

Pitsiokos v Kozakiewicz

2002 NY Slip Op 30149(U)

June 13, 2002

Sup Ct, Suffolk County

Docket Number: 01-21970

Judge: Edward D. Burke

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. EDWARD D. BURKE
Justice: of the Supreme Court

MOTION R/D : (#001) 11-9-01
 (#002) 1-25-02
 (#003) 2-21-02

ADJ. DATE : 05-15-02
Mot. Seq. : # 001 - MG
 # 002 - MD
 # 003 - MG

*PRELIMINARY CONFERENCE
SCHEDULED FOR 07-03-02*

JUDITH W. PITSIOKOS,

Plaintiff,

- against -

ROBERT F. KOZAKIEWICZ, individually
THE COMMUNITY JOURNAL and
RIVERHEAD GOP,

Defendants.

PETER PITSIOKOS, ESQ.

Attorney for Plaintiff
124 Hidden Pheasant Path
Wading River, New York 11792

WILLIAM F. ANDES, JR., ESQ.

*Attorney for Defendant KOZAKIEWICZ
AND RIVERHEAD GOP*
224 Griffing Avenue, PO Box 359
Riverhead, New York 11901

CLIFTON BUDD & DEMARIA, LLP

Attorneys for Defendant COMMUNITY JOURNAL
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New York, New York 10170

Upon the following papers numbered 1 to 53 read on this motion to dismiss and for sanctions: motion to preclude and for sanctions: and motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers (#001) 1 - 11; (#002) 23-32; (#003) 41 - 47; Notice of Cross Motion and supporting papers (#001) 12 - 20; (#002) 33 - 36; (#003) 48 - 51; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers (#001) 21 - 22; (#002) 37 - 40; (#003) 52 - 53; Other _____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion (#001) by defendant, The Community Journal, for an order, pursuant to CPLR 3211(a)(7), dismissing the complaint as to it, and for costs and sanctions; the motion (#002) by defendants, Robert F. Kozakiewicz and Riverhead GOP, for an order precluding plaintiff from offering evidence at trial and for sanctions; and the motion (#003) by defendant, Riverhead **GOP**, for an order, pursuant to CPLR 3211(a)(8), dismissing the complaint as to it, are consolidated for the purposes of this determination; and it is further

ORDERED that the motion (#001) by defendant, The Community Journal, for an order, pursuant to CPLR 3211(a)(7), dismissing the complaint as to it and for costs and sanctions pursuant to 22 NYCRR 130-1.1 is granted, and it is further

ORDERED that the motion (#002) by defendants, Robert F. Kozakiewicz and Riverhead GOP, for an order precluding plaintiff from offering evidence at trial and for sanctions is denied, and it is further

ORDERED that the motion (#003) by defendant, Riverhead GOP, for an order, pursuant to CPLR 3211(a)(8), dismissing the complaint as to it, is granted as follows.

Plaintiff commenced this action sounding in defamation for allegedly false statements made about her, relative to her candidacy in the Republican primary for the public office of Town Supervisor for the Town of Riverhead. The gravamen of plaintiff's argument is that her position regarding the density and level of development in the Town was central to her candidacy and that defendants' false statements intimating that she had ties to developers and profited therefrom, were politically motivated and caused her to lose the election. Plaintiff and her husband, Peter Pitsiokos, are attorneys who practice law together in Wading River. Defendant The Community Journal (hereafter the Journal), is a small community paper also in Wading River. Plaintiff alleges that the Journal's editor and she have an adversarial history. As to the Journal, the allegedly defamatory statements were published in an editorial in the August 23, 2001 edition and state:

Judi Pitsiokos, wife of Peter Pitsiokos, last known to be the attorney for Jan Burman, developer of Grumman property; Peter Pitsiokos, last known to be the attorney for Meadowcrest Homes, developer currently building Meadowcrest 3 off Wading River-Manor Road, Wading River; Peter Pitsiokos, last known to have bartered his house closing legal skills in order for Judi (with an "I") Pitsiokos to buy a house, and over **an** acre of grounds, complete with horse stable and preserved pond in the back-yard for just \$10,000.00 in Wading River in 1998.

