Defendants

Elena F. Cariola, J.

In an action for defamation, Defendants move this Court, pursuant to CPLR § 3212, for an order dismissing the amended complaint and also for judgment against Plaintiff for their counterclaim which seeks attorney fees and costs pursuant to Civil Rights Law § 70-a. In the main, they allege that the stories published by Defendants were fairly and accurately reported, and absolutely protected under New York's fair report privilege (*see*

Civil Right Law § 74). Further, Defendants aver that at all times they acted with due consideration for the standards of responsible newsgathering, and that certain statements challenged by Plaintiff are not actionable as they are not defamatory. Plaintiff opposes, contending that Defendants have failed to meet their burden, or in the alternative, a material issue of fact exists so as to preclude summary judgment. Additionally, Plaintiff cross-moves for an order, pursuant to CPLR § 2221, to renew a previous motion to compel discovery which was decided by an Order of this Court entered on June 29, 2022 and thereafter affirmed by the Appellate Division, Fourth Department (*see Charcholla v Channel 13 News*, 219 AD3d 1716 [4th Dept 2023]). In support of his cross motion, Plaintiff claims that Defendants have withheld information and failed to exercise due diligence in the disclosure of certain discoverable items. Defendants oppose. Now, upon due consideration of NYSCEF Docket No. 239, 241-307, the following constitutes the decision and order of the Court.

Background

By way of background, the genesis of this action arises from two lawsuits filed on August 28, 2019 against the Roman Catholic Diocese ("Diocese") brought pursuant to New York's Child Victims Act (CPLR § 214-g). In the lawsuits, the plaintiff named "J.O." alleged that the Diocese and DePaul Adult Care Communities, Inc. ("DePaul") failed to protect him from physical and sexual abuse as a child in their care in the late 1980s by Plaintiff, DePaul's former Director of Recreation. J.O.'s complaint alleged that Plaintiff

abused him for years while he was a teenager at DePaul. Specifically, the complaint stated that Plaintiff abused him for years while he was a teenager at DePaul. In relevant part, J.O. provided factual allegations which included:

- Plaintiff "violently sexually abused [J.O.] regularly," including "beating him violently with a bat while sexually assaulting him."
- Plaintiff "kidnapped [J.O.] for a week and held him in his home where he sexually abused him continuously."
- Plaintiff "violently attacked [J.O.] over his head with a baseball bat after he refused to perform oral sex and threatened to report him."
- Plaintiff "threatened [J.O.'s] life. [Plaintiff] showed [J.O.] the bat he beat him and sodomized him with. The bat was still covered in Plaintiff's blood."
- Plaintiff "was at all relevant times a serial sexual predator who sexually abused multiple boys over a period of decades."

On August 29, 2019, the day after the commencement of the lawsuits, J.O.'s lawyers at Herman Law issued a press release about the allegations and held a press conference. Defendants, and specifically Jane Flasch ("Flasch"), a reporter employed by Defendants, learned of the lawsuits through the press release and began reporting on the suits as a possible story. Flasch and a videographer attended the press conference. Flasch reviewed the J.O complaint, reached out to Herman Law and contacted DePaul. Additionally, a reporter was sent to Plaintiff's home to see if he had a comment on J.O.'s

allegations. The same day, Defendants broadcast a news report accompanied by a print article about the lawsuit under the headline "[o]ne man files two sexual abuse lawsuits against Diocese of Rochester." In drafting the report, Flasch relied on the allegations in J.O.'s publicly filed complaints.

On October 8, 2019, J.O. emailed Flasch, identifying himself as the plaintiff in the lawsuits, and agreed to participate in an interview so long as his identity was protected. During the interview, Flasch showed J.O. several photographs of different houses on the street where J.O. lived to see if he recognized any of them. J.O. identified one of the photographs as Plaintiff's former house. Flasch later confirmed that the house identified was where Plaintiff lived at the time of the alleged abuse. J.O. provided photographs of scars on his leg and head that he claims resulted from Plaintiff's alleged abuse. When asked if he had medical records, he explained his lawyers were trying to obtain them. Flasch also looked for police reports but could find none. J.O. provided Flasch with the names of sources he claimed could corroborate his allegations; Flasch attempted to contact those individuals and spoke with at least three on the condition of anonymity. One of the sources confirmed that J.O. had been a resident ay St. Joseph's Villa, where he alleged abuse in his first lawsuit. Another spoke to several instances of sexual assault involving Plaintiff and confirmed familiarity with locations mentioned by J.O.. A source who agreed to be identified as "Sean" indicated that he not only personally observed Plaintiff sexually abuse J.O., but also that Plaintiff sexually abused him during the same

period. Flasch also contacted DePaul, which declined to comment. Additionally, Flasch attempted to contact Plaintiff. He only responded to Defendants once, on October 31, 2019, in an email denying the allegations, and indicating that he could not comment further due to pending litigation.

