

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

TERRY GENE BOLLEA professionally
known as HULK HOGAN,

Plaintiff,

vs.

Case No. 12012447CI-011

GAWKER MEDIA, LLC, *et al.*,

Defendants.

DEFENDANTS' RENEWED MOTION FOR DISMISSAL FOR FRAUD ON THE COURT OR, IN THE ALTERNATIVE, AMENDED MOTION FOR A NEW TRIAL

By and through their undersigned counsel, defendants Gawker Media, LLC ("Gawker"), Nick Denton, and A.J. Daulerio hereby renew their motion to dismiss this case under the doctrine of fraud on the court or, in the alternative, amend their previously filed motion for a new trial, and state as follows in support thereof:

Preliminary Statement

1. On December 22, 2015, defendants filed a motion to dismiss this case for fraud on the court. That motion, which is incorporated herein by reference, documented a systematic effort by plaintiff Terry Bollea to commit a fraud on this Court that was uncovered by Defendants' successful FOIA request and lawsuit against the FBI, a request Bollea fought every step of the way.

2. As detailed in that motion and the accompanying exhibits, throughout this litigation plaintiff and/or his counsel provided false interrogatory responses, hid responsive documents, gave false deposition testimony, signed false affidavits, and presented numerous false arguments in briefs and at hearings to the Special Discovery Magistrate, this Court, and the District Court of Appeal. That wide-ranging pattern of fraudulent conduct was designed to hide

the fact that this lawsuit was precipitated by Bollea's discovery that video existed of him making racist statements and the severe distress he experienced when facing the possibility that footage of those statements might be released.

3. In opposing Defendants' motion, Bollea denied that the threat to release the video of him making racist statements caused him emotional distress and contended that, in any event, any "misstatements" he might have made in order to hide the existence of that video could be the subject of impeachment on cross-examination, but did not rise to the level of a fraud on the court.

4. Then, at the motion *in limine* stage, Bollea turned around and succeeded in excluding all of the material he had previously characterized as impeachment evidence, doing so based in part on his outright dismissal of Defendants' theory that a significant cause of Bollea's emotional distress surrounding the sex tapes was the threat to release the footage with the racial slurs.

5. Then, on May 2, 2016, having both successfully defeated Defendants' fraud on the court motion and obtained a \$140.1 million verdict after a trial in which Defendants were barred from using any of the FBI materials either for impeachment purposes or in support of their theory regarding the alternate cause of Bollea's emotional distress, Bollea reversed course and filed a new complaint in which he confirmed precisely what Defendants contended in their fraud on the court motion. Specifically, the new complaint (attached hereto as Exhibit A) expressly alleges that the threat to expose Bollea's racist statements was, in fact, a cause of severe contemporaneous distress, and confirms that Bollea and his lawyers made material misrepresentations to this Court – including most recently in connection with Defendants' fraud on the court motion and the parties' motions *in limine*.

6. Based on the allegations in that new lawsuit, Defendants are entitled to a dismissal of this lawsuit based on fraud on the court, or, in the alternative, a new trial in which they are permitted to pursue the theory whose correctness Bollea now concedes.

Fraud on the Court

7. Bollea's new lawsuit confirms the core contentions of Defendants' fraud on the court motion – that Bollea and his lawyers made repeated misrepresentations throughout these proceedings and that those misrepresentations were designed to conceal facts material to this lawsuit.

8. The fraud on the court motion cited, among other things, sworn testimony by Bollea stating in this case (a) that he had no idea that there were other tapes, (b) that no one had ever tried to sell the tapes back to him, and (c) that he had never heard of Keith Davidson. *See* Gawker Defs.' Mot. to Dismiss on the Grounds of Fraud on the Ct. ("Fraud on Ct. Mot.") at 13 (Dec. 22, 2015). Now, Bollea has sued that same Davidson he claimed he had never heard of, based on conduct he denied ever occurred, involving tapes he denied knowing anything about. *See, e.g.*, Ex. A ¶ 31.

9. The fraud on the court motion also detailed the sworn deposition testimony of plaintiff's counsel David Houston, who testified under oath that in his initial conversations with Davidson, Bollea's racist statements "[n]ever even came up" and that Davidson first mentioned the racist statements "toward the end" of their dealings. *Fraud on Ct. Mot.* at 20. Further attempting to downplay the significance of the racist comments, Houston emphasized at his deposition, "I know it was toward the end," stressing that Davidson first brought up Bollea's racial slurs in their "final conversations" or "the day everybody met . . . December 12th." *Id.*

10. Similarly, plaintiff's lead counsel (C. Harder) repeatedly represented to the Court and the Special Discovery Magistrate that no one in plaintiff's camp knew about any other videos and that the racist language was the invention of Davidson, even though these representations were decidedly false. *Id.* at 18-20.

