SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Arthur F. Engoron PART 37
Justice

PETER ROSADO,

Plaintiff,

- v -

DAILY NEWS, L.P.,

Defendant.

INDEX NO. 157674/13
MOTION DATE 11/7/13
MOTION SEQ. NO. 001

DECISION AND ORDER

The following papers, numbered 1 to 3, were read on this motion, pursuant to CPLR 3211(a)(1) and (7), to dismiss.

	PAPERS NUMBERED
Moving Papers	1
Opposition Papers	2
Reply Papers	3

Upon the foregoing papers, the instant motion is granted pursuant to CPLR 3211(a)(1) and is denied without prejudice solely as moot pursuant to CPLR 3211(a)(7).

This is one of those lawsuits that should never have been brought.

Prior to the events directly here in issue, three public school students complained that plaintiff Peter Rosado had engaged in inappropriate conduct against them. The Special Commissioner for Investigation for the New York City School District substantiated allegations that plaintiff "inappropriately touched and made inappropriate comments to" three female students and recommended that he be fired for misconduct. An arbitrator empowered to impose discipline declined to terminate plaintiff because plaintiff was "contrite and remorseful" and "very unlikely" to act the same way again. He specifically found that plaintiff did "not [act] in a sexual manner." He sustained certain allegations; he dismissed others; and he noted that certain allegations had been withdrawn. Among the sustained allegations (Report at 14-15) were that plaintiff had touched female students' hair, which was "inappropriate under these circumstances" and "an unwelcome sign of affection that made students uncomfortable, and [which] continued even after students told him to stop." He found that Plaintiff had "engaged in misconduct serious enough to warrant discipline," and he disciplined plaintiff by imposing a $10,000 fine.

On or about June 23, 2013 defendant Daily News, L.P. published, in widely-read print and on-line versions, an article titled "Sex predators remain in NYC schools thanks to discipline system, group finds." The sub-head of the article states that "Many school workers busted for creepy behavior have been able to hang onto their jobs because of a cumbersome disciplinary process, says [a] statewide group, the Parents Transparency Project." The on-line version of the article includes five photographs, in the following order: former CNN news anchor Campbell Brown,

Check one: ✓ FINAL DISPOSITION [ ] NON-FINAL DISPOSITION
Check if appropriate: [ ] DO NOT POST [ ] REFERENCE

the head of the parents' group; a teacher accused of raping a student; Schools Chancellor Dennis Walcott and United Federation of Teachers President Michael Mulgrew; a former school librarian accused of various improprieties against students; and plaintiff.

The caption under this last photograph states as follows:

> When Pete Rosado was a math teacher at Intermmediate [sic] School 219 in the Bronx, he was accused of tickling kids, rubbing their legs and bizarrely telling one girl, "I slept with your mother last night." Because he was 'contrite and remorseful' and 'learned a valuable lesson,' an arbitrator thought Rosado was 'very unlikely' to act the same way again. He currently teaches at Public School 92 in he [sic] Bronx.

Plaintiff is not mentioned by name elsewhere in the article. However, the text, without qualification, says that one teacher, presumably Rosado, told a student, "I slept with your mother last night."

The instant complaint essentially alleges that the subject article defamed plaintiff by falsely tarring him as a "sex predator." Defendant now moves, pursuant to CPLR 3211(a)(1) and (7), to dismiss.

Defendant argues that the complaint must be dismissed for three reasons: the article is a "fair and true" report of an official proceeding and therefore absolutely privileged pursuant to NY Civil Rights Law § 74; the headline is a "fair index" of the article as a whole; and the phrase "sexual predator" is a non-actionable statement of opinion. This Court agrees.

Civil Rights Law § 74 provides that "A civil action cannot be maintained … for the publication of a fair and true report of any … official proceeding, or for any heading of the report which is a fair and true headnote of the statement published." Here, plaintiff's disciplinary proceeding was "official"; within reasonable limits of tolerance, the article was an accurate report of the proceedings (infra); and the headline was an accurate summary of the article. As defendant argues, the article is privileged even if the allegations in the underlying proceeding are false.

In eminently quotable language, the Court of Appeals has summarized what "fair and true" means in this context:

> 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. As stated by this court in Briarcliff Lodge Hotel v Citizen-Sentinel Publishers (260 NY 106, 118): "[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."

