SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 3

Present: HON. UTE WOLFF LALLY
Justice

MD, MOD

STEVEN E. KLIG,

Plaintiff,

-against-

HARPER'S MAGAZINE FOUNDATION, an Illinois corporation and JOHN DOE,

Defendants.

Motion Sequence #1, #2
Submitted January 18, 2011

INDEX NO: 600899/10

The following papers were read on these motions to compel discovery and to dismiss:

Notice of Motion and Affs.....1-3
Second Notice of Motion and Affs.....4-6
Memoranda of Law.....7-10a

Upon the foregoing papers, it is ordered that this motion by plaintiff, Steven E. Klig ("Klig"), *pro se*, for an order, *inter alia*, pursuant to CPLR 3120, directing the defendant, Harper's Magazine Foundation, an Illinois Corporation, to comply with his Notice to Produce all documents, records and any other information in the possession of said defendant, relating to the identification of the author of the article titled "*You're a Mean One, Mr. Klig*" which appeared in the "Readings" section of the December 2009 edition of the *Harper's Magazine* is denied.

This second motion by defendant, Harper's Magazine Foundation ("Harper's) for an order pursuant to CPLR 3211(a)1. and 7. dismissing the plaintiff's Amended Complaint in its entirety and granting sanctions of costs and attorneys' fees pursuant to CPLR Rule 8303-a is granted in part and denied in part.

This libel action arises out of a column published in the December, 2009 issue of Harper's Magazine (the "Column") that consisted almost entirely of excerpts of a letter and all but two emails that were quoted in full in the criminal complaint filed against the plaintiff herein, Steven E. Klig. The Court, as best as can be determined from the papers submitted herein, finds the undisputed facts are as follows:

Defendant Harper's is a not-for-profit corporation, which publishes *Harper's Magazine*. Its "Readings" section is comprised of excerpts of found documents, ranging in length from a few lines to thousands of words. The "Readings" are taken from a variety of sources, including complaints, affidavits, transcripts, essays, poems and interviews. Harper's presents the excerpts with only the minimal information necessary to understand what the excerpts are, and where they derive from. Accordingly, the excerpts do not contain any bylines, as the "authors" of the excerpts are the individuals who wrote the underlying found documents.

By a complaint dated January 5, 2009, the United States Attorneys' Office for the Southern District of New York filed said complaint against Steven E. Klig charging him with "extortion and stalking under 18 U.S.C. §§875(d) and 2261(A)" (hereinafter referred to as the "Criminal Complaint"). The Criminal Complaint charged Klig with transmitting communications containing threats in interstate commerce and cyber-stalking. In the Criminal Complaint, FBI Special Agent Gallo states that in late 2008, the FBI learned that

a woman (the "Victim") was receiving threatening correspondence from someone who claimed to have had sexual relations with her some time in the past. Agent Gallo further states that "despite his efforts to conceal his identify [sic] by, among other things, using an alias and publicly available Internet connections, STEVEN KLIG a/k/a 'robertgibbons1967,' the defendant, has been identified as the person who sent the correspondence" to the Victim. Agent Gallo states in the Criminal Complaint that he reviewed a letter sent to the Victim at her home, postmarked October 20, 2008, which stated in part:

> I remember our past experiences together so fondly. In fact (and you may be a bit upset with me for this), I managed to record one of our sessions on DVD and it has provided me with extreme pleasure over the years...I hate asking you for this favor but was wondering if you would consider getting together with me for a one-time reunion...It would also be an opportunity for me to return the DVD to you. I suppose if you decided not to do this, I could just return the DVD. I have a few folks that I've been able to track down. I could send a copy to [Victim's husband] at his email address and perhaps [Victim's brother and sister-in-law] (are they still at [address]) and [another brother of Victim] (is he still at [address]). Just want to return the DVD to you and capture one last memory to get me through these trying times...The terms are not negotiable.
>
> The letter was signed "Bob." The Victim did not respond.

