

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Gregory Osby and : CIVIL ACTION
Kay A. Vaughn :
 :
v. :
 :
A&E Television Networks and :
Kurtis Productions, Ltd. : No. 96-7347

MEMORANDUM AND ORDER

Shapiro, Norma L., J.

June 12, 1997

Plaintiffs filed this action for defamation, false light, emotional distress, and loss of consortium. Defendants removed the action from Philadelphia Court of Common Pleas on the basis of complete diversity between the plaintiffs and all defendants.¹ Defendants moved to dismiss under F.R.Civ.P. 12(b)(6) or, in the alternative, for summary judgment under Rule 56. At a pretrial hearing on the motion to dismiss, plaintiffs withdrew their claim for emotional distress. Defendants' motion

1. The plaintiffs Osby and Vaughn, husband and wife, live in Cinnaminson, New Jersey. Defendant Kurtis Productions, Ltd. ("Kurtis") is an Illinois corporation. Defendant A&E Television Networks ("A&E") is a joint venture with its principal place of business in New York. The partners in a joint venture must all be diverse from the plaintiff. Kooperman v. Village One Assoc. Ltd. Partnership, 1989 WL 71299 *1 (E.D. Pa. 1989) (citing Stuart v. Al Johnson Construction Co., 236 F. Supp. 126 (W.D. Pa. 1964)). The partners in A&E are: Disney/ABC International Television, Inc., a Delaware corporation with its principal place of business in New York; the Hearst Corporation, a Delaware corporation with its principal place of business in New York; and RCA Cable, Inc., a Delaware corporation with its principal place of business in New York. Plaintiffs alleged damages greater than \$50,000, the statutory minimum at the time the action was removed to federal court. 28 U.S.C. § 1332.

to dismiss will be denied; summary judgment will be granted as to all remaining claims.

I. FACTS

Kurtis produced a television program, "Seized by Law," (the "program") for A&E's series, "Investigative Reports." The program, aired April 17, 1996, featured specific instances of law enforcement officers seizing personal property of people suspected of drug trafficking. The program's direction was that such seizures could be legal, but not fair or just. One segment of the program focused on Willie Jones, an African-American contractor traveling from Nashville to Houston on business. He was carrying a large amount of cash, paid for his tickets with cash, and had scheduled a short trip. According to the narrative of the program, that made him a suspicious person. "[Jones' attorney,] E.E. 'BO' EDWARDS: The federal agencies involved in forfeiture frequently, and in fact, routinely, pay rewards in airports, for example. Uh, they pay airline ticket agents to give them tips on someone who looks, quote, 'suspicious.'" "Seizures" final script, Defs' Mot. to Dismiss, Ex. B at 16.

The program emphasizes that men of color are more likely to be detained by law enforcement agents than white men.

BILL KURTIS: According to Edwards, Willie Jones was the victim of an airport profile stop. He'd paid cash for his ticket, was traveling to a so-called drug city, planned a very short stay, and most importantly, was a person of color.

E.E. "BO" EDWARDS: Had I with my white skin and my business suit on done exactly the same thing that Willie Jones did that day, I seriously doubt that I would have been bothered.

WILLIE JONES: I showed them who I was, I showed them my business card. I showed them my checkbook, no story was -- was good enough.

BILL KURTIS: Jones' money was taken from him, no arrest made, no detainment. Jones was told to board his flight. Instead, he went to court. After more than two years, Jones got his money back, the stop deemed unconstitutional, the federal government chastised. To some, however, Jones merely represents the tip of the iceberg.

E.E. "BO" EDWARDS: If a minority citizen of this country is traveling through an airport or traveling on an interstate highway, they are probably 10 times or 15 times, maybe even 20 times more likely to be stopped for the sole purpose of a law enforcement agent trying to get permission to search them to see if they have money.

"Seizures" final script, Defs' Mot. to Dismiss, Ex. B at 16-17.

