

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

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BANCO NACIONAL de MEXICO, S.A.

Plaintiff,

-against-

MARIO RENATO MENÉNDEZ RODRIGUEZ, AL GIORDANO
and THE NARCO NEWS BULLETIN

Defendants.

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PAULA J. OMANSKY, J.:

Motions sequence nos 001, 002, 003, 004 and 005 have been consolidated for disposition.

In this action for libel, defendant Mario Renato Menéndez Rodriguez ("Menéndez-Rodriguez") moves, pursuant to CPLR 3211(a)(1)(3)(5)(7) and (8), and CPLR 327 to dismiss the complaint, with prejudice (motion sequence no. 001).

Defendants The Narco News Bulletin ("Narco News") (motion sequence no.002) and Al Giordano (motion sequence no. 003) move to dismiss this action, with prejudice, on the same grounds raised by their co-defendant, Mr. Menéndez-Rodriguez.

Electronic Frontier Foundation (motion sequence no. 004), and an individual, Rebes Bault (motion sequence no. 005), non-parties, move for leave to appear as amicus curiae on the ground that the issues in this matter involve freedom of speech on the Internet.

FACTS

Plaintiff is a large, privately held bank in Mexico which is authorized to do business in New York. Plaintiff's New York branch provides banking services, acts as a correspondent bank, and manages

a substantial credit portfolio of approximately \$982 million US dollars. According to plaintiff, the New York branch contributes to a daily average of \$1 billion in short term investments in international markets, holds total investments in excess of \$1.5 billion and performs in excess of 1800 currency transactions per day with a monthly volume of approximately \$2.8 billion.

Roberto Hernández-Ramírez, a non-party, is plaintiff's general director, its chairman of the board of directors and the largest shareholder. Plaintiff alleges that defendants made accusations that Mr. Hernández-Ramírez is involved in criminal drug trafficking and specifically, the Colombian drug trade. Plaintiff also alleges that its profits, fiscal well-being, and franchise value depend in large part on its reputation and good will in the American business community and that these accusations expose the bank to severe sanctions under American law, including the freezing of its assets in the United States.

Defendant Al Giordano is the publisher of defendant Narco News; and defendant Menéndez-Rodriguez is a Mexican journalist. Defendants maintain that Narco News is the name of a non-commercial, non-interactive website, what is known as a passive informational website, whose purpose is to educate its readers about the drug trade. According to defendants, the Narco News site offers nothing for sale and it does not direct persons who "log on" to any commercial enterprise. It offers no interaction such as a "chat room" in which individuals may "talk" to each other.

Plaintiff contends that defendant Narco News is more than an

online information site and is, instead, an active electronic bulletin board. In support of its assertions, plaintiff presents a copy of printout of a page from Narco News' website which describes the purpose of the site and invites comments, correction, criticisms, new tips, and participation from the readers and gives as the e-mail address: nacrconews@hotmail.com.¹

¹The web page reads, in pertinent part:

Narco News Bulletin works to tell the truth. We call it as we see it, Yet we are conscious that it's our truth.

The whole truth can only be constructed by the participation of the people. Thus, we strive to work together, to collaborate, with your truth and the truths of others, "to make a bigger truth."

We invite your comments, corrections, criticisms, new tips and participation (as well as your nominations for Narco-of-the-Month and Hero-of-the-Month). We especially seek volunteer translators to make this site available in Spanish, Portugese, French and other languages. Narco News accepts letters from our readers. Contact us with your truth at narcomes@hotmail.com.

Defamatory Statements

Defendant Menéndez-Rodriguez claims that his Mexican newspaper, Por Esto! ("That's Why!") began publishing articles about the drug trade when, in 1997, a community of fisherman sought his assistance because they feared being pressured by narcotics traffickers to move from their traditional homeland near an ecological reservation in Yucatan. According to Mr. Menéndez-Rodriguez, one fisherman reported that narcotics were regularly being transported by boat and by plane to and from Punta Pajaros, a property allegedly owned by Mr. Hernández-Ramírez. In response to these reports, Menéndez-Rodriguez sent several of his reporters and photographers to Punta Pajaros and conducted an investigation, eventually publishing a number of articles about the situation.

The articles in Por Esto! were extremely critical of non-party Hernández-Ramírez and accused him of complicity with the narcotics traffickers operating on his land. In particular, Por Esto! reported

that cocaine was being transported from Colombia to Punta Pajaros by boat; that each day several planes arrived and departed from an air strip located on Punta Pajaros, and that Punta Pajaros was one of the arrival points for drugs heading for the United States. Por Esto! published photographs of the beaches and inlets of Punta Pajaros, the local fishermen, the airstrip on Punta Pajaros belonging to Hernandez, the docks on Punta Pajaros, large packages of cocaine seized on Punta Pajaros, and various discarded pieces of packaging from Colombia, food, medicine and other articles and necessities that washed up on the beaches of Punta Pajaros. These articles identified Hernandez as both the owner of Punta Pajaros and the Chairman an General Director of Banamex.