According to the Criminal Complaint, the Victim's Husband then received an email from robertgibbons1967@yahoo.com on November 10, 2008, stating that the sender was an old friend trying to get in touch with the Victim and seeking a current email address for her. Although the Victim's husband did not respond, the Victim received an email on December 11, 2008, from robertgibbons1967@yahoo.com stating in part:

> Well I must say that I was incredibly disappointed that I never received a response from you...So just to give you a head's up. I've been doing a little editing on our video. Mostly some blurring of myself so that I won't be recognized. You, on the other hand, can be seen very clearly having the time of your life being fucked by me. I'll be sending out Christmas presents to [your family]. Strangely enough, I think everyone will be excited by the content, even your brothers. You just look so great. Thanks for the memories and very sorry to do this but you really seem not to care.

This email was signed with the name "Steve."

The Criminal Complaint states that on or about December 11, 2008, the FBI began accessing and monitoring the Victim's email account, and responded to the emails received from "robertgibbons1967" pretending to be the Victim. On December 12, 2008, the FBI sent an email from the Victim's email account to "robertgibbons1967," stating in part "What do you want from me, I want to keep my family out of this." On December 15, the Victim received an email from robertgibbons1967@yahoo.com stating in part:

> So I've thought long and hard and here are the two options you have. I can send the video out to [your family] next week. I've successfully edited my face so I'm not recognizable. You, on the other hand are very recognizable. Alternatively, you can help me out a little bit. I don't need money. What I really want is something new to look at. Before the beginning of each month, you can send me a few pictures in poses that I have requested. At the end of one year, I will go away and you will never hear from me again. For the first installment, I would want to see the picture by Friday of this week. Here are the poses I would like. (1) fully clothed; (2) without your shirt; (3) without your shirt and pants (in just a bra and panties); (4) without the bra and (5) fully nude. I leave it up to you but if I do not get the pictures by Friday, the video goes out on Monday with a little note...It happened so long ago that maybe no one will care. But if you want the video kept private, you will do what I ask...Please don't respond unless you are willing to provide the pictures. I do not want to negotiate about this. Friday is my deadline. Otherwise, the video goes out Monday.

According to the Criminal Complaint, the email exchange between Klig and the FBI (pretending to be the Victim) continued through the holidays. The FBI agent stalled for some time, writing on December 22, 2008 "Can you give me till next week given that it's Christmas week?" and Klig replied, "ok...I will give you until Monday but because I am being so gracious about this, I will be very angry if you do not have the photos to me by Monday...At this point, if I do not get the photos, I will send copies to your neighbors and anyone else I can find that you have associated with, and post the video to the internet."

On December 29, 2008, the "Victim" sent an email claiming to have the photos, but indicating that she was having trouble transferring them from the camera to the computer. According to the Criminal Complaint, Klig responded on New Years day: " I understand your computer frustrations. I would recommend taking some innocent pictures (perhaps with the kids) and having your husband show you how to transfer them. Then you can go ahead and transfer the requested photos. This can work out for us...Happy New Year."

The Criminal Complaint also summarizes the FBI's investigation, which determined that Klig was the author of the emails. While some of the emails were sent from publicly available Internet connections at a fitness club and cyber-café, the FBI determined that other emails were sent from an IP address assigned to a residential cable modem in a residence in Queens. Armed with this information, the FBI obtained records from Yahoo! regarding the "robertgibbons1967@yahoo.com" email account; reviewed records and interviewed employees from the café and fitness club offering publicly available internet connections; reviewed records from a travel database available to the FBI to confirm that Klig had traveled to Orlando, Florida at the time that email messages were sent from a hotel in Disney World; and interviewed both the Victim and Klig, among other things. As a result, the government determined that Klig had sent the threatening emails.