The narration, including the quotes from Willie Jones and his attorney, was a voice-over accompanying pictures of an airport ticket counter, Jones' business card, newspaper headlines, and a courtroom. There were two airport crowd scenes, both showing plaintiff Osby and other people walking across an open space in an airport. The first shot of Osby appeared when Bill Kurtis said, ". . .most importantly, was a person of color." The second scene, showing Osby walking behind another African American man and an older African American woman, appeared as E.E. Edwards said, "If a minority citizen of this country is traveling through an airport . . ."

Plaintiff, filing this action in Philadelphia Court of Common Pleas on October 4, 1996, alleged the program depicted him as involved in criminal activity and damaged his reputation. After defendants removed the action to federal court, this court

heard oral argument on defendants' motion to dismiss or, in the alternative, for summary judgment.

II. DISCUSSION

A court should grant a motion to dismiss for failure to state a claim upon which relief may be granted only if "it appears to a certainty that no relief could be granted under any set of facts which could be proved." Schrob v. Catterson, 948 F.2d 1402, 1408 (3d Cir. 1991) (quoting D.P. Enterprises, Inc. v. Bucks County Community College, 725 F.2d 943, 944 (3d Cir. 1984)), reh'g denied (Dec. 24, 1991). In deciding a motion to dismiss under F.R.C.P. 12(b)(6), "all allegations in the pleadings must be accepted as true and the plaintiff. . . must be given the benefit of every favorable inference that can be drawn from those allegations." Id. at 1405 (citations omitted).

A motion to dismiss relying on matters outside the pleadings may be treated as a motion for summary judgment under Rule 56, provided all parties have had an opportunity to present pertinent material. Fed.R.Civ.P. 12(b). Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A defendant moving for summary judgment bears the initial burden of demonstrating there are no facts supporting the plaintiff's claim; then the plaintiff must introduce specific, affirmative evidence that there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322-324 (1986). The court must draw all

justifiable inferences in the nonmovant's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

Defendants Kurtis and A&E submitted a videotape of the "Seized by Law" television program and a transcript of the program's narration and interviews. Defendants provided sworn affidavits verifying the videotape and transcript are accurate; plaintiffs do not dispute the accuracy of the videotape and transcript. Defendants argue the videotape and transcript may be considered by the court in deciding the motion to dismiss since plaintiffs' complaint describes the program. The videotape and transcript are matters outside the pleadings, so the court will consider only defendants' motion for summary judgment. See In re Medical Lab. Management Consultants, 931 F. Supp. 1487, 1491 (D. Ariz. 1996) (motion to dismiss in a defamation action converted to summary judgment when defendants submitted a videotape and affidavit).

A. Applicable Law

Both parties assume without argument that Pennsylvania law applies to this action. Plaintiffs are residents of New Jersey, but Osby is "an international jazz recording artist who for many years has conducted business in the Philadelphia area and throughout the world as a recording artist and performer." Pl. Compl. ¶ 9. Osby has friends and business associates in Philadelphia, and was "enjoying a good name and reputation in the Philadelphia community" when the program aired in April, 1996. Pl. Compl. ¶ 10. Vaughn has "family, friends and business

associates in the Philadelphia area. . ." Pl. Compl. ¶ 11. The plaintiffs allege their reputation among their friends, family and business associates was damaged by defendants' airing the program.

Under a traditional choice of law analysis, the state where the plaintiff is domiciled generally, but not always, has the greater interest in a defamation case. See Restatement (Second) of Conflict of Laws § 150(2), "When a natural person claims that he has been defamed by an aggregate communication, the state of most significant relationship will usually be the state where the person was domiciled at the time. . ." In Comment e, "Multistate communication involving a natural person," the Restatement notes:

Rules of defamation are designed to protect a person's interest in his reputation. When there has been publication in two or more states of an aggregate communication claimed to be defamatory, at least most issues involving the tort should be determined, . . . by the local law of the state where the plaintiff has suffered the greatest injury by reason of his loss of reputation.

* * * * *

A state, which is not the state of the plaintiff's domicil, may be that of most significant relationship if it is the state where the defamatory communication caused the plaintiff the greatest injury to his reputation. This may be so, for example, in situations where (a) the plaintiff is better known in this state than in the state of his domicil . . .

Restatement (Second) of Conflict of Laws § 150(2) cmt e (1971).

