

Smigo v NYP Holdings, Inc.

2010 NY Slip Op 30556(U)

March 16, 2010

Supreme Court, New York County

Docket Number: 108756/2008

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

JANE S. SOLOMON

PRESENT: _____

PART 55

Justice

Index Number : 108756/2008

SMIGO, LYNSI

vs.

NYP HOLDINGS

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 1/29/10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n this motion to/for _____

PAPERS NUMBERED

1-4

5-6

7-8

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

is decided in accordance with the annexed memorandum decision and order.

FILED

MAR 17 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 3-16-10

JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----x
LYNSI SMIGO,

Plaintiff,

-against-

NYP HOLDINGS, INC., RICHARD JOHNSON,
COLLINS COMMUNICATIONS, INC. t/a
STEPPIN' OUT MAGAZINE and STEVEN P.
DOWSETT a/k/a CHAUNCE HAYDEN,

Defendants.

-----x
JANE S. SOLOMON, J.:

BACKGROUND

Defendants Collins Communications, Inc. (Collins) and Steven P. Dowsett a/k/a Chaunce Hayden (Hayden) (together, moving defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against them.

Plaintiff Lynsi Smigo (Smigo), at the time of the alleged incident, was engaged to Gregg Hughes, who is known as "Opie" on the popular "Opie and Anthony" radio show. Smigo and Greg Hughes are now married. Collins transacts business as *Steppin' Out Magazine (Steppin' Out)*, and Hayden is a columnist for *Steppin' Out* and has been quoted in *Page Six* in the *New York Post (Post)*.

On April 23, 2008, the *Post* published an article in *Page Six* entitled "Opie fiancee in sex video." The article reads:

Index No.: 108756/08

DECISION and ORDER

FILED
MAR 17 2010
NEW YORK
COUNTY CLERK'S OFFICE

"THE sex-mad "Opie & Anthony" radio show is facing its own carnal comeuppance. **Gregg "Opie" Hughes** is said to be livid over an x-rated romp starring his stunning blond fiancée, known by her first name, **Lindsay**, and MTV wildman **Bam Margera**. A disgruntled ex-employee of the radio duo recently acquired the rights to the video from Margera and it's soon to be released on a pay-for-play Web site, reports *Steppin' Out's* **Chaunce Hayden**. "They're doing the nasty—and I mean nasty," Hayden says."

Motion Ex. 1 (emphasis in original).

On or about April 24, 2008, Bam Margera expressly denied that he was involved in making a sex video with Smigo on the "Opie & Anthony" radio program, saying, "I think its nonsense ... there is no tape." Complaint, at ¶ 10. Subsequent to this broadcast, on April 30, 2008, *Steppin' Out* published an article authored by Hayden in which Hayden stated that he was contacted by a former "Opie & Anthony" staff member who told him of the existence of the sex tape referred to in the *Post's* article. Hayden further stated, "Since the Page Six item came out, all parties involved have denied the tape exists. Which I tend to believe since nobody has come forward to present the tape to the media." Amended Complaint, Ex. B.

The April 30, 2008 *Steppin' Out* article reads:

Gregg "Opie" Hughes of the Opie and Anthony 92.3 K-Rock radio show (the lowest rated morning show in New York City) is furious at me for publishing a story about an alleged sex tape starring his fiancé **Lyndsey** [sic] and MTV's favorite "Jackass" **Bam Margera**. There's only one problem, dopey Opie never bothered to pick up a copy of *Steppin' Out* to see what we reported or even if the story had ever been published.

Um, it hadn't.

Last week Page Six of the *New York Post* published an item that yours truly was planning on writing a story on the alleged sex tape in an upcoming issue. Page Six was correct. However, what Opie and Bam failed to do was return my request for a comment regarding the sex tape rumor. So the *Steppin' Out* story was killed. Despite our efforts to get the facts, Opie chose to humiliate his fiancé by using the item as a ratings grabber and turning a small mention in Page Six into two days of on-air fireworks.

* * *

But getting back to the subject at hand ... the alleged sex tape. Two weeks ago I was contacted by a former O&A staff member who informed me that there was a sex tape involving Opie's fiancé and Bam Margera and that the tape (allegedly now owned by another former staff member of the O&A Show) was going to be sold on the Internet in the coming weeks. I was told that Lindsey and Bam were allegedly "doing the nasty" on the video tape and that it was made prior to Opie meeting Lindsey.

Since the Page Six item came out, all parties involved have denied the video tape exists. I also believe that there is no sex video since nobody has come forward to present the evidence to the media.