11. The new lawsuit – on which Houston and Harder appear as co-counsel – states the opposite. It provides that “[i]n **October 2012**, the Davidson Defendants . . . contacted counsel for Plaintiff” and Davidson “***specifically stated to Plaintiff’s counsel that certain of the surreptitious recordings . . . contained insensitive racial remarks.***” Ex. A ¶ 31 (emphasis added). At that time, as the new lawsuit acknowledges, Davidson “threatened to release the entirety of the surreptitious recordings of Plaintiff.” *Id.*

12. In making the fraud on the court motion, and later in asking for evidence concerning the FBI investigation and Bollea's racist statements to be admitted at trial, defendants argued that this evidence was material because, in addition to casting substantial doubt on Bollea's and Houston's credibility, it showed that (a) the principal information Bollea did not want disclosed publicly was the fact that he used racial slurs, and (b) Bollea's distress was caused, in whole or in substantial part, by his concern about the possibility that his racist statements would be publicly released.

13. In response, Bollea and his counsel challenged the legitimacy of this evidence and contended that Bollea was not distressed by Davidson's actions. For example, they told the Court that defendants' argument was nothing more than “***factually unsupported speculation*** that [Bollea] ***feared the offensive language might be revealed.***” Pl.'s Omnibus Opp. to Defs.' Mots. *in Limine* Nos. 1, 2, 3 at 7 ¶ 1 (Feb. 12, 2016) (decided at hearing on February 17, 2016). Similarly, Bollea strenuously argued to the Court that defendants had made a “***fabricated***

argument that Mr. Bollea also suffered emotional distress” from Davidson’s threat. *Id.*; see also Pl.’s Confidential Opp. to Defs.’ Motion to Permit Presentation of Offensive Language at Trial at 7 (June 26, 2015) (“Whether Plaintiff was damaged, and the amount of his damages, is not affected one way or the other by this issue.”) (decided at hearing on July 1, 2015).

14. Now, in Bollea’s new complaint, he and his counsel state the exact opposite. The new lawsuit expressly states that Davidson acted maliciously by “participating and aiding a civil extortion scheme” to threaten the release of Bollea’s racist statements “when [he] knew or should have known that *Plaintiff would suffer severe emotional distress.*” Ex. A ¶ 91. And, the new complaint specifically admits – just as defendants previously contended – that “[a]s a *direct and proximate result*” of Davidson’s actions, Bollea in fact “*suffered emotional injury . . . and severe emotional distress.*” *Id.* ¶ 95.

15. Thus, in direct contravention of the position he took before trial, Bollea’s new lawsuit underscores the central relevance of the evidence that Bollea’s misrepresentations and those of his counsel were intended to conceal – evidence of Davidson’s communications with Houston about Bollea’s “racial remarks” in October 2012 and Bollea’s reaction to learning about the recordings of his racist statements. That evidence shows that Bollea’s distress was caused, in whole or in substantial part, by his concern that his “racial remarks” might be publicly released. Indeed, as the FBI’s documents conclusively establish, Houston and Bollea reported Davidson’s “threat” to release the “insensitive racial remarks” *before* filing this lawsuit, underscoring that Bollea’s real concern was not an alleged invasion of privacy relating to Gawker’s posting, but the risk that his reputation would suffer from exposing that the recordings showed him making racist statements. As the new complaint admits, Bollea and Houston understood that the release

of those statements “could have the effect of causing great economic harm to Plaintiff.” Ex. A ¶ 31.

16. Based on Bollea’s assertions that the threatened release of racist statements was not relevant to his claims and could in any event be the subject of cross-examination at trial, this Court denied defendants’ motion for fraud on the court at a hearing on January 13, 2016, ruling that “[t]here is insufficient evidence to show a fraud on the court.” Jan. 13, 2016 Hrg. Tr. at 86:15-16.

17. Despite Bollea’s earlier position that this evidence was at a minimum a proper subject of cross-examination, he then reversed course, successfully obtaining a ruling that excluded any evidence concerning the FBI investigation, the other DVDs, the racist remarks, or Bollea’s distress from the fear that they might be released.

18. Bollea’s new lawsuit *admits* both the falsity of his and his lawyers’ prior representations and testimony and the central relevance of the evidence concerning the FBI investigation, Davidson’s threats, and the fears that he would release Bollea’s racist statements. Simply put, Bollea has filed a pleading – signed by the same counsel – confirming that his earlier testimony and representations to the Court were false. Given these new admissions by plaintiff and his counsel, defendants renew their motion for fraud on the court.

19. Under well-established Florida law, this effort to deceive the Court and to hide critical evidence based on repeated misrepresentations is a fraud on the Court that requires the case to be dismissed. Bollea should not have been permitted to ask a jury to award him substantial damages based on the emotional distress allegedly caused by defendants’ conduct after having engaged in a systematic campaign to conceal what he now concedes was a substantial alternative cause of his alleged distress and was the principal information he did not

want disclosed publicly. *See* Fraud on the Court Mot. at 27-32 (citing multiple cases standing for the proposition that dismissal based on fraud on the court is warranted where a personal injury plaintiff conceals the existence of concurrent injuries).

