



Caution

As of: Aug 21, 2015

**LEONARD WELCH, Plaintiff, v. PENGUIN BOOKS USA, INC., f/k/a VIKING-PENGUIN, INC., TERRY MCMILLAN and POCKET BOOKS, INC. a division of SIMON & SCHUSTER, INC., Defendants**

**Index No. 21756/90**

**Supreme Court of New York, Kings County**

***1991 N.Y. Misc. LEXIS 225***

**April 3, 1991**

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendants publishers moved to dismiss plaintiff claimant's suit for libel-in-fiction defamation, negligence, and the intentional infliction of emotional distress after a fictional character in a book resembled the claimant.

**OVERVIEW:** A claimant sued the publishers of a book for libel-in-fiction defamation, negligence, and the intentional infliction of emotional distress, claiming that a fictional character resembled him. The publishers moved to dismiss the suit, denying that the claimant and the character were one and the same. The court granted the motion. There were ample similarities regarding life experiences and daily minutiae of the character and the claimant. But where, as in the case, the defamatory statements created such a profound alteration of the claimant that a reasonable reader could not have possibly attributed the defamatory aspects of the character to the claimant, the claimant could not have been damaged, so that his libel claim failed. The claimant, as a private individual, failed to sufficiently allege a cause of action for defamation. Therefore, the claims of negligence and the intentional infliction of emotional distress also failed. The court would not address the statute of limitations problems posed by the publishers because they were rendered moot.

**OUTCOME:** The court granted the publishers' motion to dismiss the libel claim because a reasonable reader could not have attributed the defamatory aspects of the character to the claimant. The court dismissed the negligence and the intentional infliction of emotional distress claims because the claimant failed to allege a defamation claim.

**LexisNexis(R) Headnotes**

***Torts > Intentional Torts > Defamation > Defenses > Exaggerations & Imaginative Commentary***  
***Torts > Intentional Torts > Defamation > Elements > Libel***

[HN1] In order for plaintiff to establish a prima facie case for a libel-in-fiction cause of action, the defamatory publication must be shown to be "of and concerning" plaintiff.

***Torts > Intentional Torts > Defamation > Defenses > Exaggerations & Imaginative Commentary***  
***Torts > Intentional Torts > Defamation > Elements > Libel***

[HN2] The question in a libel-in-fiction cause of action is whether the libel designates plaintiff in such a way as to let those who knew him understand that he was the person meant. It is not necessary that all the world should

understand the libel; it is sufficient if those who knew plaintiff can make out that he is the person meant.

***Torts > Intentional Torts > Defamation > Defenses > Exaggerations & Imaginative Commentary***  
***Torts > Intentional Torts > Defamation > Elements > Libel***

[HN3] Where, in a libel-in-fiction claim, the work claimed to be defamatory is fictional, the court's task entails a search for similarities and dissimilarities so as to determine whether a person who knew plaintiff and who read the book could reasonably conclude that plaintiff was the fictional character.

***Torts > Intentional Torts > Defamation > Defenses > Exaggerations & Imaginative Commentary***  
***Torts > Intentional Torts > Defamation > Elements > Libel***

[HN4] The court, in a libel-in-fiction cause of action, is charged with the responsibility of determining what sorts of similarities sufficiently identify plaintiff with his alleged fictional counterpart as well as the significance of differences between plaintiffs and characters who otherwise resemble each other.

***Torts > Intentional Torts > Defamation > Defenses > Exaggerations & Imaginative Commentary***  
***Torts > Intentional Torts > Defamation > Elements > Libel***

[HN5] 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 becomes a plausible aspect of the real life plaintiff or suggestive of 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.

***Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Defamation > General Overview***

***Torts > Intentional Torts > Defamation > Defenses > Exaggerations & Imaginative Commentary***  
***Torts > Intentional Torts > Defamation > Elements > Libel***

[HN6] A requirement of an action for defamation in a libel-in-fiction claim is that the reader must be totally

convinced that the book in all its aspects as far as plaintiff is concerned is not fiction at all.

***Torts > Intentional Torts > Defamation > Defenses > Exaggerations & Imaginative Commentary***  
***Torts > Intentional Torts > Defamation > Elements > Libel***

[HN7] Where the defamatory statements of a libel-in-fiction claim create such a profound, characterological alteration of plaintiff such that a reasonable reader could not possibly attribute the defamatory aspects of the character to plaintiff, then plaintiff cannot be damaged thereby and his libel claim must fail.

