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

PRESENT: EDWARD H. LEHNER Justice

PART 19

Lawrence P. Simms

- v -

INDEX NO. 110982/04

MOTION DATE

MOTION SEQ. NO. 005

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 ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

motion is decided in accordance with accompanying memorandum decision

FILED
MAY 28 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: MAY 21 2008

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 19

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LAWRENCE P. SIMMS and ALISON HO,

Plaintiffs,

- against -

JULIO MARQUEZ, AL URBONT, YOLANDA PESSINA, ANDREW BRINT, and JOSEPH CECCARELLI,

Defendants.

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Index No.
110982/04

EDWARD H. LEHNER, J.:

Defendants Julio Marquez, Al Urbont, Yolanda Pessina, and Andrew Brint move for an order vacating this court's prior decision, dated October 12, 2007, that denied their motion for summary judgment on the ground that none of the parties appeared at oral argument. The court grants the motion, as discussed at the oral argument held on December 7, 2007, which also covered defendants' original motion for summary judgment, the determination of which is decided herewith.

In this defamation action, plaintiffs Lawrence Simms and Alison Ho, husband and wife, allege that defendants Julio Marquez, Al Urbont, Yolanda Pessina, Andrew Brint, and Joseph Ceccarelli – five fellow residents at the apartment building known as "The Future Condominium" (Condominium), located at 200 East 32nd Street, New

York, New York – published defamatory materials about them relating to the operation of the Condominium as well as their alleged unauthorized personal use of Condominium property. Simms is a resident of the Condominium, residing in an apartment owned by his wife, co-plaintiff Ho. Simms has acted, at various times, in the capacity as a board member of the Condominium, as have defendants Marquez, Urbont, Pessina, Brint, and Ceccarelli.

As alleged in the verified complaint, defendants published the following statements, specifically about Simms, and, as for some of them, impliedly about Ho, that plaintiffs regard as defamatory: (1) Simms removed, without authorization, a very large quantity of replacement bricks (Belgian stone pavers) from the Condominium, and the stones are now lining the driveway of his house on Long Island; (2) Simms has a ceiling fan in his apartment that was purchased together with the lobby fans; (3) Simms circulated a groundless document filled with negative assessments about the Condominium that are at odds with the Condominium's auditors, managing agent, and the rest of the board; (4) Simms now resorts to cries of fraud; (5) Simms attempts to dictate how and when other board members should resign; (6) Simms could have, as president, withheld final payment to the building's agent; (7) Simms cost the building money in the form of increased audit fees as the auditors felt that they had to investigate all of his claims; (8) Simms attempted to cause the Condominium

auditors to issue a qualified opinion which could jeopardize the Condominium's ability to refinance the mortgage; (9) Simms has a habit of running for the board, being president, being removed, resigning, running again, complaining, becoming president again, being removed, etc.; (10) Simms is primarily responsible for many building projects which have not worked, such as eliminating the double doors in the lobby and installing the revolving doors that cause staff to freeze during wintertime; (11) Simms decided to line the elevator floors with granite, so he tore off the old floor in one elevator and put stone in and then realized that the added weight made the elevator inoperative; (12) Simms installed equipment that caused several apartments to have dirty water; (13) Simms has a doomsday agenda that would lead to more assessments for capital projects that are unnecessary and may not even work, but which he would like to manage, as a substitute career; and (14) Simms interfered with Marquez, and threatened him several times.

Plaintiffs claim that the above statements are defamatory, because they imply that: (1) plaintiffs committed a crime by removing the Condominium's property (stone pavers) and plaintiffs are enjoying the stolen property that is lining their driveway at their house on Long Island; (2) plaintiffs installed a ceiling fan in their apartment that was purchased with Condominium funds; (3) Simms wrongfully charged fraud regarding the Condominium's finances; (4) Simms caused damage to

the Condominium by causing it to spend funds unnecessarily, causing a deterioration in water quality to multiple apartments, personally destroying Condominium property, and creating and managing costly but unnecessary projects; and (5) Simms prevented the treasurer from doing his job, and he repeatedly threatened him.

