Birkenfeld v UBS AG
2018 NY Slip Op 30036(U)
January 11, 2018
Supreme Court, New York County
Docket Number: 154000/17
Judge: Sherry Klein Heitler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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BRADLEY C. BIRKENFELD,

Plaintiff,

-against-

UBS AG, UBS AMERICAS, INC., and PETER STACK,

Defendants.

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Index No. 154000/17
Motion Sequence 003

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.S.C.

Defendants UBS AG, UBS AMERICAS, INC., and PETER STACK (Defendants) move pursuant to CPLR 3211(a)(1)[1] and CPLR 3211(a)(7)[2] to dismiss this defamation action in its entirety. Defendants argue that the alleged defamatory statements are not actionable because they are true and because they are privileged under New York law. For the reasons set forth below, the motion is granted.

Plaintiff Bradley Birkenfeld (Plaintiff) commenced this action by E-filing a summons and complaint on May 1, 2017.[3] In the complaint Plaintiff claims to have been dubbed "the most significant financial whistleblower of all time" for his efforts to expose a large tax fraud scheme. (Complaint ¶2). In this regard, he alleges that in 2005, while still an employee of UBS AG, he "objected to [UBS AG's] management about the illicit practices of its private bankers serving high-net-worth American clients who engaged in tax fraud" (*id.* at ¶6). While Plaintiff himself admittedly participated in this scheme, he nonetheless contacted several governmental authorities regarding this alleged conduct in 2007, leading to a Senate investigation and a deferred prosecution

[1] CPLR 3211(a)(1) permits a party to move to dismiss the complaint where a defense is founded upon documentary evidence.

[2] CPLR 3211(a)(7) permits a party to move to dismiss the complaint where the pleading fails to state a cause of action.

[3] Defendants' exhibit A (Complaint).

agreement between the United States government and UBS AG (*id.* at ¶8). It appears Plaintiff was awarded over $100 million dollars as a result of his whistleblowing actions.

In or about April of 2008, however, Plaintiff was indicted in the United States District Court for the Southern District of Florida for conspiracy to defraud the United States in violation of 18 USC § 371.[4] In relevant part, the indictment alleges that Plaintiff[5] (Indictment ¶¶ 6, 8, 14, 16, 17-18):

> . . . participated in a scheme to defraud the IRS by falsifying Swiss bank documents, by falsifying IRS Forms W-8BEN, by failing to prepare IRS Forms W-9, by setting up nominee entities, by failing to issue IRS Forms 1099, and by failing to comply with the terms of the Qualified Intermediary Agreement with the IRS in order to conceal from the IRS United States source income paid into Swiss bank accounts beneficially owned by United States taxpayers.
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> . . . unlawfully, willfully and knowingly, did combine, conspire, confederate and agree together and with each other to defraud the United States and an agency thereof, to wit, the Internal Revenue Service of the United States Department of Treasury, in violation of Title 18, United States Code, Section 371.
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> . . . would and did prepare . . . IRS Forms W-8BEN, which falsely and fraudulently concealed that United States Taxpayers were the beneficial owners of offshore bank and financial accounts maintained in foreign countries, including Switzerland and Lichtenstein.
>
> . . . would and did advise United States clients to destroy all offshore banking records existing in the United States.
>
> . . . would and did cause to be prepared and filed with the IRS income tax returns that falsely and fraudulently omitted income earned by United States clients from their Swiss bank and Liechtenstein bank accounts.
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> . . . would and did cause to be prepared and filed with the IRS income tax returns that falsely and fraudulently reported that United States clients did not have an interest in, and a signature and other authority over, financial accounts located in a foreign country.

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[4] 18 USC § 371 provides, in relevant part, that "[i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both."

[5] Defendants' exhibit B (Indictment).

On June 18, 2008 Plaintiff pled guilty to the single count indictment.[6] As part of his plea agreement Plaintiff admitted that the allegations contained within a Statement of Facts[7] attached thereto were "true and correct." Notably, the Statement of Facts contains a thorough account of Plaintiff's involvement in a conspiracy to conceal his clients' Swiss bank accounts (*id.* at 3-4):

> Managers and bankers at the Swiss Bank, including defendant Birkenfeld, maintained relationships with Swiss and Liechtenstein businessmen . . . who would set up these nominee and sham entities for the Swiss Bank's U.S. clients and pose as owners or directors of these entities. By concealing the U.S. clients' ownership and control in the assets held offshore, defendant Birkenfeld, the Swiss Bank, its managers and bankers . . . defrauded the IRS and evaded United States incomes taxes.
>
> . . . .
>
> From at least 2001 through the date of the Indictment, defendant Birkenfeld conspired . . . to defraud the United States by assisting [businessmen] in evading income tax on the income earned on $200 million of assets hidden offshore in Switzerland and Liechtenstein.

