[* 1]
SCANNED ON 10/21/2009

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

EMILY JANE GOODMAN

PART 17

Justice

Index Number : 116964/2008

KIDD, JOHN

VS.

EPSTEIN, GENE

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 116964-08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

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 to be decided on at the next

FILED

OCT 21 2009

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 10/14/09

EMILY JANE GOODMAN

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

----------X

JOHN KIDD,

Plaintiff,

-against-

Index No. 116964/08

GENE EPSTEIN and HISAKO KOBAYASHI,

Defendants.

----------X

EMILY JANE GOODMAN, J.S.C.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

This action for libel arises out of a dispute between neighbors residing in a seven-unit residential cooperative building located at 55 Great Jones Street, New York, New York. Plaintiff, John Kidd, alleges that defendants Gene Epstein and Hisako Kobayashi libeled him in an e-mail dated September 18, 2008, which was sent to the shareholders of the building. In motion sequence number 001, Kobayashi moves, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the complaint as against her for failure to state a cause of action and based upon documentary evidence. In motion sequence number 002, Epstein moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against him.

BACKGROUND

Plaintiff is a shareholder of the cooperative corporation, and is also the president of the cooperative's Board of Directors. Epstein and Kobayashi are a married couple who reside in the building. Kobayashi is a shareholder in the cooperative.

Plaintiff alleges that defendants caused water damage to his apartment on July 15, 2008. Plaintiff thereafter commenced an action to recover monetary damages against defendants in

Small Claims Court, which was scheduled to be heard on September 15, 2008. He appeared ready to proceed to trial on that date with a letter and invoice from his plumber. The letter stated that "the leak on July 16, 2008 into the ground floor store located at 55 Great Jones Street was decidedly due to a stoppage and overflow in 2nd floor sink" (Complaint, ¶ 5, Exh. A). After plaintiff provided defendants with copies of the documents that he intended to introduce at trial, defendants requested an adjournment.

Plaintiff alleges that, on September 18th, Epstein and Kobayashi sent an allegedly libelous e-mail, captioned "John, Enough Lies are Enough!," to the shareholders of the building, which stated as follows:

> "John,
>
> On September 15 at 5 pm, just before we were due to go to small claims court at 6:10 pm, you gave me a letter supposedly from your plumber dated September 15th, 2008, which stated that 'the leak in the ground floor store at 55 Great Jones Street was decidedly due to a stoppage and overflow in 2nd floor sink.'
>
> The letter bore a signature indicating it was signed by your plumber Robert Angrisani. Because the letter appeared to be a fake composed by you (among other red flags, inconsistent type that seemed plastered on Angrisani's letterhead; language like 'decidedly due to,' which did not sound like a plumber's way of putting things), I promptly called Robert Angrisani to authenticate this statement. Unfortunately, he was out.
>
> I then got a phone call from you. You pointed out that you had met my requirement to produce a letter from your plumber and that you should therefore be given a check without our going to court. I told you I needed to authenticate the letter first and that I could not get Robert Angrisani on the phone. I also told you I wondered why you waited an hour before the court appearance to produce this letter when I'd been asking you to produce it in constant e-mails over the last two months. So when we went to court, I told the mediator I needed to postpone because you had not given me enough time to authenticate the letter.
>
> I finally got Robert Angrisani on the phone yesterday afternoon on Sept. 17th and confirmed that the letter was a fake. Angrisani told me he could not remember either

> the content of the letter or signing it even though it was purportedly signed by him only two days ago!
>
> John, out of the $1387 bill you gave me and Hisako, you included $450 for nine hours of your personal time. How about reimbursing us for our time in coping with your shenanigans? If you persist in your constant course of making up facts and bringing them either to court or the co-op, then in addition to bringing this matter to the attention of the co-op board – which we are doing by this e-mail – we will consider consulting with our attorney to investigate legal remedies.
>
> Gene & Hisako"

(Complaint, Exh. B).

