

Kendall v Hutchinson
2012 NY Slip Op 32172(U)
August 9, 2012
Supreme Court, New York County
Docket Number: 100245/2012
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. ANIL C. SINGH
SUPREME COURT JUSTICE
PRESENT: _____
Justice

PART 61

Index Number : 100245/2012
DR. CYRIL KENDALL
vs.
BUTCHINSON, BILL
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is _____

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

AUG 17 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/9/12

AC J.S.C.
HON. ANIL C. SINGH
SUPREME COURT JUSTICE

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE:MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

DR. CYRIL N. KENDALL, THE WORLD'S
MOST UNIQUE MAN,

Plaintiff,

-against-

BILL HUTCHINSON, JOHN DOYLE,
MORTIMER B. ZUCKERMAN and
DAILY NEWS, L.P.

Defendants

DECISION AND
ORDER

Index No.
100245/12

FILED

AUG 17 2012

HON. ANIL C. SINGH, J.:

Defendants Bill Hutchinson ("Hutchinson"), John Doyle ("Doyle"), Mortimer B. Zuckerman ("Zuckerman"), and Daily News, L.P., ("Daily News") move to dismiss the complaint pursuant to CPLR 3211(a)(1) and 3211(a)(7). Plaintiff opposes the motion.

NEW YORK
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Plaintiff Cyril Kendall commenced this defamation action seeking damages based on an article that was published by The Daily News, a newspaper owned by defendant Daily News, L.P. The article in question appeared in the Daily News print edition and on its website on October 3, 2011.

Kendall is an inmate at Orleans Correctional Facility in Albion, New York. In 2003, he was charged with defrauding a number of charities by claiming to have lost a son named "Wilfred" in the World Trade Center on September 11, 2001, and accepting substantial charitable gifts based on this fraud. When investigative authorities discovered that "Wilfred" was fictitious, Kendall was arrested and charged with grand larceny and fraud.

As part of his defense at trial, Kendall argued that his indictment was not valid due to a mis-typed indictment number from the transcript of his formal indictment. This "dummy indictment" theory was rejected by the court as frivolous.

Following a jury trial, Kendall was convicted on all four felony counts and sentenced to a lengthy prison term. The convictions were upheld by the Appellate Division (People v. Kendall, 27 A.D.3d 355 [1st Dept., 2006]). Leave to appeal was denied by the Court of Appeals (People v. Kendall, 6 N.Y.3d 895 [2006]).

Subsequently, plaintiff filed a *habeas corpus* petition in federal District Court. His petition was denied and dismissed (Kendall v. Connolly, 2009 WL 162899 [S.D.N.Y., 2009]).

Defendants Hutchinson and Doyle are the reporters who wrote the article that appeared under the headline: "GOOD RIDDANCE! Worst 9/11 scammer to be freed after 8 yrs. in jail, get boot from U.S." The article summarizes the charges against Kendall and reports the terms of his sentence and conditional early release.

Kendall's libel claim stems from the article, most notably the following excerpt in which the defendants describe the conviction of plaintiff based on court records:

Kendall was convicted of grand larceny and fraud after cheating several charities of benefits, including grief counseling for himself and burial funds for a son prosecutors maintained never existed.

He claimed his youngest son, Wilfred, 29, was killed in the terror attacks while attending a job interview on the 91st floor of the north tower.

Kendall, the father of 12 children, presented the charities with a photograph of his dead son and a birth certificate. Investigators later determined the photo was of Kendall at a younger age and that the birth certificate was a forgery.

His biggest target was the American Red Cross, which was bilked of \$119,000 - the most fraudulently obtained by a single individual.

(Motion to Dismiss, exhibit B).

In his complaint, plaintiff insists that he was never properly charged and convicted, so the article as written was false. Based on a transcript dated July 23, 2003, plaintiff contends that the case "People v. Kendall" was dismissed (Opp., exhibit A). This claim is founded on a mis-typed Indictment Number. In all instances prior to July 23, 2003, the record correctly shows Indictment No. 3565-2002. On July 23, 2003, the record states the slightly different Indictment No. 3525-2002, which in all past proceedings was recognized as a clerical error.

Kendall urges this Court to find that a single appearance of a slightly different indictment number should reasonably be interpreted to mean that the entire case was dismissed. Kendall claims that because it was "dismissed," the case with Indictment No. 3565-2002 never led to his conviction.

Defendants assert that the complaint should be dismissed for two reasons.

