

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

HOWARD K. STERN,

Plaintiff,

vs.

Case No. 1:07-CIV-8536-DC

RITA COSBY and
HACHETTE BOOK GROUP USA, INC., d/b/a
Grand Central Publishing, and
JOHN or JANE DOE,

Defendants.

**PLAINTIFF HOWARD K. STERN'S SUPPLEMENTAL MEMORANDUM OF LAW IN
OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT**

COMES NOW Plaintiff Howard K. Stern ("Stern"), and hereby submits the following supplemental memorandum of law in opposition to Defendants' motions for summary judgment, pursuant to this Court's March 26, 2009 Order.

On March 12, 2009, a complaint for arrest warrant was issued upon information in the Los Angeles County Superior Court against Stern and two doctors who allegedly prescribed medication to Anna Nicole Smith ("arrest warrant").¹ The charges include violations of the Health and Safety Code and the Business and Professions Code of California, all of which concern the prescribing of medication by medical professionals. Stern, who is not a medical doctor and did not prescribe any medication to Ms. Smith, is charged with conspiracy to commit these violations with his doctor co-defendants. Stern is vigorously defending himself against these baseless charges – charges that he and his counsel believe were filed against him based on

¹ The California District Attorney prosecuting the criminal case against Stern denied Stern's request to furnish any portion of the criminal case discovery to this Court. Rather than further postpone this Court's consideration of Defendants' motions for summary judgment, Stern is not filing a motion to modify the protective order in the criminal case at this time and is submitting this supplemental briefing per the schedule outlined in this Court's March 26, 2009 Order. In the event Stern is able in the future to obtain permission to provide the discovery in the criminal case to this Court for an *in camera* review, Stern will only do so if the discovery can also be provided to all parties for review.

the publicity his name would bring to the case and to California Attorney General Jerry Brown, a potential gubernatorial candidate. At a minimum, a significant portion of the media attention Stern's name garners result from the false accusations published in Cosby's book *Blonde Ambition*. Cosby cannot use this post-publication warrant as evidence that Stern was libel-proof at the time of *Blonde Ambition's* publication a year and a half earlier. If anything, Stern submits that the fact that he was criminally charged in California based on false accusations published in the media demonstrates the damage suffered by him as a result of the defamatory publication at issue.

I. THE ARREST WARRANT IS NOT RELEVANT TO THE LIBEL PROOF INQUIRY ON SUMMARY JUDGMENT.

In its March 26, 2009 Order ("Order"), this Court noted that in her motion for summary judgment, Defendant Rita Cosby ("Cosby") argues that Stern is 'libel proof on the theory that, *before* Cosby wrote the book at issue in this case, Stern's "reputation was so horribly tarnished that he could not be libeled by her book.'" Order at 1 (emphasis added). Contrary to the relevant case law, Cosby now argues that post-publication events, including the arrest warrant issued for Stern in California, render Stern libel proof with respect to the book she published eighteen (18) months earlier. This is not the law, however, and Cosby cannot rely on a post-publication arrest and attendant media scrutiny to establish that Stern is libel proof.

As this Court has explained, "the libel-proof defense has been held suitable in cases where 'the truth' or 'undisputed evidence' of a plaintiff's past had *already* severely damaged the plaintiff's reputation." *Broome v. Biondi*, 1997 WL 83295, * 4 (S.D.N.Y. 1997). In other words, a plaintiff is only to be found libel proof "in those instances where an allegedly libelous statement cannot realistically cause impairment of reputation because the person's reputation is already so low ... even nominal damages are not to be awarded." *Brooks v. Am. Broadcasting*

Co., 932 F.2d 495, 501 (1991), quoting *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 303 (2d Cir. 1986). A post-publication arrest, occurring eighteen months after the publication of the allegedly libelous statements at issue, has no bearing on Stern's pre-publication reputation and cannot render him libel-proof in this matter. See, e.g., *Ruebke v. Globe Communications Corp.*, 241 Kan. 595, 598 (1987) (noting that even a post-publication conviction for a triple-murder that was the subject of the allegedly libelous article could not render the plaintiff libel proof because "facts alleged to exist by the defamer may subsequently occur, but [the defamer's] foresight in anticipating them will not protect him from liability"); *Jackson v. Longcope*, 394 Mass. 577, 578 (1985) (holding that in determining whether the plaintiff was libel proof, the court would only consider the plaintiff's criminal record established at the time of the libelous publication).

