

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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_____AD3d_____

Submitted - June 7, 2012

REINALDO E. RIVERA, J.P.
ANITA R. FLORIO
RANDALL T. ENG
SHERI S. ROMAN, JJ.

2011-08199

DECISION & ORDER

Barry Goldberg, appellant, v Steven Levine, respondent.

(Index No. 12509/10)

Barry Goldberg, Goshen, N.Y., appellant pro se.

Jacobowitz & Gubits, LLP, Walden, N.Y. (Tobias A. Lake and J. Benjamin Gailey of counsel), for respondent.

In an action, inter alia, to recover damages for defamation, the plaintiff appeals from an order of the Supreme Court, Orange County (Ecker, J.), dated July 19, 2011, which granted the defendant's motion, inter alia, pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint.

ORDERED that the order is affirmed, with costs.

The plaintiff commenced this action, inter alia, to recover damages for defamation based upon certain written and oral statements allegedly made about him by the defendant at town board meetings and in a local newspaper. The Supreme Court granted the defendant's motion, inter alia, pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint. The plaintiff appeals, and we affirm.

In determining whether a complaint states a cause of action to recover damages for defamation, the dispositive inquiry is whether a reasonable listener or reader could have concluded that the statements were conveying facts about the plaintiff (*see Gross v New York Times Co.*, 82 NY2d 146, 152; *600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d 130, 139, *cert denied* 508 US 910; *Liere v Paini*, 93 AD3d 825, 826). "Since falsity is a necessary element of a defamation cause of action and only 'facts' are capable of being proven false, 'it follows that only statements alleging

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facts can properly be the subject of a defamation action” (*Gross v New York Times Co.*, 82 NY2d at 152-153, quoting *600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d at 139).

Here, certain of the defendant’s statements, which were allegedly made at Town Board meetings and in a local newspaper, were “rhetorical hyperbole” and expressions of individual opinion (*Gatto v Callaghan*, 231 AD2d 552, 552 [internal quotation marks omitted]; see *Brian v Richardson*, 87 NY2d 46, 54; *600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d at 144). Therefore, accepting these allegations in the complaint as true (see *Leon v Martinez*, 84 NY2d 83, 87-88), they fail to state a cause of action to recover damages for defamation (see *Springer v Almontaser*, 75 AD3d 539, 541).

Moreover, the documentary evidence submitted by the defendant demonstrated that the defendant’s statements that hazardous or toxic substances were located on the plaintiff’s property were substantially true. “Truth is an absolute defense to an action based on defamation” (*Heins v Board of Trustees of Inc. Vil. of Greenport*, 237 AD2d 570, 571; see *Kamalian v Reader’s Digest Assn., Inc.*, 29 AD3d 527, 528). Thus, the documentary evidence submitted by the defendant conclusively establishes a defense to the claim as a matter of law (see *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326).

The plaintiff’s remaining contentions are without merit.

Accordingly, the Supreme Court properly granted the defendant’s motion, inter alia, pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint.

RIVERA, J.P., FLORIO, ENG and ROMAN, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court