

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

PRESENT: HON. MARILYN SHAFER
Justice

PART 8

RAVI BATRA,
Plaintiff,

INDEX NO. 116059/04

MOTION SEQ. NO. 001

-against-

DICK WOLF, LYDIA MAYBERRY, ERIC OVERMYER,
NOAH BAYLIN, MARY GAMBARDILLA, JENNIFER
VON MAYRHAUSER, RUTH PONTIOUS, SANDY
DEBLASIO, ANNE NEWTON-HARDING, MICHAEL
STRUK, PARK DIETZ, WOLF FILMS, RICHARD
SWEREN, PETER JANKOWSKI, JEFFREY HAYES,
MATTHEW PENN, MICHAEL S. CHERNUCHIN, DAVID
POST, LORENZO CARCATERRA, AARON ZELMAN,
MARC GUGGENHEIM, GARY KARR, WILLIAM N.
FORDES, ROZ WEINMAN, ARTHUR W. FORNEY,
WENDY BATTLES, KATI JOHNSTON, RICHARD DOBBS,
SUZANNE RYAN C.S.A., LYNN KRESSEL, LYNN KRESSEL
CASTING, NBC TELEVISION, UNIVERSAL NETWORK
TELEVISION LLC, NBC UNIVERSAL NY, and UNIVERSAL
STUDIOS,

Defendants.

FILED
MAR 18 2008
NEW YORK
COUNTY CLERKS OFFICE

The following papers, numbered 1 to 4, were read on this motion to dismiss the complaint:

	<u>PAPERS NUMBERED</u>
Notice of Motion - Affirmation - Exhibits	1
Memorandum of Law in Support	2
Affidavit in Opposition - Exhibits	3
Reply Memorandum of Law - Exhibits	4

Cross-Motion: Yes No

Upon the foregoing papers, the motion by defendants to dismiss the complaint is denied.

Introduction

This is a motion to dismiss a libel-in-fiction claim arising out of an episode of the television series *Law & Order*, a "realistic" program, shot on location in New York City, exploring crime and the legal system. Famously evoking the phrase "ripped from the headlines," the show features stories and characters based upon current events. Inspirations for *Law & Order* episodes have included: the resignation of gay New Jersey Governor James McGreevey; the ambush shooting of Guardian Angel leader Curtis Sliwa; the sexual harassment lawsuit against TV host Bill O'Reilly; the drunk driving arrest and anti-Semitic tirade of actor Mel Gibson; child neglect by singer Britney Spears; and the arrest of two New York City policemen linked to organized crime.

Background

On November 12, 2003, *Law & Order* aired an episode called *Floater*, in which the investigation of a body found "floating" in the Hudson River uncovered a corruption scandal in the Brooklyn Supreme Court involving a judge who accepted bribes in exchange for preferential treatment. The episode was "ripped from headlines" of the Garson/Siminovsky scandal in the Brooklyn Supreme Court in which Justice Gerald Garson was accused of granting matrimonial attorney Paul Siminovsky preferential treatment in exchange for vacations, dinners and cigars.

Garson, faced with arrest, offered to assist the District Attorney by implicating participants in the corrupt judicial selection system in the Brooklyn Supreme Court. Garson

alleged that judgeships were "sold" for upwards of \$50,000 and scheduled a meeting with the plaintiff, Ravi Batra.

Batra, an Indian-born attorney with an office in Manhattan, was active in Kings County politics and a member of the Kings County Democratic Party judicial screening committee. Kings County politician, Clarence Norman, Jr., was "of counsel" to Batra's firm.

Garson "wore a wire" to his lunch with Batra but failed to obtain incriminating statements from him. No charges were ever brought against Batra for wrong-doing connected to judicial selection or bribery. Garson's arrest, on April 24, 2003, was reported in all the major New York newspapers. His allegations of corruption in the judicial selection process eclipsed his bribery charges in the media coverage, notwithstanding that no charges were brought.

During the months following Garson's arrest and prior to the airing of *Floater*, Garson's bribery scandal and his allegations of corruption in judicial selection were frequently reported and consistently intertwined. Batra's name and Garson's were linked and their photographs appeared together. As an example, on May 3, 2003, the New York Post reported:

Brooklyn's administrative judge has warned fellow jurists to steer clear of Ravi Batra, a veteran lawyer who has close ties to Brooklyn Democratic leader Clarence Norman. Sources said that Judge Ann Pfau issued an edict in a meeting with judges last week, after the court system was rattled by the indictment of Judge Gerald Garson for taking bribes. While wearing a wire for the DA's office, Garson met with Batra and tried - without success - to get him to concede that judgeships were for sale. One source quoted Pfau as saying, 'If I ever get a call from Ravi Batra it won't be returned. Anyone who deals with him is on your own.' A second source confirmed Pfau's comments. Batra serves on the Brooklyn Democratic Party's judicial screening committee. Batra told *The Post* that he is being maligned unfairly.