Two months later, on October 29, 2019, Defendants broadcast a second segment about the J.O. lawsuit which was also accompanied by a print article with the headline "[c]hild sex abuse survivor accuses faith community of failing him." This latter publication contained an audio recording from a witness identified only by the pseudonym "Sean" whose account seemed to corroborate certain allegations. The report noted that "[i]n the decades since, [Plaintiff] has never been publicly accused or charged with a crime" and included Plaintiff's denial and DePaul's response declining to comment.

This action was commenced on August 27, 2020, by way of summons and complaint, wherein Plaintiff claimed the following excerpts from Defendants' reports were defamatory:

- A "montage" at the beginning of the Second News Report that "lends itself to an implication by the public of fact, not opinion."
- In the Second News Report, a statement by Sean that "BEEP refused to do what the guy asked him to do. The guy hit BEEP with the bat.'"

- A WHAM Channel 13 news anchor's "cit[ation] to Defendant J.O.'s description of [Plaintiff] as a 'predator.'"
- A statement in the Second News Report that "in 1981, this building housed the gymnasium."
- The inclusion of a picture of [Plaintiff] and the statement about J.O.'s allegation that "'in one case he was tied up then sodomized by the same baseball bat that was later used as a weapon to inflict at least two blows to his head.'"

Plaintiff acknowledges that the subject news reports are based upon J.O.'s allegations. The crux of his complaint is that those allegations are "verifiably false," and that Defendants failed to engage in reasonable fact-checking before reporting on the lawsuits.

During the course of discovery exchange, Plaintiff moved this Court, pursuant to CPLR §§ 3124 and 3126, for an order compelling the production of certain documents relative to email correspondences between Ms. Flasch with her internal marketing team. As pertinent thereto, Plaintiff had served a discovery demand upon Defendants on May 5, 2021, seeking "any and all documents relating or referring to any conversations, correspondences, or documentation of Defendant 13 WHAM regarding or related to communications between Defendant Herman Law Firm P.A. and/or J.O. and/or Defendant Deerfield Media (Rochester), Inc. insofar as it relates to the allegations made

in the J.O. Complaint, the news coverage of J.O.'s accusations, and/or any other witnesses to the alleged acts of Plaintiff." In its Decision and Order, the Court granted Plaintiff's motion to compel, opining:

> "Plaintiff's request for full and complete records of email communications sent to and from Ms. Flasch relating or referring to 'J.O.'s' allegations . . . is material and necessary to this action. In his moving papers, Plaintiff identified two instances indicative of additional email communications: (1) a possible communication with Herman Law requesting the 'J.O.' news story be delayed; and (2) a possible communication with Defendants' internal marketing and promotions department about such a delay. To the extent these documents exist, and if Defendants have not done so already, they must disclose to Plaintiff any and all written communications falling within these categories. (Decision and Order, Cariola, J. June, 29, 2022).

The Court went on to note:

> "Gratuitously, the Court has serious doubts as to whether any further email communications exist as the 'smoking gun' relied upon by Plaintiff is nothing more than innuendo and conjecture. To be certain, the email cited by Plaintiff as "proof" of additional correspondence with Herman Law and Defendants' internal department merely states, in relevant part, that "after checking with promotions and scheduling – [sic] [Ms. Flasch] won't be able to hold [the] story." While Plaintiff is likely correct in his assumption that Ms. Flasch did have previous communications with both Herman Law (prompting her to inquire with Defendants) and with the promotions and marketing department (about delaying the story), there is certainly no indication that this communication was conveyed via email or even reduced to writing. Nevertheless, should Defendants identify emails (or other forms of written communications) within this vein, Plaintiff is entitled to disclosure as such documents fall

> plainly within the purview of CPLR § 3101. However, if a search by Defendants produces no results, they cannot be compelled to produce documents which do not exist (*see Castillo v Henry Schein, Inc.*, 259 AD2d 651, 652 [2d Dept 1999])." (*Id.*).