(Menéndez-Rodriguez, 2/25/01 Aff, at ¶ 10). In addition, Mr. Menéndez-Rodriguez states that his paper published information which

corroborated the fisherman's story. In a series of articles, Por Esto! reported that it received

confirmation from the PGR (the Office of the Mexican General Attorney) that there was a drug seizure on Punta Pajaros in February of 1997 and from General Ricardo Maldonado Baca of the Mexican army that drugs were being transported by sea along the coasts of Yucatan Peninsula and the Mexican Army found drugs on the beaches of Punta Pajaros. In March 1997, Por Esto! also reported that the DEA of the United States was investigating Hernandez's properties for drug trafficking. In connection with the destruction of an archeological site, Por Esto! reported that it had received confirmation from the INAH (Instituto Nacional de Antropologia e Historia) in Quintana Roo that Hernandez had in fact been responsible for damaging an archeological site known as Sian Ka'an.

(Menéndez-Rodriguez, 2/25/01 Aff, at ¶ 11). Mr. Menéndez-Rodriguez states that although he requested that the Mexican authorities commence an investigation into narcotics trafficking on Punta Pajaros and the damage to Sian Ka'an, the authorities refused to do so.

In the Spring of 2000, Mr. Menéndez-Rodriguez traveled to New York from Mexico for the alleged purpose of making a series of public appearances to promote himself and newspaper. Just before coming to New York, Mr. Menéndez-Rodriguez gave an interview to The Village Voice, a New York newspaper, during which he asserted that Mr. Hernández-Ramírez was a "narcotics trafficker". The Village Voice subsequently published an article that included Mr. Menéndez-Rodriguez' categorical statement that Mr. Hernández-Ramírez, who owns Banco Nacional de Mexico is a "narcotic trafficker". Plaintiff has not commenced any action against the Village Voice.

According to plaintiff, Mr. Menéndez-Rodriguez and Mr. Giordano jointly participated in a promotional radio broadcast on WBAC 99.5

FM in New York. Plaintiff states that Mr. Giordano made a personal appearance on a New York radio station where he allegedly remarked that he read in Por Esto! that Mr. Hernández-Ramírez, described as the "most powerful banker in Mexico" and "the president of the National Bank of Mexico, or Banamex," is "a money launderer and a drug trafficker." Mr. Giordano relied on defendant Menéndez-Rodríguez's claims that Por Esto!'s reporters took pictures of the cocaine on Mr. Hernández-Ramírez' property and published the photos and the names of eyewitness.

In addition, Menéndez-Rodríguez and Giordano appeared at Columbia University Law School in New York where they again described details of the purported drug trafficking by plaintiff's chairman and general director. According to plaintiff, defendants stated that

...the one that is heading the traffic of drugs is the chief owner, general director, and a very close friend to President Ernesto Zedillo. And we are talking about the National Bank of Mexico director. Roberto Hernández-Ramírez. That was a big problem. Well, we went there. we stayed 10 days with the respective 10 nights, and we saw what was happening there. Freely, once, twice, and three times a day you have these boats -- 28-,29-foot long- guided by satellites with two powerful Yamaha motors that will leave the Colombian coast at the north part. Those are the Yamaha, the boats [referring to photographs]. Every boat it had -- it takes about 1.2 tons of cocaine up to 1.6 tons of cocaine. All that cocaine, twice or three times a day, we are speaking of the end of 1996 and the beginning of 1997, would arrive to the coast of Quintana Roo, upper left [referring to photograph]. It would leave the Colombian coast from the north, and in 22 hours will be in Mexican territory. that cocaine was loaded in Roberto Hernández-Ramírez' land, and taken by airplanes, by bigger boats, and by trucks up to the United States frontier. ...

... We found the drug in Roberto Hernández's land, and we published the photo of Roberto Hernández property with drugs. Now we went to see to check with ministerial

authorities. We asked them if it belongs to Roberto Hernández, and they told us, "yes." That was a very terrible crime. So we published this. Look at the drug [referring to photographs]. That was published. In Mexico, if you find a human being with two grams of cocaine they grab him, and we send him to jail. Now you have a big banker, that owns the biggest bank in Mexico, with a very close friendship with the President of Mexico, we show all that,, and nothing happens.

.. And we had all those proofs, but Roberto Hernández pays big sums of money, and he said that the proof that nothing was real except the Mexican magazine, newspapers, TV, radio, kept silence [sic] for these accusations

(complaint ¶ 23).