The alleged defamatory statements appear in the following documents written primarily by members of the board of the Condominium to the unit owners of the Condominium: (1) Memorandum, dated May 7, 2004, by Marquez, with the knowing participation of Urbont and Pessina (First Cause of Action); (2) Letter, dated May 8, 2004, by Pessina, with the knowing participation of Urbont and Marquez (Second Cause of Action); (3) Letter, dated May 13, 2004, by Marquez, with the knowing participation of Urbont and Pessina (Third Cause of Action); (4) Memorandum, dated June 17, 2004, by Brint, prior to becoming a member of the board (Fourth Cause of Action); (5) Memorandum, dated July 14, 2004, by all defendants except Ceccarelli (Fifth Cause of Action); (6) Memorandum, dated July 17, 2004, by all defendants except Ceccarelli (Sixth Cause of Action); (7) Memorandum, dated July 21, 2004, by all defendants except Ceccarelli (Seventh Cause of Action); and (8) Memorandum, dated July 23, 2004, by all defendants (Eighth Cause of Action).

The ninth cause of action is for harassment and continuous defamation against Marquez, Urbont, Pessina, and Brint. It alleges that, starting on May 7, 2004, and

continuing to the date of the complaint, defendants have actively pursued a course of conduct to harass and defame plaintiffs through the dissemination of the above-described defamatory statements.

All defendants, except Ceccarelli, now seek summary judgment dismissing the complaint on the grounds that (1) the alleged defamatory statements do not concern Ho, (2) Simms has not pled special damages, (3) the statements are protected by a qualified privilege, (4) the statements are true, (5) the statements resulted from a careful investigation and good faith as to their veracity, (6) the statements constitute opinions, and (7) the ninth cause of action is not pled with specificity.

For the reasons discussed below, the motion is granted. Whether the statements at issue are reasonably susceptible of a defamatory connotation is, in the first instance, a legal determination for the court (*Weiner v Doubleday & Co.*, 74 NY2d 586, 592 [1989], *cert denied* 495 US 930 [1990]).

As a preliminary matter, defendants' argument, that Simms must show special damages is in error, because the alleged defamatory statements appear in written form, and are not merely oral. "'Any written or printed article is libelous or actionable without alleging special damages if it tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse

in society'" (*Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 379, *rearg denied* 42 NY2d 1015, *cert denied* 434 US 969 [1977], quoting *Sydney v MacFadden Newspaper Publ. Corp.*, 242 NY 208, 211-12 [1926]; *Dillon v City of New York*, 261 AD2d 34, 37-38 [1st Dept 1999]).

Defendants' citation to decisions such as *Bell v Alden Owners* (299 AD2d 207 [1st Dept 2002], *lv denied* 100 NY2d 506 [2003]) is widely off the mark because they pertain to oral statements. In *Bell v Alden Owners*, the court determined that the "claimed defamatory remarks were alleged to have been made by unknown persons to certain unspecified individuals, at dates, times and places left unspecified" (*id.* at 208). This bears no relation to the circumstances present here in which the bulk of the alleged defamatory statements are identified with adequate specificity.

Nevertheless, many of the statements constitute expressions of opinion that are cloaked with the absolute privilege of speech protected by the First Amendment (*Jaszai v Christie's*, 279 AD2d 186 [1st Dept 2001]). These include statements such as: Simms circulated a groundless document filled with negative assessments about the Condominium that are at odds with the Condominium's auditors, managing agent, and the rest of the board; Simms now resorts to cries of fraud; Simms attempts to dictate how and when other board members should resign; Simms cost the building money in the form of increased audit fees as the auditors felt that they had to

investigate all of his claims; Simms has a doomsday agenda that would lead to more assessments for capital projects that are unnecessary and many not even work, but which he would like to manage, as a substitute career. The statements are nonactionable expressions of opinion pertaining to the management of the Condominium (*O'Loughlin v Patrolmen's Benevolent Assn. of City of N.Y.*, 178 AD2d 117, 118 [1st Dept 1991]). Similarly, the dispute as to the statement that Simms attempted to cause the Condominium auditors to issue a qualified opinion, which could jeopardize the Condominium's ability to refinance the mortgage, has not been shown here to be something that can be established as either true or false.