In its December, 2009 "Readings" section, Harper's published verbatim excerpts of the letters and emails that were included in the Criminal Complaint. The Column was marked as "Correspondence" and titled, "*You're a Mean One, Mr. Klig.*" The following brief paragraph introduced the correspondence:

> *From an exchange of letters and emails between Steven Klig, a Long Island attorney, and an FBI agent posing as his ex-girlfriend. In October, Klig began blackmailing the woman, whose name has been withheld, demanding she send him*

> *nude photos of herself. She contacted the FBI, and an agent began responding to Klig's emails, assuming her identity. The emails are included in a complaint filed against Klig on January 5, when he was arrested on federal extortion and harassment charges. In September, Klig pleaded not guilty.*

After that the Column consists entirely of the letter and thirteen of the fifteen emails that were exchanged between Klig and the "Victim" and were quoted in full in the Criminal Complaint. The Column did not provide any further commentary on the correspondence and did not draw out other alleged damning facts from the Criminal Complaint.

On May 24, 2010 – six months after Harper's publication – Klig "pled guilty to accessing an unsecured network without the permission of the owner of such network" under 18 U.S.C. §1030(a)(2)(c) and 18 U.S.C. §1030(c)(2)(A).

Indeed Klig essentially admits that he sent the emails. Specifically, in support of his instant motion, Klig states that his behavior can be explained as follows:

> During the criminal proceeding, it was concluded that Plaintiff suffered from a severe and extreme sleep disorder for almost eight months during 2008 and it was concluded by mental health experts that this was the result of certain undiagnosed psychological disorders. Moreover, the severe and extreme sleep disorder, which was the result of these undiagnosed psychological disorders increased the severity of those psychological disorders to the point where they led to extremely uncharacteristic and aberrational behavior.
> (*Plaintiff's Opposing Brief*, pp. 6-7).

As a result, he claims that it is "very possible that a jury, if presented with all the facts, would conclude that Plaintiff did not possess the requisite specific intent to have committed the crime of extortion."

On October 22, 2010, Klig served a summons and verified complaint on Harper's naming as defendants both Harper's and the "John Doe" who "authored the article." On November 5, 2010, Klig served an amended summons and verified complaint. It contains one cause of action for libel. Klig alleges that the title of the Column, "*You're a Mean One,*

Mr. Klig" and the statement in the introductory paragraph, "Klig began blackmailing the woman, whose name has been withheld," are false and have caused harm to his business reputation. The parties stipulated to extend Harper's time to respond to the Amended Complaint on December 10, 2010.

On November 2, 2010, Klig served Harper's with a request to produce "all documents, records and any other information, in the possession of said defendant, relating to the identification of the author" of the Column.

On November 24, 2010, Harper's timely served its objection to the request, on the grounds that the request (1) seeks information protected by the newsgathering privilege; (2) that the request is premature, and could lead to harassment by Klig of the "author"; and (3) that the wording of the request seeking "all documents...relating to the identification" is both overly broad and calls for the production of documents protected by the attorney-client privilege.

Upon the instant motions, plaintiff Klig seeks an Order of this Court, *inter alia*, directing the defendant, Harper's to comply with its Notice to Produce, and defendant Harper's seeks an Order, *inter alia*, dismissing the Amended Complaint in this action in its entirety.

In making this motion, plaintiff submits that he has asserted a colorable claim for defamation in his Amended Complaint and therefore, his motion to compel the information sought in the Notice to Produce should be granted. Specifically in that regard and in bringing this complaint, plaintiff challenges two statements from the Column as false and harmful to his business reputation: (1) the title of the Column; and (2) the statement that he "began blackmailing" his ex-girlfriend. However, in his reply brief in opposition to

defendant's motion, plaintiff concedes that he cannot bring a defamation claim based on Harper's use of the word "blackmail" to describe the acts alleged against him in the Criminal Complaint filed by the United States Attorneys' Office which charged him with "extortion." Specifically, Klig admits that "blackmail" and "extortion" are synonymous, and therefore that Harper's fairly and accurately reported the crime charged in the Criminal Complaint. In addition, Klig stipulates, for purposes of this motion, that he did send the threatening emails that form the basis of the Criminal Complaint.

