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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2524-08T2

RONALD DURANDO and
GUSTAVE DOTOLI,

Plaintiffs-Appellants,

v.

THE NUTLEY SUN and
NORTH JERSEY MEDIA GROUP, INC.,

Defendants-Respondents.

Argued January 6, 2010 - Decided April 8, 2010

Before Judges Graves, Sabatino and Newman.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-5340-05.

Glenn M. Finkel argued the cause for appellants (Schepisi & McLaughlin, P.A., attorneys; Mr. Finkel and Christopher A. Stewart, on the brief).

Bruce S. Rosen argued the cause for respondents (McCusker, Anselmi, Rosen & Carvelli, attorneys; Jennifer Borg and Dina Sforza, of counsel; Mr. Rosen and Kathleen A. Hirce, on the brief).

PER CURIAM

This is a defamation case. Plaintiffs Ronald Durando ("Durando") and Gustave Dotoli ("Dotoli") appeal the Law

Division's entry of summary judgment in favor of defendants The Nutley Sun and North Jersey Media Group, Inc. ("NJMG"). The motion judge granted summary judgment because there was insufficient evidence that defendants had published an inaccurate headline about plaintiffs in their newspaper with actual malice. We affirm.

I.

These are the facts relevant to our consideration of the issues raised on appeal.

The newspaper headline and the related news article at issue arose out of an investigation of plaintiffs by the Securities and Exchange Commission ("the SEC" or "the Commission"). On November 15, 2005, the SEC filed a civil complaint in the United States District Court for the District of Connecticut, alleging that plaintiffs and their associates had violated numerous sections of the Securities Act of 1933, 15 U.S.C.A. §§ 77a-77aa, and Securities Exchange Act of 1934, 15 U.S.C.A. §§ 78a-78oo. The SEC complaint particularly alleged that plaintiffs and their associates had pumped up the value of the stock of a company they owned, then sold that stock to the investing public with knowledge that the stock was worth only a

fraction of what they were selling it for.¹ As a result, plaintiffs allegedly gained more than \$9 million in profits from the transaction. The complaint was publicized by the SEC in a litigation release dated November 16, 2005 and posted to the Commission's website.

The SEC's complaint was reported in a news story written by Kathleen Lynn, a staff writer for The Record, a daily newspaper based in Hackensack. The Record and The Nutley Sun, a weekly regional paper, are both owned by NJMG.

Lynn's story about plaintiffs appeared in the November 17, 2005 edition of The Record under a headline in that paper which read: "3 N.J. men accused in \$9M stock scam." The article, as printed in The Record, detailed the allegations contained in the complaint, identified plaintiffs by name as two of the three men involved in the civil case, and identified both plaintiffs as residents of Nutley.

The executive editor of The Nutley Sun at the time was Paul Milo. After Lynn's story ran in The Record, Milo received an e-mail alert² that The Record had published an article concerning

¹ This type of practice is commonly known as "pump and dump" market manipulation.

² In his deposition, Milo testified that he could not remember exactly how The Record article came to his attention. However, he did testify that it was standard practice for him to receive
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persons in Nutley, which might be of interest to his newspaper. At his deposition, Milo could not recall if he contacted the editor of The Record, or if anyone else from NJMG was involved in the decision to reprint Lynn's article in The Nutley Sun. However, he did testify that his standard routine when he wanted to reprint an article from The Record was to e-mail Frank Scandale, the editor of The Record, and indicate his intention to reprint the article in The Nutley Sun.

Milo decided to republish Lynn's article in The Nutley Sun's edition on December 8, 2005. On Monday, December 5, 2005, when Milo physically laid out the article in the newspaper, he changed the headline. He also removed the last three paragraphs from the story. The new headline above the story on page eleven read: "Local men charged in stock scheme."

The day after editing the initial article, Tuesday, December 6, 2005, Milo added a "teaser" headline to the front page of the edition. The teaser read: "Local men arrested in 'pump and dump' scheme[.]" The teaser referenced page eleven of the edition, where the story, with its new headline, had been placed.

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an e-mail alert with attached articles containing the word "Nutley" once they had been published in other NJMG newspapers.

The teaser appears as the third and final such headline from the top of the front page on the December 8th edition. Above it were two unrelated headlines. The top headline, which was in larger and bolder font than the headlines below it, read, "School board stops crossing guard funding." Underneath this was a subheading for the crossing guard story, which read, "Town says it cannot absorb total cost." This subheading was in the same font and type size as the headline referencing plaintiffs' story. The second headline, also in the same font and type size, read, "Efforts to aid Katrina victims continue." Below that was the subject headline about plaintiffs.