Many of the alleged defamatory statements are not actionable for the additional reason that they are protected by a qualified privilege in that the communications were made among persons who share a common interest. Thus, assuming that any of the statements objected to are defamatory, a party has a right to communicate such defamatory statements to others with a legitimate interest in their content (*Liberman v Gelstein*, 80 NY2d 429, 435 [1992]; *Bogoni v Simpson*, 306 AD2d 125 [1st Dept 2003]; *Kamerman v Kolt*, 210 AD2d 454, 455 [2d Dept 1994]). The qualified privilege exists here where the parties are all interested in, and concerned with, the proper functioning of the Condominium, and the alleged defamatory statements were made to other residents of the Condominium, and there is no allegation of a

publication to anyone outside the building (*Tanner & Gilbert v Verno*, 92 AD2d 802 [1st Dept], *appeal withdrawn* 60 NY2d 822 [1983]). Simms could have availed himself of an appropriate remedy by responding directly to other tenants about his job performance as a board member (*600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d 130, 138, *rearg denied* 81 NY2d 759 [1992], *cert denied* 508 US 910 [1993]).

The statement that Simms interfered with Marquez and threatened him several times is not actionable because it does not have a precise meaning that can be readily understood (*Brian v Richardson*, 87 NY2d 46 [1995]). A threat could take many forms, non-physical as well as physical. Moreover, to the extent that it implies harassment, such act is a relatively minor offense in the New York Penal Law, and the harm to the reputation of a person falsely accused of committing harassment would be correspondingly insubstantial. Thus, in the context of the related tort of slander per se, the statement would not be actionable (*Liberman v Gelstein*, 80 NY2d at 436).

As for the stone pavers, an issue in which the parties also share a common interest, Simms does not cite any express statements that any of the defendants made that he stole the stones, as opposed to the assertion that he appropriated them without authorization. Contrary to Simms's assertion, the assertion that something was taken without authorization does not necessarily imply theft; a person may believe, in good

faith, as Simms asserts here, that an object is refuse and, thus, freely available. The characterization that he took the stones without authorization may be apt, although the removal does not violate the penal code. Simms does not deny that he took the stones or that he had no authorization of the Board of the Condominium to do so. Instead, he impliedly claims that authorization was unnecessary. That is why, according to Simms, he was able to "[move] the stones in daylight, with the full knowledge of building staff," he "communicated openly" with the superintendent and the managing agent, and any of these people "would have been obliged to report anything improper to the Board" (Simms Affidavit, sworn to August 17, 2007, ¶ 81).

Moreover, the various affidavits submitted, which raise an issue of fact as to whether the stones were refuse, or whether Simms did not follow proper procedures in their removal, demonstrates that defendants had a reasonable basis to assert that the stones were removed without authorization. The allegations of the complaint itself support this determination (*see e.g.* Verified Complaint, ¶ 84). In short, the record indicates that the issue about the stone pavers may be a ground for a dispute as to their proper ownership, but not a ground for a defamation claim.

As for the ceiling fan, the complaint cites the May 13, 2004 Memorandum from Marquez to the unit owners of the Condominium that contains the following statement:

> "**Board Ethics in General.** Now, some of you might worry that there could be other instances of Board members taking property that belongs to the condominium. As far as I know, this is the first time it happens (although Larry has a ceiling fan in his apartment identical to and purchased together with the lobby fans, that I now want to investigate), and I acted as soon as I found out about it. Those of us on the Board are your neighbors, we volunteer for this, and we have high ethical standards. As a result of this mess I intend to have us adopt a code of ethics for the Board that is stricter than the condo bylaws."