* * *

> [N]ewspaper accounts of . . . official proceedings must be accorded some degree of liberality. When determining whether an article constitutes a "fair and true" report, the language used therein should not be dissected and analyzed with a lexicographer's precision. This is so because a newspaper article is, by its very nature, a condensed report of events which must, of necessity, reflect to some degree the subjective viewpoint of its author. Nor should a fair report which is not misleading, composed and phrased in good faith under the exigencies of a publication deadline, be thereafter parsed and dissected on the basis of precise denotative meanings which may literally, although not contextually, be ascribed to the words used.

Holy Spirit Assn. for the Unification of World Christianity v New York Times Co., 49 NY2d 63, 67-68 (1979) (some citations omitted). This Court finds that the instant article easily passes muster under this unexacting standard.

The headline, "Sex Predators Remain in NYC Schools Thanks to Discipline System, Group Finds" is an accurate summary, and thus a "fair index," of the article. See generally, Gunduz v New York Post Co., 188 AD2d 294, 294 (1st Dept 1992). Indeed, "A newspaper need not choose the most delicate word available in constructing its headline; it is permitted some drama in grabbing its reader's attention, so long as the headline remains a fair index of what is accurately reported below." Text Masters Educ. Servs. v NYP Holdings, Inc., 603 F Supp 2d 584, 589 (SDNY 2009). "Sex Predators" surely is more dramatic than delicate, and meant to grab the reader's attention, but that is exactly what the case law allows.

The gravamen of the instant complaint, the heart of this case, is the "implication," to use plaintiff's word, that he is a "sex predator." In and of itself, this is problematic. The article does not call him that; and two of the five photographs contain portraits of people clearly not being so labeled. See generally, Kamalian v Reader's Digest Assn., Inc., 29 AD3d 527 (2d Dept 2006) ("Doctors' Deadly Mistakes" headline not actionable because some doctors' mistakes were fatal, even though plaintiff's mistakes were not); White v Berkshire-Hathaway, Inc., 802 NYS2d 910, 912 (Sup Ct, Erie County 2005) ("headline that does not directly name ... plaintiff ... not independently actionable").

However, even assuming, arguendo, that a reasonable reader might conclude that the article is accusing plaintiff of being a "sex predator," it still would not be actionable. New York law has long recognized that opinions are not actionable "no matter how unreasonable, extreme or erroneous." Rinaldi v Holt, Rinehart & Winston, Inc., 42 NY2d 369, 380-81 (1977). By their very nature opinions are not "capable of being proven true or false." Gross v New York Times Co., 82 NY2d 146, 155 (1993). Statements like "convicted felon," or "HIV positive" or "20-weeks pregnant" have objective, verifiable meaning; "sex predator" does not. Rather, it is the

sort of "loose, figurative or hyperbolic" language that is immunized from defamation claims. E.g., Dillon v City of New York, 261 AD2d 34, 38 (1st Dept 1999). Indeed, sister-state judges have tossed out of court cases predicated on "sexual predator" language. Burgoon v Delahunt, 2000 WL 1780285 (Minn App) (reasonable person could apply "sexual predator" to inappropriate touching and offensive sexual comments); Terry v Davis Community Church, 131 Cal App 4th 1534, 1555 (2005) (inappropriate relationship with minor). So-called "Nazis," "racists," "terrorists," "scabs," "fraudsters," and "traitors," no doubt a woefully incomplete list, have all come up empty-handed in court.

Plaintiff is quick to point out that the arbitrator specifically found that plaintiff did not act in a "sexual manner." However, that problematic conclusion is not binding on defendant, or in the court of public opinion, given plaintiff's "inappropriate ... misconduct," consisting of his touching several young female students. Defamation claims should not sink or swim on the tenuous distinction between a "sexual predator" and a male teacher who bestows "unwelcome sign[s] of affection that made [his young, female] students uncomfortable, and [which] continued even after students told him to stop." Report at 14-15. The arbitrator had the final word in the disciplinary hearing; but his finding is not binding on journalists, who, in fact, did not mis-characterize his conclusions. As defendant argues (Reply Memo at 5):

> the arbitrator's conclusion does not change the fact that the [Education] Department believed that Rosado's conduct was sexual in nature .... Indeed, the entire point of the Article is that the arbitration system allows teachers who engage in "creepy" behavior to remain the in the classrooms when the Department tries to fire them.

