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

PRESENT: _____ PART 7

Index Number : 108625/2004

FERGUSON, KERSTI

VS

SHERMAN SQUARE REALTY CORP

Sequence Number : 008

VACATE ORDER/JUDGEMENT

INDEX NO. _____

MOTION DATE 10/4/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-4
Answering Affidavits — Exhibits	5-12
Replying Affidavits — Affirmation in Opp to Cross Motion	13
Reply Affirmation	14

Cross-Motion (4) ☒ Yes ☐ No

Upon the foregoing papers, It is ordered that this motion and cross-motion are determined according to the memorandum decision annexed hereto.

FILED
MAR 31 2008
COUNTY CLERK'S OFFICE
NEW YORK

MICHAEL D. STALLMAN
J.S.C.

Dated: 3/17/08

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

----------X

KERSTI FERGUSON and WILLIAM DeROSA,

Index No. 108625/04

Plaintiffs,

Decision and Order

- against -

SHERMAN SQUARE REALTY CORP., LEONID DUBRUSHIN, GEORGE GOKEA, ROBERT A. SIEGEL, BRIAN N. BECKER, JOEL B. RUDIN, KAYLE WATSON, HAROLD KOENIGSBERG a/k/a HAROLD KONGSBERG, DIANE WILNER, LANCE WARRICK, RAJIV GULATI, SHELLEY BENGIS, LAURA SEIGAL a/k/a LAURA HACK, LARRY SEIGAL, SHARI LEIGH GORDON, NAOMI HABER and HELEN WARRICK,

Defendants.

----------X

MICHAEL D. STALLMAN, J.:

In this defamation action, plaintiffs Kersti Ferguson (Ferguson) and William DeRosa (DeRosa) move for an order, pursuant to CPLR 5015 (a) (1), to vacate the court's dismissal, dated April 30, 2007, and to restore the action to the court's calendar. Plaintiff DeRosa was a resident shareholder and former board of directors president of a cooperative building owned by defendant Sherman Square Realty Corp. (Sherman Square) located at 201 West 70th Street, New York, New York. Ferguson, DeRosa's girlfriend/fiance, was also a resident of the co-op.

Cross motions for orders granting summary dismissals of the complaint as it pertains to them have been submitted by defendants Brian N. Becker (Becker), Robert A. Siegel (Siegel), Leonid Dobrushin (Dobrushin), George Gokea (Gokea), Sherman Square, Joel Rudin (Rudin), Naomi Haber (Haber), Lance Warrick and Helene Warrick. At all relevant times, Becker, Siegel, Rudin, Haber, and Lance and Helene Warrick were resident shareholders of the co-op, Dubrushin and Gokea were Sherman Square employees and Gokea was also a resident of the co-op.

By stipulation dated October 31, 2007, plaintiffs discontinued their claims against Lance Warrick and Helene Warrick; accordingly, the cross motion by these defendants is denied as moot.

Ferguson and DeRosa commenced this action, on or about October 12, 2004, by service of a summons and complaint containing 44 causes of action sounding in defamation. The action arose out of efforts involving the named defendants to remove the co-op's board of managers, including then president DeRosa, and to replace them with a board willing to conduct an independent investigation into allegations of mismanagement and financial improprieties. It is undisputed that flyers were distributed throughout the co-op explaining the reasons behind the quest to remove and replace the board of directors. Included in flyers were details of DeRosa's purported misdeeds. Furthermore, an encounter in the building's elevator, in or about February 2004, resulted in an unfortunate exchange of words between Ferguson and certain of the defendants which evolved into allegations of slander. Specifically, Ferguson alleges that Siegel, Becker, Dubrushin, Gokea, and Sherman Square knowingly spread an untrue rumor that she called Siegel a "filthy Jew," causing her to sustain injury in both her personal and professional lives.

