VERMONT SUPERIOR COURT

SUPERIOR COURT Windsor Unit	CIVIL DIVISION Docket No. 65-1-12 Wrcv

Kevin O'Neil Plaintiff v. Brattleboro Police Department, Brattleboro Reformer, and Michael Carrier Defendants	

DECISION ON MOTION TO DISMISS

The Brattleboro Reformer (hereinafter "the Reformer"), a defendant in this defamation action, has filed a motion to dismiss[1] the claims asserted against it by Plaintiff. The Reformer asserts the reporting alleged to have been defamatory is protected by the fair-report privilege. Plaintiff has filed a lengthy opposition to the motion.

Legal Standard

Motions to dismiss are not favored, and are rarely granted. *Gilman v. Maine Mutual Fire Ins. Co.*, 2003 VT 55, ¶ 14, 175 Vt. 554 (mem.). The purpose of a motion to dismiss is to test the law of the case, not the facts which underlie the complaint. *Kane v. Lamothe*, 2007 VT 91, ¶ 14, 182 Vt. 241. In considering a motion to dismiss, the court assumes all factual allegations in the complaint to be true and gives the benefit of all reasonable inferences to the non-moving party. *Richards v. Town of Norwich*, 169 Vt. 44, 48 (1999). A motion to dismiss should not be granted unless it is beyond doubt that there exist no facts or circumstances which would entitle the plaintiff to relief. *Assoc. of Haystack Property Owners, Inc. v. Sprague*, 145 Vt. 443, 446–47 (1985).

In determining a motion to dismiss, courts may properly consider matters subject to judicial notice, such as statutes and regulations, and matters of public record without converting the motion into one for summary judgment). *Kaplan v. Morgan Stanley & Co., Inc.* 2009 VT 78, 186 Vt. 605. In its motion to dismiss, the Reformer has appended its newspaper article which is alleged to have been defamatory, the court docket entries for the criminal charges against

[1] The Reformer's motion also seeks to oppose Plaintiff's attempt to amend the complaint, however the request to amend the complaint was granted on October 5, 2012. The motion to dismiss is considered under the amended complaint, styled as a "first amended complaint" which in actuality is the second amended complaint. The first amended complaint, filed April 12, 2012, and granted by the Court on July 5, 2012, removed the Brattleboro Police Department as a party defendant. The Court granted the Police Department's motion to dismiss on the same date.

Plaintiff, and the affidavit of probable cause concerning those charges. All of those documents are matters of public record and are, therefore, proper for consideration in deciding the motion to dismiss.

Discussion

Plaintiff's complaint stems from criminal charges filed against him in November 2011, and reported in the Reformer, relating to a report by O'Neil to the Brattleboro Police Department that he had witnessed sexual activity in a neighboring apartment involving a minor child. An investigation was undertaken by the police and DCF which included interviews with Plaintiff and various members of the neighboring apartment where the activities reported by O'Neil were alleged to have taken place. The affidavit of probable cause, prepared by Michael Carrier of the Brattleboro Police Department, states that during the investigation interviews there were no disclosures made that supported any of O'Neil's accusations. O'Neil was charged with voyeurism and false information to a police officer, probable cause was found by a judge, and O'Neil was arraigned on these charges on November 8, 2011.

In the Court Log section of the November 9, 2011 edition of the Reformer, the fact of O'Neil's arraignment was reported. The article discussed the charges against O'Neil, the fact of his reporting of the sexual activity in the neighboring apartment, and recited that "during the course of the investigation it was learned that none of O'Neil's statements were true."[2]

Plaintiff's first amended complaint claims the Reformer's reporting was based upon ill-motive against him because of his status as a convicted sex offender. Interestingly, Plaintiff's first amended complaint suggests the article which ran in the reformer was a direct quote from Carrier's affidavit, which, if true, would make Plaintiff's claim against the Reformer even weaker.

The officer's affidavit alleged that probable cause existed to charge Mr. O'Neil with false reports to a law enforcement officer. The affidavit recited the report made by O'Neil of sexual assault on a child at a neighbor's house, outlined the investigatory process, and stated that during the course of investigatory interviews "there were no disclosures made that supported any of O'Neil's accusations." In reporting on O'Neil's arraignment, the Reformer published that "[d]uring the course of the investigation it was learned that none of O'Neil's statements were true."

Much of O'Neil's opposition to the instant motion concerns his insistence that at least some of the statements he made to the investigating officer were, in fact, true. This misses the point with respect to the claims against the Reformer. The issue with respect to the Reformer is whether the account they published in their newspaper was a substantially correct account of a public proceeding, not whether the information revealed in that proceeding was actually true.

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In order to recover in defamation a plaintiff must show several elements: a false and defamatory statement concerning another; some negligence, or greater fault, in publishing the statement; publication to a third person; lack of privilege in the publication; special harm, unless actionable per se; and some actual harm to warrant compensatory damages. *Lent v. Huntoon,* 143 Vt. 539 (1983).

