

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS-----X
Arcadio Rodriguez,

Plaintiff,

Hon. Edgar Walker
PART: IA 90

-against-

Index No. 2058/14

Daily News, L.P. and WPIX, LLC,

Defendants.
-----X

Defendants' respective motions to dismiss the complaint, pursuant to CPLR §§3211(a)(1) and (a)(7), are granted.

In the complaint, plaintiff asserts causes of action for defamation against each defendant for publishing news articles/reports about an alleged sexual assault which erroneously included a photograph of plaintiff. It is undisputed that plaintiff had no involvement in the alleged assault. Defendants contend that the articles/reports were based on a press release, which included the photograph of plaintiff, distributed to them via email by the New York City Police Department (NYPD).

Defendants argue that the complaint should be dismissed because, *inter alia*, the articles/reports published by them are privileged pursuant to New York Civil Rights Law §74.

In pertinent part, §74 states:

A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published.

In support of their argument, defendants submitted a copy of an email, dated April 14, 2013 which they claim was issued, and distributed to the media, by the NYPD and formed the basis of the articles/reports. The email states:

The New York City Police Department is seeking the public's assistance identifying the following individual wanted for questioning in regards to an attempted rape which took place on Sunday, April 14, 2013 at approximately 0445 hours in the vicinity of Park Row and Beekman Street. The individual followed a F/28 into Theatre Alley where he threw her to the ground and attempted to rape her. The victim was taken to an area hospital where she is in stable condition.

A photo of the individual wanted for questioning is attached.

A photograph of plaintiff walking through a subway turnstile was attached to the email. On April 18, 2013, the email was updated and distributed to the media. The updated email contained the original email together with additional information printed below it indicating that an individual named Amauri Azcona had been arrested in connection with the incident. The updated email did not indicate that Amauri Azcona was not the individual depicted in the photograph. Some of the articles/reports that defendants published name Amauri Azcona as the alleged perpetrator but depict plaintiff's photograph.

In opposition to the motion, plaintiff argues that the articles/reports are not privileged because the email received by defendants is not a publication purporting to comment on a judicial, legislative or other official proceeding within the meaning of Section 74. Plaintiff also claims that there are "many inconsistencies" between the email first received by defendants and the published articles/reports. Plaintiff also claims that each defendant was advised on two separate occasions that plaintiff was incorrectly identified by them as the perpetrator of the alleged assault, by letters dated May 2, 2013 and August 30, 2013, respectively. Plaintiff submitted copies of those letters together with documentation indicating that defendants received the letters.

While defendants initially published the articles/reports prior to May 2, 2013, the articles/reports, including plaintiff's photograph, remained on the WPIX website until February of 2014, after the instant lawsuit was commenced. The articles/reports remained on the Daily News website until mid-September of 2013. Defendants contend that the fact that letters were

sent to them after the initial publication of the news articles/reports notifying them that the information was false has no affect on the absolute privilege afforded to the news articles/reports under Section 74; nor does it obligate them to either remove the news articles/reports from their websites or issue a retraction.

A motion to dismiss pursuant to CPLR §3211(a)(1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." See *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326. The privilege afforded by Civil Rights Law §74 is an affirmative defense. See *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 141. The privilege afforded by this statute is absolute "and is not defeated by the presence of malice or bad faith." See *Glendora v. Gannett Suburban Newspapers*, 201 A.D.2d 620; see also *Cholowsky v. Civiletti*, 69 A.D.3d 110, 114; *Pelayo v. Celle*, 270 A.D.2d. 469, 469-470. This absolute privilege applies only where the publication is comment on a judicial, legislative, or other official proceeding and is a "fair and true" report of that proceeding. See *Cholowsky v. Civiletti*, *supra* at 114-115; *Holy Spirit Assn. For Unification of World Christianity v. New York Times Co.*, 49 N.Y.2d 63, 67. For a report to be characterized as fair and true, "it is enough that the substance of the article be substantially accurate." See *Holy Spirit Assn. For Unification of World Christianity v. New York Times Co.*, *supra* at 67. Moreover, "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." See *Briarcliff Lodge Hotel, Inc. v. Citizen-Sentinel Pubs.*, 260 N.Y. 106, 118. "New York courts have broadly construed the meaning of an official proceeding as used in Section 74." See *Fine v. ESPN, Inc.*, 2014 WL 1312261 (N.D.N.Y.) quoting *Test Masters Educ. Servs., Inc. v. NYP Holdings, Inc.*, 605 F.Supp.2d 584, 588. Investigations of police departments, district attorneys, consumer protection boards and consumer affairs departments have all been found to constitute official proceedings under Section 74. See *Fine v. ESPN, Inc.*, *supra*; *Baumann v. Newspaper Enterprises*, 270 A.D. 825; *Test Masters Educ. Servs., Inc. V. NYP Holdings, Inc.*, *supra*; *Freeze Right Refrigeration And Air Conditioning Services, Inc., v. City of New York*, 101 A.D.2d 175, 182. A media report

is protected as long as it concerns activities which are within the prescribed duties of a public body. See *Freeze Right Refrigeration And Air Conditioning Services, Inc., v. City of New York*, *supra*.

Indisputably, the NYPD is an entity officially empowered to investigate the subject assault and to enlist the public's assistance in such investigation. As such, the NYPD investigation into the subject assault constitutes an official proceeding under Section 74. Further, the evidence submitted by defendants is sufficient to establish that the subject emails were issued and distributed by the NYPD and that such emails were routinely relied upon by the media.¹ The court also finds that the substance of the articles/reports is a substantially accurate report of the information provided by the NYPD. Section 74 was designed to protect the publisher of a fair and true report of an official proceeding from liability for such errors and to relieve it of any duty to expose the error through its own investigation. See *Freeze Right Refrigeration And Air Conditioning Services, Inc., v. City of New York*, *supra*, at 183. Therefore, the initial publications of the news articles/reports are absolutely privileged under Section 74.

Nor has the court found, or plaintiff cited to, any legal authority under which defendants may be held liable to plaintiff for not promptly removing plaintiff's photograph from their websites, or for their failure to publish a retraction of the articles/stories, upon being informed that the person in the photograph was not the perpetrator of the sexual assault.

While the court finds it unconscionable that a publisher, whether malicious or not, may

¹Plaintiff argues that the emailed press release is unsworn, unsigned, unverified, unauthenticated and from an unnamed source and is, therefore, insufficient to establish that the news articles/reports commented on an official proceeding. However, in their initial moving papers, each defendant also submitted an affidavit from a person with personal knowledge of the receipt of the email and where it came from. Also, in reply papers, WPIX submitted the affidavit of Bruce S. Rosen wherein he states that on April 10, 2014, before the motion was filed, WPIX submitted a FOIL request seeking the subject press releases. However, as WPIX had not received a response to that request at the time the motion was filed, it could not have submitted that documentation with its initial moving papers. Notably, the FOIL response includes a cover letter from the NYPD Legal Bureau together with copies of the updated email and plaintiff's photograph.

refuse to remove a news article/report from its website that it knows to be false, this is a matter for the legislature, not the courts, to address.

As the court finds that New York Civil Rights Law §74 is applicable here and, therefore, the new articles/stories are absolutely privileged, plaintiff is barred from bringing the instant action.

The clerk is directed to enter judgment in accordance herewith.

Dated: 8-19-14



Hon. Edgar G. Walker, J.S.C.


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