Defendant Giordano is alleged to have made a series of spoken and written statements calling Mr. Hernández-Ramírez, a criminal, a drug trafficker, and money launderer and portraying plaintiff as an institution that is involved in criminal activity. In addition, plaintiff alleged that Giordano published a series of articles in defendant Narco News that repeated and expanded upon his portrayal of plaintiff. Plaintiff states that Mr. Giordano's online magazine informed readers that Mr. Hernández-Ramírez purchased the nation's banks with narco-money and that bank officials have been arrested for drug-money laundering. In particular, plaintiff complains about the articles posted on the website on May 22, 2000, which stated that Mr. Hernández-Ramírez has attained a fortune worth billions of dollars in five years through illegitimate means, accuses Mr. Hernández-Ramírez of "walking with recognized delinquents, psychologically unstable officials, opportunists and resentful politicians incapable of seeing beyond their own noses," and states that "corruption and depravity are the constant qualities of these personalities" and that

their daily activities are marked with insolence, abuses of power and cynicism (complaint, ¶ 29). The posted article also asserted that Mr. Hernández-Ramírez and others "orchestrate[d] truly criminal acts against economic and political adversaries of the President of the Republic" and "are also serving the United States empire" (ibid.).

Plaintiff maintains that Mr. Menéndez-Rodriguez knew that his assertions about Mr. Hernández-Ramírez and the bank were false and that this defendant's statements were made with reckless disregard of the truth, namely that the land where the drugs were purportedly found did not even belong to Mr. Hernández-Ramírez, that Mexican authorities never concluded that the drugs belonged to Mr. Hernández-Ramírez., that no photographs of cocaine were taken on Hernández-Ramírez property and that there are no eye witness to any drug trafficking or money laundering.

Plaintiff maintains that the bank and its officers have never been engaged in illegal drug trafficking or money laundering, that the bank was neither funded nor purchased with the proceeds of drug trafficking and that it is not controlled or managed by individuals who are drug traffickers.

MEXICAN CRIMINAL PROCEEDINGS

Mr. Menéndez-Rodriguez states that after his paper published the articles in March 1997, plaintiff filed a complaint against him in an effort to have him arrested for criminal defamation and libel.

The matter came to be heard before the Second Court of the First Instance of the Judicial District of Cancun, Quintana Roo, which determined that the articles in Por Esto! referred only to Mr.

Hernández-Ramírez and not to the plaintiff bank, that Hernández-Ramírez, the alleged victim of the libel, did not file a complaint, and that there was not enough evidence of the crime of libel against the corporate entity since there was no "imputation" of any type against the "juridical identity of Banamex-Accival."

The Mexican authorities then requested an arrest warrant against Mr. Menéndez-Rodriguez, and three other individuals, who are not parties to this matter, for the crime of libel which allegedly occurred three years before Mr. Menéndez-Rodriguez traveled to New York. Pursuant to article 350 of Mexico's Federal Criminal Code:

[t]he crime of libel will be punished with incarceration up to two years or fine of fifty up to three hundred Mexican pesos, or both sanctions, at the Judge's decision [sic]. >>> Libel consists of: to communicate with malice to one or more persons, the charges made against other [sic] physical person, or corporation, in the cases provided by the law, of a true or false event, determined or undetermined, which can cause dishonor, discredit, prejudice, or exposure to someone's scorn.

The Mexican Court refused to issue warrants against Mr. Menéndez-Rodriguez and the other three men based on the fact that the Mexican Constitution prohibits the issuance of an arrest warrant when the crime calls for an alternative sanction which does not involve incarceration.

On the Government's appeal, a Mexican appellate court "confirmed" the lower court's determination not to issue warrants, finding that an arrest warrant could not issue in a criminal proceeding charging libel since the crime also provides for an economic penalty, and an arrest warrant would interfere with the "legal security of the accused person".

The Mexican prosecutor commenced a third action against Mr. Menéndez-Rodriguez for violating the Mexican Printing Law, which makes it a crime to use a means of communication to expose a person to hate, disdain, or ridicule in front of society or cause damage to a person's honor, reputation and prestige. On May 24, 2002, the Mexican Court, dismissed the action because the Prosecutor could not satisfy the element of "intimacy," that is, Banamex, a corporation, is incapable of suffering emotions such as hate, disdain, or public ridicule, unlike a natural person. The Court also held that the Mexican Printing Law is designed to protect a person's intimate sphere of action and does not refer to the realm of public action which would include executives engaged in the performance of their duties. Moreover the court found that

article 6th of the Printing Law authorizes criticism [of] public executives or employees because we must not forget that public opinion is the means to control the depositors of the power and liberty of press is necessary for political and social life and we must interpret with a broad point of view and attend to the objective that is the public, social and general welfare.

DISCUSSION

Amicus Curiae

The application of Electronic Frontier Foundation (motion sequence no. 004) for leave to appear as amicus curiae is granted in light of the potential impact of the issues in this action on freedom of speech on the Internet. The individual application (motion sequence no. 005) is denied because his views of and dedication to the First Amendment issues are sufficiently covered by the named parties and the Foundation.