First, defendants argue that Kendall is collaterally estopped from relitigating his conviction. While defendants do not reference CPLR 3211(a)(5), which specifies that collateral estoppel is grounds for dismissal, it is clear from their legal memoranda that they intend to invoke the doctrine of collateral estoppel.

"The doctrine of collateral estoppel bars relitigation of an issue which has necessarily been decided in a prior action and is determinative of the issues disputed in the present action, provided that there was a full and fair opportunity to contest the decision now alleged to be controlling" (Mahler v. Campagna, 60 A.D.3d 1009 [2nd Dept, 2009]; see also Hallock v. State of New York, 64 N.Y.2d 224 [1984]).

Defendants contend that because Kendall argued the issue of the mis-typed indictment number during his criminal trial, he is collaterally estopped from using this argument in support

of his defamation claim. More specifically, by insisting that the defendants lied by stating that he was convicted of the charges, Kendall asks this Court to reconsider the prior judicial decisions regarding his conviction.

Kendall was convicted of larceny and fraud charges. The jury's verdict and the sentence were upheld on appeal. Ultimately, there is no need for this Court to weigh its opinion on this matter. The past decisions are consistent and conclusive. Kendall's conviction is valid. Because this defamation case arises from issues he had a full and fair opportunity to contest in the criminal case, Kendall may not re-litigate the issue of his conviction in this civil action.

Second, defendants assert that by accurately reporting the criminal proceedings, they cannot be found liable, in accordance with N.Y. Civil Rights Law § 74, which states:

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.

"Judicial interpretation of section 74 has made it clear that an article need not be a verbatim account or even a precisely accurate report of an official proceeding to be a fair and true report of such a proceeding" (Freeze Right Refrig. & A.C. Servs. v. City of New York, 101 A.D.2d 175,183 [1st Dept., 1984]).

Plaintiff's criminal conviction has been upheld consistently on appeal, and the article provides a fair and true report of Kendall's past judicial proceedings. In no way is the article's language misleading or subject to misinterpretation.

Moreover, while section 74 is often cited in cases where the reliability of a publication's source is potentially questionable, that is not the case here (see, for example, Cholowsky v.

Civiletti, 69 A.D.3d 110, 113 [2d Dept., 2009] (stating that “once it is established that the publication is reporting on a judicial proceeding, ‘how a reporter gathers his information concerning a judicial proceeding is immaterial provided his [or her] story is a fair and substantially accurate portrayal of the events in question’”).

In this case, the official proceedings accurately summarized in the article are from Kendall’s indictment, conviction in court, and subsequent appeals, none of which is of uncertain legitimacy.

This Court agrees with both of the defendants’ arguments against Kendall’s defamation claims. There is simply no legal basis for Kendall’s argument. Accordingly, there is no stated cause of action as a matter of law.

Furthermore, plaintiff’s claim of property rights violation with regard to official records used for the article, is entirely frivolous. “Under New York law, there is a broad presumption that the public is entitled to access to judicial proceedings and court records” (Mosallem v. Berenson, 76 A.D.3d 345 [1st Dept, 2010]; see also Mancheski v. Gabelli Group Capital Partners, 39 A.D.3d 499, 501 [2007]; Gryphon Dom. VI, LLC v. APP Intl. Fin. Co., B.V., 28 A.D.3d 322, 324 [2006]; Danco Labs. v. Chemical Works of Gedeon Richter, 274 A.D.2d 1, 6 [2000]). Exceptions to public availability to court records exist, but are not applicable in this case – the only exception relating to criminal cases is for sealed records (CPL 160.50), and Kendall’s records were not sealed. As this suggests, all of the records which the plaintiff purports ownership of are public and are certainly not the exclusive private property of the plaintiff.

Kendall has a history of filing frivolous motions, including a claim of mental defect solely based upon a judge one time calling him delusional. Now, Kendall charges the defense

with defamation, property violation, and has most recently charged the defendants' counsel with perjury.

These charges are unfailingly without merit, and in many instances, the language used in Kendall's motion is unclear and requires imaginative and liberal interpretation. Despite this series of charges and accusations, Kendall offers no documentary evidence, legal authority, or reasonable argument in support of his assertions and, thus, fails to adequately state a cause of action.

For the above reasons, it is

ORDERED that the motion is granted, and the complaint is dismissed with prejudice.

Date: 8/9/12
New York, New York

Anil C. Singh FILED
Anil C. Singh

AUG 17 2012

NEW YORK
COUNTY CLERK'S OFFICE