Cosby's weak attempts to provide legal support for her argument that the post-publication arrest warrant and resulting tabloid media scrutiny are relevant to the libel proof inquiry fall flat. The only real legal authority relied upon by Cosby is this Court's decision in *Ceresani v. Sony Corp.*, 991 F.Supp. 343 (S.D.N.Y. 1998), a case which is clearly distinguishable from the instant case. In *Ceresani*, the plaintiff was a convicted racketeer, Mafia associate, bank robber, and drug dealer, and accounts of the acts depicted in the allegedly libelous film had been widely disseminated for fifteen years pre-publication. *Ceresani*, 991 F.Supp. at 346, 354. While this Court did mention *Ceresani*'s post-publication indictment by a federal grand jury in outlining the facts of the case, the indictment was not central to the Court's libel proof determination and was omitted from the Court's holding.² *Id.* at 346. The post-

² Moreover, a federal grand jury indictment is substantially different than the arrest warrant at issue here, which was issued upon information in California Superior Court, without a grand jury. Stern has yet to be arraigned, and the preliminary hearing to determine whether the State has sufficient probable cause to pursue the criminal charges against Stern has not even occurred. As will be discussed below, holding that an arrest warrant renders a person libel proof, without the benefit of knowing whether a court finds such charges to have merit, would be a fundamental miscarriage of justice.

publication arrest warrant at issue here is not relevant to the inquiry as to whether Stern was libel proof pre-publication, and the Court should not consider it in deciding the issue on summary judgment.

II. THE ARREST WARRANT DOES NOT MAKE THE INCREMENTAL HARM DOCTRINE APPLICABLE TO THIS CASE.

Cosby attempts to argue that the post-publication arrest warrant combined with Stern's response to defendants' motions for summary judgment somehow make the incremental harm doctrine applicable to this case. This is not the law. As discussed in Stern's Memorandum of Law in Response to Defendants' Motions for Summary Judgment ("Stern's Response"), the incremental harm doctrine "compares the harm caused by non-actionable elements of an article to the harm caused by the actionable portions and dismisses the latter when the difference in harm is 'incremental.'" *Jewel v. NYP Holdings, Inc.*, 23 F.Supp.2d 348, 388 (S.D.N.Y. 1998). In his Complaint, Stern alleges that the entire publication of *Blonde Ambition* is false, defamatory, and libelous. See Complaint ¶¶ 84-91. Since Stern alleges the entire publication is libelous, Stern has not admitted that a single sentence of *Blonde Ambition* is non-actionable. Any argument to the contrary is without merit. Similarly, Stern has not abandoned any of the specific libelous statements outlined in his Complaint. In Stern's Response, Stern stated that "[t]he record presented to the Court establishes not only sufficient evidence to establish the falsity as to all nineteen Libelous Statements at issue, but also that Defendants published these statements with actual malice.... The affidavits, depositions, and statement of material facts submitted in support of this memorandum comprehensively address the Libelous Statements not discussed in detail" in Stern's Response. Stern's Response at 39, n. 13.

Since Stern alleges that the entire publication of *Blonde Ambition* is actionable, in order for the incremental harm doctrine to apply, this Court must conclude that there are in fact non-

actionable statements in *Blonde Ambition*, and then undertake a factual inquiry into the reputational damage caused to Stern by those specific non-actionable statements. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 523 (1991). The arrest warrant issued post-publication has nothing to do with this inquiry. Moreover, given the extremely detailed factual inquiry and determinations of credibility required for an analysis of the application of the incremental harm doctrine here, such an inquiry is not appropriate on summary judgment.³ *Id.* The arrest warrant does nothing to make the incremental harm doctrine applicable to this case on summary judgment and the Court should not apply the doctrine here.

III. IF RELEVANT AT ALL, THE ARREST WARRANT AND ASSOCIATED MEDIA ATTENTION DEMONSTRATE THAT STERN CANNOT BE FOUND LIBEL PROOF AS A MATTER OF LAW.

In the event this Court finds that the arrest warrant should be considered on summary judgment, then it demonstrates that Stern cannot be found libel proof as a matter of law and summary judgment should be denied on this ground. Instead, the arrest warrant, and the related tabloid media attention highlighted by Defendant Cosby in her supplemental briefing, demonstrate that there are, at a minimum, triable issues of fact regarding Stern's reputation.