Application of New York Law

Defendants argue that this suit is barred by principles of res judicata or collateral estoppel in that the Mexican courts have decided that plaintiff bank was not injured by allegedly defamatory statements made about Mr. Hernández-Ramírez, its president and general director, and has held that the bank has, in our legal parlance, no standing to assert such claims. However, the proceedings against defendant Menéndez-Rodríguez in Mexico were criminal proceedings, and it is unclear what, if any, preclusive effect can be accorded the prosecution's failure to convict on the basis of Banamex's complaint, especially when matters of procedure and standing were determinative. In so far as the Mexican decisions can be read as holding that Banamex was not a proper complaining witness, the issue of standing is not generally given preclusive effect in New York (see, 73A NY Jur. 2d, Judgments §407 at 156 [2000] ["the ruling of a foreign court with regard to the issue of standing reflects only its parochial view of the question and does not preclude New York Courts from making a determination"])). The uncontested fact is that the Mexican Appellate Court, which dismissed the criminal proceeding, never made any determination concerning the validity of the underlying libel charges.

It is unclear on this record whether corporations have a right to file a claim for civil libel in Mexico. At present plaintiff has not commenced any tort action in Mexico². Defendant's expert claims

²If the Mexican Civil Code does not permit a corporation to maintain a civil action for defamation, plaintiff would be

that the corporation has no civil claim unless it prevails first in a criminal proceeding. Plaintiff's expert, on the other hand, states that a criminal prosecution brought by the Public Prosecutor does not prevent an aggrieved party from seeking redress for damages by way of a civil action grounded in the same facts. According to plaintiff, Article 34 of the Mexican Criminal Code provides that "[a] person who claims a right of recovery not obtainable with a criminal court, either for want of prosecution of action commenced by the Public Prosecutor, dismissal, nonsuit, or acquittal, may resort to a civil action in accordance with the applicable laws." Again, it is not clear from the opinions submitted by Mexican legal experts whether plaintiff, a corporation, is considered a "person" for purposes of defamation under the Mexican Civil Code.

Even assuming that defendants could produce persuasive evidence that Mexico bars corporations from commencing any tort claim for defamation, plaintiff may still raise an objection to the application of foreign law to defamation which occurred in New York by showing that Mexico's law violates New York public policy and by showing that "there are enough important contacts between the parties, the

prohibited from commencing an action here because, under New York law, plaintiff cannot maintain an action in this State for tortious claims, which occurred in Mexico but which are precluded by the law of that forum (Hill v Citicorp., 215 AD2d 117, 118 [1st Dept], lv denied 87 NY2d 802 [1995], rearg denied 87 NY2d 969 [1996]; Feldman v Acapulco Princess Hotel, 137 Misc2d 878, 892 [Sup Ct, NY County 1987]).

occurrence and the New York forum to implicate our public policy and thus preclude enforcement of the foreign law'" (Feldman v Acapulco Princess Hotel, 137 Misc2d 878, 888 [Sup Ct, NY County 1987], quoting Schultz v Boy Scouts of America Inc., 65 NY2d 189, 202 [1985])).

This court rejects arguments that New York does not have any interest in this matter given the fact that plaintiff's claims concern alleged defamation which occurred at public meetings in this State, on a radio program and on website which may be accessed in New York (see, Lunney v Prodigy Servs. Co., 94 NY2d 242, 249-250 [1999], cert denied 529 US 1098 [2000] [common-law tort principles apply to alleged defamation on the Internet and electronic bulletin board messages]). The mere fact that the alleged defamation may have been transmitted to this State over the Internet does not automatically preclude New York from asserting its laws because "[a] computer server cannot be permitted to function as a shield against liability" (People, ex rel. Vacco v World Interactive Gaming Corp., 185 Misc2d 852, 860 [Sup Ct, NY County 1999][New York has subject matter jurisdiction over computer gambling]).

In addition, New York has an interest in protecting companies from false statements of illegal corporate activities since accurate and truthful information concerning a corporation's business dealings is essential to private enterprise and, in turn, economic stability in this State. This State has long recognized that a corporation may raise a claim for libel (Ruder & Finn, Inc. v Seaboard Sur. Co., 52 NY2d 663, 670-671, rearg denied, 54 NY2d 753 [1981]; Lazar v Merchants' Natl. Props., Inc., 45 Misc2d 235, 237 [Sup Ct, NY County

1964, affd 23 AD2d 630 [1st Dept 1965])).

