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Citing Potential Chill on Speech, New York Court of Appeals Affirms Narrow Construction of New York's Long-Arm Statute in Defamation Cases

By Henry R. Kaufman and Michael K. Cantwell

The New York Court of Appeals reaffirmed its long-standing policy of narrowly construing the state's "long-arm" statute (NY Civil Practice Law and Rules 302(a)(1)) in defamation actions. *SPCA of Upstate New York, Inc. v. American Working Collie Association*, No. 6 (N.Y. Feb. 9, 2012).

In SPCA, by a narrow 4-3 majority, the Court affirmed dismissal of the defamation claim, based on statements made on an out-of-state web site, holding that plaintiffs had failed to establish personal jurisdiction under CPLR 302(a)(1).

Background

The SPCA case pitted two organizations engaged in animal welfare – the plaintiff, SPCA of Upstate New York (a New York corporation) and its executive director Cathy Cloutier against the American Working Collie Association ("AWCA," an Ohio not-for-profit corporation) and its president, Jean Levitt (a Vermont resident). AWCA had 13 members in New York but it had no offices or employees in New York.

In close cases at least a majority of the Court of Appeals is likely to continue to place its thumb on the scale against the assertion of long-arm jurisdiction in deference to free speech concerns.

Levitt telephoned Cloutier to offer AWCA's assistance with 23 mistreated dogs that had recently been rescued and were being cared for by SPCA in New York. Subsequently AWCA sent a $1000 donation to SPCA and Levitt placed a second call to advise Cloutier that AWCA had purchased collars and leashes and to make arrangements for their delivery.

In a visit to New York lasting under one hour Levitt delivered the leashes and collars, toured the SPCA facility, and wrote a check to cover the costs of certain veterinary care. Levitt then placed a third and final telephone call to Cloutier in New York in which they discussed proper veterinary care for the dogs. In addition, on several weekends AWCA volunteers assisted in caring for the dogs in New York. Levitt then visited the SPCA facility one final time, for about an hour and a half, to check on the collies.

After she returned to Vermont, Levitt posted comments on the AWCA web site addressing the care and treatment being provided by SPCA. Alleging that the statements were defamatory, plaintiffs brought suit and the defendants moved to dismiss on the ground of a lack of personal jurisdiction. The trial court denied the motion but the Appellate Division reversed and dismissed the suit.

The Opinions

Chief Judge Lipmann began by noting the New York Legislature's express exclusion of defamation claims from tortious acts that would otherwise support the exercise of jurisdiction under CPLR 302(a)(2) and (3). Although defamation claims may be brought under the "transacting business" clause of the long-arm statute, CPLR 302(a)(1), as noted by the majority here too they are treated differently: "Defamation claims are accorded separate treatment to reflect the state's policy of preventing disproportionate restrictions on freedom of expression." Slip op. at 6. Nevertheless, where a non-domiciliary defamation defendant has engaged in "purposeful transactions of business" within New York State, it is not an "unnecessary inhibition on freedom of speech or the press" to subject that defendant to the state's jurisdiction under CPLR 302(a)(1). *Id.*

To assert personal jurisdiction under CPLR 302(a)(1), the Court must find not only "purposeful activities" within the state but "some articulable nexus between the business transacted and the cause of action sued upon." *Id.* at 5 (*citing* McGowan v. Smith, 52 N.Y.2d 268, 271, 272 (1981)). Whether the actions of Levitt and the AWCA were sufficiently purposeful, and the nexus between the business transacted and the claim sufficiently close, was what divided the Court.

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The majority found the defendants' activities (three phone calls and two short visits) to be "quite limited." The allegedly defamatory statements, posted on AWCA's website, were neither written in nor directed to New York State; although accessible in the state, they were equally accessible in any other jurisdiction, according to the majority opinion.

Moreover, Chief Judge Lippman noted, the donations (of cash and leashes) were not purposeful activities related to the defamation claim. Rather, defendants' in-state activities were designed to "help provide financial and medical assistance for the dogs." The alleged mistreatment was observed during Levitt's visits but written about only after she returned to Vermont. Had the defendants actually placed the dogs with the plaintiffs or complained of the plaintiffs' treatment of its (New York-based) members, long-arm jurisdiction might have been warranted, but the majority concluded that the connection was simply too tangential to support the exercise of jurisdiction. *Id*. at 6-7.

The dissent, written by Judge Pigott and joined by Judges Graffeo and Smith, found the defendants' activities neither "quite limited" nor unconnected with the defamation claim. In addition to the three phone calls and two visits by Levitt, and the various donations, the AWCA sent members and volunteers over eight weekends to assist in the care of the dogs. Moreover, the allegedly defamatory posts addressed the conditions of the dogs "and the inference can be drawn from the complaint that Levitt's purpose for going to New York (and for sending volunteers to assist at the SPCA) was to garner attention" for the plight of the dogs. Dissent, at 2-3.

Discussion

The result in SPCA continues the marked and longstanding trend of pro-defendant results in the Court of Appeals in deference to New York's well-established tradition of solicitude for the protection of freedom of expression in defamation cases. While cases involving application of CPLR 302(a)(1) will always be fact-intensive, it seems clear that the New York Court of Appeals intends to continue to construe the statute more narrowly in defamation cases than in other sorts of litigation:

> Through CPLR 302, the Legislature has manifested its intention to treat the tort of defamation differently from other causes of action and we believe that, as a result, particular care must be taken to make certain that nondomiciliaries are not haled into court in a manner that potentially chills free speech without an appropriate showing that they purposefully transacted business here and that the proper nexus exists between the transaction and the defamatory statements at issue.

The SPCA case also makes clear that the mere operation of a web site view in New York State does not constitute the type of purposeful availment that would constitute the transaction of business:

> Moreover, it is of importance that the statements were not written in or directed to New York. While they were posted on a medium that was accessible in this State, the statements were equally accessible in any other jurisdiction.
>
> Slip op. at 7.

Although at least some out-of-state media defendants active on the web may have sufficient contacts with New York State to allow a court to conclude that they are transacting business within the state, jurisdiction over defamation claims will still be impermissible unless the plaintiff can establish "a substantial relationship between the purposeful activities and the transaction out of which the cause of action arose," *id*. at 5 (internal citation and quotation omitted), and in close cases at least a majority of the Court of Appeals is likely to continue to place its thumb on the scale *against* the assertion of long-arm jurisdiction in deference to free speech concerns.

Henry R. Kaufman and Michael K. Cantwell, practice media, publishing and IP law with Henry R. Kaufman, P.C. in New York City (www.hrkaufman.com). Plaintiff in this case was represented by Martin J. McGuinness, Glens Falls, New York (Stanclift Law Firm, P.C., Glens Falls, New York on the brief). Defendant was represented by Jonathan M. Bernstein, Albany, New York (Goldberg Segalla, L.L.P., Albany, New York on the brief).

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