

Gallipoli v Nicoletti

2018 NY Slip Op 33073(U)

November 28, 2018

Supreme Court, Kings County

Docket Number: 507893/2013

Judge: Paul Wooten

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**SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY**

PRESENT: HON. PAUL WOOTEN
Justice

PART 97

FRED GALLIPOLI,

Plaintiff,

- against -

INDEX NO. 507893/2013

MOT. SEQ. 5

**MARY NICOLETTI, FORTUNATO
NICOLETTI, ALDO NICOLETTI, WPIX
LLC, and STEPHANIE TSOFLIAS,**

Defendants.

The following papers, numbered 1 to 5, were read on this motion by defendant for summary judgment.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	1, 2, 3
Answering Affidavits — Exhibits (Memo) _____	4
Replying Affidavits (Reply Memo) _____	5

Before the Court is a motion by defendants WPIX LLC and Stephanie Tsoflias (collectively, the WPIX Defendants) for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the Complaint of Fred Gallipoli (plaintiff) as asserted against them.

BACKGROUND

This defamation action as against the WPIX Defendants relates to their news report about a sign posted by defendant Mary Nicoletti that stated, "My tenant FRED GALLIPOLI didn't pay his rent for three (3) months Almost (4) months!!" Starting June 2012, plaintiff rented a one-bedroom apartment located on the second floor of a building owned by defendants Mary Nicoletti and Fortunato Nicoletti. Mary Nicoletti lived in the first floor unit of the building, and

she placed the sign in front of her first floor unit in early January 2013. Defendant Stephanie Tsoflias was a reporter for WPIX LLC, who, along with a camera operator, was assigned to prepare a news report on the sign, which report consisted primarily of an interview of Mary Nicoletti and her son, defendant Aldo Nicoletti. The report aired on WPIX LLC's PIX11 newscast on January 11, 2013, and was also posted on PIX11's website.

The transcription of the report, as stated in the Complaint (Complaint at ¶ 27),¹ reads as follows:

"STEPHANIE TSOFLIAS (PIX 11): Mary Necoletti's got tenant troubles –

"MARY NICOLETTI: I have a tenant that does not like to pay his rent. He'd rather sleep all day.

"STEPHANIE TSOFLIAS (PIX 11): And isn't afraid to air her woes with the world –

"MARY NICOLETTI: I have to get some revenge him sitting up there all these months [sic]. I want people that come in and out or passing, they're all taking pictures of the sign for some reason; to, you know, make people know what type of person he is.

"STEPHANIE TSOFLIAS (PIX 11): People in Dyker Heights might not know him personally, but they certainly know his name, and that Fred Gallipoli is seriously behind on his payments.

"ALDO NICOLETTI: First couple of months were okay; third month, start to slow down; fourth month, start to slow down; so, I believe around November he bounced a check on us [sic].

"STEPHANIE TSOFLIAS (PIX 11): She [Mary Nicoletti] says two days after the sign went up she came home to find this orange graffiti all over her front stairs which forced her to put up this surveillance camera. Now, the Nicolletti's have been landlord's here in Brooklyn for 40 years and say all of this is a first.

"ALDO NICOLETTI: We're a working family. We're not, you know, we don't have 25 houses [sic].

¹ Other than contending that plaintiff has misspelled some words, defendants agree with the accuracy of the transcription of the report contained in the Complaint (Rosen Aff at ¶ 11). The use of the possessive "s" rather than plural "s" as well as the "sic's" were in the transcript in the Complaint and were not added by the Court.

"STEPHANIE TSOFLIAS: [Mary Nicoletti] and her son Aldo said that they did a background check before renting out the second floor space to Fred. They claim he is a retired city sanitation worker who can afford the \$800 a month. But when we attempted to get Fred's side of the story, our knocks went unanswered. He's gone on record saying Mary declined to take his check. The Nicolletti's though have hired a lawyer and can only hope their public plea for Fred to cough up the cash works.

