

# Fox News, Giuliani Can't Exit Smartmatic Defamation Suit

By **Y. Peter Kang**

Law360, New York (February 14, 2023, 8:06 PM EST) -- A New York appeals court declined Tuesday to toss a defamation suit alleging Fox News aired bogus claims that Smartmatic's voting technology software was used to rig the 2020 presidential election, saying the company's defamation claims were properly alleged against Rudy Giuliani and hosts Maria Bartiromo and Lou Dobbs.

A five-judge Appellate Division panel for the First Department **affirmed** the denial of motions to dismiss by Fox News, Bartiromo and Dobbs. The panel also reinstated two previously dismissed claims against Giuliani, former President Donald Trump's attorney, who allegedly made defamatory statements while a guest on various shows, and ruled that host Jeanine Pirro was erroneously cut loose from the case.

U.K.-based Smartmatic sued Fox News, the aforementioned individuals and attorney Sidney Powell in 2021 over accusations against the voting company that were aired on Fox News in support of the former president's false claim that the 2020 election was stolen, including that Smartmatic was founded by the late Venezuelan president Hugo Chavez for the purpose of stealing elections. Claims against Powell were **dismissed by the trial court** in March; she was not a party to the appeal.

Fox News **asserted on appeal** that the defamation suit must be dismissed because it violates constitutional free speech rights and broader free press protections under New York law.

The panel disagreed, saying Smartmatic's "meticulously detailed complaint" properly alleged that Fox News, Dobbs and Bartiromo did more than just relay that Trump's camp was falsely claiming the election was rigged.

"The complaint alleges in detailed fashion that in their coverage and commentary, Fox News, Dobbs, and Bartiromo effectively endorsed and participated in the statements with reckless disregard for, or serious doubts about, whether the assertions or implications that plaintiffs had participated in election fraud had any basis in truth or were supported by any reliable evidence," the panel said in a four-page opinion.

The appeals court said Smartmatic plausibly alleged that the news outlet, Dobbs and Bartiromo stated on air that Smartmatic's election software was used in Dominion machines to switch votes nationwide despite publicly available information establishing that Smartmatic's software was only used in California.

Because the claims against Pirro alleged that she made similar defamatory statements with actual malice, those claims must be reinstated, the panel said.

However, the panel dismissed claims against Fox News' parent company, Fox Corp., finding that there were no allegations that the latter "played an affirmative role in the publication of the challenged defamatory statements" or that Fox Corp. had complete control over its subsidiary. The panel's dismissed those claims without prejudice and granted Smartmatic leave to try again in an amended complaint.

The panel reinstated two claims against Giuliani, saying they were erroneously classified as "product disparagement" claims that required a pleading of special damages.

An attorney for Smartmatic, Erik Connolly, said in a statement Tuesday that the defendants made false statements that Smartmatic's voting technology was widely used to switch votes in the 2020 election.

"They knew that Smartmatic's technology was used only in Los Angeles County and there was no support for making their outrageous claims," he said in the statement. "We look forward to holding Fox News and the other defendants accountable in court. Smartmatic feels gratified by the decision of the New York appellate court, which has rejected all calls for dismissal by Fox News and its cohorts."

Counsel for Fox News, Dobbs, Bartiromo, Giuliani and Pirro did not immediately respond to requests for comment Tuesday.

According to Smartmatic's suit, the defendants "decided to make Smartmatic the villain in their story" by pushing unfounded election fraud conspiracy theories against the company.

"With this action, Smartmatic says: Enough," the company wrote. "Facts matter. Truth matters. Defendants engaged in a conspiracy to spread disinformation about Smartmatic. They lied. And they did so knowingly and intentionally."

Meanwhile, Fox argued that the company was trying to "saddle Fox with billions of dollars of liability for covering all sides of a vigorous debate of profound national importance."

"Fox did exactly what the First Amendment protects: It ensured the public had access to newsmakers and unquestionably newsworthy information that would help foster uninhibited, robust and wide-open debate on rapidly developing events of unparalleled importance," the network wrote in its dismissal bid.

Justices Rolando Acosta, Peter Moulton, Troy Webber, Martin Shulman and John Higgitt sat on the First Department panel.

Smartmatic is represented by J. Erik Connolly, Edward C. Wipper, Nicole E. Wrigley and David D. Pope of Benesch Friedlander Coplan & Aronoff LLP.

Fox News, Fox Corp., Dobbs, Bartiromo and Pirro are represented by Paul Clement and Erin Murphy of Clement & Murphy PLLC, K. Winn Allen of Kirkland & Ellis LLP and Steven Mintz of Mintz & Gold LLP.

Giuliani is represented by Adam S. Katz and Louis Russo of Russo Law LLC and Joseph Sibley of Camara & Sibley LLP.

The case is Smartmatic USA Corp. et al. v. Fox Corp. et al., case number 2022-01291 151136/21, in the New York Supreme Court Appellate Division, First Department.

--Additional reporting by Stewart Bishop and Hailey Konnath. Editing by Peter Rozovsky.