O'Brien v Higginbotham
2017 NY Slip Op 30335(U)
February 3, 2017
Supreme Court, New York County
Docket Number: 162746/2014
Judge: Lucy Billings

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
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RICHARD KERRY O'BRIEN, Index No. 162746/2014

Plaintiff

- against - DECISION AND ORDER

ADAM HIGGINBOTHAM, JOSH TYRANGIEL, and BLOOMBERG L.P.,

Defendants

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues to recover damages for libel and intentional infliction of emotional distress caused by an article entitled "The Irish Clan Behind Europe's Rhino-Horn Theft Epidemic," dated January 2, 2014, written by defendant Higginbotham, edited by defendant Tyrangiel, and published by defendant Bloomberg L.P. Defendants move to dismiss the complaint based on a documentary defense and failure to state a claim. C.P.L.R. § 3211(a)(1) and (7). For the reasons explained below, the court grants defendants' motion.

II. APPLICABLE STANDARDS

Upon defendants' motion to dismiss the complaint pursuant to C.P.L.R. § 3211(a)(1) or (7), the court accepts the complaint's allegations as true and draws all inferences in plaintiff's favor. Simkin v. Blank, 19 N.Y.3d 46, 52 (2012); Art & Fashion Group Corp. v. Cyclops Prod., Inc., 120 A.D.3d 436, 437 (1st Dep't 2014); Amsterdam Hospitality Group, LLC v. Marshal-Alan

Assoc., Inc., 120 A.D.3d 431, 432 (1st Dep't 2014); Cabrera v. Collazo, 115 A.D.3d 147, 150 (1st Dep't 2014). Dismissal is warranted under C.P.L.R. § 3211(a)(7) only if the complaint fails to allege facts that fit within any cognizable legal theory. Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007); Goldman v. Metropolitan Life Ins. Co., 5 N.Y.3d 561, 570-71 (2005); Mill Financial, LLC v. Gillett, 122 A.D.3d 98, 103 (1st Dep't 2014); Cabrera v. Collazo, 115 A.D.3d at 151.

Dismissal of the complaint's claims pursuant to C.P.L.R. § 3211(a)(1) requires documentary evidence in admissible form that conclusively resolves all factual issues and establishes a defense as a matter of law. Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); Mill Financial, LLC v. Gillett, 122 A.D.3d at 103; Art & Fashion Group Corp. v. Cyclops Prod., Inc., 120 A.D.3d at 438; Amsterdam Hospitality Group, LLC v. Marshal-Alan Assoc., Inc., 120 A.D.3d at 433. The documentary evidence must plainly and flatly contradict the complaint's claims. Maas v. Cornell Univ., 94 N.Y.2d 87, 91 (1999); Xi Mei Jia v. Intelli-Tec Sec. Servs., Inc., 114 A.D.3d 607, 608 (1st Dep't 2014); Cathy Daniels, Ltd. v. Weingast, 91 A.D.3d 431, 433 (1st Dep't 2012); KSW Mech. Servs., Inc. v. Willis of N.Y., Inc., 63 A.D.3d 411 (1st Dep't 2009). See Lopez v. Fenn, 90 A.D.3d 569, 572 (1st Dep't 2011). The court may dismiss claims based on such evidence only if plaintiff fails to rebut it. Hicksville Dry Cleaners, Inc. v. Stanley Fastening Sys., L.P., 37 A.D.3d 218 (1st Dep't 2007).