Even if the Mexican prosecutor were to refile charges and the Mexican Court were to convict Mr. Menéndez-Rodriguez of criminal libel, such a finding would not be binding on this present court upon public policy grounds. Defamation is no longer recognized as a crime in New York (Figari v New York Tel., 32 AD2d 434, 446 [2d Dept 1969])). Moreover, the Mexican crime of libel, which penalizes even statements based on truth, is incompatible with NY Constitution Article I, § 8 and the principles of New York jurisprudence, where truth is an absolute defense to an accusation of defamation (Dillon v City of New York, 261 AD2d 34, 38 [1st Dept 1999], citing Rinaldi v Holt Reinhart & Winston, 42 NY2d 369, 379 [1977], rearg denied 42 NY2d 1015, cert denied 434 US 969 [1997])). Furthermore, judicial recognition of foreign criminal proceeding against a journalist, which does not allow for the defense of truth, would also constitute a violation of freedom of speech and of the press that are guaranteed by the First Amendment of the U.S. Constitution. In the United States, there is "'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks..." (Prozeralik v Capital Cities Communications, Inc., 82 NY2d 466, 475 [1993], quoting New York Times Co. v Sullivan, 376 US 255, 270 [1964])).

The First Amendment implications of this matter, therefore, demand that this court review substantive arguments raised in this action in accordance with principles of New York defamation law and

not Mexican criminal or tort law (Schultz v Boy Scouts of America Inc., supra, 65 NY2d, at 202).

As to the remaining choice of law arguments, this court shall apply the principles of New York law to all procedural matters which are governed by the law of the forum where the action is commenced (American Natl. Bank & Trust of New Jersey v ALBA, 111 AD2d 294, 296-297 [2d Dept 1985]).

Long Arm Jurisdiction

a. Defendant Menéndez-Rodriguez

Unlike many other states, New York's "long-arm" statute is limited in scope and does not provide for personal jurisdiction in every case permitted by principles of due process (Talbot v Johnson Newspaper Corp., 71 NY2d 827, 829-830 [1988]). Generally, a court in New York may exercise personal jurisdiction over any non-domiciliary who "transacts business within the state or contracts anywhere to supply goods or services in the state" (CPLR 302[a][1]) or who commits a tortious act within or without the state in certain specified situations (CPLR 302 [a][2] and [3]).

However, this State treats defamation differently from other torts in order to avoid unnecessary inhibitions on freedom of speech or freedom of the press (Kim v Dvorak, 230 AD2d 286, 290 [3d Dept 1997]). A cause of action for defamation of character is an exception to the tortious act rule, since commission of this tort cannot form the basis of "long-arm" jurisdiction in New York (Pontarelli v Shapero, 231 AD2d 407, 410 [1st Dept 1996]; citing CPLR 302[a][2] and [3]).

In order to exercise long arm jurisdiction over the defendants, plaintiff must allege sufficient facts to show that each of the defendants transacted "purposeful business activity bearing a substantial relationship to the subject matter of the lawsuit in this State" (Pontarelli v Shapero, supra, citing Kreutter v McFadden Oil Corp., 71 NY2d 460, 467 [1988]). Under CPLR 301[a][1], the term "purposeful business activity" includes transaction of business as a journalist in New York and such assertion of jurisdiction does not inhibit the constitutional freedoms of speech and the press (Montgomery v Minarcin, 263 AD2d 665, 668 [3d Dept 1999]).

Here, plaintiff has failed to show that Mr. Menéndez-Rodriguez, a resident of Mexico, is engaged in any business in New York (Kim v Dvorak, supra, 230 AD2d, at 290). Mr. Menéndez-Rodriguez's admission that he traveled to New York in 2000, at the invitation of the Latin American Law Students Association, to participate in a panel discussion on drugs and drug trafficking at Columbia Law School, where the alleged slander took place, is not sufficient to confer personal jurisdiction over this defendant (Talbot v Johnson Newspaper Corp., supra, 71 NY2d, at 829; Pontarelli v Shapero, supra, 231 AD2d, at 410; CPLR 302[a][2] and [3]). Plaintiff has not alleged any fact which, if proven true, would contradict Mr. Menéndez-Rodriguez' statement that the panel discussion at Columbia was his first visit to New York in 35 years and that he received no payment or other compensation for his talk (Pontarelli v Shapero, supra; CPLR 302[a][1]). There is no other indication that Mr. Menéndez-Rodriguez worked previously as a journalist in New York or that he was

affiliated with a New York newspaper or a local television or radio station (Montgomery v Minarcin, supra, 263 AD2d, at 667). Furthermore, plaintiff does not state any fact which indicates that Mr. Menéndez-Rodriguez had control over the remaining defendants' alleged distribution of articles from Por Esto! on Narco News' website (Strelsin v Barrett, supra, 36 AD2d, at 923). Therefore, that branch of motion sequence no. 001 to dismiss all of plaintiff's claims against Mr. Menéndez-Rodriguez is granted.

b. Internet Connection

Defendants Narco News and Mr. Giordano (collectively the "Narco defendants") argue that the complaint fails for lack of jurisdiction since they do not do business in New York and the only nexus with the State is a foreign Internet website which can be accessed in New York.