The named defendants sought a pre-answer motion to dismiss the complaint for failure to state a cause of action and/or for a summary judgment dismissal. By orders of Justice Faviola A. Soto, before whom this matter was then pending, the pre-answer motions were either denied, or denied with leave to renew. After the orders were entered, on or about January 20, 2005 and April 5, 2005, Kayle Watson, Harold Koenigsberg, Diane Wilner, Laura Seigal, Larry Seigal, Shari Leigh Gordon, Shelley Bengis and Rajiv Gulati (the Defendant Appellants) successfully appealed the denial of their motions. By order dated June 22, 2006, the First Department reversed the motion

court's orders, and ordered dismissed the complaint as against the Defendant Appellants.

[1] Apparently, the entire matter was erroneously marked "disposed" within the court system, prompting efforts by plaintiffs to restore the matter to the active calendar. During the interim, a letter, dated August 9, 2006, was sent to plaintiffs' counsel from Fabiani, Cohen & Hall, LLP, counsel for Sherman Square, Dobrushin, Gokea, and Siegel, stating, in relevant part:

> [p]lease accept this letter as being sent from all defense counsel remaining in this case following the recent decision of the Appellate Division, First Department. In consideration of the clarity of the findings made by the Appellate Division . . . we request that you now voluntarily discontinue all claims as against the remaining defendants in this case.

Plaintiffs, however, declined the request to discontinue and sought to prosecute the balance of their action. The matter was restored to the active calendar at a conference held before this Court on January 25, 2007, and the matter was adjourned to March 22, 2007 for a compliance conference. It is undisputed that, although defense counsel was present, plaintiffs' counsel failed to appear at the compliance conference on March 22, 2007. At plaintiffs' counsel's request, the compliance conference was adjourned to April 26, 2007 at 11 a.m., at which time, defense counsel was again present and plaintiffs' counsel, once again, was not. Attempts to reach plaintiffs' counsel were unavailing. As a result, by order, dated April 30, 2007, this Court held that "[u]pon joint application of counsel for the four defendants, and upon the Court's own motion, this action is hereby ordered dismissed due to the failure of plaintiffs' counsel to appear at a compliance conference, scheduled at plaintiffs' counsel's convenience, on April 26, 2007 at 11 AM. See 22 NYCRR 202.27 (b)." Plaintiffs now move to vacate the order of dismissal and to restore the matter to the active calendar.

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[1] "All the defendants filed Notices of Appeal . . . [however only] three of the seven defense counsels in this action, filed appellate briefs in the Appellate Division, First Department" (Becker Aff. in Opp., ¶ 13, by attorney Jacqueline Cabrera of Kelly, Rode & Kelly, LLP).

It is well settled that a party seeking an order vacating a default must demonstrate a reasonable excuse and a meritorious claim or defense (Brown v Suggs, 38 AD3d 329, 330 [1st Dept 2007]; CPLR 5015 [a] [5]). To this end, plaintiffs' counsel asserts that during the week of April 23, 2007, he was engaged on trial in Supreme Court, Queens County, and that, due to a plumbing problem, there was a flood in his law office. The flooding caused the office computer containing the main calendar to be damaged and/or destroyed, and as a result, the compliance conference was, inadvertently, not calendared. Plaintiffs' counsel also states that it was his understanding that an attorney attending the conference contacted his office and spoke with an office secretary who mistakenly informed the defense attorney that no attorney was scheduled to attend the April conference because the conference had been adjourned, and that there were no attorneys present in the office at that time who were familiar with the matter. Based on the above, together with the sworn affidavits of merit, plaintiffs and their attorney ask the Court to conclude that counsel's engagement on another matter, together with any misunderstanding or misinformation on the part of the office secretary, amounts to excusable law office failure under Perez v New York City Housing Authority (290 AD2d 265 [1st Dept 2002]; Braswell v Schaffler, 12 AD3d 474 [2nd Dept 2004]; and Mediavilla v Gurman, 272 AD2d 146 [1st Dept 2000]).

Under the facts of this particular case, the court does not accept as reasonable, the sundry excuses proffered as excusable law office failure. In addition, the conclusory affidavits of merit of Ferguson and DeRosa merely repeat many of the allegations contained in the complaint which the First Department reviewed, rejected, and dismissed.

