

Touching a Hot Stove, Twice: Florida Court Dismisses Putative Defamation Action

By Matthew J. Feeley, Mark R. Hornak,
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On November 4, 2009, Judge Thomas H. Barkdull, III of the Circuit Court of the 15th Judicial Circuit in and for Palm Beach County, Florida granted motions to dismiss the defamation action brought by convicted felons Joseph Serian (Serian) and Robert Sensi (Sensi) attacking the content of the book, *America at Night: The True Story of Two Rogue CIA Operatives, Homeland Security Failures, Dirty Money, and a Plot to Steal the 2004 U.S. Presidential Election -- by the Former Intelligence Agent Who Foiled the Plan (America at Night)*. *Robert Sensi and Joseph Serian v. Engin K. Yesil, et al*, 50 2009 CA 003672 AO. Judge Barkdull's decision is the most recent chapter in Serian and Sensi's legal efforts against the author and publisher of *America at Night*. The August 2009 edition of this publication included a report detailing the dismissal of an earlier and related defamation litigation brought by Serian in the United States District Court for the Northern District of West Virginia.

Background

America at Night was written by Larry Jackson Kolb (Kolb) and was published by Penguin Group (USA) Inc. (Penguin Group). In *America at Night*, Kolb recounts that he was recruited by the Department of Homeland Security to help investigate two convicted white collar criminals, Sensi and Richard Hirschfeld (Hirschfeld), each with connections to the CIA, and that his investigation led him to discover and foil a conspiracy to defeat and smear the John Kerry 2004 presidential campaign by charging the campaign with false links to Al Qaeda. (Kolb is also the author of *Overworld: The Life and Times of a Reluctant Spy* (New York: Riverhead Books, 2004). Prior to his career as an author, Kolb worked closely with Muhammad Ali and Adnan Khashoggi and as an intelligence operative along side

Miles Copeland, who was involved in the formation of the CIA).

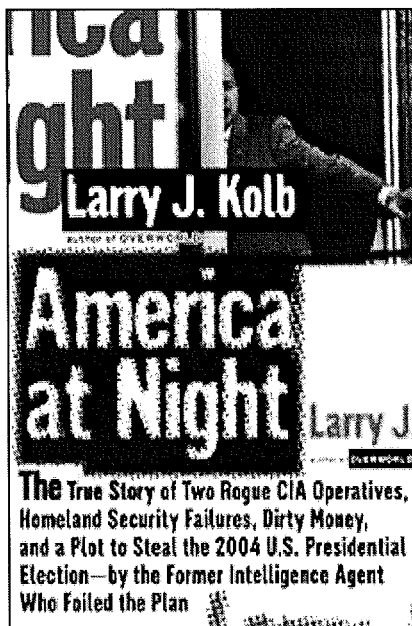
Serian, like a number of individuals acquainted with Sensi and Hirschfeld, is mentioned several times throughout *America at Night*. As recounted in the book, Serian was described by others as "very crazy," "a glib liar," "a bad businessman," and "a crook."

The West Virginia Federal Case

As reported here in August 2009, Serian filed a *pro se* lawsuit, on behalf of himself and Sensi, against Kolb and Penguin Group in the U.S. District Court for the Northern District of West Virginia. *Serian v. Penguin Group (USA), Inc. et al*, 1:08-cv.74 (the West Virginia Case). Serian brought claims for defamation and for the illegal disclosure of the identity of a covert agent under 50 U.S.C. §§ 421-26. Chief Judge Irene Keeley, *sua sponte*, dismissed the claims brought on behalf of Sensi because Serian, as a *pro se* litigant, did not have standing to represent Sensi and dismissed the 50 U.S.C. §§ 421-26 claim because the statute does not provide a private right of action. Thereafter, Kolb and Penguin Group filed a motion to dismiss the lawsuit. On July 23, 2009, Chief Judge Keeley dismissed the West Virginia Case. 2009 WL 2225412 (N.D.W.Va. July 23, 2009).

In dismissing the West Virginia Case, Chief Judge Keeley took judicial notice of the various federal judgments of conviction against Serian for obstruction of justice, conspiracy, mail fraud, wire fraud, fraud of financial institutions, delivery of misbranded devices as well as a civil judgment expressly finding that Serian lied to a court. In recognizing these judgments, Chief Judge Keeley held Serian could not possibly prove a claim for defamation because the statements that he was a "crook" and a "glib liar" were conclusively true. Chief

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Judge Keeley also found that the characterizations of Serian as "very crazy" and a "bad businessman" were non-actionable subjective opinion.