Plaintiff argues that "[t]ruth and fairness requires [sic] the full story." However that may be, the law is otherwise. Court must be "slow to intrude" on editorial judgments as to what to include or exclude. Weiner v Doubleday & Co., 142 AD2d 100, 109 (1st Dept 1988), aff'd 74 NY2d 586 (1989). "It is not the business of government" to determine such matters. Id. See also, Sprecher v Dow Jones & Co., 88 AD2d 550, 551 (1st Dept 1982):

> To hold that a possible omission of this nature [i.e., that a suit was dismissed "with prejudice"] by a reporter may be deemed defamatory would place upon the press the onerous and unreasonable burden of having to ascertain, whenever a news story is published, if something might conceivably have been left out which could be subject to misconception.

On point is Becher v Troy Publ. Co., Inc., 183 AD2d 230 (3d Dept 1992) (articles referring to "bribery trial" and naming plaintiff as defendant was not defamatory even though plaintiff was not charged with bribery, as other defendants were).

Plaintiff argues that the subject caption, which he admits is "technically an accurate excerpt from allegations made against [him]" (Memo at 11), should have indicated that the arbitrator rejected some of the students' allegations. Perhaps in a perfect world, it would have. Perhaps an academic journal would have. However, nobody would mistake the Daily News for the Harvard Law Review. In any event, the article does not say that the arbitrator accepted all the allegations. And allegations are just that, allegations.

Plaintiff argues (Memo at 15-16) that "'Sexual predator' has a precise meaning which is readily understood." Not by the average Daily News reader, probably not one in fifty of whom would know that Corrections Law § 168-a(7)(a) defines, somewhat loosely, "sexual predator." Furthermore, those readers who would know absolutely would not assume that the phrase as used in the article is the same as the phrase as used in the statute. As plaintiff points out, citing Alf v Buffalo News, 21 NY3d 988, 990 (2013) "what is important is what the 'average reader' would conclude upon reading the entirety of the story." Thus, plaintiff's argument (Memo at 17), drawing upon the Corrections Law language, that "In order to prevail in this matter, defendant must prove that [plaintiff] is a sex offender that has been convicted of a sexually violent offense and that he suffers from a mental abnormality or personality disorder that makes him likely to engage in predatory sexually violent offenses" is nothing short of silly. Nobody reading the article would conclude this about plaintiff. See Sprecher v Dow Jones & Co., 88 AD2d 550, 551 (1st Dept 1982) ("Further, the term 'with prejudice' is a legal one which has little, if any, meaning to the average reader."); Torain v Liu, 279 FedAppx 46, 2008 WL 2164659 (2d Cir 2008) (labeling plaintiff as "pedophile" not actionable; "There is simply no special rule of law making criminal slurs actionable regardless of whether they are asserted as opinion or fact."). As defendant notes, the article goes to great lengths to distinguish between criminal behavior, which results in teacher termination, and "creepy" behavior, which usually does not. So if anything, syllogistically, the article concludes that plaintiff is not a criminal, because he is still employed after disciplinary action.

Similarly silly is plaintiff's contention that the article is misleading because it does not mention that an allegation ("Specification 4") of pulling on a girl's shirt and bra was withdrawn. The article never mentions that allegation! Would plaintiff have been better off if the article had said that an allegation that plaintiff had pulled on a girl's shirt and bra was withdrawn? Obviously not.

In the final analysis, the Daily News article, albeit somewhat salacious (at least as to other teachers), was an attempt at a public service: to sound a tocsin that due to a problematic disciplinary process, public school teachers who have engaged in inappropriate conduct can and do remain in the classroom. Plaintiff is not the best example of this; he is not the poster child of predatory sexual misconduct. But his inappropriate touching of young girls, even when asked to stop, after which he was allowed to remain a teacher, does help illustrate the danger at which the article was aimed. The press must be allowed to paint with a broad brush. That plaintiff was

swept up in this crusade may not have been totally fair (and one can feel sorry for what happened to him); but as a matter of law it was not defamatory.

Dated: January 31, 2014

Arthur F. Engoron, *J.S.C.*