Baranov v World-Wide Anti-Doping Agency
2018 NY Slip Op 32640(U)
October 16, 2018
Supreme Court, New York County
Docket Number: 155881/2017
Judge: Frank P. Nervo
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SUPREME COURT OF THE STATE OF NEW YORK
OUNTY OF NEW YORK

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ANDREY BARANOV

Plaintiff,

DECISION AND ORDER
Index Number
155881/2017

-against-

WORLD-WIDE ANTI-DOPING AGENCY and
RICHARD McCLAREN,

Defendants.

---x

FRANK P. NERVO, J:

Defendants move to dismiss the complaint on the grounds of documentary evidence.

(CPLR 3211 (a) (1), and that the complaint fails to state a cause of action. (CPLR 3211 (a) (7))

The motion is granted to the extent that the complaint is dismissed for failure to state a cause of action.

This is an action for defamation arising out of the publication of a report by defendant McClaren (the McClaren Report) in which plaintiff is said to have supplied banned substances , anabolic steroids, to athletes. Defendant World-Wide Anti-Doping Association (WADA), published the report. WADA is a non-profit foundation that is organized under Swiss law and has a principal place of business in Montreal, Canada. McClaren resides in Ontario, Canada.

The complaint alleges that Baranov is a professional athletic manager, with clients in Russia and other countries. According to the complaint, his professional opportunities have diminished, following the report.

In 2014, WADA announced the creation of commission (the Independent Commission), to investigate allegations of doping made in a documentary film that discussed Russia providing steroids to its athletes. McClaren was a member, along with two others, of the Independent Commission.

The Independent Commission issued its first report on November 9, 2015, that, according to the complaint, verified the existence of corruption and bribery at the highest levels of international athletics. According to the report, Dr. Grigory Rodchenkov, a director of a WADA accredited laboratory in Moscow, aided and abetted doping activities. The report recommended his removal from his position.

On May16, 2016, WADA appointed McLaren to conduct an investigation into allegations of state-run doping raised on 60 Minutes, on May 8, 2016 and in The New York Times, on May 12, 2016. According to the complaint, "Rodchenkov was the source of several allegations in *The New York Times* article. " The article stated that Rodchenkov had worked at the Olympic laboratory in Sochi, the facility that processed urine samples submitted by Russian athletes to determine their eligibility to compete in the Sochi Games.

On July 16, 2017, McClaren mailed the McClaren Report, which addressed the *Times* and *60 Minutes* allegations, to WADA president, Craig Reedie. The report, titled *Situation in Athletics,* contained several statements concerning a person, whose name was redacted, who was the manager of several Russian runners. The complaint alleges that an attachment to the report contained the defamatory statements that are the subject of this action. The attachment contains Rodchenkov's statement to a Russian law enforcement agency, the Federation Security Service (FSB). Plaintiff submits that attachment as Exhibit 1 of his moving papers. One part of the attachment states that an unnamed person is the manager of Lilia Shobukhova. The report reads, "It was he who blew the scandal with money and unleashed Igor Shobukova."Another one of the contentions in the report is that according to a person named Kulichenko, the unnamed person supplied anabolic steroids and was personally blamed for the disqualification of a Russian athlete named Lyubov Denisova. The statement concluded by saying that he must be excluded from working with Russian athletes.

The complaint alleges that although plaintiff's name is redacted from the McClaren Report, the attachmenht is "text searchable" and that an electronic search for the name Baranov reveals the redacted name in the document. The complaint alleges that even with the redactions, plaintiff is identifiable because he had previously been identified in news articles as Lilia Shobukova's manager.

The complaint alleges that plaintiff never supplied steroids to Shobukova or anyone else. Although, according to the complaint, Shobukova has been disqualified from at least one race after testing positive for banned substances, plaintiff was not involved in her use of those substances or her disqualification.

The next allegation is that plaintiff was not involved in Luyubov Denisova's disqualification. His only involvement was speaking to the press on her behalf, explaining that she had "mistakenly purchased a banned substance. However, [plaintiff] was not involved in Denisova's use of any banned substance or otherwise involved in her disqualification from competition."

Addressing the report that the false information about plaintiff supplying steroids to athletes was "learned from Kulichenko", and noting that Kulichenko's name does not appear in the McLaren Report, the complaint alleges that "it appears to be a reference to Valery Kulichenko...a head coach suspended...pending an investigation of a doping controversy relating to to allegations that Kulichenko supplied two Russian women's hammer throwers with a

hormone blocker." The complaint then alleges that while plaintiff was acquainted with Kulechenko , he did not make any statements to him that he supplied steroids to athletes.

The complaint alleges that on July 18, 2106, the day the McLaren report was released, WADA sent an email to 4,300 persons , including media outlets, containing a link to the report. Later that day, according to the complaint, multiple news organizations, whose names are not revealed in the complaint, identified plaintiff as the person whose name was in the redacted portion of the attachment to the McClaren report. Continuing, the complaint states that these news organizations contacted plaintiff to ask about the allegations against him.

On July 25, 2016, plaintiff's counsel in the United Kingdom stated in a letter to WADA, that the attachment to the McClaren Report was false and demanded that WADA not publish the same or similar allegations in the future. WADA complied with that demand on July 27, 2016 by removing the attachment from the report published on its website.

The complaint next alleges that although the version of the report on WADA's website does not include the attachment, the original version of the report is accessible on other websites. The complaint names only one such site, The Anti-Doping Knowledge Center, a website maintained by the Anti-Doping Authority of the Netherlands.

Plaintiff alleges that after the report, athletes he represented were routinely turned down for and did not receive invitations to races, such as the New York Marathon, that they had been invited to in the past. He states that he has suffered significant financial harm to his business and personal reputation that in turn caused him to suffer losing potential clients.