III. PLAINTIFF'S CLAIMS

While the complaint includes a claim for intentional infliction of emotional distress, at oral argument January 21, 2016, plaintiff conceded that this claim merely duplicated his claim for libel. See Akpinar v. Moran, 83 A.D.3d 458, 459 (1st Dep't 2011). Libel is an injury to a person's reputation through a written publication of facts, rather than opinion. Thomas H. v. Paul B., 18 N.Y.3d 580, 584 (2012); Saint David's Sch. v. Hume, 101 A.D.3d 582, 583 (1st Dep't 2012); Konrad v. Brown, 91 A.D.3d 545, 546 (1st Dep't 2012). To sustain a claim for libel, plaintiff must show that defendants made (1) a non-privileged statement of fact, Martin v. Daily News L.P., 121 A.D.3d 90, 100 (1st Dep't 2014); O'Neill v. New York Univ., 97 A.D.3d 199, 212 (1st Dep't 2012); GS Plasticos Limitada v. Bureau Veritas, 84 A.D.3d 518, 519 (1st Dep't 2011), (2) concerning him, Smith v. Catsimatidis, 95 A.D.3d 737 (1st Dep't 2012); Prince v. Fox Tel. Stas., Inc., 93 A.D.3d 614 (1st Dep't 2012), (3) with the requisite degree of fault, (4) that is false and defamatory, Brian v. Richardson, 87 N.Y.2d 46, 51 (1995); Omansky v. Penning, 101 A.D.3d 514, 515 (1st Dep't 2012); Amaranth LLC v. J.P. Morgan Chase & Co., 100 A.D.3d 573, 574 (1st Dep't 2012); Konrad v. Brown, 91 A.D.3d at 546, and (5) that damaged him. E.g., Rinaldi v. Holt, Rinehart & Winston, 42 N.Y.2d 369, 379 (1977); Sandals Resort Intl. Ltd. v. Google, Inc., 86 A.D.3d 32, 38 (1st Dep't 2011). A statement is defamatory only if it (a) is false and (b) exposes plaintiff "to public contempt, ridicule, aversion or

disgrace, or . . . an evil opinion" of him and deprives him of "friendly intercourse in society." Stepanov v. Dow Jones & Co., Inc., 120 A.D.3d 28, 34 (1st Dep't 2014); Dillon v. City of New York, 261 A.D.2d 34, 37-38 (1st Dep't 1999). See Thomas H. v. Paul B., 18 N.Y.3d at 584; Martin v. Daily News L.P., 121 A.D.3d at 100; Sandals Resort Intl. Ltd. v. Google, Inc., 86 A.D.3d at 38; Bement v. N.Y.P. Holdings, 307 A.D.2d 86, 92 (1st Dep't 2003). Whether the statements are susceptible of a defamatory connotation is a legal determination for the court. Alf v. Buffalo News, Inc., 21 N.Y.3d 988, 990 (2013); Armstrong v. Simon & Schuster, 85 N.Y.2d 373, 380 (1995); Weiner v. Doubleday & Co., 74 N.Y.2d 586, 592 (1989); Ava v. NYP Holdings, Inc., 64 A.D.3d 407, 412 (1st Dep't 2009).

Plaintiff contends that defendants' article is defamatory insofar as it reports that (1) a law enforcement raid recovered rhinoceros horns; (2) police arrested him during that operation, but then released him upon the posting of bail, and seized artwork from his home; (3) he is the "King of the Travellers"; and (4) he sold homes in Rathkeale, Ireland, to Travellers. Plaintiff conceded at oral argument February 17, 2016, that defendants accurately reported statements by law enforcement officials, but maintain that these sources' statements were false.

A. Privileged Content

Defendants first contend that the article, in accurately citing statements by law enforcement officials, is privileged

under New York Civil Rights Law § 74, which provides 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, or for any heading of the report which is a fair and true headnote of the statement published.

This privilege applies to governmental investigations, Daniel Goldreyer, Ltd. v. Van de Wetering, 217 A.D.2d 434, 435 (1st Dep't 1995); Freeze Right Refrig. & A.C. Servs. v. City of New York, 101 A.D.2d 175, 182 (1st Dep't 1984), including police investigations connected to a judicial proceeding. Akpinar v. Moran, 83 A.D.3d at 459; Rodriguez v. Daily News, L.P., 142 A.D.3d 1062, 1063 (2d Dep't 2016). The published article's accounts of four rhinoceros horns recovered during an "Operation Oakleaf," of the police's seizure of artwork from plaintiff's home during that operation, and of his arrest and release on bail are subject to the privilege under Civil Rights Law § 74, as these accounts report on an investigation by governmental law enforcement officials.

The privilege applies even if the article's accounts are only substantially accurate. Russian Am. Found., Inc. v. Daily News, L.P., 109 A.D.3d 410, 413 (1st Dep't 2013); Daniel Goldreyer, Ltd. v. Van de Wetering, 217 A.D.2d at 435; Rodriguez v. Daily News, L.P., 142 A.D.3d at 1064. A report is not substantially accurate if it suggests that the conduct investigated was more serious than actually occurred in the official proceeding. Daniel Goldreyer, Ltd. v. Van de Wetering, 217 A.D.2d at 436. Defendants' article attributes rhinoceros

horn thefts to the Rathkeale Rovers, not to plaintiff. Therefore, by omitting that the horns recovered during the law enforcement operation were tested and found to be fake, the article did not falsely suggest more serious conduct by him.

