

Cicccone v Shen

2007 NY Slip Op 32375(U)

July 27, 2007

Supreme Court, New York County

Docket Number: 0101316/2007

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE
Justice

PART 10

Cicccone

INDEX NO. 101316/07

MOTION DATE _____

- v -

MOTION SEQ. NO. 001

Shen

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED

AUG 01 2007

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 7/27/07

JUDITH J. GISCHE, J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X

SALVATORE CICCONE,

Plaintiff,

-against-

IRENE H.P. SHEN, EMILY FEINSTEIN,
THOMAS B.C. SHEN and POLLY N.
PASSONNEAU,

Defendants.

DECISION/ORDER

Index No.: 101316/07
Seq. No.: 001

Present:
Hon. Judith J. Gische
J.S.C.

-----X

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Def's motion [sj] w/ IS, TS affids in support, memo, exhs	1
Pltf's affirm in opp (LRS), w/ exh	2
Def's reply affirm (KJK), affid (MH), exh.	3

-----X

Upon the foregoing papers, the decision and order of the court is as follows:

This action is for slander *per se*. Defendants Irene H.P. Shen ("Irene") and Thomas B.C. Shen ("Thomas") make this pre-answer motion, pursuant to CPLR § 3111(c), seeking to convert it to a motion for summary judgment and, pursuant to CPLR § 3212, dismissing the first and fourth causes of action in the amended verified complaint. In the alternative, Irene and Thomas move, pursuant to CPLR § 3211(a)(7), to dismiss the first and fourth causes of action in the amended verified complaint on the grounds that the verified complaint fails to state causes of action against Irene and Tom on which relief can be granted against them.

Although plaintiff Salvatore Ciccone ("Salvatore") seeks to amend the summons and complaint, he has not made a cross-motion. This requested relief is, therefore, not properly before the court. CPLR § 3025(b); Marinelli v. Shifrin, 260 A.D.2d 227 (1st Dept. 1999).

The action against Polly N. Passonneau has been dismissed on consent (Order, Gische, J. dated 7/17/07).

The facts relevant to this motion, as alleged in the verified complaint, are as follows. Thomas told Irene, his daughter, that Salvatore threatened him during a telephone conversation (fourth cause of action). The exact words of the alleged threat are as follows: "I will destroy you and your Brooklyn house if this problem with Jon and Irene is not settled" (the "Statement"). Salvatore then claims that Irene repeated the Statement to defendants Passonneau and Emily Feinstein ("Feinstein") and another person (first cause of action). Salvatore also claims that Feinstein repeated the Statement to a third person (second cause of action).

Salvatore's has conceded, in opposition to this motion, that the original complaint did not allege the date, time and place of the Statement.

At bar, if the first and fourth causes of action do not survive a motion to dismiss, the motion to convert plaintiff's pre-answer motion to dismiss to one for summary judgment is rendered moot. Consequently, the court will first address the motion to dismiss.

In determining whether a cause of action is sufficient so as to withstand a motion to dismiss pursuant to CPLR § 3211, "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which

taken together manifest any cause of action cognizable at law." Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977). The facts as alleged must be accepted by the court as true for purposes of such a motion, and are to be accorded every favorable inference. Morone v. Morone, 50 N.Y.2d 481 (1980); Beattie v. Brown & Wood, 243 A.D.2d 395 (1st Dept. 1997).

Defamation is the injury to one's reputation, either by written expression (libel) or oral expression (slander). Morrison v. National Broadcasting Co., 19 N.Y.2d 453 (1967). Slander is not actionable unless the plaintiff suffers special damages or falls within one of the slander *per se* exceptions to the rule. Lieberman v. Gelstein, 80 N.Y.2d 429 (1992). The four exceptions include statements that: (1) charge the slandered with a serious crime; (2) that tend to injure the slandered or his/her trade, business or profession; (3) that accuse the slandered of having a loathsome disease; and, (4) that impute unchastity. Id. When statements fall within a "slander per se" category, the law presumes that damages will result, and they need not be alleged or proven.

It is the court's responsibility in the first instance to determine whether a statement is susceptible to the defamatory meaning ascribed to it. Golub v. Enquirer/Star Group, Inc., 89 N.Y.2d 1074 (1997); Aronson v. Wiersma, 65 N.Y.2d 592 (1985); Rejent v. Liberation Publications Inc., 197 A.D.2d 240 (1st Dept. 1994). A court should neither strain to place a particular construction on the language complained of nor should the court strain to interpret the words in their mildest and most inoffensive sense to hold them non-libelous. Rejent v. Liberation Publications, Inc., *supra*.

Since there are no special damages pled, the first and fourth causes of action can only be held sufficient if the statement "I will destroy you and your Brooklyn house if

this problem with Jon and Irene is not settled” is slanderous *per se*. Therefore, in these circumstances, the statement must either charge the plaintiff with the commission of a punishable crime or injure him in his profession. Liberman v. Gelstein, *supra*.

The court finds the Statement insufficient to constitute slander *per se*. The Statement does not reflect upon plaintiff's professional ability. Nor has plaintiff alleged any injury to his work as Executive Director to the New York Poverty Law Center, a not for profit organization created to provide *pro bono* legal services to the impoverished. Nor does the Statement charge the commission of a crime. The word “destroy” is not reasonably susceptible to the connotation of criminality. Therefore the Statement cannot be slanderous *per se*.

Even if the Statement fell within a slander *per se* exception, plaintiff has failed to plead defamation with sufficient particularity. CPLR § 3016 (a) expressly requires that the particular words complained of be set forth in the complaint. Acota v. Fidelity New York, 227 A.D.2d 424 (2nd Dept. 1996). The pleading must also allege the time, place and manner of false statement and specify to whom it was made. Dillon v. City of New York, 261 A.D.2d 34 (1st Dept. 1999). Plaintiff has failed to satisfy the pleading requirements. The time, place and circumstances of the communication have not been alleged in the complaint. The allegations are simply inadequate. Moreover, even were the court to consider the amplified proposed pleading, the allegations would still be insufficient.

Accordingly, Irene and Thomas' motion to dismiss the first and fourth causes of action in the verified complaint is hereby granted.

In light of the court's holding, the court denies that branch of Irene and Thomas' motion seeking to convert this motion to one for summary judgment, as moot.

Further, the court notes that the allegations against the remaining only remaining defendant, Feinstein, suffer from the same infirmities as discussed herein. In the interests of justice, the court, *sua sponte*, is dismissing the second cause of action and, consequently, the entire complaint is hereby dismissed. Rand v. Hearst Corp., 31 A.D.2d 406, 298 N.Y.S.2d 405 (1st Dept. 1969).

Any requested relief not expressly addressed herein has nonetheless considered by the court and is denied.

This shall constitute the order and decision of the court.

Dated: New York, New York
July 27, 2006

SO ORDERED:


HON. JUDITH J. GISCHE, J.S.C.

FILED
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