

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:

Hon. Paul J. Baisley, Jr.

DAVID BERNACCHI AND LUCKY FUND,
INC.,

Plaintiff(s),

-against-

COUNTY OF SUFFOLK, STEVE LEVY,
INDIVIDUALLY AND IN HIS OFFICIAL
CAPACITY AS COUNTY EXECUTIVE OF THE
COUNTY OF SUFFOLK, STATE OF NEW
YORK, NEWSDAY, INC., NORTH SHORE
ANIMAL LEAGUE AMERICA, INC., LONG
ISLAND PRESS, MOREY PUBLISHING, INC.,
MOREY PUBLISHING, LLC, 1010 WINS, CBS
RADIO, INC. AND THE ASSOCIATED PRESS,

Defendant(s).

ORIG. RETURN DATE: September 15, 2008
FINAL RETURN DATE: December 10, 2008
MTN. SEQ. #: 001 - MotD

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FILED

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JOSEPH A. QUATELA
SUFFOLK COUNTY CLERK

Upon the following papers numbered 1 to 16 read on this motion to dismiss: Notice of Motion and supporting papers 1 -3; Affirmation in Opposition 4 - 14; Reply Affirmation and supporting papers 15 - 16; it is,

ORDERED and ADJUDGED that the motion (001) to dismiss pursuant to CPLR 3211(a)(1) and (7) by the defendants Newsday, Inc., 1010 WINS, CBS Radio, Inc. and The Associated Press is granted pursuant to CPLR 3211(a)(7) and the complaint is dismissed only as to them; and it is further

ORDERED that the defendants Newsday, Inc., 1010 WINS, CBS Radio, Inc. and The Associated Press are severed from the caption and that this action shall continue only as against the remaining defendants; and it is further

ORDERED that the moving defendants are directed to serve copies of this Decision and Order upon all parties pursuant to CPLR 2103 within 45 days of the date of entry of this decision and order and thereafter file proofs of service with the Clerk of the Court; and it is further

ORDERED that the remaining parties are directed to appear for a preliminary conference pursuant to 22 NYCRR 202.8(f) on November 23, 2010 at the Supreme Court, DCM Part, Room A362, One Court Street, Riverhead, New York at 10:00 a.m.

This is a defamation action against the County of Suffolk, the County Executive Steve Levy and various media entities arising out of statements made about the plaintiffs by Suffolk County officials and the County Executive. Four of the media entities sued herein - Newsday, Inc., 1010 WINS, CBS Radio, Inc. and The Associated Press (hereinafter the Press defendants) - seek dismissal of the complaint in its entirety as to them in this pre-answer motion to dismiss brought pursuant to CPLR 3211(a)(1) and (7).

The basic premise behind this motion to dismiss is that the Press defendants are immune from such an action pursuant to Civil Rights Law §74 (“Privileges in action for libel”) which, in part, prohibits an action for the publication of a “fair and true report of any judicial proceeding, legislative proceeding or other official proceeding”

By way of background, it is uncontested, based upon the admissible submissions on this motion, that a complaint was filed with the Suffolk County Police Department by the owners of a dog which was allegedly stolen and put up for sale on the internet. A police investigation led to the arrests of three individuals including the individual plaintiff herein, David Bernacchi (hereinafter Bernacchi). The co-plaintiff Lucky Fund, Inc. is a not-for-profit corporation set up for the purpose of facilitating animal rescue efforts undertaken by Bernacchi and others.

According to the complaint in this action, on June 20, 2007, 54 dogs were seized from Bernacchi’s facility and news reports that day and the next aired and published by the Press defendants included “false, scurrilous and defamatory statements” (Complaint, ¶3) which the Press defendants either knew to be false or, at least, acted with reckless disregard in publishing such false statements (*Id.*, ¶¶ 37, 46).

Specifically, the statements were as follows:

- 1) On June 20, 2007, 1010 WINS “attributed” Steve Levy with saying that the plaintiffs were stealing and selling dogs for a profit; that officials in some instances, will be returning dogs “to their rightful owners (*Id.* at ¶33);
- 2) that on June 21, 2007, an article on the 1010 WINS web site “quoted Steve Levy” as making that same statement as above (*Id.* at ¶34);

3) on June 21, 2007, Newsday, Inc. published an article in its newspaper and on its web site which stated that the "Police believe" that the plaintiffs, "rather than running a shelter, were operating a for-profit enterprise that involved collecting dogs 'by any means they could' - even stealing them off the street" (*Id.* at ¶44).