In this statement, Marquez does not state that the fan was purchased with Condominium funds. Rather, he states that Simms has a ceiling fan in his apartment identical to and purchased together with the lobby fans. This does not mean that Simms did not contribute his own money to purchase the fan. The allegedly harmful words must be construed in context and interpreted reasonably, and are only actionable if susceptible of a defamatory meaning (*Aguinaga v 342 E. 72nd St. Corp.*, 14 AD3d 304 [1st Dept 2005]), which is not the case here. Although the statement could be understood to imply suspicion of improper use of Condominium funds, it does not so state, and it indicates only the possibility of an investigation into the matter, thereby militating against a finding of a defamatory meaning (*Ferguson v Sherman Sq. Realty Corp.*, 30 AD3d 288 [1st Dept 2006] [defendant residential cooperative distributed flyers seeking to remove co-op's board of directors and replace it with a board willing to conduct an independent investigation of alleged mismanagement and financial improprieties]).

To be sure, the shield that a qualified privilege provides may be dissolved if the plaintiff can demonstrate that the defendant was motivated by "actual malice"(*Liberman v Gelstein*, 80 NY2d at 437-438). Plaintiffs have the burden of proof to establish that the communications were not made in good faith, and were motivated solely by malice (*id.* at 439; *Kamerman v Kolt*, 210 AD2d at 455). Common-law malice is motivated by spite or ill-will and constitutional malice is a statement made with a high of degree of awareness of its falsity (*Hoesten v Best*, 34 AD3d 143 [1st Dept 2006]). There is nothing in Simms's lengthy affidavit, or in any of the supporting affidavits submitted on his behalf, that raises a factual issue that the statements at issue were motivated by spite or ill-will, or made with a high of degree of awareness of their falsity. The evidence establishes that the basis for the statements is the intense disagreement among the board members about the operations of the Condominium. Hence, plaintiffs have not met their burden in demonstrating a triable issue of fact as to malice (*Dos v St. John's Episcopal Hosp., Smithtown*, 199 AD2d 460 [2d Dept 1993], *lv denied* 83 NY2d 754 [1994]).

As asserted by Ho, the complaint is not viable for the additional reason that the statements do not pertain to her for purposes of asserting a defamation claim.

Plaintiffs argue that, because the ceiling fan was installed in the condominium apartment that is owned in Ho's name alone, Ho is a proper plaintiff. Plaintiffs have

failed to identify any remarks that any of the defendants made to indicate that Ho had any involvement in any alleged wrongdoing pertaining to the ceiling fan, or anything else in the complaint that specifically involves Ho, nor has the court's own review of the complaint revealed any language that can be reasonably construed as defamatory as against Ho. The statements in the complaint were solely about a family member, Ho's husband, Simms, and there is no basis to impute them to her or to connote as against her a defamatory meaning, thereby rendering her claims not viable (*Sarwer v Conde Nast Pub.*, 237 AD2d 191 [1st Dept], *lv dismissed in part, denied in part* 91 NY2d 865 [1997]). Any viable claim would belong to Simms, not to Ho, because they are not "of and concerning" Ho (*Gross v Cantor*, 270 NY 93, 96 [1936]; *Chicherchia v Cleary*, 207 AD2d 855, 856 [2st Dept 1994]; *Brady v Ottaway Newspapers*, 84 AD2d 226, 228 [2d Dept 1981]).

In her affidavit, Ho, a medical doctor, states that her reputation has been harmed, because no one would go to a doctor that would allow stolen property into her home (¶ 42). As discussed above, however, there is nothing in the complaint indicating that she was involved in the alleged theft of the paving stones and ceiling fan, or that defendants' statements implied that she had knowledge that they constituted allegedly stolen property.

Accordingly, it is

ORDERED that the decision of this court, dated October 12, 2007, denying defendants' motion for summary judgment, is hereby recalled and vacated; and it is further

ORDERED that the motion for summary judgment is granted, and the complaint is severed and dismissed as against defendants Julio Marquez, Al Urbont, Yolanda Pessina, and Andrew Brint, and the Clerk is directed to enter judgment accordingly.

Dated: May 21, 2008

J.S.C.