Plaintiff alleges that these statements were made with malice', i.e. with intentional or reckless disregard for the truth, and injured her reputation and standing in the general community as well as the legal community.

As a general rule, expressions of opinion are cloaked with the absolute privilege of speech protected by the First Amendment (*Gertz v Robert Welch, Inc.*, 418 US 323 [1974]), and "false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions" (*Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 397 NYS2d 943 [1977] *cert denied*

¹Because the plaintiff is also a public figure she must plead and establish, with convincing clarity, actual malice, i.e., that any defamatory falsehood was published with knowledge of its falsity or with reckless disregard of the truth (see, *New York Times Co. v Sullivan*, 376 U.S. 254, 84 S.Ct. 710 [1964]).

434 US 969). The Court of Appeals has applied a four-part test to distinguish opinion from fact (*Steinhilber v Alpohonse*, 68 NY2d 283, 287, 508 NYS2d 901 [1986]): (1) an assessment of whether the specific language in issue has a precise meaning which is readily understood or whether it is indefinite and ambiguous; (2) a determination of whether the statement is capable of being objectively characterized as true or false; (3) an examination of the full context of the communication in which the statement appears; and (4) a consideration of the broader social context or setting surrounding the communication including the existence of any applicable customs or conventions which might signal to readers or listeners that what is being read or heard is likely to be opinion, not fact. Here, these statements were clearly asserted as facts not opinion, notwithstanding that they were made under an editorial banner (*compare, Jaszai v Christie's*, 279 AD2d 186, 719 NYS2d 235 [2001]). Further, based on plaintiffs assertion that she and her husband practice law together, they were made "of and concerning the plaintiff" (*see, Chicherchia v Cleary*, 207 AD2d 855, 616 NYS2d 647 [1994]).

Plaintiff offers that her husband, Peter Pitsiokis, has not represented Meadowcrest Homes for five years; that he never bartered his legal skills to buy the house; that the \$10,000 price for the undeveloped two-acre parcel was a fair price at the time it was negotiated²; that the home was built at her own expense; that the barn was not built until 1999; and that the property does not contain a pond. The Journal counters with evidence that Peter Pitsiokos was an officer of the developer's company in 1998, when the property was transferred; that the pond abuts the back of plaintiffs property, albeit not in the backyard; and offers that the fact that the barn was not built until 1999 is not material. The Journal also counters that the plaintiffs opposition exhibits, which are bills for construction materials, are noticeably devoid of any contractor or labor costs, supporting its conclusion that compensation for construction of the house was made in some other manner.

Proof of the truth of the defamatory words constitutes a complete defense in an action for slander (*see, Jung Hee Lee Han v State of New York*, 186 AD2d 536, 588 NYS2d 358 [1992]), regardless of the harm done by the statement (*see, DeGregorio v CBS, Inc.*, 123 Misc2d 491, 473 NYS2d 922 [Sup Ct. NY Co. 1984], and regardless of the malicious or evil motives that may have prompted the publication (*see, Sanctuary v Thackrey*, 189 Misc 724, 72 NYS2d 104 [1947], *aff'd* 273 AD 883, 78 NYS2d 361). Further, in invoking the truth defense, substantial truth is all that is required (*see, Jung Hee Lee Han v State of New York, supra; Sauders v County of Washington*, 255 AD2d 788, 680 NYS2d 743 [1998]; *Schwartzberg v Mongiardo*, 113 AD2d 172, 495 NYS2d

²Plaintiff asserts that the price for the undeveloped land was negotiated in 1993 but it was not transferred until 1998.

269 [19851). The courts finds that the first, and unrefuted³, statement regarding Peter Pitsiokos's representation of developer Jan Burman is true, and that the second statement regarding representation of developer Meadowcrest Homes (whether it was five or three years ago) is substantially true. Therefore, these two statements are not actionable.