The main headline on the front page, which was situated below the preceding four headlines, and in the largest font of all, read: "Peace on earth," with a sub-heading beneath it reading "Nutley holiday celebration draws hundreds Sunday." Most of the remainder of the front page was taken up by a large photograph of the holiday celebration. Plaintiffs' photographs did not appear on the front page. Nor did their photographs accompany the article on page eleven.

This particular edition of The Nutley Sun was a promotional issue. It was distributed to about 4,000 subscribers and 2,500 non-subscribers in the Nutley area.

On Friday, December 9, 2005, the day after the edition was published, plaintiffs' initial counsel contacted Milo by e-mail. Counsel alerted Milo to the falsity of the word "arrested" in the teaser headline, and demanded a retraction.³ Milo forwarded the e-mail to Kathleen Hivish, his publisher, asking for her guidance. Both Milo and Hivish agreed that they should notify the in-house counsel for NJMG, Dina Sforza, since the e-mail included a threat of litigation. In his deposition, Milo specifically recalled contacting Sforza for advice as to whether a retraction should be issued.

The deadline for submission of all articles or headlines in The Nutley Sun was on Tuesday evening before the weekly edition was sent to press. The e-mail from plaintiffs' counsel was received by Milo on Friday, December 9, 2005, and he forwarded it on to his publisher and to in-house counsel that same day.

In a certification filed with the court in support of defendants' summary judgment motion, Sforza indicated that, although she had received the e-mail from Milo on Friday, December 9, 2005, she did not discuss the contents of the e-mail with him until Wednesday, December 14, 2005. That discussion was one day after the Tuesday deadline for any retraction to be

³ Plaintiffs have not complained about the text of the article that appeared on page eleven, nor the headline that appeared on that inside page, as neither of them refer to any arrest.

printed in the December 15, 2005 edition. Sforza explained that the delay resulted from the fact that she was a part-time employee and she was not in the office until that day. Additionally, Sforza noted that NJMG's General Counsel, Jennifer Borg, whose approval was necessary before any retraction was printed, was not available that particular week as she was attending to a terminally-ill relative.

Sforza contacted plaintiffs' initial counsel on Thursday, December 15, 2005. She requested that he wait on filing any litigation until she had a chance to discuss the matter with Borg. According to Sforza's certification, plaintiffs' counsel assured her that he would not file any lawsuit until after Monday, December 19, 2005. Nevertheless, plaintiffs filed the initial defamation complaint in this action in the Law Division on Friday, December 16, 2005.

The retraction was prepared on Monday, December 19, 2005, with Borg's approval. It was printed in The Nutley Sun on Thursday, December 22, 2005. The retraction⁴ was placed in the same area that the originally false teaser headline had occupied, at the top of the front page. It took up almost all

⁴ Plaintiffs have raised no criticism concerning the contents or placement of the retraction, only pointing out that the December 22, 2005 edition was not a promotional issue and thus had a smaller circulation than the December 8, 2005 edition.

of the area on the page that was used for the three headlines in the December 8, 2008 edition, and began with the word "retraction" in large-print, boldface type. The retraction stated:

The Nutley Sun hereby retracts the headline "Local men arrested in 'pump & dump' scheme", which appeared on page A-1 of the Dec. 8 edition. Ronald Durando and Gustave Dotoli were not arrested, but were served with a civil complaint by the [F]ederal Securities and Exchange Commission. The Nutley Sun regrets the error and any embarrassment it may have caused Mr. Durando and Mr. Dotoli.

One month later, Milo was reprimanded in writing by Hivish for printing the false headline.

Milo was asked about these events during his deposition. When asked at one point if he was sure that the plaintiffs had been arrested, Milo stated, "[i]t's possible, but I don't remember."

Milo subsequently amplified and clarified his deposition answers in a certification filed in support of defendants' summary judgment motion. Among other things, Milo attested that he generally had a "hectic and harried" schedule on the two days immediately preceding his submission of the weekly edition of The Nutley Sun to the printer. He noted in his certification that he was the only editor for the newspaper, and that Monday and Tuesday nights were long nights for him, as he had a 10:30

p.m. deadline on Tuesday for getting the newspaper to press. Milo stated that, although he had edited and placed Lynn's news story about the SEC's action on a prior day, he wrote the teaser headline for the front page on Tuesday, December 6, 2005, in the evening. He asserted in his certification that, "[t]he error [he] made was internally inconsistent and made [The Nutley Sun look ridiculous because anyone reading the [n]ews [s]tory would realize that the teaser headline on [the front page] was incorrect. This is something [he] would have never done consciously or purposely."