**JUDGES:** [\*1] Jules L. Spodek, J.S.C.

**OPINION BY: SPODEK**

**OPINION**

**DECISION**

Leonard Welch and Franklin Swift have a lot in common. They are physically similar; both have dark complexions, dark hair and carry approximately 225 pounds on a six foot four inch frame. The two men dropped out of high school but subsequently obtained equivalency diplomas. They share the same avocational interests; they both enjoy carpentry and a good game of scrabble. Their vocational history is also identical; Leonard Welch and Franklin Swift have both been employed as construction workers. Each owns a fish tank, favors a bowl of Wheatena in the morning, drip dries after a shower, has a trick knee, and is the only son in a family with three children. Their romantic relationships are also alike. Both men met their girlfriends while rendering carpentry services at their respective apartments, and in addition, both couples apparently have had identical vacations, dates and arguments.

Leonard Welch and Franklin Swift are also very different. Franklin Swift can be characterized as an alcoholic. He drinks on the [\*2] job, once raped his girlfriend, uses drugs, is at times unwilling to work for a living, is occasionally lazy, hostile, a racist, homophobic and emotionally unbalanced. He was wrongfully discharged from the Navy due to his uncontrollable temper, hates his parents and accepts payoffs by contractors not to go to work. Leonard Welch is none of these things. But the most important difference of all is that Franklin Swift is the fictional character in a novel entitled *Disappearing Acts* written by Terry McMillan (MCMILLAN), while Leonard Welch is the plaintiff in an action primarily for defamation against the author of the same book and its hardcover and paperback publishers.

The plaintiff contends he is identified as Franklin Swift, one of the main characters in the novel *Disappearing Acts*. Plaintiff's claim of identification is based on the similarities enumerated above. Plaintiff also contends that the circumstances of his real life relationship with the defendant McMillan parallel and imitate that of Swift and the book's female protagonist Zora. Aside from the libelous statements contained in the book, plaintiff further maintains that defendants are guilty of negligence by erroneously [\*3] labelling the book as a novel. Plaintiff also avers that the book's realistic portrayal of the plaintiff's life during his three year relationship with McMillan and its dedication to McMillan and plaintiff's son is tantamount to the intentional infliction of emotional distress upon the plaintiff. It seems that the use of the dedication was extremely offensive to the plaintiff who believes that the child will ultimately read the book, believe that the defamatory portions are true and place the plaintiff in an "unfavorable light".

Defendants essentially deny that Leonard Welch and Franklin Swift are one and the same. They seek to dismiss plaintiff's complaint for failure to state a cause of action. While defendants do not deny that plaintiff might have served as an inspiration or model for the character Swift, they maintain that under New York law such "suggestion is not identification". Furthermore, say defendants, the dissimilarities between the plaintiff and the character are readily apparent to any reader who knows the plaintiff, thereby making it impossible for any reader to believe the novel is actually a truthful depiction of plaintiff.

[HN1] In order for the plaintiff to establish [\*4] a prima facie case for a libel-in-fiction cause of action, the defamatory publication must be shown to be "of and concerning" the plaintiff. The paucity of libel-in-fiction cases however, has made the task of defining that which would satisfy the "of and concerning" requirement difficult. The Second Circuit of the United States Court of Appeals relied on the following definition:

[HN2] The question is whether 'the libel designates the plaintiff in such a way as to let those who knew him understand that he was the person meant. It is not necessary that all the world should understand the libel; it is sufficient if those who knew the plaintiff can make out that he is the person meant.'

*Fetler v Houghton Mifflin Co.*, 364 F.2d 650, 651 (2d Cir. 1966).

The New York Court of Appeals affirmed a decision by the Appellate Division denying plaintiff's libel-in-fiction claims after utilizing the following standard:

[HN3] Where as here, the work claimed to be defamatory is fictional, the court's task necessarily entails a search for similarities and dissimilarities so as to determine whether a person who knew plaintiff and who read the book could reasonably conclude that plaintiff [\*5] was [the fictional character].

*Springer v. Viking Press*, 90 A.D.2d 315, 319, 457 N.Y.S.2d 246, 248 (1st Dept. 1982), aff'd., 60 N.Y.2d 916, 470 N.Y.S.2d 579 (1983).

The presiding [HN4] court then, is charged with the responsibility of determining what sorts of similarities sufficiently identify a plaintiff with his alleged fictional counterpart as well as the significance of differences between plaintiffs and characters who otherwise resemble each other. Courts have failed to carve out a clear standard as to how similar or how different the two must be. Compare, *Springer v. Viking Press*, *supra*, (similarities of name, physical height, weight and build, incidental grooming habits and recreational activities of plaintiff and fictional character held insufficient in context of preposterous plot) and, *Allen v. Gordon*, 86 A.D.2d 514, 446 N.Y.S.2d 48 (1st Dept. 1982) (similarities of name held insufficient to defeat defendant's motion to dismiss), with *Fetler v. Houghton Mifflin Co.*, 364 F.2d 650 (2d Cir. 1966) (similar family composition, ethnic background, family circumstances and history held sufficient, in the face of numerous dissimilarities to be an issue [\*6] as to identification for the jury) and *Geiser v. Petrocelli*, 616 F.2d 636 (2d Cir. 1980) (same name and physical characteristics held sufficient to withstand motion to dismiss where reasonable reader would understand that character portrayed was appellant, acting as described).