Moreover, where, as here, defendant has made a motion to dismiss pursuant to CPLR 3211 (a)(7), the legal question for the court is "whether the contested statements are reasonably susceptible of a defamatory connotation" and, in making this determination, the court must give the disputed language a fair reading in the context of the publication as a whole (*Armstrong v Simon & Schuster*, 85 NY2d 373, 625 NYS2d 477 [1995] citing *Weinerv Doubleday & Co.*, 74 NY2d 586, 592; *James v Gannett Co.*, 40 NY2d 415, 419-20). Language will be considered defamatory, i.e., injurious to one's reputation, if it tends "to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society" (*Kimmerle v New York Evening Journal*, 262 NY 99, 102 [19331). Here, there is no reading of the first two statements which would give them a defamatory connotation. Legal representation, by plaintiffs spouse and legal partner, of clients who are engaged in the development of real property cannot expose the plaintiff to public shame or induce an evil opinion of her.

The last statement has different components. Parts of the statement, i.e. the presence of the pond in or abutting the back yard, and whether the barn was present before or after the 1998 transfer are too insignificant to be actionable. As to the remaining part, i.e., that Pitsiokos used his "house closing legal skills" as consideration for obtaining the two-acre parcel and home, the court is unable to conclude that this statement is defamatory. Plaintiff denies a barter arrangement and asserts that the home was built, at her expense and direction in 1995, and that the land on which the house was built was not transferred to her until 1998 at a price agreed upon in 1993. In evaluating whether a cause of action for defamation is successfully pleaded, 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 (see, *Silsdorf v Levine*, 59 NY2d 8, 462 NYS2d 822 [1983] cert denied 464 US 831). Courts "will not strain to find defamation where none exists" (see, *Cohn v National Broadcasting Co.*, 50 NY2d 885, 887, 430 NYS2d 265 [1980] cert denied 449 US 1022). Loose, figurative or hyperbolic statements, even if deprecating to the plaintiff, are not actionable (see, *Gross v New York Times Co.*, 82 NY2d 146, 152-153 603 NYS2d 813 [1993]; *Immuno AG. v Moor-Jankowski*, 77 NY2d 235, 244, 566 NYS2d 906 [1990] cert denied 500 US 954).

³Plaintiff has not offered any opposition to The Journal's first statement, that Peter Pitsiokis is known to be the attorney for the developer of the Grumman property.

Plaintiff states that her husband ceased representing one developer five years ago. Put another way, in 1993, when she states the purchase price of \$10,000 for the two acre parcel was agreed upon, her husband was representing the developer. While the parcel's purchase price of \$10,000, not transferred for five years, infers that consideration other than cash was negotiated, it does not imply that plaintiff and her husband were dishonest or engaged in an illegal activity nor would it "induce an evil opinion" of her in the community (*see generally, Kimmerle v New York Evening Journal, supra*), notwithstanding any discomfort it may have caused plaintiff, The Journal is able to tie its conclusions to public documents, and the "political spin" that it wishes to ascribe to the transfer, which may be deprecating to plaintiffs political platform regarding development in the Town of Riverhead, does not rise to the level of libel (*see, Dillon v City of New York, 261 AD2d 34, 704 NYS2d 1 [19991; Gross v New York Times Co., supra; Immuno AG. v Moor-Jankowski, supra*).

Accordingly, the motion to dismiss the complaint as to defendant The Community Journal is granted. Further, so much of the Journal's motion which seeks sanctions is denied. Defendant has failed to show that plaintiffs actions were frivolous or that her position was taken or continued in bad faith (*see, 22 NYCRR 130-1.1; Karnes v City of white Plains, 237 AD2d 574, 655 NYS2d 615 [19971; Watson v City of New York, 178 AD2d 126, 567 NYS2d 864 [1991]*).

Defendants, Robert F. Kozakiewicz and Riverhead GOP, seek (#002) an order precluding plaintiff from offering evidence at trial based upon plaintiffs failure to comply with discovery demands. Initially, the court notes that defendants' counsel did not provide an affirmation, as required by 22 NYCRR §202.7, that he attempted to resolve this issue before bringing the motion. Plaintiffs opposition 'has provided the discovery requested, with the exception of interrogatories, to which plaintiff objects (CPLR 3133). Notwithstanding defendants' lack of compliance with 22 NYCRR §202.7, the court has considered the merits of defendant's motion and plaintiffs objection and, in exercise of its discretion (*see, Selkowitz v County of Nassau, 45 NY2d 97, 408 NYS2d 10 [1978]*), determines the motion as follows.