After several rounds of dispositive motion practice, the trial court ultimately⁵ granted summary judgment to defendants, dismissing plaintiffs' complaint with prejudice. The trial court found, among other things, that the substance of the article was "clearly a [subject] matter that is heavily regulated and . . . addresses a matter of [a] substantial regulatory violation." Consequently, defendants' publication dealt with a matter of "public concern," thereby requiring plaintiffs to demonstrate "actual malice" on the part of

⁵ The motion judge initially denied summary judgment to defendants on the issue of actual malice, instead granting defendants' motion on the alternative basis that plaintiffs had not proven reputational damages. The judge subsequently granted reconsideration, concluding that the record presented no genuine factual issue of actual malice, even if plaintiffs could prove reputational damages.

defendants in order to pursue their defamation claims. See Dairy Stores, Inc. v. Sentinel Publ'g Co., Inc., 104 N.J. 125, 136 (1986). The court recognized that, under the applicable law, actual malice requires proof that either defendants had knowledge of the falsity of their publication or, alternatively, acted in reckless disregard of its truth or falsity.

The court found that there is no proof that Milo or defendants consciously knew that plaintiffs had not been arrested when the untrue headline was composed and printed. Moreover, the court also found no triable claim of reckless disregard for the truth. In particular, the trial court observed that "nothing in the record before us creates a genuine issue of material fact that any defendant knew the statements [in the headline] to be false or entertained serious doubts about their truth." The court further noted that the record was bereft of "clear and convincing evidence" of actual malice, the heightened proof standard required under the law. Summary judgment dismissing plaintiffs' defamation claims was therefore granted.

The trial court likewise dismissed plaintiffs' separately-pleaded claims seeking monetary damages because the newspaper headline had portrayed them in a false light. The court found that the same actual malice standard of liability governing

plaintiffs' defamation claims equally applied to their false light claims. Because actual malice was not demonstrated, summary judgment on the false light claims was similarly granted. Lastly, the court also dismissed plaintiffs' claims for the negligent infliction of emotional distress.

Plaintiffs now appeal. Their principal substantive argument is that the record contains sufficient indicia of actual malice to create a genuine issue of material fact and that, if permitted to present the case before a jury, they could demonstrate actual malice by clear and convincing proof. Additionally, they contend that the motion judge procedurally erred in granting defendants' motion for reconsideration, which they argue was untimely.⁶

II.

The governing law is well established. In a defamation case which involves a publication addressing a "matter of public concern" our Supreme Court has prescribed an elevated standard for a plaintiff to prevent summary judgment, requiring the

⁶ Plaintiffs also argue that the motion judge erred, in an initial phase of the motion practice, in classifying plaintiffs as "limited-purpose" public figures. We need not address this point, as the court specifically found in its final order on August 15, 2008, and defendants concede, that plaintiffs are not limited-purpose public figures. We note, as did the trial court, that the actual malice standard of liability still applies to this case because the publication addressed a matter of public concern. See Dairy Stores, supra, 104 N.J. at 140-41.

plaintiff to establish "'actual malice [on the part of the defendant] by clear and convincing evidence'" DeAngelis v. Hill, 180 N.J. 1, 12 (2004) (quoting Lynch v. N.J. Educ. Ass'n, 161 N.J. 152, 169 (1999)); Turf Lawnmower Repair, Inc. v. Bergen Record Corp., 139 N.J. 392, 413 (1995); Sisler v. Gannett Co., Inc., 104 N.J. 256, 275 (1986). The Court has stated that "any business charged with criminal fraud, a substantial regulatory violation, or consumer fraud that raises a matter of legitimate public concern[,] will trigger this heightened standard. Turf Lawnmower Repair, supra, 139 N.J. at 413.

The Court has found that a case that falls within the ambit of public concern, or involving the tort of false light—and thus requiring "actual malice" standard to apply—is governed by the jurisprudence that has evolved in defamation matters under the First Amendment to the United States Constitution. Sisler, supra, 104 N.J. at 266-67. In applying those First Amendment values, our Supreme Court has echoed the United States Supreme Court in stating that, "[t]o satisfy the actual[]malice standard, a plaintiff must show by clear and convincing evidence that the publisher either knew that the statement was false or published with reckless disregard for the truth." Lynch, supra, 161 N.J. at 165 (citing New York Times Co. v. Sullivan, 376 U.S.