Despite defendants' August 9, 2007 request to have the remainder of the case discontinued, plaintiffs opted to prosecute their claims and sought to have the matter restored to the compliance

conference calendar in order to pursue discovery. The matter was in fact restored at the January 25, 2007 conference with counsel for all parties present, and together, the attorneys agreed to appear for a further compliance conference on March 22, 2007. However, the defense attorneys, while maintaining their position that the entire complaint should be discontinued or dismissed, appeared in court each time the matter was scheduled, and plaintiffs' counsel did not. Despite the fact that both the date and the time of the April conference were set at the request and at the convenience of plaintiffs' counsel, and despite the myriad of excuses now proffered by counsel, neither on, nor or prior to, April 26, 2007, was an affidavit of actual engagement of trial provided to this Court, nor was substitute counsel sent in his stead, nor was communication with the Court or with opposing counsel attempted.

The discovery which plaintiffs ardently claimed would yield evidence of defamation, has not progressed, and the compliance conference, the vehicle by which the Court monitors the progress of discovery (see 22 NYCRR 202.19 [b] [3]), was twice in a row rendered meaningless by plaintiffs' default. Pursuant to 22 NYCRR 202.27: "[a]t any scheduled call of a calendar or at any conference . . . (b) [i]f the defendant appears but the plaintiff does not, the judge may dismiss the action." It was on this ground that this Court dismissed the complaint based upon the two failures of plaintiffs' counsel to appear at the compliance conferences scheduled at his request and at his convenience.

Moreover, even if this Court were to accept movants' claim of law office failure, the matter would, nevertheless, be dismissed based upon plaintiffs' lack of meritorious defamation claims. The First Department made it clear that any and all claims contained in the amended complaint which stem from the offending statements printed in the flyers circulated through the co-op, are insufficient to overcome the moving defendants' qualified common-interest privilege (Ferguson v Sherman

Square Realty Corp., 30 AD3d 288, 288 - 289 [1st Dept 2006]).

The First Department also stated, in relevant part:

> given the context in which they were made, the offending statements in the flyers, which essentially sought to remove the co-op's board of directors and replace it with a board willing to conduct an independent investigation of alleged mismanagement and financial improprieties, are not susceptible to a defamatory meaning or are opinions about plaintiffs' actions accompanied by a recitation of the facts upon which they were based.
>
> The opposing affirmations of plaintiffs' attorney, alleging, inter alia, a campaign to "ruin" plaintiff DeRosa by defaming his fiancee, who worked for the cooperative's managing agent, and arguing that plaintiffs are entitled to an opportunity to conduct discovery regarding defendants' motives and knowledge, were insufficient to withstand the moving defendants' motions to dismiss and for summary judgment. Moreover, notwithstanding the pleading of purported special damages in the amended complaint, plaintiffs failed to state a cause of action for libel or slander per se. A fair reading of the offending statements in the flyers does not permit a finding that plaintiffs were accused of ineptitude in their professions or that their reputations in those professions . . . were damaged.

(id. [citations omitted]).

It is clear that the First Department viewed the offending statements, accusations, and remarks made by all parties to the action as having been made in the context of the co-op dispute. Upon a review of the record, there is no basis on which to infer that the defendants were motivated by malice, or by a desire to defame plaintiffs, or that the purported anti-Semitic remarks relate to either plaintiff's ability to perform their respective jobs as a musician (DeRosa), or as a real estate agent (Ferguson) for a non-party, or that the remarks damaged them in their professional capacities, and to the extent that plaintiffs claim otherwise, their allegations are purely speculative. Plaintiffs fail to present a viable basis for characterizing the remaining accusations as anything other than hostile rhetoric between parties involved in a highly contentious co-op dispute (see Steinhilber v Alphonse, 68 NY2d 283 [1986]).

Accordingly, it is

ORDERED that the motion by plaintiffs Kersti Ferguson and William DeRosa for an order, pursuant to CPLR 5015 (a) (1), vacating the Court's dismissal and restoring the action to the court's calendar is denied; and it is further

ORDERED that the cross motions are denied as moot.

Dated: March , 2008
New York, New York

ENTER:

J.S.C.