Plaintiff confirmed at his plea hearing that everything in the Statement of Facts was accurate and that he committed the acts described[8] (Plea Transcript, pp. 9-10):

Q. Is everything in this Statement of Facts truthful and accurate?

A. Yes, Your Honor. . . .

Q. If I were to ask you to tell me what you did regarding the charge in the indictment, does this statement of facts represent your conduct?

A. Yes, it does, Your Honor.

Q. You knew what you were doing when you committed these acts?

A. Yes, I did, Your Honor.

The court accepted Plaintiff's guilty plea, imposed a $30,000 fine, and sentenced him to 40 months in prison. Plaintiff has since been released.

In October of 2016 Plaintiff published a book entitled "Lucifer's Banker: The Untold Story of How I Destroyed Swiss Bank Secrecy" (Complaint ¶ 17). On or about November 6, 2016, the New York Post published an article regarding Plaintiff and his book. The article includes a

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[6] Defendants' exhibit C.

[7] Defendants' exhibit D.

[8] Defendants' exhibit E (Plea Transcript).

statement attributable to Defendants: "This unedited work and often unsubstantiated recollection only benefits Mr. Birkenfeld, who has been convicted in the U.S. for, among other things, having lied to the U.S. authorities."[9] Plaintiff alleges that the phrase "having lied to U.S. authorities" is defamatory because he was never charged or convicted of lying to government authorities (Complaint ¶¶ 20-26). On or about April 3, 2017, the Bloomberg BNA Daily Tax Report published an article about Plaintiff which includes a similar statement attributable to Defendants: "[Plaintiff's] continuing efforts to publicize his book and his often unsubstantiated recollections only benefit Mr. Birkenfeld, who has been convicted in the US for, among other things, having lied to the US authorities."[10] Like the New York Post article, Plaintiff alleges that the phrase "lied to the US authorities" is defamatory because he was never charged with or convicted of lying to government authorities (Complaint ¶¶ 41-47). The Complaint seeks $10 million in compensatory damages, $10 million in punitive damages, and an order requiring Defendants to retract both statements. In lieu of an answer, Defendants filed this motion to dismiss.

On a CPLR 3211 motion to dismiss, the court must afford the pleadings a liberal construction, must accept the facts as alleged in the complaint as true, and must afford the Plaintiff the benefit of every favorable inference. *Roni LLC v Arfa*, 18 NY3d 846, 848 (2011); *see also Leon v Martinez*, 84 NY2d 83, 88 (1994) ("We . . . determine only whether the facts as alleged fit within any cognizable legal theory"). A motion to dismiss will fail if "from [the Complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law . . . ." *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977); *see also Rovello v Orofino Realty Co.*, 40 NY2d 633 (1976). On the other hand, while factual allegations contained in a Complaint should be accorded a favorable inference, bare legal conclusions and inherently incredible facts are

[9] Complaint, exhibit A.

[10] Complaint, exhibit B.

not entitled to preferential consideration. *Beattie v Brown & Wood*, 243 AD2d 395, 395 (1st Dept 1997).

Turning to the allegations in the Complaint, defamation is "the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society." *Foster v Churchill*, 87 NY2d 744, 751 (1996) (internal quotation marks omitted). To proceed with a cause of action for defamation under New York law, the Plaintiff must plead "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se." *Dillon v City of New York*, 261 AD2d 34, 38 (1st Dept 1999); *see also Gutierrez v McGrath Mgt. Servs., Inc.*, 152 AD3d 498, 502 (2d Dept 2017). Because falsity is an element of a defamation claim, the statement's truth is an absolute defense. *Dillon*, 261 AD2d at 39; *see also Konrad v Brown*, 91 AD3d 545, 546 (1st Dept 2012). Courts examining a defamation or libel claim should "overlook[] minor inaccuracies and concentrate[] upon substantial truth." *Masson v New Yorker Magazine*, 501 US 496, 499 (1991).[11] Thus, a statement that is "substantially true" is also not actionable. *See Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 (1st Dept 2014); *Konrad*, 91 AD3d at 546; *Panghat v New York Downtown Hosp.*, 85 AD3d 473, 473 (1st Dept 2011); *Fairley v Peekskill Star Corp.*, 83 AD2d 294, 297 (2d Dept 1981) ("Substantial truth is all that is necessary to defeat a charge of libel"); *Pearlman v NYP Holdings, Inc.*, 2015 WL 2232335, *3 ("Under New York law, it is not necessary to demonstrate complete accuracy to defeat a charge of libel. It is only necessary that the gist or substance of the challenged statements be

[11] *See also Cafferty v Southern Tier Pub. Co.*, 226 NY 87, 93 (1919) ("When 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 . . . . the law cannot take words from their setting and association; rather it must receive them for what they fairly and reasonably state.")

true."). A statement is substantially true if it would not have a "different effect on the mind of the reader from that which the pleaded truth would have produced." *Fleckenstein v Friedman*, 266 NY 19, 23 (1934); *see also Biro v Condé Nast*, 883 F Supp.2d 441, 458 (SDNY Aug. 9, 2012).