On March 31, 2023, a note of issue was filed. The instant motions followed thereafter.

Summary Judgment

A party seeking summary judgment pursuant to CPLR § 3212 must make a *prima facie* showing of entitlement to judgment as a matter of law and submit sufficient evidence to demonstrate the absence of any material issue of fact (*Iselin & Co. Inc v Mann Judd Landau*, 71 NY2d 420 [1988]). The Court must view the evidence presented in the light most favorable to the nonmoving party (*Russo v YMCA of Greater Buffalo*, 12 AD3d 1089 [4th Dept 2004]). When faced with a motion for summary judgment, "a court's task is issue finding rather than issue determination," and thus the Court "must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference and ascertaining whether there exists any triable issue of fact" (*Esposito v Wright*, 28 AD3d 1142, 1143 [4th Dept 2006]). Likewise, a moving defendant must affirmatively demonstrate the merits of its defense and cannot meet its burden in moving for summary judgment by pointing to gaps in plaintiff's proof (*George Larkin Trucking Co. v Lisbon Tire Mart, Inc.*, 185 A.D.2d 614 [4th Dept 1992]). If the proponent demonstrates entitlement to summary judgment, the opposing party must

then demonstrate, generally by admissible evidence, the existence of an issue of fact requiring a trial (*Zuckerman v City of New York*, 49 NY2d 851 [1985]).

"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.' In order to prove a claim for defamation, the plaintiff must show: (1) a false statement that is (2) published to a third party (3) without privilege or authorization and that (4) plaintiff is caused harm, unless the statement is one of the types of publications actionable regardless of harm. Further, 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.' Loose, figurative or hyperbolic statements, even if deprecating the plaintiff, are not actionable.'" (*Cardali v Slater*, 56 Misc 3d 1003, 1008 [Sup Ct 2017] [internal citations omitted].) "In order to establish a prima facie case of defamation, plaintiffs must show that the matter published is 'of and concerning' them" (*Three Amigos SJL Rest., Inc. v CBS News Inc.*, 28 NY3d 82, 86 [2016]).

"Section 74 of the Civil Rights Law provides, in relevant part, that '(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.' 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. . . . [A] fair and true report admits of some liberality; the exact words of every proceeding need not be given if the substance be substantially stated." (*Holy Spirit Ass'n for Unification of World Christianity v New York Times Co.*, 49 NY2d 63, 67 [1979] [internal citations and quotations omitted].) To that end, "newspaper accounts of legislative or other official proceedings must be accorded some degree of liberality. When determining whether an article constituted 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 [2013].) "Comments that essentially summarize or restate the allegations of a pleading filed in an action are the type of statements that fall within section 74's privilege" (*Mistretta v Newsday Media Group*, 200 AD3d 775 [2d Dept 2021] [internal citations and quotations omitted]). Furthermore, "it is well settled that 'there is 'no requirement that the publication report the plaintiff's side of the controversy'" (*Curto v New York Law Journal*, 144 AD3d 1543, 1544 [4th Dept 2016] [internal citations omitted]).

In the instant case, Defendants have met their prima facie burden of establishing that the subject news reports, and in particular, the five challenged statements, are subject to New York's fair report privilege. Upon reviewing the subject news stories in their entirety, the two reports, on their face, constitute accurate reports of the allegations

contained in J.O.'s lawsuits. Initially, as argued by Defendants, and undisputed by Plaintiff, the first and fourth challenged statements (the "montage" about J.O. that supposedly "lends itself to an implication by the public of fact, not opinion" and the statement that, "in 1981, this building housed the gymnasium") are not actionable as the statements are not "of and concerning" Plaintiff. Now turning to the remaining challenged statements, as duly noted by Defendants, the word "predator" in the third challenged statement is quoted from J.O.'s description of Plaintiff in his complaint. The second challenged statement that "[J.O.] refused to do what the guy asked him to do [and [t]he guy hit BEEP with the bat" and the fifth challenged statement that "[J.O.] was tied up then sodomized by the same baseball bat that was later used as a weapon to inflict at least two blows to his head" are nearly verbatim recitations of allegations contained in J.O.'s complaint. (*See generally Mistretta*, 200 AD3d 775 [2d Dept 2021] [court ruled that comments in newspaper article, which plaintiff argued suggested he was involved in a political arrest, were a fair and true report of allegations contained in action brought by arrestee against the sergeant and the investigative findings of the district attorney's office]; *Napoli v New York Post*, 175 AD3d 433 [1st Dept 2019] [allegedly defamatory statements that appeared in various articles in newspaper, concerning judicial filings in a case related to plaintiff, were protected by the privilege for fair and true reporting of judicial proceedings, where the allegedly defamatory statements essentially summarized or restated allegations in the judicial filings].)

