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Court Refuses to Dismiss Tort and Defamation Claims Against Authors and Publisher of Book About Cryonics Organization

By Lisa Lewis

On October 29, 2010, Justice James A. Yates refused to dismiss tort and defamation claims, among other claims, against the authors and the publisher of a book about Alcor Life Extension Foundation, Inc. ("Alcor"). *Alcor Life Extension Foundation, Inc. v. Larry Johnson, Vanguard Press, Inc. and Scott Baldyga, Index No. 113938/2009 (Sup. Ct., NY County, Nov. 3, 2010)*. Alcor is a not-for-profit organization in the field of cryonics, which is the practice of keeping a clinically dead human body or brain frozen in the hope of later restoring it to life with the help of future technologies. The book, called *Frozen*, was written by Larry Johnson ("Johnson"), a former employee of Alcor, and co-author Scott Baldyga ("Baldyga") and published by Vanguard Press, Inc. ("Vanguard"). Alcor alleged in its Complaint that *Frozen* disclosed confidential and proprietary information about Alcor and its members, including information regarding baseball legend, and alleged Alcor member, Ted Williams.

Johnson was employed by Alcor for about seven months and, during his time at Alcor, he was promoted to the position of Chief Operating Officer ("COO"). Alcor alleged that, as the COO, Johnson had access to "patient records, case files, medical procedures, membership information, scientific research, developing technologies, methodologies and operations procedures of Alcor." Alcor further alleged that, the day after his employment at Alcor ended, Johnson launched a website called www.FreeTed.com where the public could pay to view private and confidential information of Alcor, including alleged photographs of deceased baseball player Ted Williams.

After taking efforts to prevent Johnson from disclosing confidential information, including prior actions against Johnson and a default judgment barring Johnson from publishing or communicating any information about Alcor, Alcor learned in September 2009 that Johnson and Baldyga were planning to publish a book about Alcor through Vanguard. Despite Alcor's efforts to prevent publication, *Frozen* was released to the public on October 4, 2009. In the Complaint, Alcor claims that *Frozen* disclosed confidential and proprietary information, member information and patient information, including information regarding Ted Williams. The Complaint asserted claims against Johnson for breach of contract, breach of fiduciary duty and conversion. The Court denied the motion to dismiss with regard to certain of the claims against Johnson, finding that Alcor had sufficiently plead claims for breach of contract and breach of fiduciary duty against Johnson.

Alcor also set forth several tort claims against Vanguard and Baldyga, including claims for tortious interference with contract, aiding and abetting trade secret misappropriation, aiding and abetting breach of fiduciary duty and aiding and abetting conversion. In support of these claims, Alcor alleged that Vanguard published *Frozen* despite being aware of agreements and duties that barred Johnson's disclosure of Alcor's confidential information. Vanguard, on the other hand, argued that the First Amendment shielded it from all tort claims because "a stranger's illegal conduct" in obtaining information provided to a publisher "does not suffice to remove the First Amendment shield from speech about a matter of public concern." *Alcor* at pg. 12 (citing *Bartnicki v. Vopper, 532 U.S. 514*, 535 (2001)). Looking to the *Bartnicki* case, the Court noted that First Amendment protection applies only "to publishers who play no role in the initial unlawful acquisition and where the subject of the publication is a public figure." In determining whether First Amendment protection applied in this case, Justice Yates analyzed the question of whether Alcor was a public figure. The Court noted that, while the courts have sometimes decided the issue of whether someone is a public figure on the pleadings alone, this question "may be a mixed question of fact and law." In this case, Alcor denied that it was a public figure, but the

defendants argued that Alcor had been soliciting media attention and had thrust itself into the public eye. Justice Yates found that the evidence submitted by defendants, including evidence that Alcor maintains an informational website, puts out some paper publications for the benefit of its members and is occasionally interviewed by the media for articles discussing the cryogenics field, to be insufficient to support a determination of public figure status on a motion to dismiss. As a result, the Court declined to dismiss the tort claims against Vanguard on First Amendment grounds. The Court then went on to find that Alcor had sufficiently plead certain tort claims against both Vanguard and Baldyga.

Alcor also brought defamation claims against all defendants based upon 32 allegedly defamatory statements in the book. The defendants argued that a heightened standard of review requiring proof of malice applied to the defamation claims because Alcor is a public figure. However, as set forth in the First Amendment analysis on the tort claims, the Court found that the determination of whether Alcor is a public figure was premature at this stage of the proceedings. Accordingly, the Court rejected the argument that the defamation claims should be dismissed for failure to plead malice.

The defendants further argued that the defamation claims should be dismissed because the allegedly defamatory statements were non-actionable. For example, the authors refer to a group of individuals called "Alcorians" in the book and they make statements alleging that the Alcorians were involved in crimes such as kidnapping and murdering people in order to conduct experiments. A claim for defamation lies only where "the defendant has published the matter 'of and concerning the plaintiff.' Consequently an impersonal reproach of an indeterminate class is not actionable." *Alcor* at pg. 18 (citing *Gross v. Cantor*, 270 N.Y. 93 (1936)). Johnson argued that statements referring to "Alcorians" are non-actionable descriptions of an indeterminate group. The Court rejected this argument, however, because "the so-called group allegedly being defamed (Alcorians) is derived from the plaintiff's name," and, therefore, "it is reasonable to conclude that a fact finder or jury could find the statements 'are of and concerning Alcor.'" Additionally, the Court rejected an argument by the defendants that the statements contained in the book were non-actionable opinions or benign statements. A defamatory statement is libelous *per se* if the statement "tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce and evil opinion of him the minds of right-thinking persons." *Alcor* at pg. 17 (citing *Rinaldi v. Hold, Rinehart & Winston, 42 N.Y.2d 369*, 379 (1977)). Justice Yates concluded that statements regarding kidnapping and murder, among others, implied Alcor's participation in crimes and reprehensible conduct and, as a result, sufficiently stated a cause of action for defamation *per se*. As a result, the defamation claims were not dismissed.

In this case, the Court could not determine whether Alcor was a public figure at the motion to dismiss stage of the proceedings because the question of whether Alcor is a public figure was in dispute. As a result, the First Amendment did not shield the publisher from tort claims. Likewise, because it was too early in the proceeding to determine whether Alcor is a public figure, neither the publisher nor the authors could benefit from the heightened standard of review requiring proof of malice for defamation claims. Thus, the defamation claims also survived the motion to dismiss. While there may be some circumstances in which a court can determine as a matter of law that a person is a public figure, this case demonstrates that the courts will be reluctant to make such a determination where a plaintiff denies being a public figure and there is little evidence to support such a finding. In other words, a public figure determination should only be made where the facts are not seriously in dispute. Thus, publishers and authors alike must be aware that merely alleging that someone is a public figure will not be sufficient to shield them from tort liability or create a heightened standard of review for defamation claims.

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