Despite the fact that New York has an interest in claims of defamation arising from use of the Internet in this State, a defendant's physical presence, for jurisdictional purposes, is not established by merely maintaining an Internet site which is accessible by New York residents (People by Vacco v Lipstiz, 174 Misc2d 571, 578 [Sup Ct, NY County 1997]). "However, where a person or business conducts a business within the forum State by being a subscriber to a local Internet service provider and selling a product through that provider, jurisdiction is proper" (ibid.; see, Armouth Intl. v Haband Co., 277 AD2d 189, 190 [2d Dept 2000][there must be a substantial relationship between the Internet retail activity and the alleged breach of contract]).

Here, defendants point out that Mr. Giordano has lived in Mexico since September 1998 and established the defendant website by computer on April 7, 2000, while he was living in Mexico. Mr. Giordano maintains that the sole purpose of the website was to establish a robust dialogue on the drug war in Latin America and the effects of that drug war on democracy, human rights, and the people of Latin America. Articles are sent by computer from Mr. Giordano's Mexican location to an Internet server in Maryland.

Plaintiff, on the other hand, maintains that Mr. Giordano is engaged in purposeful activity in New York and that he transacted business here within the meaning of CPLR 302(a)(1). Plaintiff points out that Mr. Giordano maintained a post office box address in New York at P.O. Box 20743, New York, New York 10009, that the domain name, "www.narconews.com" is officially registered to defendant Narco News, and that Giordano was the addressee of the "billing contact" for the website. Plaintiff also argues that the website has a New York nexus because Mr. Giordano allegedly engaged a New York company, called Voxel.Net to be the "host" and "technical consultant" for his website. According to plaintiff, Voxel.Net is funded by a New York organization which allegedly claims, as affiliates, a number of New York-based entities. Plaintiff states that Mr. Giordano procured funding for his website publishing endeavor from an organization located in New York City, called "Love Artist."

Mr. Giordano denies that he does any business in this State. He explains that his residential address is a secret because he fears reprisals from drug traffickers. Mr. Giordano states that he

initially opened the New York post office box, but that he lost the key and never obtained a duplicate key. He states that the United States Post Office has reclaimed the box for non-payment of rent.

On balance, plaintiff has alleged sufficient facts, which if proven true, would support a finding of jurisdiction against the remaining defendants. The present dispute cannot be resolved upon the submitted papers. A resolution of the jurisdictional issues would involve discovery and, arguably, a hearing on whether the Narco defendants were actually engaged in purposeful business activity in New York. However, prior to directing limited discovery on the jurisdictional issue, it is appropriate first to determine whether plaintiff has sufficiently pleaded a defamation claim against the Narco defendants.

Pleading Requirements for Defamation

a. Statements Which Concern the Plaintiff

In New York, a corporation does not have a cause of action based on an allegedly defamatory statement made solely against an individual identified as a company owner or officer (Afftrex, Ltd. v General Elec. Co., 161 AD2d 855, 856 [3d Dept 1990]). However, plaintiff has stated sufficient facts to show that the alleged defamation was not limited to corporate officers, namely the statements that plaintiff bank was created with drug money and that officers of the corporation were involved in money laundering. A reasonable person could conclude that the public speeches, the radio broadcast, and the web postings were addressing the integrity of the corporation and its day-to-day business practices (Lazar v Merchants'

Natl. Props., Inc., supra, 45 Misc2d, at 237; see generally, Immuno AG v J. Morr-Jankowski, 77 NY2d 235, 243 [1991]).

b. Actionable Speech

An expression of an opinion is not actionable and "receives the Federal constitutional protection accorded to the expression of ideas, no matter how vituperative or unreasonable" (Steinhilber v Alphonse, 68 NY2d 283, 289 [1986]). Moreover, a pure opinion is not actionable even if it is false or libelous (id. at 285).

The term "pure opinion" is defined as a statement of belief which is accompanied by a recitation of facts upon which it is based (Steinhilber v Alphonse, supra, 68 NY2d, at 289). However, if the statement of opinion implies that it is based upon facts which justify the opinion but which are unknown to those reading or hearing it, the statement is a mixed opinion and is actionable (ibid.). The determination of whether a given statement is a recitation of facts or a pure opinion is not subject to a rigid set of criteria. However, New York courts have applied four general factors in determining whether speech is protected opinion or actionable misrepresentation of facts:

(1) an assessment of whether the specific language in issue has a precise meaning which is readily understood or whether it is indefinite and ambiguous; (2) a determination of whether the statement is capable of being objectively characterized as true or false; (3) an examination of the full context of the communication in which the statement appears; and (4) a consideration of the broader social context or setting surrounding the communication including the existence of any applicable customs or conventions which might "signal to readers or listeners that what is being read or heard is likely to be opinion, not fact"

(Steinhilber v Alphonse, supra, 68 NY2d, at 292, quoting Ollman v Evans, 750 F2d 970, 983 [DC Cir 1984], cert denied 471 US 1127 [1985]; cf., 600 West 115th Street Corp. v Von Gutfeld, 80 NY2d 130, 139-134, rearg denied 81 NY2d 759 [1992], cert denied 508 US 910 [1993])).