The gravamen of plaintiffs argument is that the interrogatories are not necessary to either the prosecution or defense of this action but merely seek the identity of the person or persons who notified plaintiff of defendants' intention to publish allegedly defamatory statements. Plaintiff states the only purpose of offering that event was to permit her to state that she forewarned defendants that the statements were not true. It is incumbent upon the moving party to show that information sought by interrogatories is requested in good faith and is material to the issues involved (*see, Avco Sec. Corp. v Post, 42 AD2d 395, 348 NYS2d 409 [1973]*). The court finds that defendants' interrogatories are neither material nor necessary to the prosecution or defense of this action (*see, Neos v Neos, 212 AD2d 678, 623 NYS2d 12 [1995]*) and so much of the motion seeking to compel

or preclude is denied. Further, defendants have failed to show that plaintiffs actions were frivolous or that her position was taken or continued in bad faith (*see*, 22 NYCRR 130-1.1; *Karnes v City of White Plains*, 237 AD2d 574, 655 NYS2d 615 [1997]; *Watson v City Of New York*, 178 AD2d 126, 567 NYS2d 864 [1991]). Therefore, that portion of defendants' motion which seeks sanctions is also denied.


The final motion (#003) seeks to dismiss the complaint against the Riverhead GOP pursuant to CPLR 3211(a)(8) because of lack of personal jurisdiction. The affidavit in support is made by W. Bruce Stuke, who is the Chairman of the Riverhead Town Republican Committee. Apparently, the process server attempted to serve Mr. Stuke personally but was told by him that he "had nothing to do with the Riverhead GOP." After two more attempts at service at Mr. Stuke's address, the process server states that he affixed a copy of the summons and complaint at Mr. Stuke's residence and mailed a copy pursuant to CPLR 308 (4). Defendant argues that the Riverhead Town Republican Committee and the Riverhead GOP are two separate entities, and that Mr. Stuke, while chairman of the Riverhead Town Republican Committee, is without the authority to accept service on behalf of the Riverhead GOP. Election Law § 14-108 prohibits a political party or a committee of a political party from expending any money in aid of the designation or nomination of any person to be voted for at a primary election. Therefore, funds for such primary election candidates are held separate and apart and are separately accounted for with the State Board of Elections (*see generally*, *Werner v Nassau County Republican Committee*, 36 Misc2d 535, 232 NYS2d 617 [1962]). To that end, the Riverhead GOP, apparently the name used by the primary committee, designated a treasurer, namely Russell A. Kratoville, and a depository to accept such primary funds on its registration. Mr. Stuke was named as a person, other than the treasurer, authorized to sign checks but he is not an officer of the Riverhead GOP and is not authorized to accept service on its behalf.

It is well settled that service pursuant to CPLR 308 (4) may only be used in those instances where service under CPLR 308 (1) and (2) cannot be made with "due diligence." The due diligence requirement of CPLR 308 (4) must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received by the proper party (*see*, *Moran v Harting*, 212 AD2d 517, 622 NYS2d 121 [1995]). The affidavit and job description of the plaintiffs process server, offered in opposition, together with the moving papers, do not demonstrate that the process server attempted to ascertain the person authorized to accept service and/or the business address of the Riverhead GOP and to effectuate personal service thereon, pursuant to the provisions of CPLR 308 (1) and (2). Under these circumstances, the attempted service of the summons and complaint pursuant to CPLR 308 (4) was defective as a matter of law (*see*, *Gurevitch v Goodman*, 269 AD2d 355, 702 NYS2d 634 [2000]; *Lowinger v State University of New York Health Science Center*, 180 AD2d 606, 580 NYS2d 316 [1992]; *Moran v Harting, supra*). Accordingly, the motion to dismiss, as to the Riverhead GOP, is granted.

In summary, the action is dismissed as to defendants The Community Journal and Riverhead GOP, and the action against Robert F. Kozakiewicz is severed and shall continue; and it is further

ORDERED that a preliminary conference with respect to the continued claims shall be held on July 3, 2002 at 9:30 a.m. in the courtroom of the undersigned located in the Supreme Court Annex, 215 Griffing Avenue, Riverhead, New York. Counsel are thus directed to appear on July 3, 2002 ready for said conference.

Dated: June 13, 2002.



EDWARD D. BURKE, A.J.S.C.