The documentary evidence presented on this motion demonstrates that the challenged statements are a substantially truthful, if not absolutely truthful, summary of Plaintiff's conviction, i.e., conspiring to defraud a United States agency in violation of 18 USC § 371. According to the Statement of Facts, which Plaintiff admitted on the record and under oath to be accurate, Plaintiff conspired to file false information with and conceal information from the IRS, a government agency. Thus, Plaintiff's focus on the differences between "lying" and "conspiracy" is unavailing. To be sure, the government does rely on other criminal statutes to charge people who lie to it (*see* 18 USC § 1621, 18 USC § 1001), and a person can be guilty of violating 18 USC § 371 without uttering a false statement. But despite the existence of these other statutes, Defendants may properly defend against Plaintiff's complaint by noting that he did, in fact, lie to the government by assisting his clients to file false tax returns.

The determinative question is whether there is a difference between accusing someone of "lying" when in fact that person was convicted of "defrauding" – in other words, whether there is a meaningful distinction between saying that someone "lied to U.S. authorities" and saying that someone "defrauded U.S. authorities." From a definitional standpoint, to defraud[12] involves some form of misrepresentation, essentially a lie.[13] And, in the context of this case, any distinction

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[12] *Defraud*, "To cause injury or loss to (a person) by deceit" (Black's Law Dictionary (9th ed. 2009)); "To take or withhold from (one) by some possession, right, or interest by calculated misstatement or perversion of truth, trickery, or other deception" (Webster's Third New International Dictionary (1961)); *Fraud*, "A knowing misrepresentation of the truth of concealment of a material fact to induce another to act to his or her detriment" (Black's Law Dictionary (9th ed. 2009)).

[13] *Lie*, "To tell an untruth, to speak or write falsely" (Black's Law Dictionary (9th ed. 2009); "To make an untrue statement with intent to deceive" or "to create a false or misleading impression" (Webster's Third New International Dictionary (1961)).

between these two charges is substantively insignificant. Plaintiff's indictment, Plea Agreement, Statement of Facts, and the colloquy on the record during his plea hearing all show that his crime, while perhaps most accurately described as conspiracy to defraud, in sum and substance involved a lie. Plaintiff admitted to multiple wrongful acts in furtherance of a conspiracy to hide information from the IRS by preparing false and misleading IRS forms and assisting clients to conceal assets from the US government. In its simplest form, Plaintiff did in fact lie to a federal authority. Thus, the "essence of [Defendants'] statement" was accurate. *Cusimano v United Health Servs. Hosps., Inc.*, 91 AD3d 1149, 1152 (3rd Dept 2012).

Of course, Defendants' statements must be read in the context of the articles in which they appeared. But contrary to Plaintiff's arguments, reading the statements in context does not change the result. *See Alf v Buffalo News, Inc.*, 21 NY3d 988, 990 (Courts should not "view statements in isolation" when examining a libel claim); *Dibble v WROC TV Channel 8*, 142 AD2d 966, 967 (4th Dept 1988) ("The publication must be considered in its entirety when evaluating the defamatory effect of the words"). In fact, reading the individual statements in the context of the articles in which they appear actually bolsters Defendants' argument. Both articles discuss Plaintiff's whistleblowing activities and indicate that Plaintiff's indictment and conviction arise from tax schemes, giving clear context to Defendants statements.[14] Thus, read in context, the complained-of statements did not cause any additional harm to Plaintiff over and above the harm caused by his admission that he had conspired to defraud the IRS. I therefore find that Defendants' alleged defamatory statements are substantially if not absolutely true, would produce no worse "effect on

[14] Complaint, exhibit A ("For his whistleblowing, Birkenfeld was awarded a record $104 million in 2009 – and was sentenced to 40 months in prison and fined $30,000 for his part in tax-evasion transgressions"; Complaint, exhibit B ("The U.S. government indicted Birkenfeld in April 2008 for conspiracy to defraud the government through his attempts to obstruct the IRS from collecting income taxes due").

the mind of the reader" then the purported truth (*Fleckenstein*, 266 NY at 23), and are not actionable as a matter of law.