The Narco defendants argue that the alleged defamation is protected opinion because the public pronouncements, which were also broadcast on the radio, as well as the articles posted on the website clearly state that the Narco defendants' statements are based on eyewitness accounts and reports' investigations. Plaintiffs argue that the statements are actionable speech because the recitation of supporting evidence is based on a gross distortion or misrepresentation of the underlying facts.

A review of the pleadings and the submitted documents indicate that defendant's message was intended to be an assertion of fact.

The alleged statements are precise and definite accusations against plaintiff. The context of the speech, the broadcast and the electronic transmission indicate to the listener or the reader that the Narco defendants were reporting on alleged past events (cf., 600 West 115th Street Corp. v Von Gutfeld, supra, 80 NY2d, at 139-140 [statements of false facts are actionable])).

c. Media Defendants

This court finds that Narco News is a media defendant and is entitled to heightened protection under the First Amendment (New York Times Co. v Sullivan, supra, 376 US, at 270-280).

The Internet is similar to a television and radio broadcast in

the sense that the electronic missive is able to reach a large and diverse audience almost instantaneously (Matherson v Marchello, 100 AD2d 233, 293 [2d Dept 1984])). However, the character of a particular website depends on the format and program design (see, Lunney v Prodigy Servs. Co., 94 NY2d 242, 249 [1999], cert denied 529 US 1098 [2000])). A careful review of defendants' submissions on Narco News's website indicates that the Narco defendants' format is similar to a regularly published public news magazine or a newspaper except for the fact that the periodical is published "on line" or electronically, instead of being printed on paper. The fact that the Narco News website can accept readers' comments, or letters to the editor, via a separate e-mail address only strengthens the need for First Amendment protections for the medium. Since principles of defamation law may be applied to the Internet (Lunney v Prodigy Servs. Co., supra, 94 NY2d, at 248), this court determines that Narco News, its website, and the writers who post information, are entitled to all the First Amendment protections accorded a newspaper/magazine or journalist in defamation suits (Huggins v More, 94 NY2d 296, 301 [1999])). Furthermore, the nature of the articles printed on the website and Mr. Giordano's statements at Columbia University constitute matters of public concern because the information disseminated relates to the drug trade and its affect on people living in this hemisphere (id. at 302).

d. Public and Private Figures, Malice and Gross Irresponsibility

There are also different standards of proof, and, in turn, pleading requirements, for complainants who are public figures and

those that are private individuals. Public figures may only recover for defamation when they can both prove that the statement was made with actual malice, that is with knowledge that it was false or with reckless disregard for the truth (Prozeralik v Capital Cities Communications, Inc., supra, 82 NY2d, at 475, citing New York Times Co. v Sullivan, supra 376 US, at 285-286 [remaining citation omitted]; see, Esposito-Hilder v SFX Broadcasting, Inc., 171 Misc2d 286, 290 [Sup Ct, Albany County 1996], affd 236 AD2D 186 [3d Dept 1997])).

The category of public figure includes individuals who must be deemed such for all purposes as well as those who might invite publicity only with respect to a narrow area of interest (James v Gannett Co., Inc., 40 NY2d 415, 422-423, rearg denied 40 NY2d 990 [1997])). In certain instances, corporations, which are large and possess great influence, are considered public figures or deemed so because of actions taken by them which invite public comment (Ithaca College v Yale Daily News Pub. Co. Inc., 105 Misc2d 793, 796 [Sup Ct, Tompkins County, 1980], affd 85 AD2d 817 [3d Dept 1981], citing Reliance Ins. Co. v Barron's, 442 F Supp 1341 [SD NY 1977])). A bank is not a public figure solely by virtue of the fact that it is in business or that it is incorporated or that it is subject to routine or usual regulation of that business (Bank of Oregon v Independent News, Inc., 65 Or App 29, 35 [Ct App, OR 1983], affd 296 OR 434, rehearing denied 298 OR 819 [Sup Ct, OR], cert denied 474 US 826 [1985])). A bank which thrusts itself into the public sphere solely to defend itself against alleged defamatory statements, does not

become a public figure, waiving the protections afforded private individuals in defamation actions (id., at 35, citing Hutchinson v Proxmire, 443 US 111, 135 [1979] [remaining citation omitted]). The Narco defendants have not asserted facts which show that plaintiff took steps to influence public opinion prior to the alleged defamation; therefore, this court is unable to deem plaintiff a public figure (cf., Howard v Buffalo Evening News Co., 89 AD2d 793 [4th Dept 1982]).