Plaintiff claims that the letter from his plumber was not forged or altered by him. He alleges that this e-mail has damaged his reputation as president of the Board, and undermined his ability to execute his position as president. Plaintiff seeks compensatory damages in excess of $25,000, in addition to $500,000 in punitive damages as a result of the purportedly libelous e-mail.

DISCUSSION

A. Kobayashi's Motion to Dismiss

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord [plaintiff] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, "bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not presumed to be true and accorded every favorable inference" (*M & B Joint Venture, Inc. v Laurus Master Fund, Ltd.*, 49 AD3d 258, 260 [1st Dept 2008], *affd as mod* 12 NY3d 798 [2009] [internal quotation marks and citation omitted]).

Where extrinsic evidence is submitted in connection with the motion, the appropriate standard of review "is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*IIG Capital LLC v Archipelago, L.L.C.*, 36 AD3d 401, 402 [1st Dept 2007] [internal quotation marks and citation omitted]). This entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977] ["When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, . . . dismissal should not eventuate"]; *see also Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000] ["where the court has considered extrinsic evidence on a CPLR 3211 motion, 'the allegations are not deemed true . . . . The motion should be granted where the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted'"] [citation omitted]).

Dismissal of a complaint pursuant to CPLR 3211 (a) (1) is proper where the documentary evidence "conclusively establishes a defense to the asserted claims as a matter of law" (*Leon*, 84 NY2d at 88). Stated otherwise, where a defendant moves to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence "'must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim'" (*Reid v Gateway Sherman, Inc.*, 60 AD3d 836, 837 [2d Dept 2009], quoting *McCue v County of Westchester*, 18 AD3d 830, 831 [2d Dept 2005]). While evidence such as a contract constitutes "documentary evidence," affidavits and depositions usually do not qualify under this test (Siegel, NY Prac § 259, at 420 [3d ed]).

Defamation is the "making of a false statement which 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" (*Foster v Churchill*, 87 NY2d 744, 751 [1996] [internal quotation marks and citation omitted]). To state a cause of action for defamation, the plaintiff must allege "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se" (*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]). Furthermore, pursuant to CPLR 3016 (a), "the particular words complained of shall be set forth in the complaint." The time, place, and manner of publication must also be alleged in the complaint (*Khan v Duane Reade*, 7 AD3d 311, 312 [1st Dept 2004]; *Williams v Varig Brazilian Airlines*, 169 AD2d 434, 437 [1st Dept], *lv denied* 78 NY2d 854 [1991]).

It is the role of the court to determine, in the first instance, whether the words are reasonably susceptible of defamatory meaning (*Golub v Enquirer/Star Group*, 89 NY2d 1074, 1076 [1997]; *Aronson v Wiersma*, 65 NY2d 592, 593 [1985]; *T.S. Haulers v Kaplan*, 295 AD2d 595, 596 [2d Dept 2002]). In evaluating whether a statement is defamatory,

> "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"

(*Dillon*, 261 AD2d at 38). "'Courts will not strain' to find defamation 'where none exists'" (*id.*, quoting *Cohn v National Broadcasting Co.*, 50 NY2d 885, 887, *cert denied* 449 US 1022 [1980]).

Defamation per se consists of statements: (1) charging the plaintiff with a serious crime; (2) tending to injure his or her trade, business, or profession; (3) that the plaintiff has a loathsome disease; or (4) imputing unchastity to a woman (*Liberman v Gelstein*, 80 NY2d 429, 435 [1992]; *Harris v Hirsh*, 228 AD2d 206, 208 [1st Dept], *lv denied* 89 NY2d 805 [1996]).

Kobayashi contends that the complaint fails to state a cause of action as against her. She submits an affidavit in which she states that she neither composed nor discussed the e-mail with her husband prior to its delivery (Kobayashi Aff., ¶ 7). Kobayashi points out that the "tag" on the e-mail shows that it was sent by her husband on September 18, 2008, and that a copy of the e-mail was also sent to her own e-mail address (*id.*). By virtue of her Japanese upbringing, she avoids disputes if at all possible (*id.*). Additionally, Kobayashi contends that plaintiff admitted to his prior attorney that she did not write the e-mail, inasmuch as plaintiff's prior attorney only addressed a letter to her husband and not to her (Kobayashi Aff., Exh. 2).

