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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DORIS LING-COHAN PART 36

Justice

Index Number : 114468/2011
ALEXANDER, ANAND JON
vs.
DAILY NEWS, L.P.
SEQUENCE NUMBER : 001
DISMISS

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

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). 1, 2

Answering Affidavits — Exhibits ____ | No(s). 3

Replying Affidavits (memo of law) | No(s). 4

Upon the foregoing papers, it is ordered that this motion ~~is~~ to dismiss is granted in accordance with the attached memorandum decision dated January 11, 2013.

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

Dated: 1/11/13

_____, J.S.C.
DORIS LING-COHAN

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: IAS Part 36

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ANAND JON ALEXANDER,

Plaintiff,

INDEX NO.
114468/11

-vs-

DECISION

DAILY NEWS, L.P., and DAILY NEWS
STAFF WRITER MELISSA GRACE,

Defendants.

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LING-COHAN, J:

The defendants, a major newspaper and its employee, move for dismissal of the complaint, pursuant to CPLR Sections 3211 (a) (1) and 3211 (a) (7)[1]. The complaint (Exhibit A annexed to the moving papers), presents two statements published by defendants alleged to be defamatory *per se*, for which undetermined compensatory and punitive damages are sought. The offending statements are (1) that plaintiff is "awaiting trial in New York for the rape of 9 victims", and (2) that plaintiff "was convicted of raping seven wanna-be models in California..." (The complaint, p. 2)[2].

Defendants seek dismissal of the complaint in its entirety based on the documentary evidence presented herewith, pursuant to New York Civil Rights Law Section 74, which reads as follows:

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[1] The court thanks volunteer, Anna Tse, for her research on this case.

[2] Plaintiff initially complained that defendants published his incorrect age, but has since abandoned such claim, in his opposition papers.

> 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...,or for any heading of the report which is a fair and true headnote of the statement published.

Defendants argue that the statute immunizes the complained of statements as such statements are fair and true within the meaning of the statute; "fair and true" has been held to mean that the "substance of the article be substantially accurate", without resort to dissection and analysis "with a lexico-grapher's precision." (*Holy Spirit Association for the Unification of World Christianity v New York Times Co.*, 49 NY2d 63, 67-68 [1979]) Defendants argue that the published statements are substantially accurate, as it would not have a different effect on the minds of the readers than a statement reciting each count and degree of rape, and criminal sexual acts, of which plaintiff was charged or convicted.

Plaintiff argues, and the complaint asserts, that he "has only been charged with two counts of rape - one each for two separate complainants", and that plaintiff "was only convicted of one" count of rape in California. (The complaint, p. 2). Plaintiff contends that the defendants' published statements, that plaintiff is "awaiting trial in New York for the rape of 9 victims" and that plaintiff "was convicted of raping seven wanna-be models in California...", are false and malicious.

The court must determine, "by considering the challenged publication in its entirety...whether, and to what extent, the falsehood affects the over-all impression left on the average reader." (*Fraser v Park Newspapers of St. Lawrence Inc*, 246 AD2d 894, 896 [3d Dept 1998] [citations omitted]). " 'A workable test is whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced.' " (*George v Time, Inc.*, 259 AD 324, 328 [1st Dept 1940] aff'd 287 NY 742 [1942] [citations omitted]).

The Appellate Division, First Department has held that a published article need not be a verbatim account of a judicial or other official proceeding, but need only be "substantially accurate". (*Leder v Feldman*, 173 AD2d 317, 318 [1st Dept 1991]). "[C]ase law has established a liberal interpretation of the 'fair and true report' standard of Civil Rights Law §74 so as to provide broad protection to news accounts of judicial or other official proceedings." (*Becher v Troy Publishing Co., Inc.*, 183 AD2d 230, 233 [3d Dept 1992]). A newspaper publication is granted broad immunity pursuant to the New York Civil Rights Law, provided that the statements are substantially accurate. (*See Holy Spirit Association for the Unification of World Christianity v New York Times Co.*, 49 NY2d 63 [1979]).