Additionally, Under New York law, a plaintiff challenging news reporting on matters even "arguably within the sphere of legitimate public concern," must prove that the defendant 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]). Here, Defendants persuasively argue the matters reported were on a public concern, and Defendant does not dispute this contention. The Court now turns to second inquiry of whether Defendants acted in a grossly irresponsible manner, without due consideration for the standards of information gathering, and finds that they did not. Here, Defendants have established, prima facie that they vetted J.O.'s allegations using standard and reasonable journalist methods. To be sure, Flasch spoke with J.O. and corroborating sources, reviewed property records, reviewed photographs with J.O., and repeatedly sought comment from DePaul and Plaintiff.

With respect to Defendants' counterclaim, New York's recently amended "Anti-SLAPP" law provides for an award of attorneys' fees and costs against plaintiffs who "commenced or continued" claims based on speech on matters of public concern "without a substantial basis in fact and law" or a "substantial argument for the extension, modification or reversal of existing law"(Civ Rights Law § 70-a [1] [a]). "New York courts have generally applied a broad interpretation to what constitutes a matter of public concern. Matters of public concern include matters of political, social, or other concern

to the community, even those that do not affect the general population. When determining whether content is within the sphere of legitimate public concern, allegedly defamatory statements can only be viewed in the context of the writing as a whole and courts must examine the content, form, and context of the statements. Statements falling into the realm of mere gossip and prurient interest are not matters of public concern nor are "publications directed only to a limited, private audience. (*Aristocrat Plastic Surgery, P.C. v Silva*, 206 AD3d 26, 29-30 [1st Dept 2022] [internal citations and quotations omitted].) Defendants have satisfied their initial burden. It should be noted that Defendants have established, and Plaintiff does not dispute, that the subject news reports constitute a matter of public concern. Furthermore, for all of the reasons herein stated, Defendants have established, prima facie, that Plaintiff's complaint is without a substantial basis in law or fact.

In opposition, Plaintiff has failed to raise a triable issue of fact. Plaintiff relies on the following inconsistencies within the Flasch affidavit:

- Flasch stated she was not able to obtain medical records; later she stated she did not request them;
- Flasch stated she spoke with at least three witnesses provided by J.O.; she previously stated she only spoke with one, "Sean."

He also relies upon Flasch's failure to contact his ex-wife as a possible witness, her tactics of showing J.O. photographs of houses (including Plaintiff's former house) in the

neighborhood where the abuse allegedly occurred as evidence that there is a material issue of fact relative to whether Defendants acted in a grossly irresponsible manner. The Court disagrees.

Contrary to Plaintiff's contention, that Defendants could not locate medical records or police reports does not lend credence to a conclusion that they failed to exercise due diligence in fact checking. The passage of time between the allegations of abuse and the filing of the J.O. complaints render it possible, if not probable, that no such medical records exist. Flasch indicated that she requested the records from J.O. who advised that his attorney was in the process of searching for them. Relatedly, the absence of police records are not inconsistent with the nature of the allegations. The remainder of investigatory "shortcomings" relied upon by Plaintiff are unpersuasive. Furthermore, any inconsistencies identified in the Flasch testimonies are, at best minute, and of no moment in creating an issue of fact. Finally, for the reasons discussed below, the absence of discovery cited by Plaintiff does not create an issue of fact so as to overcome summary judgment. It is for these reasons that Defendant's motion to dismiss Plaintiff's complaint (third and fourth causes of action) must be granted.

Motion to Renew

On a motion to renew, CPLR § 2221 (e) provides:

1. shall be identified specifically as such;

2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there

has been a change in the law that would change the prior determination; and

3. shall contain reasonable justification for the failure to present such facts on the prior motion.