The focus of the Reformer's motion to dismiss is the application of the fair-report privilege. Vermont has long recognized the right of the media to report on the fact of arrest and the nature of the charges against an accused and to report on documents used by the judicial tribunal in judicial proceedings so long as the reporting is fair, impartial, and substantially accurate. *Lancouer v. Herald & Globe Association,* 111 Vt. 371 (1941)(overruled on other grounds, *Lent v. Huntoon,* 143 Vt. 539 (1983)). "News media have a qualified privilege to publish in good faith current news involving violations of the law or public misconduct justifying police interference. This is true even though the publication may disgrace some individuals. *O'Neal v. Tribune Co.,* 176 So.2d 535, 547 (Fla.Dist.Ct.App.1965). News-dispensing media are privileged to publish actual facts as to the commission of a crime, the arrest, and the charges brought against a person suspected of a crime, as long as the statement does not assert that the person arrested is guilty of the crime." *Weisburgh v. Mahady*, 147 Vt. 70, 72-73 (1986).

The fair-report privilege reflects the importance of the free flow of information about matters of public interest. Documents that are open to public inspection are the basic data of government operations. *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 491 (1975). In the discharge of the important function of informing the public, the media is afforded immunity so long as their reports on the doings of government, through use of public data or otherwise, are substantially accurate. *Weisburgh v. Mahady*, 147 Vt. 70 (1986).

The Reformer reported that during the course of the investigation "it was learned that none of O'Neil's statements were true." However, the affidavit of the investigating officer in support of a charge of false information to a police officer stated "[d]uring these interviews there were no disclosures made that supported any of O'Neil's accusations." It is not necessary that a media report quote word for word from documents or statements made in order to be substantially accurate. "A news item must be accurate or at least substantially accurate to be privileged. *McCracken v. Evening News Association,* 3 Mich.App. 32, 38-41, 141 N.W.2d 694, 697-98 (1966); *Turnbull v. Herald Co.*, 459 S.W.2d 516, 519 (Mo.Ct.App.1970); 50 Am.Jur.2d Libel and Slander § 252. For the defense of truth to apply, "it is now generally agreed that it is not necessary to prove the literal truth of the accusation in every detail, and that it is sufficient to show that the imputation is substantially true, or, as it is often put, to justify the 'gist,' the 'sting,' or the 'substantial truth' of the defamation." W. Prosser & W. Keeton, The Law of Torts § 116, at 842 (1984)." *Weisburgh v. Mahady*, 147 Vt. 70, 73 (1986).

The article reported that none of the statements made by O'Neil were true. The affidavit stated that during the investigation there were no disclosures made that supported any of O'Neil's accusations. It further stated that the officer had probable cause to believe that O'Neil had committed the offense of false reports to a law enforcement officer. O'Neil claims that the Informer report was not a fair and substantially accurate summary of the officer's affidavit. However, the gist of the Reformer article was that O'Neil had made false statements to the police concerning his report of sexual assaults. That the officer found "no disclosures that supported

any of O'Neil's accusations" and that "during the course of the investigation it was learned that none of O'Neil's statements were true" conveys the same gist, i.e., that the reports made by O'Neil concerning the sexual assaults involving the child at the neighbor's home were untrue.

In *Weisburgh*, infra, the United Press International (UPI) reported Weisburgh's arrest for receipt of stolen property. UPI initially reported the value of the stolen property (tokens and coins) to be $50,000, before correcting the value to $500. A television station reported the value to be $50,000 in its broadcast. The Court held the difference in the value broadcast and the actual value of the stolen items was immaterial as the effect on the listener's mind was the same regardless of the value of the items. The gist of the report was the arrest of Weisburgh for receipt of stolen property, not what the actual value of the items may have been.

Here the effect on the reader's mind was the same even if not every statement made to the police by O'Neil was false. He was being arrested concerning his reports of sexual assaults on a child at a neighbor's home, reports which the police investigation found to be false, and for which a judge had found probable cause. That was the gist or sting of the newspaper report and that was accurate. It is not required that every aspect of every statement made by O'Neil be false for the Reformer's article to be substantially accurate. As a result of the report being substantially accurate, the Reformer is entitled to fair-report privilege concerning its report of O'Neil's arraignment. *Weisburgh v. Mahady*, 147 Vt. 70 (1986); *O'Neal v. Tribune Co.*, 176 So. 2d. 535 (Fla. App. 1965).

O'Neil further states the Reformer was motivated by malice in its reporting of his arraignment because of the "slanderous mindset" of the investigating officer and that the officer's conclusions that the statements by O'Neil were false was wrong. However, it is not necessary for the Reformer to make an independent determination of the accuracy of the police investigation in order to be shielded by the fair-report privilege. If the media was required to ensure the accuracy of every public action of government, reporting on the activities of government would be severely, and probably irreparably, hindered. The Reformer substantially accurately reported on a public proceeding and on information relied upon in that public proceeding (the affidavit, which itself was a public document at the time probable cause was found). They were acting as the public eye and are not required to verify the accuracy of the information contained in the public record if their report of the proceedings themselves is substantially accurate, as it was here. *Read v. News-Journal Co.*, 474 A. 2d 119 (Del. 1984). The mindset of the investigating officer, even if true, does not impact on the Reformer's right to report what had transpired in the public arena.

Because the Reformer was protected by the fair-report privilege in its reporting of the O'Neil's arraignment as it appeared in the newspaper of November 9, 2011, there is no basis for recovery by O'Neil against them in defamation. Accordingly, even under the exacting standards which apply to motions to dismiss, the Reformer's motion must be **GRANTED**.

ORDER

Based upon the foregoing, the claims against the Brattleboro Reformer are **DISMISSED**. The remaining parties are to confer and submit a proposed V.R.C.P. 16.3 discovery order within 20 days.

Dated at Woodstock this 2nd day of November, 2012.

Harold E. Eaton, Jr.
Civil Division Judge