Here, it is undisputed that in New York, plaintiff is charged with two counts of rape and thirty-eight additional counts of nonconsensual sexual acts, which include penile-anal and penile-oral sexual contact with nine different females. Nor does plaintiff dispute that in California he was convicted of 15 other nonconsensual sex crimes, involving seven different females, in addition to a single rape charge. The gravamen of plaintiff's claim herein is that defendants mischaracterized the charges pending against him in New York, as well as the crimes he has been convicted of in California. However, although defendants failed to precisely label plaintiff's criminal charges and convictions based on statutory definitions, such precision is not required under the New York Civil Rights Law. In fact, the Court of Appeals has held that "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." (*Briarcliff Lodge Hotel, Inc. v Citizen-Sentinel Publishers, Inc.*, 260 NY 106, 118 [1932]).

Had the disputed "libel *per se*" statements specified each count and degree of rape, and other nonconsensual sex crimes that plaintiff is charged with or has been convicted of, instead of

the challenged statements, the effect on the minds of the readers would not differ. To the average reader, there is little difference between an individual awaiting trial for 2 counts of rape and 38 additional counts of nonconsensual sexual acts involving 9 different victims, and an individual who is "awaiting trial in New York for the rape of 9 victims". Nor is there substantial difference in a reader's mind between a rapist convicted of "raping seven wanna-be models in California" and a rapist undisputably convicted of one count of rape and 15 other nonconsensual sex crimes inflicted on seven different females.

In essence, we have an admitted convicted rapist, charged with additional counts of rape in New York, and numerous other nonconsensual sex crimes, bemoaning that his reputation was besmirched simply because defendants failed to precisely recite, in lawyerly fashion, the numerous sex crimes he was convicted of in California and the even more numerous additional sex crimes he was charged with in New York. At most, the defendants mislabeled similarly severe criminal charges and convictions involving anal and oral contact by forcible compulsion as rape, when, technically, pursuant to the Penal Codes of both New York and California, rape involves solely sexual intercourse by forcible compulsion[3]. "[N]ewspapers cannot be held to a

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[3] New York Penal Law defines "Rape in the First Degree" as "engaging in sexual intercourse with another person...by forcible compulsion." N.Y. Penal Law § 130.35(1).

New York Penal Law defines "Criminal Sexual Act in the First Degree as engaging in "oral sexual conduct or anal sexual conduct with another person...by forcible compulsion..." N.Y. Penal Law § 130.50(1).

Rape under California Penal Code is defined as "sexual intercourse accomplished with a person not the spouse of the perpetrator...where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another." Cal. Penal Code § 261(a)(2).

Forcible Acts of Sexual Penetration are defined as "any person who commits an act of sexual penetration when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or

standard of strict accountability for the use of legal terms of art in a way that is not precisely or technically correct by every possible definition." (*Gurda v Orange County Publications Division of Ottaway Newspapers*, 81 AD2d 120, 130 [2d Dept 1981], *revd for reasons stated in concurring in part and dissenting in part op below* 56 NY2d 705 [1982]). Where, as here, "the truth is so near to the facts as published that fine and shaded distinctions must be drawn and words pressed out of their ordinary usage to sustain a charge of libel, no legal harm has been done [citation omitted]." (*George v Time, Inc.*, 259 AD 324, 329 [1st Dept 1940] aff'd 287 NY 742 [1942]). Defendants' published statements are a fair and true report, and thus, are immunized from civil suits based on libel.

As the Court has determined that the complained of statements fall under Section 74 of the New York Civil Rights Law, it need not address the remainder of defendants' arguments. As defendants' published statements are immunized from civil liability, defendants' motion to dismiss plaintiff's complaint is granted.

Accordingly, it is

ORDERED, that the defendants' motion to dismiss the complaint pursuant to CPLR 3211 (a) (1) and CPLR 3211 (a) (7) is granted; and it is further

ORDERED that within 30 days of entry, defendants shall serve a copy of this decision upon plaintiff with notice of entry.

This constitutes the decision/order of the Court.

Dated: 1/11/13

Doris Ling-Cohan, J.S.C.

J:\Dismiss\Alexander v Daily News - defamation, fair and true reporting.wpd

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another person..." Cal. Penal Code § 289(a)(1).