As a threshold matter, although identified as a motion to renew, the sum and substance of Plaintiff's motion does not entitle him to relief pursuant to CPLR § 2221. Plaintiff's motion substantively appears to be a challenge to Defendants' compliance with the Court's previous disclosure Order. It is not a motion offering new facts which may affect that prior Order. To be sure, Plaintiff alleges that Defendants' narrow reading of this Court's Order, directing the disclosure of email communications with Defendants' marketing and promotions department pertaining to the airing of the subject news stories, resulted in improperly limiting the scope of its search, which artificially and erroneously yielded no results. Assuming arguendo Plaintiff requested sanctions for Defendants' alleged noncompliance with this Court's previous disclosure Order, he nevertheless fails to articulate the information that was purportedly not disclosed by Defendants. Rather, Plaintiff simply conjectures that an "admission" by Ms. Flasch --- the email with the link of a deleted interview with J.O. that was sent to Beth Swerda and Paul Stella of Defendants' marketing and promotions department, and discussions subsequent thereto directly led the editorial team to conclude the story was strong enough to air --- evidences the existence of other discoverable items. The Court disagrees. Simply stated, Plaintiff cannot point to any information that was unavailable to him

during discovery, he has not identified any discoverable evidence that he seeks to obtain, and he has not shown that any such evidence would be material to this action.

Alternatively, to the extent the content of Plaintiff's motion is more consistent with an application to strike the note of issue based upon incomplete discovery, the Court nevertheless finds it to be entirely without merit. A court may strike a note of issue and certificate of readiness on motion upon a showing the case is not ready for trial or "it appears that a material fact in the certificate of readiness is incorrect" (22 NYCRR § 202.21 [e]). "While a note of issue will generally be stricken if the case is not ready for trial, the motion to strike can be denied where the parties had sufficient time to complete discovery" (*Plonka v Millard Fillmore Emergency Physicians Services, P.C.*, 9 AD3d 869, 869 [4th Dept 2004] *see also Simmons v Kemble*, 150 AD2d 986 [3d Dept 1989] [in declining to strike note of issue, court deemed 13 months sufficient to complete discovery] *Bycomp, Inc. v New York Racing Ass'n, Inc.*, 116 AD2d 895 [3d Dept 1986] [motion to strike note of issue denied where parties exchanged some discovery in 8 month period]). Furthermore, "discovery requests must be legitimate and pending, not resolved or contrived" (Ireland v Geico Corp., 2 AD3d 917, 918 [3d Dept 2003] [citations omitted]).

Here, affording Plaintiff every favorable inference, nearly six months elapsed without any effort to obtain discovery relative to communications involving Beth Swerda and Paul Stella of Defendants' marketing and promotions department. During this time frame, Plaintiff failed to exercise a scintilla of effort and took no steps to further their

discovery. It is noteworthy that Plaintiff has had an email from Flasch to Paul Stella for more than two years. Additionally, during Ms. Flasch's deposition, Plaintiff, referencing this email, asked questions about both Paul Stella and Beth Swerda, but he failed to inquire about the manner by which Flasch communicated with them, and further, despite having the opportunity and adequate time, Plaintiff failed to depose Paul Stella and Beth Swerda. In this Court's view, Plaintiff had adequate time to demand discovery and their lack of diligence in pursuing it is without excuse so as to justify the striking of the note of issue.

Finally, the extent to which Plaintiff now seeks a video of an evening news segment, such a request is grossly untimely in that by Plaintiff's own admission, this video was a "key point [pleaded] in the Plaintiff's complaint." That it is only now being raised, after two years of discovery exchange, multiple motions and six months after the filing of the note of issue, in this Court's estimation, necessitates a rejection of such a contention.

For all of the foregoing reasons, it is hereby

ORDERED, that the Defendants' motion for summary judgment pursuant to CPLR § 3212 is hereby GRANTED in its entirety; and it is further

ORDRED that the Plaintiff's complaint is dismissed in its entirety; and it is further

ORDERED that the Court shall conduct a damages inquest with respect to reasonable attorney's fees at a date and time to be determined; and it is further

ORDERED, that the Plaintiff's motion to renew pursuant to CPLR § 2221 (e) is hereby DENIED in its entirety; and it is further

ORDERED that counsel shall appear for a compliance conference on February 16 at 11:00 am/pm.

Any prayers for relief not specifically addressed herein are DENIED.

This constitutes the Decision and Order of the Court.

Dated: January 10, 2024

HON. ELENA F. CARIOLA
Supreme Court Justice