

Massachusetts Trial Court Dismisses Defamation

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Posted in Defamation

The Volokh Conspiracy recently blogged about a 2008 Massachusetts Superior Court order granting a libel defendants' motion to dismiss defamation and business defamation claims because the defendant had "no continuing duty to investigate the accuracy" of a news article that was posted by the defendant on its website. The case, Jenzabar, Inc. v. Long Bow Group, Inc., No. 2007-2075H (Mass. Super Ct., Aug. 5, 2008) is linked from the Volokh site here.

The case is an interesting one, first, for its treatment of the fair report privilege and, second, because it is another example of an unusual and constitutionally troubling Massachusetts state statute that is apparently still on the books.

According to the Superior Court's order, one of the plaintiffs in the Jenzabar case (Chai Ling) was a student leader during the 1989 Tiananmen Square protests in China who later moved to the United States and founded Jenzabar, a software company. The defendant, Long Bow, Inc., was a documentary production company that produced a film chronicling the Tiananmen Square protests. According to at least one news article, the film included an interview with Chai Ling.

The gist of the plaintiffs' defamation claims was that beginning in May 2004, the defendant's website referred to news articles that "reported certain concerns third parties expressed with respect to Chai Ling and Jenzabar." One such article was an excerpt from an August 2003 story published by the Boston Globe, which stated that "five former executives have sued Jenzabar, including the former CEO, who accused Chai and [a third person, apparently Chai Ling's husband] of 'a number of unethical, inappropriate, and/or illegal actions.'" The plaintiffs in Jenzabar alleged the Boston Globe article (as republished by Long Bow) was false because the former CEO had retracted his allegations. However, it appears that the defendant first posted the Boston Globe article before the former CEO's lawsuit had been dismissed.

The critical question for the court with respect to the defamation claim based on the Boston Globe article was "whether [the defendant] had any kind of continuing duty to investigate the accuracy of the Boston Globe article, i.e., whether [the former CEO] was still accusing the plaintiffs of inappropriate actions." Ultimately, the court held that "there is no such duty." Accordingly, the court dismissed the defamation claim based on the Boston Globe article.

Interestingly, the plaintiffs apparently tried to use the fair report privilege as formulated in the Restatement (Second) of Torts, Section 611 to argue that the defendant had a duty to publish a “follow-up” to the Boston Globe story about the CEO’s lawsuit. In so arguing, Jenzabar relied on Comment f of Section 611, which states, “when a newspaper publishes from day to day the report of a judicial proceeding, it may not, after reporting derogatory parts, fail to publish the further proceedings that tend to vindicate the person defamed.” However, the Superior Court stated in a footnote that this example from Comment f “is intended to apply to ongoing coverage of proceedings such as trials, and does not impose a duty on Long Bow (or the Boston Globe) to publish the fact that [the former CEO] dropped the suit.” (Long Bow raised the fair report privilege in support of its motion to dismiss).

With respect to articles other than the Boston Globe story, the plaintiffs claimed the articles were defamatory because the defendant “has provided this material [on its website] in a manner that purports to be balanced and fair but, in reality, is biased and deceptive.” However, and notably for the court, the plaintiffs did not allege these other articles were false. Rather, the plaintiffs relied on Mass. Gen. Laws ch. 231, § 92, which provides, “[t]he defendant in an action for writing or for publishing a libel may introduce in evidence the truth of the matter contained in the publication charged as libelous; and the truth shall be a justification unless actual malice is proved.” Citing the Massachusetts Supreme Judicial Court, the Superior Court stated that “application of that statute to a truthful statement concerning a matter of public concern violates the First Amendment. Allegations of improper business practices are a matter of public concern. To survive this motion to dismiss, the plaintiffs must allege falsity, which they have not.”

Earlier, we wrote about this troubling Massachusetts statute as applied in [Noonan v. Staples](#). In that case, a panel of the First Circuit held that a defamation claim could move forward, based on Mass. Gen. Laws ch. 231, § 92, even though the allegedly defamatory statements were true or substantially true. The First Circuit found proffered evidence that the sender of the allegedly defamatory e-mail harbored ill will toward the plaintiff raised a triable issue of fact regarding whether the sender acted with common-law malice toward the plaintiff. Later, as reported here, a federal jury returned a verdict of no liability in favor of the defendant on this defamation claim.

Although the Superior Court dismissed the defamation claims in [Jenzabar](#), it allowed other trademark and unfair business practice claims to move forward. According to Long Bow’s website, the legal dispute over those claims remains ongoing.