Defendants' statements are also protected from suit under the "fair report privilege," codified at section 74 of New York's Civil Rights Law. The statute 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 proceedings." Civil Rights Law § 74. The privilege attaches when there is a statement about a judicial proceeding and the statement can be considered fair and true. *Gonzalez v Gray*, 69 F. Supp. 2d 561, 570 (SDNY Oct. 21, 1999). "For a report to be characterized as 'fair and true' within the meaning of the statute, . . . it is enough that the substance . . . be substantially accurate." *See Holy Spirit Assn. for the Unification of World Christianity v New York Times Co.*, 49 NY2d 63, 67 (1979); *see also Russian Am. Found., Inc. v Daily News, L.P.*, 109 AD3d 410, 413 (1st Dept 2013); *Saleh v New York Post*, 78 AD3d 1149, 1152 (2d Dept 2010). Hence, "[m]inor inaccuracies are 'not serious enough to remove [a party's] reportage'" from the protections of the state. *Bouchard v Daily Gazette Co.*, 136 AD3d 1233, 1235 (3rd Dept 2016) (quoting *Misek-Falkoff v McDonald*, 63 Fed Appx 551, 552 [2d Cir 2003]). This principle is consistent with the common law of libel, which also overlooks minor inaccuracies. *Cholowsky v Civiletti*, 69 AD3d 110, 114 (2d Dept 2009). The fair report privilege has been interpreted to provide broad protection for news reports of judicial proceedings. *Id.* However, the privilege applies to all persons, not just journalists. *See Williams v Williams*, 23 NY2d 592, 597 (1969).

Consistent with my ruling that Defendants' statements are "substantially true" in the defamation context, I find that such statements are "substantially accurate" for purposes of the fair report privilege. In reaching this decision, the court is persuaded by the Third Department's decision in *Bouchard, supra*. In that case, several newspapers received a Department of Justice (DOJ) press release entitled "Attorney Convicted in Mortgage Fraud Prosecution" detailing

plaintiff's charges and conviction, and later published an article entitled "Albany lawyer convicted of mortgage fraud" based upon the release. The plaintiff commenced a defamation action against the newspapers, who then secured dismissal of the lawsuit on the ground that their article was privileged under Civil Rights Law § 74. The Third Department affirmed the dismissal on appeal, holding that "[a]lthough defendants used language that differed slightly from the DOJ press release in their article, given plaintiff's criminal charges and convictions detailed in the press release, the language used . . . does not suggest more serious conduct than that actually suggested in the official proceeding . . . ." *Id.* at 1235. In reaching that conclusion, the court afforded defendants' statements a "liberal reading," viewed the article in its entirety, and afforded defendants' statements "some liberality." *Id.*

The Second Department's decision in *Cholowsky*, *supra*, is also highly persuasive. In that case, the defendant newspaper reported that the plaintiff had pled guilty to conspiring to defraud the United States and was sentenced to probation. Further, the newspaper reported that the evidence gathered established the scheme's organizer used plaintiff's hauling permit to improperly dump hazardous waste. In dismissing plaintiff's defamation suit against the newspaper, the court held that the newspaper's reporting was privileged even though it overstated plaintiff's involvement. In fact, while on appeal plaintiff was able to show that he was actually a victim of extortion and never knowingly allowed others to use his permit, the Second Department still affirmed the dismissal of his lawsuit. *Id.* at 113-116.

To the extent Plaintiff argues that *Cholowsky*, *Bouchard*, and the other cases cited by Defendants are factually distinguishable from the case at bar, the caselaw leaves no doubt that a party need not precisely report on a judicial proceeding in order for the fair report privilege to apply. *See Ford v Levinson*, 90 AD2d 464, 465 (1st Dept 1982); *D'Annunzio v Ayken, Inc.*, 876 F. Supp. 2d 211, 220 (EDNY July 17, 2012). Notably, at least one court has found that the fair report

privilege applies where a defendant "fail[s] to precisely label plaintiff's criminal charges and convictions based on statutory definitions" because "such precision is not required under the New York Civil Rights Law." *Alexander v Daily News, L.P.*, 2013 NY Misc. LEXIS 5993, *4 (Sup. Ct. NY Co. Jan. 11, 2013, Ling-Cohan, J.). With that in mind, Defendant's characterization of Plaintiff's conviction as "lying to the U.S. authorities" is a fair and true report of Plaintiff's conviction. This conclusion holds especially true given that both articles discuss how Plaintiff's conviction arose from defrauding the government through tax evasion. I therefore find Defendants' statements protected under Civil Rights Law § 74.

The court has considered Plaintiff's remaining contentions and finds them to be without merit.

Accordingly, it is hereby

ORDERED that Defendants' motion to dismiss is granted; and it is further

ORDERED that the Complaint is dismissed.

The Clerk of the court is directed to enter judgment and mark his records accordingly.

This constitutes the decision and order of the court.

ENTER

DATED: 1-11-18

SHERRY KLEIN HEITLER, J.S.C.