Even if defendants' article attributed the rhinoceros horn thefts to plaintiff, plaintiff's evidence that the horns were tested and found to be fake is irrelevant hearsay. In opposition to defendants' motion to dismiss the complaint pursuant to C.P.L.R. § 3211(a)(1) or (7), plaintiff may rely on admissible evidence to supplement his complaint. Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007); Cron v. Hargro Fabrics, 91 N.Y.2d 362, 366 (1998); Ray v. Ray, 108 A.D.3d 449, 452 (1st Dep't 2013); Thomas v. Thomas, 70 A.D.3d 588, 591 (1st Dep't 2010). The unsworn report on which plaintiff relies to show that the rhinoceros horns were fake, however, lacks a foundation for admissibility as an exception to the rule against hearsay.

Second, even were this report that plaintiff presents admissible, it is dated July 20, 2015, after the publication of defendants' article. Therefore defendants may not be charged with knowledge of these facts that were unknown when their article was published. While plaintiff also maintains that defendants were irresponsible in not testing the rhinoceros horns before reporting that the horns were real, defendants owed no duty to uncover any error in the official investigation by conducting their own investigation. Freeze Right Refrig. & A.C. Servs. v. City of New York, 101 A.D.2d at 183; Rodriguez v. Daily

News, L.P., 142 A.D.3d at 1064. Plaintiff does not claim that the article inaccurately reported law enforcement officials' view of what their investigation found based on their own examination or that, when defendants published their article, anyone knew the recovered rhinoceros horns were fake.

Plaintiff further urges that defendants' article suggests conduct more serious than actually occurred, his involvement in the rhinoceros horn thefts, by reporting that in September 2013 he was arrested, questioned, and released on bail after the Operation Oakleaf raid that found four rhinoceros horns, but omitting that his bail subsequently was cancelled. Plaintiff shows this subsequent fact through a bail cancellation notice dated November 5, 2014, attached to the complaint, as well as through defendants' affidavit by Adrian Green, a senior investigating officer of the United Kingdom Police, authenticating that notice. Yet this date when plaintiff's bail was cancelled was also after the publication of defendants' article: again, a fact unknown when their article was published, such that knowledge of the fact may not be charged to defendants. Therefore the account of plaintiff's arrest, questioning, and release on bail, which plaintiff does not dispute, was not false when published.

Regarding the seizure of artwork from plaintiff's home, plaintiff maintains that this account suggests his involvement in theft of Chinese artifacts. The article does refer to the seizure of Chinese artifacts as an objective of law enforcement

officials' Operation Oakleaf. Nowhere, however, does the article link the accomplishment of that objective to the seizure of artwork from plaintiff's home during a law enforcement raid. Even if such a connection is inferable, the fact that a seized painting, among other items, subsequently was returned, as shown by a receipt dated November 7, 2013, does not render the article substantially inaccurate. To report the return of the seized artwork, like the cancellation of plaintiff's bail, is simply to report facts after the raid that portray plaintiff's side of the controversy, which defendants, reporting what occurred during the raid, bore no duty to report, and which plaintiff was free to publish in his own account. Curto v. New York Law Journal, 144 A.D.3d 1543, 1544 (4th Dep't 2016); Alf v. Buffalo News, 110 A.D.3d 1487, 1489 (4th Dep't 2012), aff'd, 21 N.Y.3d 988. No authority required defendants to include facts that developed after the raid that cast a different light on their accurate reporting of the raid itself.

B. Non-Privileged Content

The article's statements that plaintiff is the King of the Travellers and built and sold houses in Rathkeale are unconnected to the official investigation, so these statements are not subject to the privilege under Civil Rights Law § 74. Plaintiff claims these statements are defamatory because they suggest his involvement in laundering the proceeds of criminal activity.

First, plaintiff contends that naming him the King of the Travellers falsely labels him a criminal. Defendants' article

describes a group named the Rathkeale Rovers as "part of a network of clans called the Irish Travellers, a nomadic and often secretive ethnic group that maintains its own distinct customs and language." The article attributes various criminal activities to the Rathkeale Rovers by describing that the group operates "within the extended families of the Irish Traveller network, a tangle of relatives who work together in all enterprises, both legal and illegal." Aff. of Deirdre Hykal Ex. 1 (Compl.), Ex. A, at 5.