Batra's resignation from the Judicial Screening Committee in June was termed, by the New York Times, "the biggest development in the roiling scandal since Judge Garson's arrest in

April."

An article about Batra, together with his picture, appeared on the front page of the New York Times, under the headline, "Cozying Up to Judges and Reaping Opportunity," on Nov. 11, 2003. Repeating much that had been previously published, the article described Batra as a "particularly potent force" who socialized extensively with judges and politicians and played a role in picking judges. Justice Reinaldo E. Riviera of the Appellate Division was quoted as saying, "Everyone knows Mr. Batra."

Judges who were [Batra's] friends, or who visited his house or who joined him for dinner, gave him appointments or presided over cases in which he had a stake, according to court records. ...

Mr. Batra's name has surfaced again this year as District Attorney Charles J. Hynes of Brooklyn investigates the culture of the borough's courthouse. They have sent a cooperating witness into a meeting with him, wearing a concealed recording device, to discuss whether money can influence the judicial selection process.

The following night, *Floater* was aired. In the episode, a woman judge in the Brooklyn Supreme Court is shown socializing with a lawyer from whom she accepts bribes. The lawyer is a bald Indian-American attorney named Ravi Patel.

Discussion

Because of the counterintuitive nature of a libel-in-fiction claim – in which a plaintiff claims that something that is fictional is not factually accurate – two separate elements of the traditional defamation claim converge. (*Pring v Penthouse Int'l, Ltd*, 695 F2d 438 [10th Cir 1982]; *Welch v Penguin Books USA, Inc*, No 21756/90 NY Misc LEXIS 225 [Kings Cty 1991]) Any libel plaintiff must show that the alleged defamation is "of and concerning" the plaintiff and that it is false. In the fiction context, the plaintiff must also show that the viewer was "totally convinced that the episode in all aspects as far as the plaintiff is concerned is not fiction at all."

(*Welch* at 9-10) Put another way:

In order to overcome the ironies inherent in a libel-in-fiction claim, the identity of the real and fictional personae must be so complete that the defamatory material become a plausible aspect of the real life of the plaintiff or suggestive of the plaintiff in significant ways. Identification alone is insufficient.

Only when the immediate context of the allegedly defamatory statement convinces the reader of the statement's literal truth – when, that is, it ceases to be merely imaginable or plausible and begins to be believed – do damages to reputation, and thus liability, become possible. (*Welch* at 7-8)

New York courts favor early adjudication of libel claims to protect freedom of speech from the chilling effect of unwarranted claims. (*Immuno AG v Moor-Jankowski*, 145 AD2d 114 [1st Dept 1989], *aff'd* 74 NY2d 548 [1989], *vacated*, 497 US 1021 [1990], *aff'd*, 77NY2d 235 [1991], *cert denied*, 500 US 954 [1991]). In the almost twenty-five years since the Court of Appeals affirmed the dismissal of the complaint in *Springer v Viking Press*, 90 AD2d 315 [1st Dept 1982], *aff'd*, 60 NY2d 916 [1983], no libel-in-fiction claim has survived a summary motion in New York.

Determination as to whether the publication is “of and concerning” the plaintiff, is, in the first instance, to be made by the Court. The task entails a search for similarities and dissimilarities between the plaintiff and the fictional character to determine whether a person who knew the plaintiff could reasonably conclude that the plaintiff was the fictional character. (*Springer* at 249)

Defendants, relying on *Springer*, argue that the similarities between Patel and Batra are “abstract” – the same first name, ethnicity, general appearance and occupation – and insufficient as a matter of law to establish that the Patel character is of and concerning Batra. The *Springer* Court found:

While the similarities [between the plaintiff and the character] adverted to are in large part superficial, [first names, the street they had lived on, weight and build, recreation and grooming habits, and jewelry] the dissimilarities both in manner of living and in outlook are so profound that it is virtually impossible to see how one who has read the book and who knew [the plaintiff] could attribute to [the plaintiff] the lifestyle of [the character.] (*Springer* at 250)

Batra argues that because of the uniqueness of his name, ethnicity, and appearance, any person who knew him, or had heard of him, would identify him with Patel. Moreover, because of the widespread media coverage of the Garson/Siminovsky scandal, with which the accusations against him were inextricably intertwined, it would be reasonable for a viewer to associate Batra with Patel.

This Court agrees. Batra is distinguished from the plaintiffs in *Springer* and its progeny in that he was, in relation to the Garson/Siminovsky scandal, a public figure. A plaintiff who is considered a public figure must make the same showing, at the pleading stage, as any other plaintiff: that the statements were of and concerning him and likely to be understood as defamatory by the ordinary person. (*Church of Scientology International v Behar*, 238 F3d 168 [2d Cir 2001]) However, analysis of both elements is colored by his familiarity to a public not personally acquainted with him.