Thus, what is left of plaintiff's claim is his contention that the fair reporting privilege otherwise afforded to the defendant pursuant to New York Civil Rights Law §74, is lost because Harper's did not use the word "alleged" or "allegedly" when describing an arrest or the filing of charges. Klig claims that in the absence of the word "alleged," an ordinary reader could infer from the Column that he "was, in fact, convicted of blackmailing someone because the article states it so matter of factly and the title...presupposes that the author is concurring on the truth of the factual assertions set forth in the article" (*Plaintiff's Memo of Law*, p. 6). These arguments are unavailing.

New York's Civil Rights Law §74 states, in pertinent part, as follows:

> 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.

The purpose of Civil Rights Law § 74 "is the protection of reports of judicial proceedings which are made in the public interest" (*Williams v Williams*, 23 NY2d 592). The privilege afforded by this statute is absolute and furthers "the public interest in having proceedings of courts of justice public, not secret" (*Gurda v Orange County Publs. Div. of*

Ottaway Newspapers, 56 NY2d 705; *Lee v Brooklyn Union Pub. Co.*, 209 NY 245, 248). That is, the purpose of this "fair report" privilege is to inform the public about judicial, legislative, or otherwise official proceedings (*Glantz v Cook United, Inc.*, 499 F. Supp. 710, 715 [EDNY 1979]; *Cholowsky v Civiletti*, 69 AD3d 110, 114). This absolute privilege applies only where the publication is a comment on a judicial, legislative, or other official proceeding (*Cholowsky v Civiletti*, *supra* at 114-115; *Cuthbert v National Org. for Women*, 207 AD2d 624, 626; *Ramos v El Diario Publ. Co.*, 16 AD2d 915), and is a "fair and true" report of that proceeding (*Holy Spirit Assn. for Unification of World Christianity v New York Times Co.*, 49 NY2d 63, 67; *Briarcliff Lodge Hotel, Inc. v Citizen-Sentinel Publs.*, 260 NY 106, 118).

Whether a statement is privileged under Section 74 of the Civil Rights Law presents a threshold question of law for the Court to determine at the pleadings stage (*Palmieri v Thomas*, 29 AD3d 658, 659; *Every Drop Equal Nutrition, L.L.C. v ABC, Inc.*, 5 AD3d 536, 537). As to the threshold requirement that the publication purport to comment on an judicial, legislative, or other official proceeding, "[i]f the context in which the statements are made make it impossible for the ordinary viewer[,] listener[,] or reader to determine whether [the] defendant was reporting on a judicial [or other official] proceeding, the absolute privilege does not apply" (*Cholowsky v Civiletti*, *supra* at 114-115). "Comments that essentially summarize or restate the allegations of a pleading filed in an action are the type of statements that fall within section 74's privilege" (*Lacher v Engel*, 33 AD3d 10, 17).

As to the requirement that the publication be a fair and true report of the official proceeding, the Court of Appeals has stated that "[f]or a report to be characterized as 'fair and true' within the meaning of [Civil Rights Law § 74], thus immunizing its publisher from

a civil suit sounding in libel, it is enough that the substance of the article be substantially accurate" (*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" (*Id*; *see also, Briarcliff Lodge Hotel, Inc. v Citizen-Sentinel Publs.*, *supra* at 118). Thus, "[t]he case law has established a liberal interpretation of the 'fair and true report' standard of Civil Rights Law § 74 so as to provide broad protection to news accounts of judicial or other official proceedings" (*Becher v Troy Publ. Co.*, 183 AD2d 230, 233). This is consistent with the common law of libel, which " 'overlooks minor inaccuracies and concentrates upon substantial truth' " (*Shulman v Hunderfund*, 12 NY3d 143, 150, *quoting Masson v New Yorker Magazine, Inc.*, 501 US 496, 516). Specifically, New York courts have held that a report is privileged where the language used in the report, despite minor inaccuracies, does "not produce a different effect on the reader than would a report of the precise truth" (*Silver v Kuehbeck*, 2005 WL 2990642 [SDNY 2005] *aff'd* 217 Fed. Appx. 18 [2nd Cir. 2007]).