Plaintiffs' complaint suggests, but does not state explicitly, that their reputations are based more in Philadelphia

than in the New Jersey community where they live. Based on the pleadings, Pennsylvania has an interest in the outcome of this litigation, since Osby works here and his professional reputation is based here. Where the parties have agreed to apply Pennsylvania law and Pennsylvania has an interest in the outcome of the litigation, there is no reason for the court, "sua sponte, to challenge the parties' consensual choice of law." Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264, 269-70 (3d Cir. 1980). The court will apply Pennsylvania law to this action.

B. Plaintiffs' Defamation Claim

Osby alleges the program, by suggesting he was involved in criminal activity, made false and defamatory statements about him that "serve to disparage Plaintiff's good name, credit reputation both in his professional life as a musician and recording artist and in his private life, all of which brought Plaintiff into public ridicule and disgrace." Pl. Compl. ¶ 27. Defendants argue that the two scenes of Osby walking through an airport cannot support the meaning Osby alleges, and the program's depiction of him is not defamatory.

Plaintiff bears the burden of establishing the program is defamatory. Thomas Merton Center v. Rockwell Intern'l Corp., 442 A.2d 213, 215-16 (Pa. 1981) cert. denied, 457 U.S. 1134 (1982) (article that implied plaintiff organization was unknowing recipient of Soviet funding was not libelous). "It is the function of the court to determine whether the challenged publication is capable of a defamatory meaning. If the court

determines that the challenged publication is not capable of a defamatory meaning, there is no basis for the matter to proceed to trial." Id. citing Restatement (Second) of Torts, § 614(1) (1977). "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from dealing with him." Franklin Music Co. v. American Broadcasting Co., 616 F.2d 528, 541 (3d Cir. 1979). See also, Thomas Merton Center, 442 A.2d at 215; Corabi v. Curtis Publishing Co., 273 A.2d 899, 904 (Pa. 1971); Cosgrove Studio and Camera Shop, Inc. v. Pane, 182 A.2d 751, 753 (Pa. 1962); Restatement (Second) of Torts § 559 (1977). Communications must be evaluated to determine "'the effect the [communication] is fairly calculated to produce, the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate.'" Baker v. Lafayette College, 532 A.2d 399, 402 (Pa. 1987) quoting Corabi, 273 A.2d at 907.

Osby contends the two scenes showing him walking through an airport are defamatory because the context of the program suggests he is suspicious and involved in criminal activity. On the contrary, the program's narrative emphasizes that average African American men who were not suspicious have been at risk of being stopped and searched because of their race. In the first scene, he was one of three African American men shown walking through the airport. He was not doing anything special to single him out from the other travelers. He appeared

after the narrative stated that Willie Jones was stopped in part because he was a "person of color."

In the second scene, Osby was on screen longer, but he was seen behind another African American male and an older African American female. Osby did not appear to be travelling with the other couple; he was simply walking behind them. Edwards' voice-over explained that minority persons in an airport were at a greater risk of being stopped by law enforcement without probable cause to see if they have money.

No reasonable viewer watching the segment profiling Willie Jones and the federal agents' unconstitutional seizure of his money could have concluded Osby, or any of the four other African American men seen in the airport, was involved in criminal activity, or was suspected of criminal activity. At most, a reasonable viewer could have concluded that Osby was at greater risk of being an object of law enforcement discrimination on the basis of race.

Even if, as plaintiffs contend, the program suggested some African Americans are drug traffickers, there was nothing to connect Osby to criminal activity, or allegations of criminal activity. This action is remarkably similar to Fogel v. Forbes, Inc., 500 F. Supp. 1081 (E.D. Pa. 1980). In Fogel, Forbes Magazine ran an article on the financial benefit of increased investments and purchases by Latin Americans in the Miami area. The article stated some Latin Americans were buying goods in Florida and selling them on their return to South America.

Including in the article was a photograph of plaintiffs, husband and wife, standing next to a large pile of boxes at an airport ticket counter. The caption read, "The Load: Some Latins buy so much in Miami they've been known to rent an extra hotel room just to store their purchases." Id. at 1084. There are other people in the photograph; the plaintiffs are not identified in the caption or the article. Id. Plaintiffs contended their appearance in the photograph implied they engaged in buying merchandise in Miami for resale in Latin America. Dr. Fogel admitted in his deposition that no one had been deterred from dealing with them, or that their private or professional reputations had been injured by the Forbes Magazine article. Fogel, at 1086.