254, 279, 84 S. Ct. 710, 725 11 L. Ed. 2d 686, 706 (1964))
(emphasis added).

The United States Supreme Court has instructed that, for a plaintiff to prove the "reckless publication" prong of the "actual malice" standard, he or she must provide "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731, 88 S. Ct. 1323, 1325, 20 L. Ed. 2d 262, 267 (1968). "Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." Ibid.

In applying this standard, the New Jersey Supreme Court has observed that plaintiffs who are required to prove actual malice "can recover for 'a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.'" Maressa v. N.J. Monthly, 89 N.J. 176, 199 (1982) (emphasis added) (quoting Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155, 87 S. Ct. 1975, 1991, 18 L. Ed. 2d 1094, 1111 (1967)).

Specifically, plaintiffs must present evidence that, "the recklessness in publishing material of obviously doubtful

veracity [approaches] the level of publishing a knowing, calculated falsehood.'" Lynch, supra, 161 N.J. at 165 (quoting Lawrence v. Bauer Publ'g & Printing, Ltd., 89 N.J. 451, 466, cert. denied, 459 U.S. 999, 103 S. Ct. 358, 74 L. Ed. 2d 395 (1982)). "Sufficient evidence does not exist, however, when the only evidence offered is that the defendants 'should have known the [defamatory statements] were false, or they at least should have doubted their accuracy.'" Costello v. Ocean County Observer, 136 N.J. 594, 617 (1994) (quoting Lawrence, supra, 89 N.J. at 457). In the context of editing for publication, the "actual malice standard plainly requires a [plaintiff] to 'prove more than an extreme departure from professional standards.'" Schwartz v. Worrall Publ'ns, Inc., 258 N.J. Super. 493, 502 (App. Div. 1992) (quoting Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 665, 109 S. Ct. 2678, 2685, 105 L. Ed. 2d 562, 575 (1989)).

In the present case, plaintiffs rest their theory of recklessness upon a statement that Milo made at his deposition that it was "possible" that he was not sure about whether plaintiffs had been arrested when he printed the headline. When this singular and tentative response is considered in light of Milo's subsequent explanation of that response, as well as the dearth of other evidence of reckless disregard for the truth,

the record does not present "clear and convincing" evidence that would enable plaintiffs to survive summary judgment.

Plaintiffs' reliance on the fact that Milo could have checked the accuracy of his headline and yet chose not to in the context of a deadline-pressured environment, under Schwartz, supra, does not provide plaintiffs with sufficient evidence to establish reckless disregard of the truth. At no point do plaintiffs point to any evidence that Milo was informed prior to publication as to the falsity of his headline, or was he provided with an obvious basis to reflect upon the truth of the teaser headline.

The record does not bespeak the clear and convincing evidence that allows a defamation or false light complaint to proceed. The less-prominent placement that the subject headline had on the first page of the December 8, 2005 edition is also consistent with defendants' position that they did not act with actual malice.

Summary judgment, as our Supreme Court has instructed, is a favored device for winnowing out non-meritorious defamation cases before they are improperly listed for trial. See Kotlikoff v. The Cmty. News, 89 N.J. 62, 67-68 (1982). This distinctive approach to summary judgment in defamation cases is designed to promote free speech values, and to prevent the

chilling of speech by the specter of protracted litigation. Id. at 67. Even viewing the record in a light most favorable to plaintiffs, see Rule 4:46-2, there simply is not "clear and convincing" evidence of actual malice here to warrant a jury trial. Although the headline's inclusion of the inaccurate word "arrested" was careless and unfortunate, the circumstances do not satisfy the legal and constitutional requirements for liability.⁷

Lastly, we reject plaintiffs' claims that the trial court unjustifiably dismissed their claims on a motion for reconsideration. The trial court's prior rulings maintaining certain aspects of plaintiffs' cause of action were interlocutory in nature, and could be revisited at any time before final judgment. See R. 4:42-2; see also Pressler, Current N.J. Court Rules, comment 1 to R. 4:49-2 (2010) (citing Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250 (App. Div. 1987), certif. denied, 110 N.J. 196 (1988)).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.


CLERK OF THE APPELLATE DIVISION

⁷ The same result obtains as to plaintiffs' emotional distress claims, which they have not specifically appealed and did not address in their brief. See Decker v. The Princeton Packet, Inc., 116 N.J. 418, 432 (1989) (requiring the same standard of proof for claims of negligent infliction of emotional distress and for defamation when the claims are based on the same conduct).