In this case, having admitted that almost the entire Column "quotes verbatim, the language contained in the original federal information filed against him on January 5, 2009" (*Plaintiff's Memo of Law*, p. 5), plaintiff nonetheless argues that Harper's failure to use the word "alleged" or "allegedly" removes the subject Column from the ambit of protection afforded by the "fair reporting" privilege. This argument is entirely unavailing.

As stated above, New York courts have consistently determined that whether a report falls within the broad ambit of the protection under the privilege is to be determined by the substance of the report, not its precise language (*Holy Spirit Ass'n for Unification of World Christianity v N.Y. Times Co.*, *supra*).

Further, given that the Column's introductory paragraph explicitly states that the quoted emails were part of a criminal complaint filed against Klig, that he pled not guilty to the charges against him, and says nothing more about the case's resolution, renders plaintiff's argument that the absence of the word "alleged" could lead an ordinary reader to infer that he "was, in fact, convicted of blackmailing someone" entirely meritless (*Liebgold v Hofstra University*, 245 AD2d 272).

While Klig conclusively pleads that the statements are "false," he does not allege that Harper's misquoted the criminal complaint, let alone allege that he did not send the emails. To the contrary, he admits that, well after publication of the Column he pled guilty to a misdemeanor in connection with the charges brought against him. In this case, Harper's column made it expressly clear (1) that the emails were included in a federal complaint charging Klig with extortion and harassment; and (2) that Klig pleaded not guilty to the charges.

Klig's argument that the determination of whether the Column "would have the same effect on the reader without the defamatory statements" cannot be determined by this Court at this juncture is equally meritless. As stated above, section 74 entitles the Court to make exactly such a determination as a matter of law on a motion to dismiss (*Cholowsky v Civiletti*, *supra*).

With respect to plaintiff's contention that the title of the Column, "*You're a Mean One, Mr. Klig*" is false and harmful to his business reputation, again, this Court finds that, when read as a whole and in the appropriate context, the title (and the "began blackmailing" statement) are part of the privileged report of a judicial proceeding (*Liebgold v Hofstra University*, *supra*; *Becher v Troy Publ'g Co.*, *supra*). Headlines and materials

accompanying a recitation of alleged misconduct in a judicial proceeding, such as the Column's title and introductory paragraph, are regularly found by the courts to fall within the fair report privilege (*Branca v Mayesh*, 101 AD2d 872, 874; see also *Posner v N.Y. Law Publ'g Co.*, 228 AD2d 318). So long as headlines and accompanying material do not constitute a separate defamatory accusation, they are protected by the Civil Rights Law Section 74 (*Glendora v Gannett Suburban Newspapers*, 201 AD2d 620). Here, the headline suggesting Klig was mean cannot be considered a separate defamatory accusation from the accusations contained in the Criminal Complaint. Nor does Klig identify any separate defamatory accusation in the title; to the contrary, he complains that they too closely echo the Criminal Complaint and Harper's error, if any, was not to repeat that these are allegations (*Amended Complaint*, ¶¶9-11).

Furthermore, in his opposition, Klig concedes that the title of the Column, a play on the famous phrase from "How the Grinch Stole Christmas!", "would ordinarily constitute an expression of opinion" (*Plaintiff's Memo of Law*, p. 8). However, he claims that since he denies blackmailing or extorting anyone (even while admitting that he sent the emails quoted in the Column), "the author had no reasonable basis upon which to infer that he factual statements underlying the opinion were true, and therefore, had no basis for making the statement that Plaintiff is a mean one" (*Id*). This argument is also entirely meritless.

