

Press Privilege Defense OK'd For BuzzFeed In Dossier Suit

By Carolina Bolado

Law360 (June 4, 2018, 3:54 PM EDT) -- A Florida federal judge ruled Monday that BuzzFeed can use the fair reporting privilege defense to fend off a Russian tech executive's defamation suit over the website's publication of a dossier alleging ties between Russia and President Donald Trump.

U.S. District Judge Ursula Ungaro said BuzzFeed may employ the fair reporting privilege defense, which protects journalists who are reporting on official proceedings. Plaintiff Aleksey Gubarev, whose tech companies are mentioned in the dossier, argued that an "official proceeding" in the context of the fair reporting privilege is limited to a government investigation, but Judge Ungaro said a classified intelligence briefing also qualifies.

She also concluded that the January 2017 BuzzFeed article clearly stated that the 35-page dossier, authored by former British intelligence officer Christopher Steele, was circulated at the highest levels of government and that President Barack Obama and Trump had been briefed on the dossier's allegations. The article also linked to a CNN story about the briefings that also said the FBI was investigating the dossier's allegations, according to the judge.

"The court agrees with defendants that the term 'official proceeding' should be broadly interpreted to apply to any official action," Judge Ungaro said. "A confidential briefing to the president and the president-elect by the four most senior intelligence directors in the country is official action taken by those empowered to do so. So too is an FBI investigation into the truth of the dossier's allegations."

The judge declined, however, to allow BuzzFeed to use the neutral report privilege, which applies when the press publishes a report of serious charges against a public figure by a responsible prominent organization and does not espouse or endorse the organization's statement.

Judge Ungaro said the neutral report privilege is not recognized by New York law, and that it would allow the press to publish defamatory statements as long as they are newsworthy and from a source that is trustworthy. New York law, and not Florida law, applies in the case because the BuzzFeed article was published in the Empire State and because the parties' connections are stronger to New York than Florida, according to the judge.

She added that just because BuzzFeed can apply the fair reporting privilege, that does not mean

the case is over, because application of the privilege depends on whether the facts regarding the underlying official actions — the classified briefings and the FBI investigation — are true.

“At this stage, the court takes as true that the official actions described in the CNN article actually occurred,” Judge Ungaro said. “If discovery reveals that they did not, then there was, in fact, no official action.”

Gubarev, who is the CEO of XBT Holding SA, an internet hosting and web development company based in Luxembourg, filed the defamation suit against BuzzFeed and Editor-in-Chief Ben Smith in February 2017.

His complaint centers around a portion at the end of the dossier asserting that XBT and Florida-based subsidiary Webzilla Inc. had been transmitting viruses, planting bugs, stealing data and generally conducting “altering operations” against the Democratic Party’s leadership. According to the complaint, the dossier mentioned Gubarev specifically, calling him one of the “significant players” in the operations.

Gubarev, however, says none of these statements has “any basis in fact whatsoever.”

The lawsuit in Florida has spawned an ancillary proceeding in the U.K., where Gubarev sought to depose Steele about his dossier. Steele fought the request, but last month, an English judge said Steele's lawyers had failed to show how the U.K.'s national security would be imperiled by limited questioning of Steele, and approved a new, scaled-back list of topics Gubarev's attorneys can put to him. BuzzFeed has appealed that decision on the grounds that the new limited scope of questioning precludes the news company from questioning Steele.

BuzzFeed spokesman Matt Mittenenthal called Judge Ungaro's ruling a “victory for the American free press and the First Amendment.”

“As the judge writes, a document that was circulating at the highest levels of government, under active investigation by the FBI and briefed to two successive presidents, falls squarely into the category of ‘official action’ by our government,” Mittenenthal said. “As we have argued from the start, the public’s interest in understanding the investigation into whether the Russian government compromised and colluded with Donald Trump is, and has always been, quite clear.”

Gubarev’s attorney Evan Fray-Witzer said he was thrilled that the court struck the neutral reporting privilege from BuzzFeed’s defenses.

He added that though the court found that the link to the CNN story might support an application of the fair report privilege, the judge also said it was premature to make that determination.

“We’re confident that, when discovery is complete, there isn’t going to be any evidence that the December memo — which is the only memo that mentioned Gubarev, Webzilla or XBT — was the subject of any ‘investigation’ at the time BuzzFeed published the dossier,” Fray-Witzer said.

The plaintiffs are represented by Evan Fray-Witzer of Ciampa Fray-Witzer LLP, Brady J. Cobb of Cobb Eddy PLLC and Valentin D. Gurvits and Matthew Shayefar of Boston Law Group PC.

BuzzFeed is represented by Katherine M. Bolger, Adam Lazier and Nathan Siegel of Davis Wright Tremaine LLP and Roy Black and Jared Lopez of Black Srebnick Kornspan & Stumpf PA.

The case is Gubarev et al. v. BuzzFeed Inc. et al., case number 0:17-cv-60426, in the U.S. District Court for the Southern District of Florida.

--Additional reporting by Nathan Hale. Editing by Orlando Lorenzo.

Update: This article has been updated to add comment from Gubarev's counsel.