However, despite the Narco defendants' omission, plaintiff is still not entitled to enjoy the lower standard of proof accorded private complainants because even private individuals suing media defendants over statements involving matters of public concern, must prove constitutional malice to recover presumed or punitive damages (Huggins v More, supra, 94 NY2d, at 301, citing Gertz v Robert Welch, Inc., 418 US 323, 347 [1974]).

Plaintiff may not rely on allegations of falsity alone to raise an inference of malice but must plead facts which, if proven true, would show that the Narco defendants intended to injure plaintiff (Prozeralik v Capital Cities Communications, Inc., supra, 82 NY2d, at 302, citing Bose Corp. v Consumers Union of U.S., 466 US 485, 511, n 30, rehearing denied 467 US 1267 [1984]). Plaintiff does not specifically explain how the Narco defendants' statements actually disrupted plaintiff's business (Jurlique Inc. v Austral Biolab Pty. Ltd., 187 AD2d 637, 638 [2d Dept 1992]). Nothing in the supporting papers indicates that the Narco defendants had any monetary interest in the banking industry or that they wished to harm plaintiff's

business dealings.

In addition, plaintiff has also failed to state sufficient facts which indicate that the Narco defendants "'acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties'" (Huggins v More, supra, 94 NY2d, at 301 quoting Chapadeau v Utica Observer-Dispatch, 38 NY2d 196, 199 [1975]). Plaintiff did not plead facts which, if proven true, would show that the Narco defendants did not utilize those methods of verification which are reasonably calculated to produce accurate copy (Lee v City of Rochester, 254 AD2d 790, 792 [4th Dept 1998]). Here, plaintiff does not indicate that the Narco defendants used sources which they knew, or should have known, were unreliable, or that the Narco defendants were aware of other reliable sources to verify the information alleged in Por Esto! (Robare v Plattsburgh Co. Div of Ottaway Newspapers, Inc., 257 AD2d 892, 893 [3d Dept 199], citing Chapadeau v Utica Observer-Dispatch, supra, 38 NY2d, at 199). The Narco defendants were entitled to rely on the accuracy of articles written by reporters from Por Esto! (Karaduman v Newsday, Inc., 51 NY2d 531, 550 [1980], rearg denied 52 NY2d 899 [1981]) and are under no legal obligation to interview, or re-interview, every possible witness to an incident (Lee v City of Rochester, supra, 252 AD2d, at 793, citing Mitchell v Herald Co., 137 AD2d 213, 217 [4th Dept], appeal dismissed 72 NY2d 952 [1988]). Moreover, the question of whether the Narco defendants are guilty of unbalanced reporting is

a matter of editorial judgment and is not actionable (Gotbetter v Dow Jones & Co., Inc., 259 AD2d 335 [1st Dept 1999]). Plaintiff has not stated any fact which, if proven true, would show that the Narco defendants were aware of circumstances which would have lead them to question the veracity of the information provided (Robare v Plattsburgh Co. Div of Ottaway Newspapers, Inc., supra, 257 AD2d, at 894).

Therefore, those branches of the Narco defendants' motions, in motion sequence nos. 002 and 003, to dismiss the first and second causes of action for libel and slander on the ground of insufficiency, are granted.

Remaining Claims

Plaintiff has also failed to state sufficient facts to indicate that the Narco defendants tortiously interfered with future contract relationships (WFB Telecommunications v NYNEX, 188 AD2d 257, 258 [1st Dept 1992], lv denied 81 NY2d 709 [1993]; Jurlique Inc. v Austral Biolab Pty. Ltd., supra, 187 AD2d, at 638). In particular, plaintiff has failed to allege any specific relationships with which the Narco defendants interfered (Business Networks of New York v Complete Network Solutions Inc., 265 AD2d 194, 195 [1st Dept 1999]). Therefore, those branches of motions sequence nos. 002 and 003 which seek to dismiss the third cause of action for interference with prospective economic advantage, are granted.

This court need not reach any of the litigants' remaining arguments concerning the sufficiency of the pleadings or the objections to this action based on the ground of forum non

conveniens. Since this court has dismissed all the causes of action, there is no need for further discovery or for a hearing on jurisdictional matters.

Accordingly, it is

ORDERED that the motion of Electronic Frontier Foundation in motion sequence no. 004, for leave to appear as amicus curiae is granted and the individual's application, motion sequence no. 005, is denied for the reasons stated herein; and it is further

ORDERED that the motion of defendant Menéndez-Rodriguez, in motion sequence no. 001 to dismiss, with prejudice, all claims against him for lack of personal jurisdiction is granted; and these portions of the complaint are severed and dismissed; and it is further

ORDERED that the motions of defendant Narco, motion sequence no.002, and defendant Al Giordano, motion sequence no. 003, to dismiss, with prejudice, the complaint against them on the ground of insufficiency, is granted; and the remaining portions of the complaint are dismissed; and it is further

ORDERED that the clerk is directed to enter judgment accordingly.

DATED: December __, 2001

ENTER:

PAULA J. OMANSKY
J.S.C.