The complaint does not attach the actual printed articles or supply transcripts of the radio broadcasts but these items are supplied with the Press defendants' reply papers. The following quotes are taken from the actual articles and broadcasts:

1) From Newsday.com (June 21, 2007): "Police believe Bernacchi and two colleagues, rather than running a shelter, were operating a for-profit enterprise that involved collecting dogs 'by any means they could' - - even stealing them off the street." " 'It was an absolute travesty,' County Executive Steve Levy said . . . " Bernacchi's "girlfriend [identified as Karen Schleich] was "charged with one count of possession of stolen property." Another individual, "[Kristin] Beauchesne was charged with grand larceny. All three [Bernacchi, Schleich, Beauchesne] were arraigned . . . , and each pleaded not guilty." "Bernacchi was held on \$27,000 cash or \$54,000 bond."

2) From 1010WINS' web site, publishing an AP story (July 21, 2007): Police said the so-called rescuers were scammers running an illegal dog napping operation." Levy said, "This fly-by-night operation was taking these dogs from their rightful owners and selling them [on line] for profit." "Karen Schleich, 45, and David Bernacchi, 44, . . . were arrested and charged with animal cruelty, police said. Schleich was also charged with criminal possession of stolen property" "Police arrested Kristen Beauchesne, 25, . . . on a charge of grand larceny." "Police were trying to determine whether any of the other animals also had been stolen." "The three suspects were in custody and scheduled to appear in court Thursday."

3) From a CD and transcript of the 1010 WINS broadcasts on June 21, 2007: "[A]uthorities on Long Island say a Medford couple [Bernacchi and Schleich] were into a whole other scheme [other than rescuing dogs]." "[A]uthorities say [it] was actually a dog napping operation . . . the couple . . . were actually stealing pets off the streets, or picking up strays, and selling them over the internet for profit." "Three people are charged in this dog scam . . . all will be arraigned later today." "Three people are under arrest . . . charged with animal cruelty and stealing animals." Levy says, "These dogs were being stolen . . ." "Authorities say it was an illegal dog napping operation." "Steve Levy . . . says many of the dogs were lost or stolen." "Levy . . . says the couple . . . made themselves out to be animal rescuers, but were stealing pets, or, picking up lost pets, and selling them over the internet for profit." "Police Sergeant Kevin Lee says . . . some were stolen, or picked up as strays, and sold even if they had collars and chips . . ." "[A]uthorities on Long Island say three suspects were actually stealing the pooches and selling them on line." "Levy says they are dog nappers, he says the dogs were stolen off the streets or brought in and never returned."

The plaintiffs claim that the above reports, aired and published by the Press defendants, were false in portraying Bernacchi as a thief, a scammer and as a person engaged in criminal conduct. It is noteworthy that there is no affidavit from Bernacchi submitted in opposition to this motion which contests that he was arrested and criminally charged for animal cruelty as well as being arraigned with a cash bail or bond alternative being set.

Nevertheless, the plaintiffs are suing the Press defendants for defamation for the reports containing the accusations detailed herein.

In support of this motion to dismiss, the Press defendants rely upon Civil Rights Law §74 and argue that they are immune for publishing these “fair and true” accounts of what the police authorities and the County Executive said with regard to the investigation, arrests and charges.

There is no contention in the record before the court that the Press defendants did not accurately report what the police authorities and the County Executive said. It is the plaintiffs’ contention, however, that what the sources said was not true and that the Press defendants were negligent in printing such attributed statements without taking efforts to ascertain the truth of said statements.

The Press defendants contend that Civil Rights Law §74 protects them from such a law suit where they merely reported on what government officials said with regard to an official investigation resulting in formal criminal charges.

The plaintiffs cite a case for a more restrictive, less protective interpretation of Section 74 which holds that in order for statements to be protected, they must be part of an actual official proceeding (like a trial or hearing). In support of this contention, the plaintiffs cite *Nunnally v Press Publishing Co.* (110 AD 10, 96 NYS 1042 [2d Dept 1905]). The *Nunnally* case, however, is 105 years old and was based upon a more restrictive predecessor of Section 74 (which became effective in 1962) and has not been cited in a majority decision in any other case since 1956¹ (54 years ago; six years before the current version of Section 74 became effective).

Case law under the current Section 74 has been protective of the media in its reporting of statements and information from named official sources regarding investigations and arrests (*see Law Firm of Daniel P. Foster, P.C. v Turner Broadcasting System, Inc.*, 844 F2d 955, 960 [2d Cir], *cert. denied* 488 US 994 [1988]). The rationale behind this is the importance of informing the public as to what government officials say and do. Whether such officials are giving precisely accurate information is not the issue (*see Freeze Right Refrigeration & Air Conditioning Servs., Inc. v City of New York*, 101 AD2d 175, 183, 475 NYS2d 383 [1st Dept 1984]; *see also Robart v Post-Standard*, 74 AD2d 963, 425 NYS2d 891 [3d Dept 1980], *affd* 52 NY2d 843, 437 NYS2d 71 [1981]).

