

Smartmatic USA Corp. v Fox Corp.

2025 NY Slip Op 34562(U)

November 24, 2025

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

-----X

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

Plaintiffs,

- v -

FOX CORPORATION, FOX NEWS NETWORK LLC, DEBI
DOBBS, MARIA BARTIROMO, JEANINE PIRRO, SIDNEY
POWELL,

Defendants.

-----X

INDEX NO. 151136/2021

MOTION DATE 06/20/2024

MOTION SEQ. NO. 048

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 048) 2136, 2137, 2144 were read on this motion to/for DISMISS DEFENSE.

Plaintiffs move pursuant to CPLR 3211 for an order dismissing defendants’ affirmative defenses two, three, six, 14, 16, and 18. Defendants oppose.

This action involves defendants’ alleged defamation of plaintiffs related to the 2020 United States presidential election. The salient facts are set forth in earlier motions in this case.

I. PERTINENT BACKGROUND

At issue on this motion is the applicability of several affirmative defenses asserted by defendants against plaintiffs’ defamation claims. In affirmative defense number two, defendants allege that plaintiffs’ claims are barred by the First Amendment of the United States Constitution, and in affirmative defense number three, are barred by Article I, Section 8 of the New York State Constitution (NYSCEF 1438).

In affirmative defense six, defendants assert that “the allegedly defamatory statements concerned matters of substantial public interest and legitimate public concern, and Fox News did

not act with actual malice.” In defense 14, defendants maintain that plaintiffs’ claims are barred by New York Civil Rights Law Section 74 and 76.

In defense 16, defendants contend that:

Plaintiffs’ claims are barred because the news coverage at issue in the Complaint dealt with matters within the sphere of legitimate public concern, was reasonably related to matters warranting public exposition, and was not published in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.

Finally, in defense 18, defendants argue that plaintiffs’ claims are barred in whole or in part under both state law and the First Amendment to the United States Constitution because Fox News is not liable for allegedly defamatory statements by third parties not employed by or affiliated with Fox News.”

Plaintiffs characterize these affirmative defenses as either concerning a neutral reporting privilege or defense, or a fair reporting privilege or defense. As to the neutral reporting defense, plaintiffs argue that such a defense does not exist under New York State law, and, in any event, defendants failed to plead it. As to the fair reporting defense, plaintiffs maintain that defendants did not plead it properly.

II. ANALYSIS

A. Neutral reporting defense

New York State does not recognize a “neutral reporting” defense (*Weiner v Doubleday & Co., Inc.*, 74 NY2d 586 [1989]; *Hogan v Herald Co.*, 84 AD2d 470 [4th Dept 1982], *affd* 58 NY2d 630 [1982]; *Lopez v Univision Communications, Inc.*, 45 F Supp 2d 348 [Dist Ct, SDNY 1999] [recognizing that no neutral reporting privilege exists under New York Law]; *see also U.S. Dominion, Inc. v Fox News Network, LLC*, 293 A3d 1002 [Sup Ct, Del 2023] [severing and

dismissing “neutral reporting” defense as not recognized in New York]). Those affirmative defenses that rely on neutral reporting are therefore severed and dismissed.

B. Fair reporting defense

A fair comment or reporting defense requires a showing that the defendant alleged the facts upon which the comments or reports were made, that the facts were true, and that the comments made on such facts were fair and made without malice as the defendant’s honest opinion. A defense that a publication was a fair and true report of an official proceeding must identify the proceeding (44 NY Jur 2d, Defamation and Privacy 277 [2025]). New York Civil Rights Law 74 codifies this privilege, and provides that a civil action may not be maintained against any entity or person for the publication of a fair and true report of a judicial or other official proceeding (43A NY Jur 2d, Defamation and Privacy 150 [2025]). The fair reporting doctrine is codified in New York Civil Rights Law 74

Thus, the report must be both “fair and true” and “of an official proceeding.” (*US Dominion, Inc.*, 293 A3d at 1058-1059). The substance of the statement must be “substantially accurate” (*Cholowsky v Civiletti*, 69 AD3d 110 [2d Dept 2009]), and the context of the statement must be such that an ordinary viewer can determine whether the defendant was reporting on an official proceeding (*id.* at 115).

Here, defendants fail to identify any “official proceeding” in their amended answer (NYSCEF 2025), and the statements at issue do not mention an official proceeding and do not provide a context from which an ordinary viewer would believe that defendants were reporting on an official proceeding. Plaintiffs thus demonstrate that the fair reporting privilege does not apply here.

In an analogous case, the Federal District Court in *Khalil v Fox Corp.* dismissed defendants’ affirmative defense related to fair reporting, finding that:

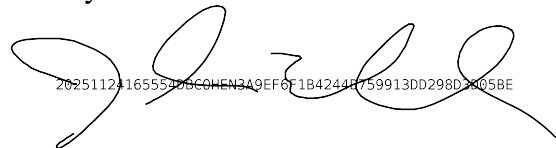
While defendants argue that the challenged statements constitute a report on an “ongoing investigation into electoral fraud, seemingly at the President’s behest, this argument fails. [Sidney] Powell was not working on a case in an official capacity nor on behalf of a public agency during her investigation . . . More damning, however, is that at no point did [Lou] Dobbs or Powell attribute the statements about Khalil to an official investigation or a judicial proceeding. A reasonable observer would have no grounds to believe that her statements constituted a report of an official proceeding.

(630 F Supp 3d 568 [SDNY 2022]).

Defendants’ amended answer here suffers from the same pleading infirmities as in *Khalil*, and for the same reasons, they fail to state a fair reporting defense.

Accordingly, it is hereby

ORDERED, that plaintiffs’ motion to dismiss some of defendants’ affirmative defenses is granted, and defenses two, three, six, 14, 16, and 18 are hereby severed and dismissed.



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11/24/2025
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: