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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES
Justice

PART 17

-----X

STEVE AWAD,

Plaintiff,

-against-

Index No. 20073/01
Motion Date: 3/13/02
Motion Cal. No. 24

DANIEL K. CHOU,

Defendant.

-----X

The following papers numbered 1 to 13 read on this application by defendant for an order pursuant to CPLR 3211, and cross-motion by plaintiff for an order granting him leave to amend his complaint. .

PAPERS
NUMBERED

Order to Show Cause-Affirmation-Exhibits.....	1-4
Affidavit of Service.....	5
Notice of Cross-Motion-Affirmation-Exhibits.....	6-9
Reply Affirmation-Exhibits.....	10-13

Upon the foregoing papers, it is ordered that defendant's application for an order dismissing the complaint, pursuant to CPLR 3211, on the grounds that service was defective, the pleadings lack particularity as required by CPLR 3016, and the complaint fails to state a cause of action, is granted; and the cross-motion by plaintiff for an order granting him leave to amend his complaint, is denied, for the following reasons:

Defendant claims that plaintiff served the summons and complaint upon defendant at his place of business, in an unmarked Airborne Express envelope that was opened and delivered to defendant by an employee. Plaintiff's service was pursuant to CPLR 308(2), which requires that service shall be made in the following manner:

by delivering the summons within the state to a person of suitable age and

discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served...

According to defendant, the follow-up mailing was not in accordance with CPLR 308(2), since the envelope containing the summons and complaint did not bear the required legend, it was not delivered via first class mail, and it contains an attorney's return address. Plaintiff argues that the service of the summons and amended complaint was proper. This argument fails to address the improper service of the summons and complaint. Accordingly, since the plaintiff failed to comply with the prescribed conditions of CPLR308(2), personal jurisdiction over the defendant was not acquired, and the complaint must be dismissed. Pesner v Fried, 166 AD2d 560 (2d Dept. 1990.)

Additionally, the complaint must be dismissed for failure to satisfy the pleading requirements of CPLR 3016(a). This section requires that, " In an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally." In the instant case, the complaint in paragraph seven states that defendant " explicitly accusing plaintiff in said flier of being a thief, racist, and dictator with respect to plaintiff's relationship with plaintiff's employees and coworkers." The complaint in paragraph eight states that defendant described " plaintiff in a letter... as overbearing, despotic, unethical, undignified, and uncontrollably violent in plaintiff's dealings with plaintiff's employees and coworkers." In paragraph nine of the complaint, defendant is alleged to have questioned "the veracity of plaintiff's character, in said letter to Emil Akhnoukh, by expressly describing and falsely

accusing plaintiff of lying." The court finds that these allegations fail to set forth the specific words that defendant allegedly used to defame plaintiff. Significantly, the complaint is drafted in a manner that merely claims that defendant used descriptive terms, rather than any particular word. Moreover, the complaint fails to sufficiently provide the time, place and manner of the purported defamatory statement. Accordingly, the complaint fails to state a cause of action to recover damages for defamation and is dismissed. Acosta v Fidelity New York, 227 AD2d 424 (2d Dept. 1996.); Grynberg v Alexander's Inc., 133 AD2d 662 (2d Dept. 1987.)

Finally, the complaint fails to state a cause of action for defamation. "Whether particular words are defamatory presents a legal question to be resolved by the court in the first instance...." (Aronson v Wiersma, 65 NY2d 592, 593; Golub v Enquirer/Star Group, Inc., 89 NY2d 1074; Tracy v Newsday, Inc., 5 NY2d 134; Brach v Congregation Yetev Lev D'Satmar, Inc., 265 AD2d 360.) "The words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction * * *." (Aronson v Wiersma, *supra*, 593; *see*, Brach v Congregation Yetev Lev D'Satmar, Inc., *supra*.) "Generally, a written statement may be defamatory 'if it tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number of the community'* * *." (Golub v Enquirer/Star Group, Inc., *supra*, 1076, quoting Mencher v Chesley, 297 NY 94, 100.) In the case at bar, the alleged defamatory words were made during a heated election campaign for the Presidency of a local union chapter. The average person hearing or reading the alleged words of defendant, when construed in their full context, would find that they constituted personal opinion and rhetorical hyperbole rather than objective fact, and thus are not actionable. Chernick v Rothstein, 204 AD2d 508 (2d Dept. 1994.) Furthermore, the plaintiff can be viewed as a public figure, and as such, the complaint also fails for not

setting forth with convincing clarity that the words were made by defendant in actual malice. *See, McKinnon v Smith*, 52 Misc. 2d 349 (Queens County, 1966) aff'd 32 AD2d 615(2d Dept. 1969); *Veella v Benedetto*, 83 AD2d 465 (1st Dept. 1981.) Accordingly, the court finds as a matter of law that the alleged defamatory statements are not actionable.

In light of the above, the court shall not address plaintiff's cross-motion.

Dated: March 20, 2002

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ORIN R. KITZES, J.S.C.