

Smartmatic Defeats Fox News, Giuliani Dismissal Bids In NY

By **Hailey Konnath**

Law360 (March 8, 2022, 11:42 PM EST) -- A New York state judge on Tuesday refused to throw out Smartmatic's defamation claims against Fox News, a pair of network hosts and attorney Rudy Giuliani, ruling that there's a "substantial basis" for the voting technology company's claim that Fox News "turned a blind eye to a litany of outrageous claims."

At the same time, New York Supreme Court Judge David B. Cohen found that his court didn't have jurisdiction over lawyer Sidney Powell and also threw out Smartmatic's claims against network host Jeanine Pirro.

Specifically, the judge said in a 61-page decision that Smartmatic's claims are sturdy enough to survive Fox News' motion to dismiss. Smartmatic "meticulously set forth the allegedly defamatory language used by the defendants" in its complaint, he noted.

Powell, Giuliani, Fox News, Pirro, host Maria Bartiromo and former host Lou Dobbs all lodged **motions to dismiss** last year, looking to escape Smartmatic's \$2.7 billion defamation suit. Florida-based Smartmatic has **contended** that they defamed it by airing unfounded accusations from former President Donald Trump and his supporters that the company helped rig the 2020 election in favor of President Joe Biden.

But the network and its hosts argued they were **merely reporting and discussing** newsworthy accusations made by others.

Judge Cohen said Tuesday that, at this stage in the litigation, plaintiffs aren't required to demonstrate actual malice by clear and convincing evidence. Because the statements broadcasted, if false, defamed Smartmatic in its profession and/or trade and accused them of committing a serious crime, they are defamatory per se, Judge Cohen said.

"Even assuming that Fox News did not intentionally allow this false narrative to be broadcasted, there is a substantial basis for plaintiffs' claim that, at a minimum, Fox News turned a blind eye to a litany of outrageous claims about plaintiffs, unprecedented in the history of American elections, so inherently improbable that it evinced a reckless disregard for the truth," the judge said.

Similarly, the statements allegedly made by Bartiromo and Dobbs, if false, are defamatory, Judge Cohen said.

"Additionally, this court finds that plaintiffs have adequately pleaded a substantial basis for their claim that Bartiromo acted with reckless disregard for the truth or falsity of the statements she made, and/or with a high degree of belief that the said information was false," he said.

The same is true for the claim against Dobbs, Judge Cohen said.

And Giuliani's "barrage of statements" about Smartmatic "adequately provide a substantial basis for its claim that he acted with actual malice," Judge Cohen said, denying the lawyer's motion to dismiss.

However, Pirro's statements on a November 2020 broadcast weren't defamatory, Judge Cohen held.

"Although Pirro states elsewhere that the Democrats 'stole votes' she does not specify that the votes

were stolen by using [Smartmatic] software," he said. "Therefore, the complaint is dismissed as against Pirro."

And there is no jurisdiction over Powell in New York because her contacts there aren't significant, he said.

"Powell has only minimal and attenuated New York contacts," Judge Cohen said. "Her only defamation-related contacts with this state were her appearances on Fox News, which is broadcast from its studios in New York City, and there is no allegation that she came to New York to personally appear on Fox News."

Smartmatic said in a statement that it welcomed the decision, which means the case will proceed to discovery.

"The defamatory statements by Fox News about Smartmatic caused catastrophic damage to its business and reputation in the United States and worldwide," said J. Erik Connolly, an attorney representing the company. "This lawsuit will help to undo that damage."

Smartmatic added in the statement that it had already filed a lawsuit against Powell in Washington, D.C., in case the New York court decided it lacked jurisdiction. The D.C. court has held that it does have jurisdiction over Powell in other litigation, Smartmatic noted.

"Smartmatic will continue to pursue its claims against Ms. Powell, either by appeal in New York or in D.C.," the company said.

Fox News Media said in a statement Tuesday that the network is gratified that Judge Cohen dismissed the claims against Pirro at this early stage, but it still plans to appeal the ruling immediately.

"We will also continue to litigate these baseless claims by filing a counterclaim for fees and costs under New York's anti-SLAPP statute to prevent the full-blown assault on the First Amendment, which stands in stark contrast to the highest tradition of American journalism," Fox News said.

Powell and counsel for Dobbs, Bartiromo and Giuliani didn't immediately respond to requests for comment late 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.

Smartmatic CEO Antonio Mugica said in Tuesday's statement that the alleged lies underlying the case had consequences, not only for his company but for the integrity of elections and the people who administer them."

"Fox's reckless disregard for truth has caused debilitating harm to our ability to conduct our business globally as well as in the United States," Mugica said. "We look forward to our day in court."

Smartmatic is represented by J. Erik Connolly and Nicole E. Wrigley of Benesch Friedlander Coplan & Aronoff LLP.

Fox News, Dobbs, Bartiromo and Pirro are represented by Paul D. Clement, Erin E. Murphy, K. Winn

Allen and Mark R. Filip of Kirkland & Ellis LLP and by Steven G. Mintz of Mintz & Gold LLP.

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

The case is Smartmatic USA Corp. et al. v. Fox Corp. et al., case number 151136/2021, in the Supreme Court of the State of New York, County of New York.

--Editing by Jay Jackson Jr.