A. The Impact of The Arrest Warrant is, at Most, a Factor the Jury Can Consider in Determining Compensatory Damages.

This Court has previously held that dismissal based on the libel proof doctrine at the summary judgment stage is "not appropriate ... because it requires the Court to make factual findings regarding plaintiff's reputation for a particular trait." *Church of Scientology International v. Time Warner, Inc.*, 932 F.Supp. 589, 594 (S.D.N.Y. 1996); *see also James v. DeGrandis*, 138 F.Supp.2d 402, 418 (W.D.N.Y. 2001)(quoting *Church of Scientology* in holding plaintiff not libel proof as a matter of law); *Armistead v. Minor*, 815 So.2d 1189, 1194 (Miss.

³ See Stern's Response, Section II, and page 28 n. 10.

2002) (holding application of libel proof doctrine inappropriate on summary judgment because “while it may be said that some reputations are easily assessed, it still requires consideration of credibility issues, and this is not something the trial judge should undertake”). Even if this Court were to combine the evidence of Stern’s reputation pre-publication with the arrest warrant and subsequent media attention, the facts here require detailed credibility determinations that are inappropriate to make on summary judgment and must be determined by the jury. *See Marcone v. Penthouse International Magazine for Men*, 754 F.2d 1072 (3d Cir. 1985) (holding that evidence of the plaintiff’s well publicized *pre-publication* reputation, including: indictment for drug trafficking, connection to gang activities, trials for tax fraud and criminal tax evasion, and conviction for contempt of court, were not enough to determine as a matter of law the plaintiff was libel proof and were instead factors for the jury to consider).

As Stern outlined in his Response, there is substantial evidence in the record to confirm that Stern’s reputation was injured by the publication of the libelous statements in *Blonde Ambition*. *See* Stern’s Response at 27-28. Cosby cannot wipe away this damage by focusing on the post-publication arrest warrant and surrounding media coverage. Any damage caused to Stern’s reputation by the arrest warrant should be considered, if at all, by the jury as a factor with respect to the extent of Stern’s compensatory damages, not as dispositive at summary judgment.

B. Public Policy Requires That The Arrest Warrant Not Determine the Libel Proof Inquiry.

If this Court determines that the arrest warrant and subsequent media attention could render Stern libel proof as a matter of law, this Court would be looking at less than half of the story and ignoring the impact of the potential outcome of the criminal case. Stern is entitled to the “presumption of innocence, which simply means that no individual should suffer adverse consequences merely on the basis of an accusation, unless the charges were ultimately sustained

in a court of law.” *Benitez v. Whitehall Apartments Co., LLC*, 19 Misc.3d 1120(A), 2008 WL 1744268, *4 (N.Y.Sup. 2008) (internal quotations omitted); *People v. Motz*, 52 A.D.3d 1029 (3d Dept. 2008). Stern and his counsel strongly believe that the criminal charges filed against him are baseless, without merit, and will result in an outcome that conclusively establishes his complete and total vindication.

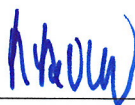
If this Court decides to consider post-publication events in making the libel proof determination, then it must consider not just the arrest warrant and related media coverage, but also the ultimate outcome of the criminal trial and media coverage. If the charges against Stern are dismissed or he is acquitted, Stern’s reputation will undoubtedly improve and many of the attacks made against him in *Blonde Ambition* and other media outlets will be proven false once and for all. Stern should not be penalized at the summary judgment stage by considering merely a snapshot of post-publication evidence. Either this Court should postpone any libel proof determination until the conclusion of Stern’s criminal case, or it should let the jury weigh any impact of the criminal charges in determining Stern’s compensatory damages, and deny Defendant’s motions for summary judgment on this ground.

CONCLUSION

The arrest warrant recently issued against Stern has no bearing on the libel proof inquiry in the motions for summary judgment pending before this court. The libel proof doctrine looks at the plaintiff’s reputation pre-publication to determine whether the defendant’s defamatory statements could cause no further damage. Post-publication events have no bearing on this inquiry. If this Court considers the arrest warrant at all, such consideration requires either the postponing of its summary judgment determination until the resolution of the criminal case, or the denial of defendants’ motions for summary judgment on the basis of the libel proof doctrine.

Any impact the arrest warrant has should be left for the jury to resolve. Stern is entitled to the presumption of innocence and should not be penalized in a civil court based on a meritless criminal accusation. Defendants' motions for summary judgment should be denied.

Dated: April 13, 2009.



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