Further complicating any consideration of a libel-in-fiction claim is the paradox produced by the plaintiff asserting an identification with the fictional character yet denying that significant aspects of such character are true.

Bringing and defending such an action requires a kind of 'doublethink'. On the one hand, the plaintiff must assert simultaneously that the story or novel is 'about' him or her to the extent that there are similarities between the plaintiff and the fiction character but 'could not be about' the plaintiff because, in real life, he or she would never do the scandalous things ascribed to the character. The plaintiff's case thus becomes "It's me, but it couldn't be me". Similarly, on the author's side, the defense must assert that a fictional portrayal - something that purports to convey no literal truth - was not knowingly, recklessly, or negligently untrue. (references omitted).

[\*7] 51 *Brooklyn L. Rev.* 225, 228 (1984-1985). The dissenting opinion of a California Appellate court justice laconically noted "What is similar to the plaintiff in a given work identifies him; what is dissimilar and unflattering is false and defamatory, and therefore libelous". *Bindrum v. Mitchell*, 92 *Cal.App. 3d* 61, 86, 155 *Cal.Rptr.* 29, 44 (Files, J., dissenting), cert. denied, 444 D.S. 984 (1979). A Federal Circuit Court found that there existed a "disturbing irony inherent in the scheme: the more virtuous the victim of the libel, the less likely it will be that she will be able to establish this essential confusion [between the plaintiff and his fictional counterpart] in the mind of the third party" *Geiser v. Petrocelli*, 616 *F.2d* 636, 639 (2d Cir. 1980).

[HN5] 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 becomes a plausible aspect of the real life 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 [\*8] 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.

92 *Yale L.Rev.* 538, 541 (1982-1983)

In the case at bar, plaintiff is an individual of no general renown. A sample of the few people who might know the plaintiff and read the book have 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. (see Welch affidavits). The affidavit of one of his neighbors identified the plaintiff but disassociated him from the fictional Swift's drinking habits, homophobic tendencies and irresponsibility regarding money. Another acquaintance stated in his sworn statement that the two men were the same "except for the defamatory aspects attributed to Franklin". Plaintiff submitted similar statements from his estranged wife and mother. Therefore, those who knew the plaintiff had no difficulty differentiating him from Franklin Swift; the defamatory material was clearly not believed. A thorough reading of the book supports this judgment. The negative attributes [\*9] attached to the character pervade the entire novel. The story is constantly punctuated by Franklin's drinking

excesses and emotional lack of control. In this book the allegedly defamatory aspects of the character become fundamental to the character. And, as the plaintiff's evidence shows, no one who knows the plaintiff can confuse him with the fictional Swift in these essential aspects. In fact, the self-destructive motif of the character winds up overwhelming and trivializing the claimed similarities.

The biggest hurdle for the plaintiff however, must be the task of overcoming a fictional work's presumption that all the material is untrue. In order for the reader to believe its contents are truthful and, as claimed in this case, libelous, the presumption of invention must be overcome. Even if the plaintiff proves that he is the prototype for the character, the assumption that everything else is not true - meaning the defamatory aspects - still exists. Given the obvious and implied constitutional repercussions of a libel-in-fiction claim as well as the accepted fact that writers create their fictional works based on their own experiences, it must be [HN6] a requirement of an action for [\*10] defamation that the reader be totally convinced that the book in all its aspects as far as the plaintiff is concerned is not fiction at all.

This court need not deny that plaintiff may indeed have been a model or inspiration for his fictional counterpart. There are ample similarities regarding life experiences and daily minutiae of Franklin Swift and Leonard Welch. But [HN7] where, as here, the defamatory statements create such a profound, characterological alteration of plaintiff such that a reasonable reader could not possibly attribute the defamatory aspects of the character to plaintiff, then plaintiff cannot be damaged thereby and his libel claim must fail. See, *Middlebrooks v. Curtis Publishing Co.*, 413 *F.2d* 141 (4th Cir. 1969).

In sum plaintiff, as a private individual has failed to sufficiently alleged a cause of action for defamation. Therefore, the remaining causes of action for negligence and the intentional infliction of emotional distress must also fail. The court will not address the statute of limitations problems posed by the defendants as they are rendered moot by this decision.

Accordingly, defendants' motion to dismiss the amended complaint is granted for the reasons [\*11] stated above. The request for sanctions is denied.

*Settle order.*

108PMQ

\*\*\*\*\* Print Completed \*\*\*\*\*

Time of Request: Friday, August 21, 2015 15:25:54 EST

Print Number: 1825:526191964

Number of Lines: 197

Number of Pages:

Send To: DeLossa, Richard  
KELLEY DRYE & WARREN LLP  
10100 SANTA MONICA BLVD STE 2300  
LOS ANGELES, CA 90067-4135