LOS ANGELES
Daily Journal
www.dailyjournal.com
THURSDAY, SEPTEMBER 26, 2013

Libel tourism's trip gets cut short

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Content Matters

This is a monthly column devoted to matters of interest to those who create content of all kinds (entertainment, news, software, advertising, etc.) and bring that content to market. Our hope is to shed light on key issues facing the creative content community. If you have questions, comments or topic ideas, let us know at ContentMatters@jenner.com. **Because content matters.**

Earlier this month, the 5th U.S. Circuit Court of Appeals became the first federal appellate court to issue a decision applying a federal law enacted to curb "libel tourism" — a form of international forum shopping in which plaintiffs file libel suits against U.S. authors and publishers in foreign jurisdictions with lax free speech protections, then seek to enforce those judgments in the U.S.

In *Trout Point Lodge, Ltd. v. Handshoe,* No. 13-60002 (Sept. 5, 2013), the 5th Circuit affirmed a trial court decision holding that a Canadian defamation judgment against an American blogger could not be enforced in the U.S. because it did not satisfy the requirements of the SPEECH Act, 28 U.S.C. Section 4101.

The SPEECH Act — the Securing the Protection of our Enduring and Established Constitutional Heritage Act — bars U.S. courts from enforcing foreign defamation judgments unless the judgment is consistent with both the First Amendment and state law. Congress enacted the SPEECH Act in August 2010 in response to a perceived rise in libel tourism, finding that the threat of foreign libel suits was "significantly chilling American free speech and restricting both domestic and worldwide access to important information." S. Rep. 111-224, at 2 (2010).

Libel tourism gained nationwide attention in 2004 when Saudi businessman Khalid Bin Mahfouz sued American author Rachel Ehrenfeld for defamation in England. The publication at issue was Ehrenfeld's book, "Funding Evil: How Terrorism is Financed and How to Stop It," which asserted that Bin Mahfouz funded al Qaeda and other Islamist terror groups. After Ehrenfeld failed to appear in the High Court of Justice in London, the court granted Bin Mahfouz a default judgment providing an award of damages and requiring Ehrenfeld to publish an apology. In New York, Ehrenfeld sought a declaratory judgment that the English judgment was unenforceable, but her action ultimately was dismissed due to a lack of personal jurisdiction over Bin Mahfouz, who had taken no steps to enforce the judgment in the *U.S. Bin Mahfouz v. Ehrenfeld*, 881 N.E.2d 830, 838 (N.Y. 2007).

In response to the decision in *Bin Mahfouz*, New York enacted "Rachel's Law" in 2008. The law was the first state statute to make foreign defamation judgments unenforceable in state court unless the court finds that the foreign country's defamation law provides at least as much protection for freedom of speech and press as would be provided under the U.S. Constitution and state law. Rachel's Law also authorized personal jurisdiction in a declaratory judgment action against a person who obtains a judgment in a defamation proceeding outside the U.S. against a New York resident. Illinois, Florida and California soon followed suit, passing similar statutes restricting enforcement of foreign defamation judgments and extending personal jurisdiction to include potential "libel tourists." See, e.g., Cal. Code Civ. Proc. Sections 1716(c)(9) and 1717(c).

The federal SPEECH Act prohibits domestic courts from recognizing or enforcing foreign defamation judgments unless (A) the defamation law applied by the foreign court "provided at least as much protection for freedom of speech and press in that case as would be provided by" the First Amendment and the law of the state where the domestic court is located, or (B) even if the defamation law applied in the foreign court does not provide that level of speech protection, the party opposing recognition or enforcement of the foreign judgment "would have been found liable for defamation by a domestic court" applying the First Amendment and the law of the domestic forum state. See 28 U.S.C. Section 4102(a)(1).