The article merely connects the Rathkeale Rovers to the Irish Travellers and plaintiff to the Travellers, but does not connect plaintiff to the Rathkeale Rovers. Absent this connection, naming plaintiff the King of the Travellers does not carry a defamatory connotation concerning him. The article implicates the Rathkeale Rovers, not the Travellers, in criminal activity. Stepanov v. Dow Jones & Co., Inc., 120 A.D.3d at 35. For the same reason, neither the article's label of King of the Travellers, even in the context of its title, "The Irish Clan Behind Europe's Rhino-Horn Theft Epidemic," nor its claim that plaintiff was the wealthiest Traveller, is defamatory.

While plaintiff contends that Green's unauthenticated testimony in another action admits that the Rathkeale Rovers is a euphemism and a fictitious entity, Green does not suggest, in either his testimony or his affidavit, that Rathkeale Rovers is a euphemism or a fictitious name for the Travellers. Nor does he even refer to the Rathkeale Rovers as the group under

investigation for stolen rhinoceros horns and Chinese artifacts. Therefore the use of Rathkeale Rovers as a euphemism or a reference to a fictitious entity did not defame plaintiff.

If the article stated that plaintiff built and sold homes as part of a scheme to launder the proceeds of criminal activity, the statement would be defamatory in claiming that he committed a serious crime. See Rosenberg v. MetLife, Inc., 8 N.Y.3d 359, 363-64 (2007). Once again, however, the article attributes the purchase of real estate for the purpose of laundering the proceeds of crime to the Rathkeale Rovers, not to plaintiff. The article merely notes that he built 20 homes that he sold to other Travellers, to whom the article attributes no criminality. Therefore these statements are not defamatory either. Russian Am. Found., Inc. v. Daily News, L.P., 109 A.D.3d at 413; Asenio v. KPMG, LLP, 293 A.D.2d 426 (1st Dep't 2002); Alf v. Buffalo News, Inc., 100 A.D.3d at 1488, aff'd, 21 N.Y.3d 988.

Plaintiff also fails to demonstrate that these two non-privileged statements constituted defamation by implication, which are implied falsehoods derived from truthful statements. Armstrong v. Simon & Schuster, 85 N.Y.2d at 380-81; Stepanov v. Dow Jones & Co., Inc., 120 A.D.3d at 35; Garcia v. Puccio, 17 A.D.3d 199, 200 (1st Dep't 2005). To establish implied defamation, plaintiff must show that the communication as a whole imparts a defamatory inference intended by the author. Stepanov v. Dow Jones Co., Inc., 120 A.D.3d at 37. As discussed above, the article's association of plaintiff with the Travellers, of

which his affidavit in opposition to defendants' motion admits he is a member, does not imply his involvement in criminal activity, because the article focusses on the Rathkeale Rovers' criminal activity, not plaintiff's. Nor does the article's portrayal of plaintiff as an antiques expert in the business of importing furniture or in the business of manufacturing aluminum gutters imply that he trades in stolen Chinese artifacts or builds homes to launder the proceeds of crime. Finally, the arrest of plaintiff's son or other family members of the same name does not reasonably imply plaintiff's criminality--particularly where the article describes the Travellers' tradition of their members using identical names. Stepanov v. Dow Jones & Co., Inc., 120 A.D.3d at 39-40.

In sum, because defendants' article does not imply plaintiff's involvement in the Rathkeale Rovers' criminal activity, the article does not implicitly defame plaintiff. Stepanov v. Dow Jones & Co., Inc., 120 A.D.3d at 39. Moreover, even if plaintiff's claim that the law enforcement authorities in Operation Oakleaf bear animosity toward the Travellers, plaintiff fails to show defendants' intent to defame plaintiff, as required for defamation by implication.

IV. CONCLUSION

Since the statements in defendants' article are either privileged or not defamatory concerning plaintiff, the court grants defendants' motion and dismisses the complaint. C.P.L.R.

§ 3211(a)(1) and (7). This decision constitutes the court's order and judgment of dismissal.

DATED: February 3, 2017

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.