SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

----------X **Index No. 303630/2014**

Andrew Robert Rector,
Plaintiff,

-against-

DECISION and ORDER

Major League Baseball Advanced Media,
ESPN New York, New York Yankees,
Dan Shulman, John Kruk,

Present:

Defendants.

Hon. Julia I. Rodriguez
Supreme Court Justice

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Recitation, as required by CPLR 2219(a), of the papers considered in review of the motions of Defendants ESPN, New York Yankees, Dan Shulman and John Kruk ("ESPN/Yankees"), and Defendant MLB Advanced Media ("MLBAM"), respectively, to dismiss the Complaint pursuant to CPLR 3211(a)(1) and 3211(a)(7).

Papers Submitted	Numbered
ESPN/Yankees' Notice of Motion, Affidavit & Exhibits	**1**
ESPN/Yankees' Memorandum of Law	**2**
MLBAM's Notice of Motion, Affidavit & Exhibits	**3**
MLBAM's Memorandum of Law	**4**
Pls. Memorandum of Law in Opposition & Exhibits	**5**
ESPN/Yankees and MLBAM's Reply Memorandum of Law	**6**

Plaintiff's complaint alleges causes of action for defamation and intentional infliction of emotional distress. Plaintiff bases these claims on a telecast by the ESPN program *Sunday Night Baseball* of a game between the Major League Baseball clubs known as the New York Yankees and the Boston Red Sox at Yankee Stadium on April 13, 2014 (the "Telecast"). During the top of the fourth inning, ESPN's cameras turned to Plaintiff sleeping in his seat and ESPN's announcers Dan Shulman and John Kruk commented on Plaintiff's ability to sleep during the game. A partial clip of the portion of the Telecast where Shulman and Kruk discussed Plaintiff was later posted online at MLB.com and was entitled "Tired Fan Naps in the Stands." Defendant MLBAM manages MLB.com. MLBAM posted the subject portion of the Telecast on MLB.com and also on YouTube. The YouTube excerpt was entitled "Fan Sleeps in Stands During Game

vs. Red Sox" with a caption stating "4/13/14: A fan in the stands takes a snooze during the 4th inning of the Red Sox/Yankees game at Yankee Stadium." YouTube allows users of its website to post comments of the videos they watch. In addition, the website NOTSSportsCenter posted an article dated April 13, 2014 entitled "PIC: Sleeping Yankees Fan Cares Not For Your Rivalry Talk." NOTSportsCenter is not affiliated with any of the Defendants.

With respect to his defamation cause of action, Plaintiff alleges, *inter alia,* that:

> 25. Defendants negligently or maliciously published false, defamatory statement of fact about the plaintiff, a private individual. The false statements include but are not limited to :
>
> a. Plaintiff is unintelligent and stupid individual.
> b. Plaintiff is not worthy to be fan of the New York Yankee.
> c. Plaintiff is a fatty cow that need two seats at all time and represent symbol of failure.
> d. Plaintiff is a confused disgusted and socially bankrupt individual.
> e. Plaintiff is confused individual that neither understands nor knows anything about history and rivalry between the Red Sox and New York Yankee.
> f. Plaintiff is so stupid that he cannot differentiate between his house and public place by snoozing throughout the fourth inning of the Yankee game.

With respect to his cause of action for intentional infliction of emotional distress, plaintiff alleges, *inter alia,* that:

> Defendants intentionally and recklessly made statements that created a high degree of risk of harm yet deliberately proceeded to act with conscious disregard or indifference to the risk. Specifically, defendants made false statements of facts, insensitive that the defendant is on air and millions of people are watching and hearing these comments. Examples of defendants' outrageous statements include, but are not limited to:
>
> a. Falsely insinuation that plaintiff is something of confused individual.

b. Juxtaposes a series of photos and text falsely implied that plaintiff is engaged in the type of conduct described in the article which is false.
c. Placing the Plaintiff before the public in a false light and that false light would be highly offensive to a reasonable person.

Plaintiff seeks $10 million in damages, including punitive damages, to compensate him for "[t]he loss of reputation and character plaintiff has suffered and will continue to suffer in the future; [t]he mental anguish plaintiff has suffered and will continue to suffer in the future; and [t]he loss of earnings sustained by plaintiff and the loss or reduction of plaintiff's earning capacity in the future . . . [and because] defendants proceeded with a conscious indifference to the rights, safety or welfare of others, including plaintiff."

Defendants ESPN, New York Yankees, Shulman and Kruk (the "ESPN/Yankees") now move to dismiss the complaint, pursuant to CPLR 3211(a)(1) and 3211(a)(7). Defendant MLB Advanced Media also moves to dismiss the complaint, pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7). In support of their motion, the ESPN/Yankees submitted two CDs -- one contains the entire Telecast and the other contains only the portion of the Telecast at issue. MLBAM also submitted two CDs -- one contains the excerpt posted on MLB.com and the other contains the excerpt posted on YouTube. The court reviewed all of the CDs.

Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. *See Leon v. Martinez,* 84 N.Y.2d 83, 88, 638 N.E.2d 511 (1994). On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Leon v. Martinez,* 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994). However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration." *See Maas v. Cornell,* 94 N.Y.2d 87, 91, 699 N.Y.S.2d 716 (1999).

To prove a claim for defamation, a plaintiff must show: (1) a false statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm. *See Stepanov v. Dow Jones & Co., Inc.*, 120 A.D.3d 28, 987 N.Y.S.2d 37 (1st Dept. 2014); *Dillon v. City of New York*, 261 A.D.2d 34, 704 N.Y.S.2d 1 (1st Dept. 1999). "Courts will not strain" to find defamation "where none exists." *See Cohn v. National Broadcasting Co.*, 50 N.Y.2d 885, 887, 449 N.E.2d 716 (1980). Loose, figurative or hyperbolic statements, even if deprecating the plaintiff, are not actionable. *See Gross v. New York Times*, 82 N.Y.2d 146, 152-153, 603 N.Y. 813 (1993). Truth provides a complete defense to defamation claims. *See Rinaldi v. Holt, et al.*, 42 N.Y.2d 369, 379, 397 N.Y.S.2d 943 (1977).

The statements made by Shulman and/or Kruk concerning the Plaintiff consist of the following:

> Shulman: This guy's oblivious to how good it is. Join the millions of subscribers, maybe even this guy. Watch every out of market game live in true HD on over 400 devices. Visit MLB.tv for details.
>
> Kruk: Sometimes you have to turn it off, get some sleep. This is not the place you come to sleep. Tell you what though, how comfortable is that? Probably won't have any neck problems tomorrow.
>
> Shulman: I mean, is that guy to his left his buddy, who's just letting him sleep, or is he here alone? What's the deal with this guy?
>
> Kruk: Maybe that's his buddy and he likes him a lot better when he's asleep.
>
> Shulman: I think the other guy's really more concerned with the food and the game.
>
> Kruk: Chicken fingers are a special item at the ballpark. Why share? Get'em while he's asleep so he won't ask for one.
>
> Shulman: We gotta to see how long this guy's out for.
>
> Kruk: You don't think he can sleep, its only the fourth inning, you don't think he can sleep through.

> Shulman: Did he sleep through the Beltran homer? I mean 45,000 people stand up and cheer and he sleeps through.
>
> Kruk: You think it'd be tough to, but he seemed comfortable. It didn't look like he just started to sleep.
>
> Shulman: Not a cousin, not a relative?
> Kruk: No, I don't think so, but you never know. I mean, I didn't get a good look at him cause of the head tilt. But I mean physically he could be, yeah.

Those comments were made during the course of a 1 minute and 20 second period of time. The camera turned to Plaintiff three times during that time period and the Plaintiff was on camera for a total of 31 seconds. The camera turned to other spectators shortly before turning the Plaintiff. The game lasted approximately three hours.

The CDs conclusively establish that none of the defendants made any of the statements attributed to them in the complaint. In fact, the Plaintiff's own submissions reflect that all of the statements alleged in the complaint were made by private individuals on websites not hosted or maintained by any of the defendants herein. And, in the Court's view, none of the comments actually made by the announcers is defamatory. Notably, nothing said by either of them could be considered a false statement which is a necessary element of a defamation action. Nor was ESPN/Yankees' depiction of the Plaintiff at the game along with other spectators unauthorized. Indeed, it is a common practice during baseball games and other public sporting events to depict spectators on camera. At worst, the announcers' comments might be considered to be loose, figurative or hyperbolic statements which are not actionable. Since MLBAM simply posted the excerpted portion of the Telecast discussed above, no defamatory statements are attributable to MLBAM.

While in opposition papers, Plaintiff argues that the Defendants "set the stage" for others to comment and defame Plaintiff, the court has not found nor has Plaintiff cited to any legal authority upon which any of the defendants may be held liable for Plaintiff's alleged injuries. Indeed, it is axiomatic that a defendant cannot be held liable for a libelous or defamatory statement that it did not write or publish. *See Khan v. New York Times Co.*, 269 A.D. 2d 74, 710

N.Y.S.2d 41 (1st Dept. 2000). Nor do any of the defendants owe a duty to Plaintiff to protect him from the alleged defamatory statements of third parties.

II. Intentional Infliction of Emotional Distress

To survive a motion to dismiss a cause of action for intentional infliction of emotional distress, plaintiff must allege "extreme and outrageous conduct intentionally or recklessly [which] causes severe emotional distress to another." *See Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 303, 448 N.E.2d 86 (1983); *Fischer v. Maloney*, 43 N.Y.2d 553, 557, 402 N.Y.S.2d 991 (1978). The Court of Appeals has noted that liability has been found "only where the conduct has been so outrageous of character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *See id.* Clearly, nothing shown or said which can be attributed to any of the defendants during the Telecast, on MLB.com or on YouTube concerning the Plaintiff rises to the level of an act of extreme and outrageous conduct.

Based on the foregoing, the Defendants' respective motions to dismiss the Complaint are **granted** and the Complaint is hereby dismissed in its entirety.

Dated: Bronx, New York
August 17, 2015

Hon. Julia I. Rodriguez, J.S.C.