FORM 818

MEMORANDUM

[A6- A12]

SUPREME COURT, SUFFOLK COUNTY. ORDER APPEALED FROM SPECIAL TERM, PART 1

GEORGE SASSOWER,

Plaintiff,

VS.

ERNEST L. SIGNORELLI, et al,

Defendants.

BY DE LUCA, J. S. C.

DATED NOVEMBER 5, 1982

D0132-006

11-29-82

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This is a motion by plaintiff to dismiss certain affirmative defenses in a libel action. The motion is disposed of as follows:

This causes of action against the New York Daily News ("News"), seeks damages for libel alleged to have been committed in two articles printed on June 27, 1977 and August 17, 1977. The stories purport to report a controversy involving plaintiff and the Surrogate of Suffolk County. The plaintiff, who was the Executor of the estate of a Suffolk County decedent, was twice cited for contempt by the Surrogate for reasons which concern the plaintiff's handling of the estate and his conduct in an accounting proceeding before the Surrogate. The essential allegations in the complaint are contained in plaintiff's second cause of action, paragraph 23, as follows:

> "23. That the defendant, NEW YORK NEWS, INC., published that plaintiff was jailed on June 23, 1977, setting forth numerous untruths in connection therewith: (1) falsely stating that the reason therefor was his failure "to provide a complete accounting"; (2) falsely stating that "state inheritance taxes have never been paid"; (3) falsely stating that plaintiff had been removed from office as executor of an estate in March of 1976; (4) falsely implying that he was immediately substituted by another; (5) falsely stating that plaintiff could "purge himself by giving (his successor) a complete accounting"; (6) falsely stating that plaintiff's successor was due but "had never received the accounting"; (7) falsely stating that plaintiff tried to sell estate

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> Property without authorization; (9) falsely implying that plaintiff knew he had no authorization to sell; (10) falsely stating that after June 23, 1977 additional criminal charges had been placed against the plaintiff; (10)[sic] falsely stating that plaintiff was being investigated by the Office of the District Attorney for criminal conduct; (11) falsely implying that plaintiff had given estate monies to an insurance company and a bank; (13) falsely implying that plaintiff was obligated to "personally" appear in court but had failed to do so; (14) and other deliberate or reckless,false,misleading and improper statements."

It is to be noted that only the clauses numbered (1),(2),(5) and (6) comply with the provisions of CPLR R.3016(a) by setting forth in haec verba, that is in quotations, the specific words complained of. The quotations do not state which of the two articles is the source for the above statements. Those portions of the complaint which are not in conformity with the statute, do not state a cause of action. See Brandt v. Winchell, 3 NY2d 628,636; Edison v. Viva International, 70 AD2d 379,385-86; Schwartz v. Andrews, 50 AD2d 1057; Randaccio v. Retail Credit Co., 43 AD2d 798; Gardner Lnagert v. Scalamandre, 9 AD2d 647. Compare Ostrer v. Readers Digest Association Inc., 48 AD2d 856; Suozzi v. Pante, NYLJ, 10/25/82, p. 7, col. 4, Sup.Ct., N.Y. County,(Wolin J. As the court stated in Gardner v. Alexander Rent-A-Car,Inc., supra, with respect to pleading a cause of action under CPLR 3016(a):

> "Any qualification in the pleading thereof by use of the words 'to the effect', 'substantially' or words of similar import generally renders the complaint defective.(cit.om.)"

Accordingly, this Court will only consider paragraph 23, clauses (1),(2),(5) and (6) of the plaintiff's second cause as stating the libel cause of action against the "News".

The defendant "News" has stated four affirmative defenses to the action, all of which plaintiff seeks to dismiss. The first affirmative defense is that of truth; the second is that the articles were fair and true reports of judicial proceedings and were privileged; the third is that the articles were published without malice and the fourth relates to the privilege of publishing matters arguably within the sphere of public concern.

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Prior to the decision in New York Times Co. v. Sullivan, 376 US 254 84 S.Ct.710, 11 L. Ed2d 686, libel laws were a matter of state law. In the New York Times case, the Supreme Court, for the first time, brought the law o libel within the constitutional protection of the First Amendment. The rule o that case was that a public official could not recover for a defamatory falsehood concerning his official conduct unless the public official proves that the statement was made with actual malice. That is, with knowledge that it was false or with reckless disregard of whether it was false or not. Id., at 376 US 279-280, 84 S.Ct.726. This rule was later extended to apply to defamatory criticism of "public figures" in Curtis Publishing Co. v. Butts, and its companion case Associated Press v. Walker, 388 US 130,162, 87 S.Ct.1975, 1995, 18 L. Ed.2d 1094. With respect to libel of private individiuals, a plurality of the court in Rosenbloom v. Metromedia, Inc.,403 US 29,43, 91 S. Ct. 1811,1819, 29 L.Ed.2d 296, extended the rule of New York Times Co. v. Sullivan, supra, to private individuals if the defamatory falsehood concerned matters of general or public interest.