A defamation action must be based on statements of objective fact, not unverifiable expression of opinion (*Milkovich v Lorain Journal Co.*, 497 US 1, 20 [1990]; *600 West 115th Street Corp. v Von Gutfield*, 80 NY2d 130, 139). Whether a statement is a non-actionable expression of opinion or an actionable factual assertion is a threshold question of law to be decided by the Court (*Gross v New York Times, Co.*, 82 NY2d 146, 153; *Steinhilber v*

Alphonse, 68 NY2d 283, 290). In drawing the line between fact and opinion, "the dispositive inquiry...is whether a reasonable [reader] could have concluded that [the statement at issue] convey[s] facts about the plaintiff" (*Gross v New York Times, Co.*, *supra* at 152). Particular significance is given to context, since context typically informs the reader that the statement is not being offered as objective fact, but rather as opinion, conjecture or surmise (*Brian v Richardson*, 87 NY2d 46).

The title in this case does not contain any verifiable facts. In the context of emails threatening to send sex videos as "Christmas presents" to a woman's family and friends, and published during the holiday season in 2009, the entirely subjective view that Klig's threats were "mean" is quintessential opinion. It is "vague, ambiguous, indefinite and incapable of being objectively characterized as true or false" (*Park v Capital Cities Communications*, 181 AD2d 192, 196; *Weiner v Doubleday*, 142 AD2d 100, 105 *aff'd* 74 NY2d 586) and is therefore not actionable. Moreover, the opinion is based on the alleged facts disclosed in the Column – that the Criminal Complaint charged Klig with having sent the letter and emails that are quoted at length in the column. The opinion that he is "a mean one" is not founded on the specific criminal charges brought against him of "extortion" or "stalking" but rather on the threats and taunts paired with the references to Christmas he was alleged to have written in the emails. Further, as Klig is "willing to stipulate that he sent the emails recited in the article" (*Plaintiff's Memo of Law*, p. 2), he simply has no claim for defamation based on the title.

Given the full recitation of Klig's emails threatening to send "Christmas presents" to a woman's family and neighbors, this Court finds that the conclusion that "*You're a Mean One, Mr. Klig*," is fully protected opinion that his conduct was not in the traditional holiday

spirit of giving.

Therefore, even affording a liberal construction of the plaintiff's amended complaint (*511 West 232nd Street Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144), this Court herewith grants defendant Harper's motion to dismiss made pursuant to CPLR 3211(a)1. and 7. Plaintiff has failed to plead a cognizable cause of action (*Leon v Martinez*, *supra*; *Well v Yeshiva Rambam*, 300 AD2d 580).

Inasmuch as defendant also seeks an Order granting it sanctions of costs and attorneys fees pursuant to CPLR 8303-a, said motion is denied. CPLR 8303-a permits the imposition of costs and reasonable attorneys' fees, not in excess of $10,000, against a plaintiff found to have brought a frivolous action (*Zysk v Kaufman, Borgeest & Ryan, LLP,* 53 AD3d 482). Although the plaintiff is an attorney, this Court cannot find any basis on these facts that the plaintiff commenced and continued this action in "bad faith." There is no evidence on this record such that this Court can find that plaintiff should have known that the action did not have any reasonable basis in law or fact and could not be supported by a good faith argument for an extension, modification, or reversal of existing law (CPLR 8303-a[c][I]; [ii]; *Grasso v Mathew*, 164 AD2d 476). Therefore, that part of defendant's motion is denied.

Further, in light of the fact that plaintiff's Amended Complaint is herewith dismissed, plaintiff's motion for an Order, pursuant to CPLR 3120, is denied in its entirety as moot.

Settle Judgment on Notice.

Dated: April 26, 2011

UTE WOLFF LALLY, J.S.C.

TO: Steven E. Klig
Plaintiff Pro Se
52A Cedar Drive
Great Neck, NY 11021

Davis Wright Termaine LLP
Attorneys for Defendant
1633 Broadway, 27th Floor
New York, NY 10019

klig-harpersmag,#1,#2/cplr