Batra alleges that, at the time *Floater* was aired, he was one of only six attorneys practicing law in New York City with the first name "Ravi"; and that he was the only one who was the same age and physically resembled Patel. He submits affidavits from acquaintances who saw *Floater* and believed that Patel was modeled on Batra because: (1) they were acquainted, at the time, with only one Indian attorney with the first name "Ravi"; (2) they recognized the episode as referring to the Garson/Siminovsky scandal; (3) they were aware of the media

coverage linking Batra to the Garson/Siminovsky scandal; and (3) the actor portraying Patel was a "look alike" to Batra.

Defendants admit that there are less than 500 people with the first name "Ravi" in the City of New York, and only 20 lawyers nationwide. They cite to differences between Batra and Patel, including: Batra's office is in Manhattan; Batra never appeared before Judge Garson; Batra grew up in Queens; Batra does not specialize in matrimonial law; and Batra is an upstanding member of the Bar. None of these facts would be known to a viewer, aware of Batra only through the media coverage, who recognized *Floater's* reference to the Garson/Siminovsky scandal despite changes to Garson's gender and Siminovsky's ethnicity. These differences fail to outweigh the similarities, which are suggestive of Batra in significant ways, satisfying the *Springer and Welch* standard.

However, in both *Springer and Welch*, acquaintances of the plaintiffs recognized them as the model for the character. But since only readers acquainted with them personally recognized them, they knew the defamation was false:

[P]laintiff is an individual of no general renown. A sample of the few people who might know the plaintiff and read the book stated that while they recognized the main male character in the book as plaintiff they unequivocally denied that any of the defamatory [portions of the book] were attributable to plaintiff... Therefore, those who knew the plaintiff had no difficulty differentiating [plaintiff] from [the character]; the defamatory material was clearly not believed. (*Welch* at 8)

Defendants argue that no reasonable viewer could believe that *Floater* stated actual facts about Batra. They deny that *Floater* depicts actual events with respect to the Garson/Siminovsky scandal. Even if it did, the Patel character refers to Siminovsky.

This Court disagrees. In the context in which *Floater* was presented, extensive media

coverage linking Batra to the Garson/Siminovsky scandal, there is a reasonable likelihood that the ordinary viewer, unacquainted with Batra personally, could understand Patel's corruption to be the truth about Batra. While the accusations against Batra were for graft rather than for bribery, it cannot be said that this distinction is sufficiently "far-fetched" that Patel's corruption could never be understood as describing actual facts. (*See, Hustler Magazine v Falwell*, 485 US 46 [1988][parody suggesting Rev. Falwell indulged in incest could not be understood as describing real facts]; *Pring, supra*, story describing physically impossible behavior could not be understood as describing real facts; *Randall v Demille*, NYLJ, Vol 28, No 62 [Sept 28, 1992][public "perceived" plaintiff as married rather than single, a mother rather than childless, rich and socially prominent when she was neither].¹

On a motion to dismiss for failure to state a cause of action, the factual allegations of the complaint are deemed true and the affidavits submitted on the motion are considered only for the limited purpose of determining whether the plaintiff has stated a claim, not whether plaintiff has one. (*Wall Street Associates v Brodsky*, 257 AD2d 526 [1st Dept 1999]). It is well-settled that a pleading shall be liberally construed and will not be dismissed for insufficiency merely because it is inartistically drawn. (*Foley v D'Agostino*, 21 AD2d 60 [1st Dept 1964]) The relevant inquiry is whether the requisite allegations of any valid cause of action cognizable by the state courts can be fairly gathered from the four corners of the complaint. (*Id*) "Defects shall be ignored if a substantial right of a party is not prejudiced." (*Foley* at 65)

¹ *Randall*, the only New York case dealing with a publically known plaintiff, is of limited assistance. The court found the statements complained of were opinion, not actionable under any circumstances, and the plaintiff committed perjury.

While First Amendment considerations are substantial, the unique facts of this case render it *sui generis*. Defendants acknowledge that it is the only defamation action brought against *Law & Order* in seventeen years.

This Court finds that it cannot be determined, as a matter of law, that (1) *Floater* was not "of and concerning" *Batra*; and (2) was not likely to be understood as defamatory by the ordinary viewer.

We have considered the other arguments raised by the parties and find them to be without merit.

Accordingly, it is hereby

ORDERED that the motion by defendants to dismiss the complaint is denied.

This reflects the decision and order of this Court.

Dated: _____

3/14/08

STEPHEN SHAFER
J.S.C.

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION.

FILED
MAR 18 2008
NEW YORK
COUNTY CLERK'S OFFICE