However, in Gertz v. Robert Welch Inc., 418 US 323,347, 94 S.Ct.29 3010, 41 L.Ed.2d 789, the court, again in a plurality opinion, retreated fro the rule in Rosenbloom and allowed the states to define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehoods with respect to a private individual so long as a showing of fault be required. In the case of Time Inc. v. Firestone, 424 US 488, 96 S.Ct.958. 47 L.Ed.2d 154, the court was able for the first time to assemble a clear majority in favor of the plurality rule in Gertz v. Robert Welsh Inc., supra, that is, with respect to private persons, the states were free to fashion a fault standard of liability for defamation. It now appears that the approac of the plurality in Gertz, supra, has taken a firmer hold. See Wolston v. Readers Digest Association Inc., 443 US 157, 99 S.Ct.2701, 61 L.Ed.2d 450; Hutchinson v. Proxmire, 443 US 111, 99 S.Ct.2675, 61 L.Ed.2d 411.

New York's response to the rule of the Gertz, supra, plurality,came in the case of Chapadeau v. Utica Observer-Dispatch, Inc., 38 NY2d 196,199, where the court set the rule:

> "...where the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition, the party defamed may recover; however, to warrant such recovery he must establish, by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner, without

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due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties."

It is to be noted that the burden is on plaintiff to defeat constitutionally mandated defenses raised by defendants. See Rinaldi v. Holt Rinehart & Winston, 42 NY2d 369,380; Greenberg v. CBS, 69 AD2d 693,701. It is the media defendant's burden to establish the status of plaintiff. See Waldbaum v. Fairchild Pubs., 627 F2d 1287, cert.den. 449 US 898; Fairley v. Peekskill Star Corporation, 83 AD2d 294,298.

In the present case, the third affirmative defense raised by the "News" is that the articles in question were published without malice and are privileged. Thus the "News" seeks to cast plaintiff in the role of a public figure so as to requrire him to meet the burden of showing malice under the rule of Associated Press v. Walker, supra.

The test for determining whether a libel plaintiff is a public figure was stated in Gertz v. Robert Welch Inc., supra, at 418 US 345, 94 S.Ct. 3009 and reiterated in Time Inc. v. Firestone, at 424 US 453, 96 S.Ct. 965, Wolston v. Readers Digest Associaton Inc. at 443 US 164, 99 S.Ct.,2706, and Hutchinson v. Proxmire at 443 US 134, 99 S.Ct.,2687-88:

> "For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classified as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issue involved."

The status of the plaintiff must be established before the appropriate standard of care may be determined. See Greenberg v. CBS,Inc., 69 AD2d 693,703. The burden of proof with respect to the status of plaintiff is on the media defendant. See Waldbaum v. Fairchild Publishers, supra; Fairley v. Peekskill Star Corporation, supra. The "News" does not contest plaintiff's assertion that he is a private person. On the record before the court, it cannot be concluded that plaintiff assumed a role of especial prominence in the affairs of society or that he thrust himself to the forefront of a particular public controversy in order to influence the resolution of the issues involved. The plaintiff is involved in a controversy with the Surrogate of Suffolk County over the former's handling of a decedant's estate. Plaintiff's allegedly contemptible conduct or mishandling of estate affairs and his personal

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confrontations, or lack thereof, with the Surrogate are all involved in an attempt to have estate issues resolved. The Court does not perceive these to be public issues. The Court holds that the "News" has failed to meet its burden as a media defendant of showing that plaintiff is a public figure. The "News'" third affirmative defense is therefore stricken.

The defendant's second defense is based upon Civil Rights Law section 74 which provides an absolute privilege for the fair and true report of judicial proceedings. The purpose of the statute is to encourage the dissemination of information concerning the judicial branch of government and thereby to serve the public interest in having proceedings of courts of justice public, not secret, for the greater security thus given for the proper administration of justice. See Gurda v. Ottaway Newspapers, 81 AD2d 120,126-133, rev'd on concurring and dissenting opinion of JJ. Mollen and Titone at 82 AD2d 126-133,sub nom Gurda v. Orange County Publications, Division of Ottaway Newspapers Inc., 56 NY2d 705; Shiles v. News Syndicate Co., 27 NY2d 9,14. See also Williams v. Williams, 23 NY2d 592,596-599 for the legislative history of Civil Rights Law §74. The construction to be placed on the statute is set forth in Gurda v. Ottaway Newspapers Inc. at 81 AD2d 131:

> "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 [the] 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.'(cit.om.)"