"MARY NICOLLETTI: I don't want to do anything illegal, you know, I got the lawyer working on it, and he said maybe six weeks we could evict him.

"STEPHANIE TSOFLIAS: Stephanie Tsoflias PIX 11 news."

The WPIX Defendants have provided a DVD that contains a copy of the video broadcast of the news report, and the Court has considered the video in determining this motion (see *Greenberg v Spitzer*, 155 AD3d 27, 44-45 [2d Dept 2017]). Consistent with the allegations of the Complaint, the video, apart from showing shots of Mary Nicoletti and Aldo Nicoletti being interviewed, shows shots of the above-noted sign, and plaintiff's check that Aldo Nicoletti identified as having been dishonored by the bank, and the graffiti on the steps. In the Complaint, plaintiff identifies the defamatory statements made by the WPIX Defendants in the report as including, but not limited to, the statements by Tsoflias that:

"People in Dyker Heights might not know him personally but they certainly know his name, and that Fred Gallipoli is seriously behind in his payments" (Complaint at ¶ 58) and

"[Mary Nicoletti] says two days after the sign went up she came home to find this orange graffiti all over her front stairs which forced her to put up this surveillance camera" (Complaint at ¶ 58).

In addition to the defamation cause of action against the WPIX Defendants (third cause of action), plaintiff also pleads causes of action for intentional infliction of emotional distress (fourth cause of action) and negligent infliction of emotional distress (fifth cause of action).

DISCUSSION

“The elements of a cause of action [to recover damages] for defamation are 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” (*Martino v HV News, LLC*, 114 AD3d 913, 913 [2d Dept 2014], quoting *Epifani v Johnson*, 65 AD3d 224, 233 [2d Dept 2009]; see *Franco Belli Plumbing & Heating & Sons, Inc. v Dimino*, 164 AD3d 1309, 1311 [2d Dept 2018]). As the statements at issue here were broadcast by means of television, they are classified as libel rather than slander (see *Matherson v Marchello*, 100 AD2d 233, 239-240 [2d Dept 1984]). “A defamatory statement is libelous per se if the statement ‘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’” (*Matovcik v Times Beacon Record Newspapers*, 46 AD3d 636, 637 [2d Dept 2007], quoting *Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 379 [1977], cert denied 434 US 969 [1977] [internal quotation marks omitted], lv denied 22 NY3d 855 [2013]; see *Martino*, 114 AD3d at 914).

Here, as plaintiff has not pleaded special damages, plaintiff’s right to recover at all turns on whether the respective statements are libelous per se (see *Matherson*, 100 AD2d at 236). With respect to the statements relating to the graffiti, the report merely noted the fact that the steps had been covered with graffiti shortly after the sign went up without any assertion from Tsofilias, Mary Nicoletti or Aldo Nicoletti that plaintiff was responsible for the graffiti. The portion of the report regarding the graffiti thus did not give rise to defamation by implication as there was nothing in the report that could be read to both “impart a defamatory inference and to affirmatively suggest that [the WPIX Defendants] intended or endorsed that inference” (*Stepanov v Dow Jones & Co.*, 120 AD3d 28, 37-38 [1st Dept 2014]; see *Tracy v Newsday, Inc.*, 5 NY2d 134, 137-138 [1959]; *Duci v Daily Gazette Co.*, 102 AD2d 940, 941 [3d Dept 1984]; *Martin v Hearst Corp.*, 777 F3d 546, 552-553 [2d Cir 2015], cert denied ___ US ___, 136

SCt 40 [2015]). While there may be a close question as to whether the statements regarding plaintiff being “seriously” behind in paying his rent may be considered defamatory per se (see *Neaton v Lewis Apparel Stores, Inc.*, 267 App Div 728, 731-733 [3d Dept 1944]), the Court need not resolve the issue as the WPIX Defendants have demonstrated that they are entitled to summary judgment under the “gross[] irresponsib[ility]” standard of liability for news reports falling within the sphere of legitimate public concern (see *Chapadeau v Utica Observer-Dispatch*, 38 NY2d 196, 199 [1975]).²