In his claim for relief, plaintiff alleges that

" Defendants made or caused to be made statements of fact in the McClaren Report that were expressly and/or impliedly false, including without limitation that

a. Baranov supplies anabolic steroids to athletes; and

b. Baranov is personally to blame for the disqualification of Densisova."

The complaint alleges that the statements of fact were made with reckless disregard for whether they were "true or false and/or a high degree of awareness that the statements were probably false." It states that defendants published the false statements by making the report "available on its website and by emailing a link to more than 4,300 individuals and news organizations." The publication, according to the complaint, was done "...with malice, motivated by spite and ill will and a desire to injure Plaintiff's reputation." Plaintiff alleges that the false statements are defamatory *per se* because they injure him in his profession as an athletic manager and subject him to contempt, shame and ridicule.

Defendants submit a memorandum of law in opposition to the motion.

Defendants contend that the McClaren Report is privileged under Civil Rights Law § 74, as the attachment, the statements by Rodchenkov, was made to the FSB, an official organization. They argue that the WADA investigation was also an official investigation.

Defendants argue that even if the document is not privileged under Civil Rights Law § 74, *supra,* plaintiff's complaint fails to plead that defendants acted with actual malice. As such, the complaint fails to state a cause of action, as plaintiff is a limited-purpose public figure. They argue that there is nothing in the complaint to show that defendants had any reason to question the accuracy or credibility of Rodchenkov's report.

Civil Rights Law § 74, *supra.*, is broadly worded, protecting statements made in the course of judicial, legislative or other official proceedings. The court finds that this broad language refers only to governmental, not private, proceedings. While neither side submits proof of WADA's status, as a public or private agency, the court notes the *dicta* in *Armstrong v. Taggert*, 886 F. Supp. 2d 572, 574 (USDC W.D. Texas), in which that court wrote that WADA is a Swiss private law body. However, the report was a vehicle for an official report, the report to a Russian government investigative body. As such it is privileged. (see *Freeze Right Refrigeration and Air Conditioning Services, Inc. v. City of New York, et al. and New York Times Company, et al.*, 101 AD2 175, 184) There is nothing before the court to indicate that the material in question was not an accurate report of the Russian investigation. Moreover, the fact that the Russian investigation was not a United States proceeding does not negate its status as an official proceeding. (see *Ibrahim v. Fox Television Stations, Inc.,* 32 Misc. 3d 1223 (A) In that case, the official proceeding was a United Nations matter. Civil Rights Law § 74, *supra,* is broadly worded to include "any other official proceeding", after listing several types of proceedings. Its plain, unambiguous language does not restrict its application to United States proceedings.

The copy of the McClaren report defendants submit is a fair and true report of the WADA investigation. Plaintiff does not demonstrate that it is inaccurate. Rather, from the papers submitted, including the affidavits from defendant McLaren, the court is satisfied that the document is a substantially accurate version of the report. (see *Fishof v. Abady,*280 AD2d 417, 418) The report and the investigation advance public interest of revealing illegal steroid use in sporting events. Permitting a defamation action under the circumstances of this case would have a deleterious effect on that public interest. (see *Freeze Right Refrigeration and Air Conditioning Services, Inc. v. City of New York and New York Times, id.* at 181)

In addition to plaintiff having no cause of action because the alleged defamatory statement is privileged, it cannot state a cause of action because it cannot demonstrate malice, an essential element, when a limited-purpose public figure sues. Baranov is such a person. And the question of improper steroid use is a matter of public concern. (see *Chapadeau v. Utica Observer-Dispatch,* 38 NY2d 196, 199) Baranov testified before a public body and gave newspaper interviews on the question of illegal doping. By his actions, he injected himself into a public controversy. (*Gertz v. Robert Welch, Inc.,* 418 US 323, 351) Thus, an action by him must allege facts showing malice.

The complaint does not allege specific facts that demonstrate actual malice. The complaint merely states that the allegedly defamatory statements were expressly or impliedly false. This conclusory allegation, lacking any factual basis showing malice, cannot form the basis of a

defamation claim against a public official. (see *Rivera v. Time Warner, Inc.* 56 AD3d 298) Moreover, The complaint alleges no facts that show that defendants knew, or even should have known that the report contained false information. There is nothing in the complaint that would support a finding that defendants either "acted in a grossly irresponsible manner."(*Chapadeau v Utica Oberver-Dispatch, id.* at 199) and certainly nothing to show that they had a high degree of awareness that the report conveyed false information as required when a public figure is involved. (*Rivera v. Time Warner, Inc., id .)* Rather, the facts as alleged show that they relied on a report that was part of a public, official investigation and that they had no reason to question the accuracy of that report. *(id.)*.

While in some cases the question of malice must await a trial at which the jury will determine the question, the facts themselves, as pleaded in this case, show that plaintiff has neither alleged a cause of action nor that he even has one. Moreover, there is no merit to plaintiff's argument that discovery is necessary to determine the question of malice. His generalized argument does not state what discovery could be obtained or what it would reveal.

Finally, there is no basis to find, as plaintiff argues in his memorandum of law, that the fact that defendant may have suffered harm as a result of the publication is a basis for finding that defendants acted with malice. There is no logical nexus between harm and malice.

Accordingly, it is

ORDERED that the motion is granted and the complaint dismissed; and it is further

ORDERED that the Clerk shall enter judgment dismissing the complaint, together with costs as taxed by the Clerk upon submission to the Clerk of a proposed judgment and bill of costs.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: October 16, 2018

ENTER:

JSC