Plaintiff contends, in opposition to the motion, that there is no dispute that Kobayashi designated her husband to serve as her agent in Small Claims Court. Further, plaintiff argues that at no point did Kobayashi disavow the statements in the September 18, 2008 e-mail.

Generally, every person who either directly or indirectly publishes or assists in the publication of an actionable defamatory statement is liable for the resulting injury (*see Youmans v Smith*, 153 NY 214, 219 [1897]).

Here, plaintiff alleges that, in the September 18, 2008 e-mail, defendants accused plaintiff of attempting to file a falsified document in a court proceeding, which could constitute a serious crime (*see* Penal Law §§ 110.00, 175.30, 175.35; *see also* Restatement [Second] of Torts § 569, comment d [a written or printed imputation of any crime involving moral turpitude is libelous]).

Contrary to Kobayashi's contention, the subject e-mail does not conclusively show that it was authored and distributed by her husband. The text of the e-mail states that it was sent by "Gene & Hisako" (Complaint, Exh. B). Moreover, while the court has considered Kobayashi's affidavit on her CPLR 3211 (a) (7) motion, it cannot be said that plaintiff does not have a viable cause of action for libel as against her. The essential facts have not been negated beyond substantial question by the extrinsic evidence submitted on the motion (*see Biondi*, 257 AD2d at 81). Indeed, Kobayashi's affidavit is at odds with the text of the e-mail. In any event, at this juncture, Kobayashi has not conclusively shown that her husband was not her agent and that she did not authorize him to make the offending statements (*see Calafiore v Penna*, 289 AD2d 359, 359-360 [2d Dept 2001], *lv denied* 97 NY2d 612 [2002] [rule holding principal liable for torts of his or her agent applies to defamation actions when the agent is acting within the scope of his or her authority]; *see also Seymour v New York State Elec. & Gas Corp.*, 215 AD2d 971, 973 [3d Dept 1995] [same]). After completion of discovery, Kobayashi may move for summary judgment on this ground, if so advised.

B. Epstein's Motion for Summary Judgment

"'[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Johnson v CAC Bus. Ventures, Inc.*, 52 AD3d 327, 328 [1st Dept 2008], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once this showing has been made, the burden shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan*

Museum of Art, 27 AD3d 227, 228 [1st Dept 2006]). "[T]he court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues" (*F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186, 188 [1st Dept 2002], citing *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, *rearg denied* 3 NY2d 941 [1957]).

Epstein contends that the subject e-mail is privileged and non-actionable as an expression of his opinion. He maintains that the e-mail conveys a "pure opinion," because it disclosed the facts upon which it was based.

"Expressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation" (*Mann v Abel*, 10 NY3d 271, 276 [2008], *cert denied* – US –, 129 S Ct 1315 [2009]). Whether a statement is one of fact or opinion is a question of law for the court, and depends upon "'whether a reasonable reader or listener would understand the complained-of assertions as opinion or statements of fact'" (*Millus v Newsday, Inc.*, 89 NY2d 840, 842 [1996], *cert denied* 520 US 1144 [1997], quoting *Brian v Richardson*, 87 NY2d 46, 52 [1995]; *see also Silverman v Clark*, 35 AD3d 1, 14 [1st Dept 2006]). In determining whether a statement constitutes a fact or opinion, the following three factors are to be examined:

> "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact"

(*Mann*, 10 NY3d at 276 [internal quotation marks and citation omitted]; *see also Caplan v Winslett*, 218 AD2d 148, 151 [1st Dept 1996]).

With respect to the third factor, the court must consider the content of the communication as a whole, as well as its tone and apparent purpose (*Brian*, 87 NY2d at 51). "Rather than sifting through a communication for the purpose of isolating and identifying assertions of fact, the court should look to the over-all context in which the assertions were made and determine on that basis 'whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff'" (*id.* [citation omitted]; *see also Guerrero v Carva*, 10 AD3d 105, 112 [1st Dept 2004]).