The Florida State Court Action

Perhaps sensing that he was on the verge of dismissal in the West Virginia Case, on January 27, 2009, Serian, this time with Sensi's full involvement, attempted to move the fight to Florida and filed a *pro se* lawsuit against Engin Yesil (Yesil), Eial "Yali" Golan (Golan), Kolb and Penguin Group in the Circuit Court of the 15th Judicial Circuit in and for Palm Beach County, Florida. Serian and Sensi named Yesil and Golan under the theory that they encouraged and facilitated Kolb's publication of *America at Night* to bolster their own images at the expense of Serian and Sensi. Serian and Sensi brought a claim for "Emotional Distress Resulting from Defamation of Character" against all the defendants. In addition, Sensi brought a claim for violation of 50 U.S.C. §§ 421-26, alleging that the book had unlawfully "outed" him as a CIA operative, and asserting a private right of action under that statute.

Motion to Dismiss in Florida

Penguin Group and Kolb filed an immediate motion to dismiss, asserting that no relief could be granted because, *inter alia*, Serian and Sensi were guilty of blatant forum shopping as they only filed the Florida action subsequent to receiving several preliminary negative rulings in the West Virginia Case. Penguin Group and Kolb argued that because the West Virginia Case was dismissed Serian and Sensi's instant claims were barred by the doctrines of *res judicata* and *collateral estoppel*.

Penguin Group and Kolb also argued that the subject statements in *America at Night* were either conclusively true or non-actionable opinion. Penguin Group and Kolb also contended that Sensi's claim under 50 U.S.C. §§ 421-26 failed as a matter of law because the statute did not provide a private right of action.

Yesil filed a separate motion to dismiss and argued, *inter alia*, that Serian and Sensi failed to alleged that Yesil made any publication and that 50 U.S.C. §§ 421-26 failed to provide a private right of action.

Decision of the Florida Court

After hearing oral argument, on November 4, 2009, Judge Barkdull issued a brief but strongly worded Final Order granting the defendants' motions to dismiss. Judge Barkdull expressly held that Sensi and Serian attempted to engage in inappropriate forum shopping in that they previously filed the same claims in the West Virginia Case. The Court held that Serian's claims for "emotional distress" based on defamation were in reality defamation claims and were precluded by *res judicata* and *collateral estoppel* and that any defamation claim Sensi now wished to pursue could only be heard, if at all, in federal district court in West Virginia. Judge Barkdull also held that 50 U.S.C. §§ 421-26 did not provide a private right of action and did not allow a private attorney general appointment to prosecute such a claim.

Judge Barkdull's decision is particularly valuable in that it endorses Chief Judge Keeley's decision in the West Virginia Case to take judicial notice of Serian's felony convictions even though they were outside the "four corners" of the complaint. This concept is particularly important in the defamation context as it allows defendants to challenge the plausibility of allegations under *Ascroft v. Iqbal*, 129 S.Ct. 1037, 1055 (2009) with reference to conclusively established facts from unrelated proceedings. In dismissing Serian's claims with prejudice, Judge Barkdull relied on Serian having had a full opportunity to litigate his claims in the West Virginia Case. Judge Barkdull's treatment of Sensi is likewise notable; although Judge Barkdull did not foreclose Sensi from attempting to pursue potential defamation claims, Judge Barkdull ordered that any such claims by Sensi had to be brought only in the Northern District of West Virginia, as Sensi had consented to Serian's efforts to bring claims on his behalf in the West Virginia Case. The final import of Judge Barkdull's decision is its clear intolerance for forum-shopping plaintiffs that attempt to hedge their bets with the filing of multiple claims in different jurisdictions based on the same operative facts and legal theories, even when both state and federal forums have been invoked.

Matthew J. Feeley (Miami) Mark R. Hornak and Kathleen Jones Goldman (Pittsburgh) of Buchanan Ingersoll & Rooney PC represented Larry Jackson Kolb and Penguin Group USA, Inc. Larry A. Stumpf, Jared Lopez and Jenifer J. Soulikias of Black, Srebnick, Kornspan, & Stumpf, P.A. represented Engin K. Yesil. Plaintiffs Joseph Serian and Robert Sensi appeared pro se.