The Fogel court noted, "The caption to the photograph in question focuses the readers' attention to the boxes of merchandise in the photograph. The plaintiffs' appearance in the photograph is obviously incidental and does not in any manner imply that they are participating in the activity discussed in the article..." Id. at 1085.

The court finds that the picture and the article are not reasonably capable of conveying the meaning or innuendo ascribed by the plaintiffs. As the Supreme Court of Pennsylvania has said on numerous occasions, if the publication is not in fact libelous, it cannot be made so by innuendo which puts an unfair and forced construction on the interpretation of the communication.

Id. (citing Boqash v. Elkins, 176 A.2d 677 (Pa. 1962); Sarkees v. Warner-West Corp., 37 A.2d 544 (Pa. 1944)). "Furthermore,

assuming that the article and the picture were reasonably capable of conveying the meaning and innuendo ascribed by the plaintiffs, the Court finds that such meaning is not defamatory" to the Fogels since they were not buying and selling merchandise.

Here, plaintiffs' claim regarding Osby's appearance in the "Seized By Law" program is less plausible than the Fogels' claim regarding the Forbes photograph. There was nothing to connect Osby with Willie Jones or any of the individuals portrayed in the program as stopped by law enforcement agents on suspicion of criminal activities. Osby is portrayed, accurately, as an African American male using an airport. The reasonable viewer would recognize that the producers had no particular reason for videotaping Osby, other than to show an innocent citizen potentially at risk of an unconstitutional seizure of his money because of his race. Osby's depiction in the program was not capable of defamatory meaning.

C. Plaintiffs' False Light Claim

Pennsylvania has adopted the Restatement (Second) of Torts § 652E governing the tort of portraying someone in a "false light":

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of privacy, if

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the

publicized matter and the false light in which the other would be placed.

Weinstein v. Bullick, 827 F. Supp. 1193, 1202 (E.D. Pa. 1993),
citing Restatement (Second) of Torts § 652E (1977). The "false
light" cause of action differs slightly from defamation; it
involves a false statement that is not necessarily defamatory.
Id.

Plaintiffs allege the program depicted Osby as involved
or suspected of criminal activity, and that "false and
defamatory" depiction "created a highly offensive, objectionable
and false public impression of [Osby] and placed him in a false
light in the public eye." Pl. Compl. ¶ 36. Plaintiffs contend
that the depiction of Osby "would be highly offensive to a
reasonable person. . . ." Pl. Compl. ¶ 37.

To survive summary judgment, plaintiffs must show that
"the publicity forming the basis for the false light claim be
reasonably capable of being understood as singling out, or
pointing to, the plaintiff." Weinstein, 827 F. Supp. at 1202.
The publicity must also be untrue. Fogel, 500 F. Supp. at 1088.
As in Fogel, plaintiffs here place the same interpretation on the
program as they did in the defamation claim, that is, that Osby
was depicted as involved in criminal activity.

The defects in the defamation claim are defects in the
false light claim: 1) plaintiffs' interpretation of how Osby was
depicted is not reasonable; 2) defendants' program did not
portray Osby as involved in criminal activity; and 3) a

reasonable person could not find the two scenes of Osby walking in an airport "highly offensive."

D. Vaughn's Consortium Claim

Vaughn's loss of consortium claim relies on injuries sustained by Osby. As Osby's claims of defamation and false publicity have not survived summary judgment, Vaughn's consortium claim cannot survive either. An appropriate order follows.

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ORDER

AND NOW, this 12th day of June, 1997, upon consideration of defendants' motion to dismiss or, in the alternative, for summary judgment and plaintiffs' memorandums in opposition, it is **ORDERED** that:

1. Defendants' motion to dismiss is **DENIED**;
2. Defendants' motion for summary judgment is **GRANTED**;
3. The Clerk of the Court is directed to enter judgment for defendants on all counts.

J.