Now the question has to be asked, "Why do so many ex-staffers hate Opie so much that they feel the need to embarrass him any chance they get?" Well, judging from the lies Opie so easily tells over his airwaves, from this reporter's perspective its easy to see why."

On May 5, 2008, the *Post* published a retraction entitled "for the record" which reads:

"On April 23 we reported that the fiancée of **Gregg "Opie" Hughes**, one half of the Opie and Anthony radio show, was involved in an X-rated sex video with MTV star **Bam Margera**. We reported that Hughes was taking legal action against a disgruntled ex-employee of the radio duo who had acquired the rights to the video. We have since learned that this information, supplied by *Steppin' Out's* **Chaunce Hayden**, was entirely incorrect. There is no sex tape. Further,

Hughes' fiancée has never met the MTV star. The Post sincerely regrets the error."

Motion Ex. 3.

On or about May 5, 2008, the *Philadelphia Daily News*, while reporting that the *Post* had retracted its April 23d article about the alleged video tape, published the following article:

"Page Six retracts report of Margera sex tape with Opie's Philly fiancée"

Page Six today retracted its April 23 report that the local fiancée of **Gregg "Opie" Hughes** of XM Satellite Radio's **Opie & Anthony** show, made a sex tape with Chester County "Jackass" **Bam Margera**. The paper, which used information from *Steppin' Out's* **Chaunce Hayden**, stated that "There is no sex tape. Further, Hughes' fiancée has never met the MTV star." Margera, who declined comment for our April 24 story, went on O&A's show that morning and denied any such tape exists, which Opie had sworn the day before. Opie's fiancée is **Lynsi Smigo**, a 25-year old Archbishop Ryan grad and former Drexel student who lives with Opie in New York. They were engaged in September. Smigo and Opie are seen here [photograph] in an undated photo posted by satellite radio blog Orbitcast. Margera by the way does have a sex tape out there, a brief video of him and former **Jenn Rivell** getting it on, that was included on some copies of his "Haggard." DVD Savvy web surfers can find that one online.

Aff of Peter R. Ginsberg, Opposition Ex. 7.

Smigo instituted the instant action on June 25, 2008, asserting the following causes of action as against the moving defendants, numbered as they appear in the amended complaint: (1) libel per se, as against Collins and Hayden; (2) slander per se, as against Hayden; (3) intentional infliction of emotional distress, as against Collins and Hayden; (4) violation of New

York Civil Rights Law §§ 50-51, as against Collins and Hayden; (5) negligent supervision, as against Collins; (7) respondeat superior, as against Collins; (8) respondeat superior, as against NYP Holdings; and (9) violation of New York Civil Rights Law § 77, as against Hayden. The third, fourth and sixth causes of action were dismissed as against defendants NYP Holdings, Inc. and Richard Johnson, non-moving defendants, by a decision and order of this court on November 6, 2008 (the Prior Decision). The action was subsequently discontinued as against NYP Holdings, Inc. and Richard Johnson, pursuant to a stipulation of discontinuance entered into by the parties.

DISCUSSION

"The proponent of a summary judgment motion [pursuant to CPLR 3212] must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment should not be granted. See *Rotuba*

celebrity." The Prior Decision further held that a cause of action based on New York Civil Rights Law §§ 50-51 could not be maintained in this case because those statutes do not apply to reports of newsworthy events (*Messenger v Gruner + Jahr Printing & Publishing*, 94 NY2d 436 [2000]), and the article in question was deemed to be newsworthy. These prior findings constitute the law of the case with respect to those issues.

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

Chapadeau v Utica Observer-Dispatch, Inc., 38 NY2d 196, 199 (1975).

To support a cause of action based on libel per se, it must be evidenced that the "defamatory statement 'tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of [her] in the minds of right-thinking persons, and to deprive [her] of their friendly intercourse in society' [citation omitted]." *Donati v Queens Ledger Newspaper Group*, 240 AD2d 696, 697 (2d Dept 1997). Libel per se consists, among other things, of imputing unchastity to a woman (*Liberman v Gelstein*, 80 NY2d 429 [1992]), and special damages need not be pleaded in that instance. *Id.*; NY Civil Rights Law § 77.

In this case, the only article written by Hayden and published by Collins states that there is no truth to the story published in the *Post* regarding a sex tape involving Smigo, and that moving defendants did not publish an article alleging the existence of such a tape because the information could not be verified. The objectionable articles were published, in fact, by the *Post* and the *Philadelphia Daily News*. There is no evidence that moving defendants acted in an irresponsible manner or without due consideration to standards of information gathering. Nor did the article written by Hayden and published by Collins impute unchastity to Smigo; rather, that article specifically stated that there was no truth to the allegation that a sex tape involving Smigo existed.