¹ *Kelley v Hearst Corp.*, 2 AD2d 480, 157 NYS2d 498 [3d Dept 1956].

In general, in considering a motion to dismiss pursuant to CPLR 3211(a)(7), the court's role is limited to "determining whether a cause of action is stated within the four corners of the complaint, and not whether there is evidentiary support for the complaint [citations omitted]" (*Frank v Daimler Chrysler Corp.*, 292 AD2d 118, 121, 741 NYS2d 9, 12 [1st Dept 2002], *lv denied* 99 NY2d 502, 752 NYS2d 589 [2002]). In addition, the pleading "is to be afforded a liberal construction (CPLR 3026), and the court should accept as true the facts alleged in the complaint, accord the plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory [citations omitted]" (*Id.*, at 120-121, 12).

The protections of Civil Rights Law §74 apply to reports of arrests (*see Law Firm of Daniel P. Foster, P.C. v Turner Broadcasting System, Inc.*, *supra* at 959 [regarding report of the execution of an arrest warrant and a search warrant]). Indeed, a "fair and true" reporting of the contents of a press release from an official source which "substantially mirrored" a press release, was protected from a civil suit pursuant Civil Rights Law §74 (*Greiger v Town of Greece*, 2007 WL 4232717 [not reported in F Supp 2d][WDNY 2007][regarding a New York State Attorney General's press release regarding a tow truck business investigation and settlement]). Moreover, even an investigation, let alone an arrest, constitutes an official proceeding (*id.*).

New York law broadly construes the definition of "official proceeding" (*see Greiger v Town of Greece, supra*, citing *Easton v Public Citizens, Inc.*, 1991 WL 280688, 91 Civ 1639 [SDNY Dec. 26, 1991]); the test is whether an action taken is by a person officially empowered to do so (*id.*).

In this case, the action taken was the making of an arrest by police officers. Based upon the definition above, this constitutes an official proceeding. The reporting by the Press defendants of the official police action taken, based on statements made by the police department's representatives as to the underlying investigation and its results as well as the related comments made by the County Executive, are, thus, protected under Civil Rights Law §74 (*id.*). The subject articles and broadcasts clearly attribute every contested remark to a government official; for example, to the police ("Police believe"; Police said"), the County Executive Steve Levy ("Levy said"; "Levy says"), other government officials ("Authorities say") as well as to specific persons ("Police Sergeant Kevin Lee says"). Indeed, the plaintiffs do not contend that the Press defendants inaccurately related what was said by the attributed sources.

In addition, the Court is mindful that such reporting,

"which is not misleading [and is] composed and phrased in good faith under the exigencies of a publication deadline [should not] thereafter be parsed and dissected on the basis of precise denotative meanings which may literally, although not contextually, be ascribed to the word used" (*Holt Spirit Assoc. for Unification of World Christianity v New York Times Co.*, 49 NY2d 63, 68, 424 NYS2d 165 [1979]).

In this case, the statements provided by the police department's representatives and the County Executive did not provide any reason to doubt their accuracy. The submissions on this motion support the contention that Bernacchi was arrested and arraigned on animal cruelty charges and others were charged with additional crimes related to a stolen dog. Therefore, relying upon the information given by the police and county officials cannot be the basis for a claim of gross irresponsibility (malice) even if the report later proves to be inaccurate (*see Cottrell v Berkshire Hathaway, Inc.*, 26 AD3d 786, 809 NYS2d 714, *rehearing denied* 28 AD3d 1258, 813 NYS2d 690 [4th Dept 2006]; *Robart v Post Standard*, 74 AD2d 963, 425 NYS2d 891 [3d Dept 1980], *aff'd* 52 NY2d 843, 437 NYS2d 71 [1981]).

Accordingly, under the facts of this case, the court finds as a matter of law that the claims for defamation against the Press defendants are protected under the provisions of Civil Rights Law §74 and, thus, the complaint must be dismissed for its failure to state a cause of action as against said defendants (*see* CPLR 3211[a][7]).

As to that part of this motion seeking dismissal pursuant to CPLR 3211(a)(1) [based upon documentary evidence], that request is not addressed as it is rendered moot in light of the dismissal granted herein pursuant to CPLR 3211(a)(7).

This constitutes the decision and order of the court.

Dated: *Nov 8, 2010*

HON. PAUL J. BAISLEY, JR.

HON. PAUL J. BAISLEY, JR., J.S.C.