“[W]hen the claimed defamation arguably involves a matter of public concern, a private plaintiff must prove that the media defendant ‘acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties’” (*Huggins v Moore*, 94 NY2d 296, 302 [1999], quoting *Chapadeau*, 38 NY2d at 199; see *Matovik v Times Beacon Record Newspapers*, 108 AD3d 511, 511 [2d Dept 2013]). The “standard of ‘gross irresponsibility’ demands no more than that a publisher utilize methods of verification that are reasonably calculated to produce accurate copy” (*Karaduman v Newsday, Inc.*, 51 NY2d 531, 549 [1980]; *Matovik*, 108 AD3d at 511). In judging the reasonableness of the verification efforts, courts should consider the ease with which the truth may be found (see *Hawks v Record Print. & Publ. Co.*, 109 AD2d 972, 975 [3d Dept 1985]) and cannot expect a news organization to engage in an obviously futile investigation (see *Pollnow v Poughkeepsie Newspapers*, 107 AD2d 10, 17 [2d Dept 1985], *affd* 67 NY2d 778 [1986]).

Courts, in determining whether a story involves a matter of public concern, absent clear abuse, give broad deference to editorial judgments “so long as a published report can be ‘fairly

² Similarly, in view of the finding under the *Chapadeau* standard, the Court has not addressed the WPIX Defendants’ assertion that they are entitled to summary judgment because the statements at issue are true or substantially true.

considered as relating to any matter of political, social, or other concern of the community” (*Huggins*, 94 NY2d at 303, quoting *Connick v Myers*, 461 US 138, 146 [1983]). Additionally, courts have found that matters of public concern can be drawn from “‘human interest’ portrayal of events in the lives of persons who are not themselves public figures” (*Huggins*, 94 NY2d at 303).

Here, there is no real dispute that *Chapadeau*'s gross irresponsibility standard applies. The story relating to one landlord's unique means of attempting to obtain payment from a defaulting tenant, while involving a landlord/tenant dispute between non-public figures, undoubtedly involves an issue of concern to the public at large relating to what self-help means a landlord may use to obtain payment from a recalcitrant tenant (*see Huggins*, 94 NY2d at 303-304; *see also Cottom v Meradith Corp.*, 65 AD2d 165, 169-171 [4th Dept 1978], *lv denied* 46 NY2d 711 [1979]). The Court also notes that plaintiff specifically pleaded that the statements at issue involved a matter of public concern (Complaint at ¶ 57), and that plaintiff made no argument in his opposition papers that the *Chapadeau* standard was inapplicable here.

In considering the reasonableness of the WPIX Defendants' information gathering efforts, there does not appear to be any reason for the WPIX Defendants to doubt the veracity of Mary Nicoletti and Aldo Nicoletti in providing their version of the story (*see Gaeta v New York News, Inc.*, 62 NY2d 340, 351 [1984]; *Pillnow*, 107 AD2d at 17; *Robart v Post-Standard*, 74 AD2d 963, 963 [3d Dept 1980], *affd* 52 NY2d 843 [1984]; *Campo Lindo for Dogs v New York Post Corp.*, 65 AD2d 650, 650 [3d Dept 1978]). Mary Nicoletti and Aldo Nicolettis' presentation of the dishonored check from November 1, 2012 – which check plaintiff, in his own deposition testimony, conceded he did not have sufficient funds in his checking account to cover – provided support for their position that plaintiff had failed to pay his rent for at least a portion of the time claimed in the sign. The record also shows that Tsoflias made an effort to discuss the matter with plaintiff by knocking on his apartment door. Although Tsoflias reported that plaintiff

did not answer the door, she did report he had gone “on record” as saying that Mary Nicoletti had declined to accept his checks.³ Given that it would appear that Mary Nicoletti, Aldo Nicoletti and plaintiff were the only possible sources for determining plaintiff’s rent payment history, it is unclear what further steps the WPIX Defendants could have taken to investigate the accuracy of Mary Nicoletti and Aldo Nicoletti’s assertions (*see Pollnow*, 107 AD2d at 17; *cf. Hogan v Herald Co.*, 84 AD2d 470, 476 [4th Dept 1982] [accuracy/inaccuracy of information could easily have been verified by reporter]). Under these circumstances, the Court finds that the WPIX Defendants have made a prima facie showing that they did not act in a grossly irresponsible manner in preparing, broadcasting and posting the report.