The Court of Appeals has made a distinction between (1) a "mixed opinion," which means a purported statement of opinion that implies a basis in facts which are not disclosed to the reader or listener, and (2) a "pure opinion," or a purported statement of opinion that is accompanied by a recitation of facts on which it is based or one that does not imply the existence of undisclosed underlying facts (*see Steinhilber v Alphonse*, 68 NY2d 283, 289 [1986]; *Brown v Albany Citizens Council on Alcoholism*, 199 AD2d 904, 905 [3d Dept 1993]). As noted by the Court,

> "[t]he former are actionable not because they convey 'false opinions' but rather because a reasonable listener or reader would infer that 'the speaker [or writer] knows certain facts, unknown to [the] audience, which support [the] opinion and are detrimental to the person [toward] whom [the communication is directed].' In contrast, the latter are not actionable because . . . a proffered hypothesis that is offered after a full recitation of the facts on which it is based is readily understood by the audience as conjecture. Indeed, this class of statements provides a clear illustration of situations in which the full context of the communication 'signal[s] . . . readers or listeners that what is being read or heard is likely to be opinion, not fact.'"

(*Gross v New York Times Co.*, 82 NY2d 146, 153-154 [1993] [citations omitted]).

Applying these principles to this case, the court concludes that a reasonable reader would

understand the September 18, 2008 e-mail, when viewed as a whole, to convey facts about plaintiff. Specifically, the e-mail states that the authors "confirmed" that the letter from plaintiff's plumber was "fake," after they spoke with the plumber (Complaint, Exh. B). This statement has a precise meaning, and is capable of being proven true or false. Furthermore, the context and surrounding circumstances of the e-mail suggest that the statements within the e-mail are likely to be factual in nature. The subject line of the e-mail stated, "John, Enough Lies are Enough!" (*id.*). The e-mail was also written in response to a lawsuit brought by plaintiff against defendants for property damage to his apartment. Therefore, a reasonable reader would expect the e-mail to reveal facts about plaintiff, not an opinion of the authors.

Epstein further argues that the e-mail is privileged because plaintiff made the water leak a matter of interest to the shareholders by e-mail dated July 16, 2008, in which he informed them that his unit sustained water damage due to defendants' failure to maintain their drain pipes (Epstein Aff., Exh. 4). According to Epstein, the e-mail is qualifiedly privileged because plaintiff's conduct could subject the Board of Directors to a future lawsuit and because plaintiff engaged in an ongoing pattern of harassment against defendants, which impacted plaintiff's ability to fulfill his duties as board president .

A qualified privilege extends to a "'communication made by one person to another upon a subject in which both have an interest'" (*Liberman*, 80 NY2d at 437, quoting *Stillman v Ford*, 22 NY2d 48, 53 [1968]; *see also Rosenberg v MetLife, Inc.*, 8 NY3d 359, 365 [2007] [a communication is qualifiedly privileged where "it is fairly made by a person in the discharge of some public or private duty, legal or moral, or in the conduct of his own affairs, in a matter where his interest is concerned"] [internal quotation marks and citation omitted]). In order to be

protected by a qualified privilege, the communication must be expressed "in a reasonable manner and for a proper purpose" (*Toker v Pollak*, 44 NY2d 211, 219 [1978] [internal quotation marks and citation omitted]). The rationale for applying the privilege is that "so long as the privilege is not abused, the flow of information between persons sharing a common interest should not be impeded" (*Liberman*, 80 NY2d at 437). The common-interest privilege has been found to protect a tenant's defamatory statements to other tenants relating to the cooperative's business, operation, and management regarding a contested election for the board of directors (*Tanner & Gilbert v Verno*, 92 AD2d 802, 803 [1st Dept], *lv dismissed* 60 NY2d 553 [1983]; *Pusch v Pullman*, 11 Misc 3d 1074 [A], *6, 2003 NY Slip Op 51759 [U] [Sup Ct, NY County 2003]; *see also Liberman*, 80 NY2d at 437 [communications between board members of a tenant's association falsely accusing a landlord of bribing police officers to avoid parking tickets in front of the landlord and tenants' building were subject to the privilege]).