Motion for a New Trial

20. In the alternative, based on plaintiff's admissions in the new lawsuit, defendants hereby amend their previously filed motion for a new trial. In addition to the reasons previously stated, defendants are entitled to a new trial in light of Bollea's admissions in his new lawsuit. As plaintiff and his counsel now concede, the evidence derived from the FBI investigation and related to Bollea's racial slurs is directly relevant to Bollea's alleged damages for emotional distress for precisely the reasons stated in defendants' previously filed Motion *in Limine* No. 2: Evidence Concerning Plaintiff's Use of Racial Slurs on a Sex Tape, which is incorporated herein by reference.

21. According to plaintiff's latest lawsuit, Davidson's October 2012 "threat" to Houston that he or others would "release the entirety of the surreptitious recordings" – including the "insensitive racial remarks" – caused Bollea to suffer "severe emotional distress." Ex. A ¶¶ 31, 91, 95. That threat, as plaintiff now admits, prompted Bollea to complain to the FBI and preceded his filing of this suit against defendants.

22. At trial, defendants should have been permitted to share that evidence with the jury, to undercut Bollea's claim that he was concerned only about the video excerpts posted by Gawker, and to challenge his and Houston's contention that Bollea's alleged emotional distress was caused by the posting of those excerpts – and not some other intervening event or alternative cause, such as Davidson's threat.

Conclusion

Defendants respectfully request that the Court grant their motion and dismiss this case with prejudice or, in the alternative, grant them a new trial.

May 18, 2016

Respectfully submitted,

THOMAS & LOCICERO PL

By: /s/ Gregg D. Thomas

Gregg D. Thomas

Florida Bar No.: 223913

Rachel E. Fugate

Florida Bar No.: 0144029

601 South Boulevard, P.O. Box 2602 (33601)

Tampa, FL 33606

Telephone: (813) 984-3060

Facsimile: (813) 984-3070

gthomas@tlolawfirm.com

rfugate@tlolawfirm.com

Seth D. Berlin

Pro Hac Vice Number: 103440

Michael D. Sullivan

Pro Hac Vice Number: 53347

Michael Berry

Pro Hac Vice Number: 108191

Alia L. Smith

Pro Hac Vice Number: 104249

Paul J. Safier

Pro Hac Vice Number: 103437

LEVINE SULLIVAN KOCH & SCHULZ, LLP

1899 L Street, NW, Suite 200

Washington, DC 20036

Telephone: (202) 508-1122

Facsimile: (202) 861-9888

sberlin@lskslaw.com

msullivan@lskslaw.com

mberry@lskslaw.com

asmith@lskslaw.com

psafier@lskslaw.com

Counsel for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of May, 2016, I caused a true and correct copy of the foregoing to be served via the Florida Courts' E-Filing Portal on the following counsel of record:

Kenneth G. Turkel, Esq.
kturkel@BajoCuva.com
Shane B. Vogt, Esq.
shane.vogt@BajoCuva.com
Bajo Cuva Cohen & Turkel, P.A.
100 N. Tampa Street, Suite 1900
Tampa, FL 33602
Tel: (813) 443-2199
Fax: (813) 443-2193

Attorneys for Plaintiff

David Houston, Esq.
Law Office of David Houston
dhouston@houstonatlaw.com
432 Court Street
Reno, NV 89501
Tel: (775) 786-4188

Attorney for Plaintiff

Timothy J. Conner
Holland & Knight LLP
50 North Laura Street, Suite 3900
Jacksonville, FL 32202
timothy.conner@hkllaw.com

Charles D. Tobin
Holland & Knight LLP
800 17th Street N.W., Suite 1100
Washington, D.C. 20006
charles.tobin@hkllaw.com

Attorneys for Intervenors First Look Media, Inc., WFTS-TV and WPTV-TV, Scripps Media, Inc., WFTX-TV, Journal Broadcast Group, and The Associated Press

Charles J. Harder, Esq.
charder@HMAfirm.com
Jennifer McGrath, Esq.
jmcgrath@hmafirma.com
Harder Mirell & Abrams LLP
132 S. Rodeo Drive, Suite 301
Beverly Hills, CA 90212
Tel: (424) 203-1600
Fax: (424) 203-1601

Attorneys for Plaintiff

Allison M. Steele
Rahdert, Steele, Reynolds & Driscoll, P.L.
535 Central Avenue
St. Petersburg, FL 33701
amnestee@aol.com
asteel@rahdertlaw.com
ncampbell@rahdertlaw.com

Attorney for Intervenor Times Publ'g Co.

/s/ Gregg D. Thomas
Attorney