In opposition to the instant motion, Smigo cites *Krauss v Globe International, Inc.* (251 AD2d 191 [1st Dept 1998]), in support of her contention that, because she is not a public figure, she need not prove or allege malice in order to maintain her causes of action based on claims of defamation, and that the subject matter of the articles in question is mere gossip and not to be considered of legitimate public concern.

In *Krauss*, the plaintiff ex-husband of television celebrity Joan Lunden moved for summary judgment on a defamation claim based on the defendant's publication of an article stating that Krauss had had a liaison with a prostitute, while he and

Lunden were still married. In granting the plaintiff's motion for summary judgment, the Court in *Krauss* held that Krauss was not a public figure simply because of his relationship to a celebrity, and also found that the article was mere gossip and not a public controversy.

The *Krauss* case is distinguishable from the case at bar in several aspects. First, the *Krauss* article only involved Krauss and another private individual, whereas the article that is subject to this lawsuit directly involved a celebrity who is an unquestioned public figure. Second, the article published by the moving defendants never alleged or intimated that Smigo was unchaste; in fact, it indicated the reverse, stating that there was no evidence that any sex tape involving Smigo existed. Third, the articles that did allegedly defame Smigo were not published by the moving defendants. And fourth, the law of this case has established that the articles in question were newsworthy. Therefore, the *Krauss* decision is not controlling in this matter.

Consequently, the first and second causes of action alleging libel and slander per se, and the ninth cause of action alleging a violation of New York Civil Rights Law § 77, cannot be maintained.

The tort of intentional infliction of emotional distress, Smigo's third cause of action, "has four elements: (i)

extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress." *Howell v New York Post Co.*, 81 NY2d 115, 121 (1993). "[I]t is long settled that publication of a single, purportedly false or defamatory article regarding a person does not constitute extreme and outrageous conduct as a matter of law." *Bement v N.Y.P. Holdings, Inc.*, 307 AD2d at 92.

In the Prior Order of November 6, 2008, it was found that the publication of the *Post* articles did not constitute the intentional infliction of emotional distress. Similarly, the single publication of the *Steppin' Out* article that specifically denies the existence of the alleged sex tape does not rise to the level of extreme and outrageous conduct so as to support Smigo's third cause of action.

"Civil Rights Law §§ 50 and 51 provide, respectively, that it is a misdemeanor to use a living person's 'name, portrait or picture' for advertising or trade purposes without first obtaining his or her written authorization and that an aggrieved person may maintain an equitable action to prevent such unauthorized use and may also sue to recover damages sustained as a result. The Court of Appeals has limited this statutory right to privacy by generally making it inapplicable where the use occurs in the context of a report of newsworthy events or matters of public interest, since in such instance the use 'is not deemed produced for the purposes of advertising or trade' and also as a matter of deference to the constitutional right to free speech [citation omitted]."

Bement v N.Y.P. Holdings, Inc., 307 AD2d at 89-90.

Just as this court held that the publication of the *Post* articles did not violate New York Civil Rights Law §§ 50 and 51, because the subject matter was deemed newsworthy, the court finds that the publication of the *Steppin' Out* article also fails to meet these statutory requirements. In addition, the *Steppin' Out* article was published in response to the *Post* article and the subsequent disclaimer by Margera and incorrect attribution of the article to Hayden on a radio broadcast, which makes the Collins' publication part of a public controversy that Collins and Hayden did not create. Consequently, Smigo's fourth cause of action is dismissed.

Finally, Smigo's fifth and seventh causes of action, for negligent supervision and respondeat superior respectively, must be dismissed. These claims are based on the alleged tortious conduct of an employee, and, as discussed above, Hayden, the employee in question, did not engage in any tortious conduct with respect to Smigo. Therefore, these claims cannot be maintained. Accordingly, it hereby is

ORDERED that the motion for summary judgment by defendants Collins Communications, Inc. t/a *Steppin' Out* Magazine and Steven P. Dowsett a/k/a Chaunce Hayden to dismiss the action as against them is granted and the complaint is dismissed with costs and disbursements to said defendants as taxed by the Clerk

of the Court upon submission of an appropriate bill of costs; and
it is further

ORDERED that the Clerk is directed to enter judgment
accordingly.

Dated: March 16, 2010

ENTER:



J.S.C.

JANE S. SOLOMON

FILED

MAR 17 2010

NEW YORK
COUNTY CLERK'S OFFICE