In opposing the motion, plaintiff contends that the WPIX Defendants should not have relied on the dishonored check because it only related to one month of rent. While the check may not have served as proof for the entire period of nonpayment asserted by Mary Nicoletti and Aldo Nicoletti, it provided some support for their non-payment assertions and provided some basis for finding them credible. Plaintiff also contends that Mary Nicoletti’s statement during the interview that she posted the sign as “revenge” shows that she had an “ax to grind” against plaintiff and provided grounds for doubting her veracity. This argument is misplaced because it does not show that Mary Nicoletti had an “ax to grind” based on a fact independent from plaintiff’s failure to pay rent that would have led her to fabricate her assertions relating to plaintiff’s rent history. Plaintiff’s assertions are thus insufficient to demonstrate a factual issue as to whether the WPIX Defendants acted in a grossly irresponsible manner that would warrant denial of the motion with respect to the defamation claim (*see Gaeta*, 62 NY2d at 350-351).

In view of the fact that the defamation cause of action must be dismissed, defendants are also entitled to dismissal of the duplicative intentional and negligent infliction of emotional

³ The source of plaintiff’s assertion regarding Mary Nicoletti’s declining to accept his check that is contained in the report is not clear from the record on the motion.

distress causes of action that are based on the same facts as the defamation cause of action (see *Matthaus v Hadjedj*, 148 AD3d 425, 425 [1st Dept 2017]; *Segal v Sanders*, 129 AD3d 819, 821 [2d Dept 2015]; *Hirschfeld v Daily News*, 269 AD2d 248, 249 [1st Dept 2000], *lv denied* 271 AD2d 386 [1st Dept 2000]; *Chaiken v VV Pub. Corp.*, 119 F3d 1018, 1034-1035 [2d Cir 1997], *cert denied* 522 US 1149 [1998]; see also *Howell v New York Post Co.*, 81 NY2d 115, 125 [1993]).

Finally, plaintiff's contention that summary judgment is premature because discovery has not been completed must be rejected because plaintiff has failed to demonstrate that further discovery may lead to relevant evidence warranting denial of the motion (see *Erkan v McDonald's Corp.*, 146 AD3d 466, 468 [1st Dept 2017]; *Sarata v Metropolitan Transp. Auth.*, 134 AD3d 1089, 1093 [2d Dept 2015]; *Norero v 99-105 Third Ave. Realty, LLC*, 96 AD3d 727, 728 [2d Dept 2012]; cf. *Antonyshyn v Tishman Constr. Corp.*, 153 AD3d 1308, 1310 [2d Dept 2017]).

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CONCLUSION

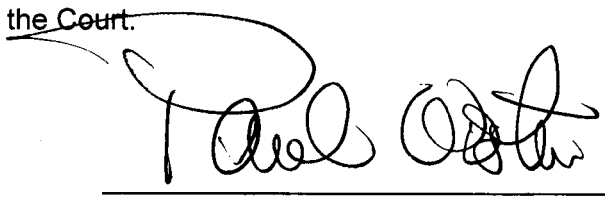
Based upon the foregoing, it is hereby

ORDERED that the motion by defendants WPIX LLC and Stephanie Tsofilias for an Order, pursuant to CPLR 3212, granting them summary judgment is granted, and the Complaint is dismissed as against these defendants with costs and disbursements to said defendants upon the submission of an appropriate bill of costs; and it is further,

ORDERED that counsel for WPIX LLC is directed to serve a copy of this Order with Notice of Entry upon all parties and the Clerk of the Court who shall enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 11/28/18



PAUL WOOTEN J.S.C.