The plaintiff has not submitted a copy of the transcript of proceedings in the Surrogate's Court, upon which proceedings the newspaper articles in question are apparently based. The only record submitted is a copy of the opinion of defendant Surrgoate Signorelli as published in the New York Law Journal of March 3, 1978, which reviews the history of the proceedings in Matter of Eugene Paul Kelly,deceased, the estate matter from which this controversy arose. A comparison of the opinion of the Surrogate, the newspaper articles in question and the allegedly libelous words pleaded in paragraph 7 subdivisions (1), (2), (5) and (6) leads the Court to conclude that there is merit to the defense based upon Civil Rights Law §74 and that the "News'" second affirmative defense should not be stricken.See e.g.Schermerhorn v. Rosenberg,73 AD2d 276,299-300;Grobe v. Three Village Herald,69 AD2d 175 (per curiam) aff'd 49 NY2d 932. The Court notes that a copy of the transcript of proceedings before the Surrogate was not submitted to the Court.

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The "News'" fourth affirmative defense is based upon the holding in Chapadeau v. Utica Observer-Dispatch, supra. If the content of the articles are arguably within the sphere of legitimate public concern which is reasonably related to matters warranting public exposition, then the articles are entitled to a privilege in that plaintiff bears the burden of proving by a preponderance of the evidence that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by reasonable parties.

Whether the articles in question fall within the ambit of the Chapadeau, supra, holding, is a question for the court to determine based upon the facts of each individual case. See e.g. Greenberg v. CBS, supra, at 69 AD2d 706-709; Wehringer v. Newman, 60 AD2d 385, 389-392. See also Karaduman v. Newsday, 71 AD2d 411, 414.

In this case plaintiff was twice cited for contempt; the second time sentenced to serve a jail term for refusal to obey court mandates. In addition he has been removed as executor from the Kelly estate for failure to file a court-ordered accounting, and directed to turn over estate property in his possession to the Public Administrator. It further appears that plaintiff has delayed resolution of issues raised with respect to the accounting he filed as well as the turnover of estate property pursuant to court order. Indeed the plaintiff's reasons for so acting may rest on good and sound reasons. That, however, does not change the nature of the dispute between plaintiff and the Surrogate.

The Court holds that the "News" articles in question are arguably within the sphere of legitimate public concern and reasonably relate to matters warranting public exposition. The motion to dismiss the "News'" fourth affirmative defense is denied.

Finally, the defendant's first affirmative defense is the truth of the statements made in the articles. Substantial truth is sufficient to defeat a charge of libel. See Fairly v. Peekskill Star, supra, at 83 AD2d 297. The motion to dismiss the "News'" first affirmative defense is denied.

The Court points out that the only issues considered were whether the affirmative defenses raised by the "News" have merit. The Court makes no determination that the statements in the articles which plaintiff complains

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of are in fact libelous. (See e.g. Schermerhorn v. Rosenberg, supra, at 73 AD2d 283-284), or whether summary judgment should be granted, (see e.g. Greenberg v. CBS, supra, at 69 AD2d 700-701; Roche v. Hearst Corp., 72 AD2d 245, 249-250). Those issues were not presented to the Court.

Settle order granting plaintiff's motion to dismiss the defendant "News'" third affirmative defense and denying plaintiff's motion to dismiss defendant "News'" first, second and fourth affirmative defenses.

That portion of this motion seeking disclosure from the "News" of the address of Art Penny is denied as moot. Art Penny is no longer in the employ of the "News". However, his last known address has been set forth in defendant's opposition papers as 74 Sunrise Ave., Riverhead, New York 11901.

Plaintiff may have disclosure from Art Penny. The prospective witness, who is not a party to this action, authored the newspaper articles upon which plaintiff's action is based. His involvement in the matters at issue in this action constitutes special circumstances, pursuant to CPLR 3101(a),(4), so as to warrant the relief requested. Plaintiff may proceed pursuant to CPLR 3102 to obtain disclosure from the witness subject to any defenses the witness may interpose.

That part of the application requesting sanctions for the failure of the County defendants to answer plaintiff's interrogatories is denied as moot, the answers thereto having been served prior to submission of this motion.

Settle order.

J. S. C.