Few courts to date have interpreted the SPEECH Act. In *Pontigon v. Lord*, 340 S.W.3d 315 (2011), the Missouri Court of Appeals overturned registration of a Canadian defamation judgment because the lower court had failed to apply the provisions of the SPEECH Act. In *InvestorsHub.com, Inc. v. Mina Mar Group, Inc.,* 2011 U.S. Dist. LEXIS 87566 (N.D. Fla. June 20, 2011), a Canadian company surrendered its claims in a stipulated final judgment, acknowledging that its Canadian defamation judgment against a U.S. company was not enforceable in Florida because Canadian law does not provide as much protection of speech as the First Amendment and Florida law.

Trout Point Lodge is the first federal appellate decision to construe the SPEECH Act in a significant way. Plaintiffs, a Canadian hotel and two of its owners, sued Mississippi blogger Doug Handshoe for defamation in the Supreme Court of Nova Scotia for tying them to a Louisiana political scandal on his blog. Handshoe never appeared in the Supreme Court of Nova Scotia, and that court entered a default judgment against him, awarding the plaintiffs compensatory and punitive damages. In March 2012, the plaintiffs enrolled the default judgment in Mississippi state court, in an attempt to collect the damages award. Handshoe removed the action to the U.S. District Court for the Southern District of Mississippi — pursuant to removal jurisdiction created by the SPEECH Act — and the district court granted summary judgment in favor of Handshoe, holding that the SPEECH Act precluded enforcement of the Canadian judgment. The 5th Circuit affirmed, finding that the plaintiffs had failed to meet their burden under the SPEECH Act.

First, the 5th Circuit held that the Nova Scotia proceeding did not provide Handshoe at least as much speech protection as he would have received under U.S. law. The court emphasized that falsity is not an element of a defamation claim under Canadian law: "The most critical legal difference here is that a Canadian plaintiff — unlike a plaintiff subject to First Amendment and Mississippi state law — need not prove falsity as an element of its prima facie defamation claim. Rather, in Canada, truth is a defense that a libel defendant may raise and, if so, must prove."

(Like many states, including California, Mississippi includes falsity as an element of a prima facie claim for defamation. In *Philadelphia Newspapers v. Hepps,* 475 U.S. 767 (1986), the U.S. Supreme Court held that, at least where the speech in question involves a matter of public concern and the defendant is a member of the media, the First Amendment requires that the plaintiff prove falsity.)

Second, the 5th Circuit held that the plaintiffs failed to show that a Mississippi court presented with the same facts and circumstances would have entered a default judgment holding Handshoe liable for defamation. Although Handshoe's failure to answer would satisfy the basic prerequisite for a default, the court found it unlikely that a state or federal court in Mississippi would have entered a default judgment, because the plaintiffs had failed to set forth specific facts rebutting or undermining most of Handshoe's allegedly defamatory statements. The court also noted that many of the statements at issue were opinion statements and insults that are not actionable under Mississippi law.

Although the 5th Circuit's *Trout Point Lodge* ruling vindicated the defendant, its opinion raises questions about how much protection the SPEECH Act really provides. In focusing on inadequacies in the plaintiffs' complaint allegations, the 5th Circuit evidently was trying to craft a narrow decision — expressly avoiding determining whether the plaintiffs were public figures, for example. The court's analysis, however, can be read to suggest that a private-figure plaintiff might be able to enforce a foreign default judgment for defamation simply by making more detailed factual allegations about how each challenged statement is false. Such an outcome would run contrary to the purpose of the SPEECH Act, which was designed to alleviate domestic authors' fears of foreign lawsuits in countries with lax speech protections. Foreign libel suits will continue to have a chilling effect on American free speech if domestic authors and publishers feel compelled to appear and defend foreign defamation suits in order to avoid U.S. enforcement of a well-pleaded default judgment.

Rather than permitting foreign plaintiffs to avoid the SPEECH Act by pleading falsity with particularity, a better approach would be to ask whether a U.S. court would have entered a judgment against the defendant after a trial on the merits, or perhaps even to hold that the second prong of the SPEECH Act can never be satisfied in the case of a foreign default judgment. Either approach would avoid making the SPEECH Act's protection hinge on speculation about how a domestic court would apply its default judgment procedural rules, and thus would provide a greater deterrent against libel tourism.

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