Even if a qualified privilege exists, the privilege can be dissolved if the communication was made with either common-law malice (spite or ill will) or constitutional malice (a high degree of awareness of its probable falsity) (*Silverman*, 35 AD3d at 11; *Hoesten v Best*, 34 AD3d 143, 158 [1st Dept 2006]; *Bogoni v Simpson*, 306 AD2d 125, 126 [1st Dept 2003]).

Epstein has failed to demonstrate the applicability of the common- interest privilege, as a matter of law, or, that the offending statements were not made with malice. Epstein's affidavit attests to his legal or moral obligation to communicate his conclusions relating to the plumber's letter to the shareholders, because of an ongoing pattern of harassment by plaintiff against defendants, which impacted plaintiff's ability to fulfill his duties as board president (*see Liberman*, 80 NY2d at 437, quoting Restatement § 596, comment d ["'Tenants in common . . .

are included within the rule stated in this Section as being conditionally privileged to communicate among themselves matter defamatory of others which concerns their common interests'"]; *Bogoni*, 306 AD2d at 126 [tenant, who posted a notice in her building alleging that landlord entered a tenant's apartment without permission, was entitled to a qualified privilege, given that tenants had common concern for security and privacy of their apartments]; *Pusch*, 11 Misc 3d at *6 [recipients of allegedly defamatory correspondence had interest in reading opinion about plaintiff, in his role as board president]). However, plaintiff maintains that the letter related to a private dispute over property damage to plaintiff's apartment and that the offending statements were made wilfully, wantonly and maliciously. With issues of fact in dispute, the court cannot determine that Epstein's motion should be granted, as matter of law.

Finally, Epstein argues that he is entitled to summary judgment because the statements in his September 18, 2008 e-mail were true, or if not true, that he justifiably erred in believing that the plumber did not sign the letter because of the conflicts between two documents and the plumber's inability to recall signing the letter two days after the date of the letter.[1] In response to Epstein's motion for summary judgment, plaintiff submits an affidavit from his plumber, Robert Angrisani, indicating that he signed the letter dated September 15, 2008, which summarized the work he performed to fix the leak (Angrisani Aff., ¶¶ 2, 3). While "[t]ruth is an absolute defense to a cause of action based on defamation" (*Silverman*, 35 AD3d at 12), issues of fact exist as to

[1]Although Epstein conclusorily asserts in his affidavit that plaintiff was not damaged by the September 18, 2008 e-mail, he has not submitted any evidence to demonstrate his entitlement to summary judgment on this issue. The court further notes that, while Epstein appeared to retract part of the September 18, 2008 e-mail in a subsequent e-mail dated November 5, 2008 (Epstein Aff., Exh. 3), this is not a proper basis for summary judgment. Instead, a full and fair retraction of a defamatory statement may be shown for the purpose of mitigating damages (*see De Severinus v Press Publ. Co.*, 147 App Div 161, 163 [2d Dept 1911]).

whether the plumber's letter was falsified and if not, whether Epstein acted reasonably in concluding that it was. Therefore, Epstein's motion for summary judgment must be denied.[2]

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 001) of defendant Hisako Kobayashi to dismiss the complaint is denied; and it is further

ORDERED that defendant Hisako Kobayashi is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the motion (sequence number 002) of defendant Gene Epstein for summary judgment is denied; and it is further

ORDERED that the action is transferred to Civil Court in accordance with a separate CPLR 325 (d) order signed herewith.

This Constitutes the Decision and Order of the Court.

Dated: October 14, 2009

ENTER:

J.S.C.

EMILY JANE GOODMAN

[2] Although the court cannot say that the action is frivolous, it is the opinion of this court that both plaintiff (who has chosen to resolve this dispute by litigation, and, who refers to Epstein several times in his affidavit as the "guest husband" of Kobayashi) and Epstein are very difficult individuals, who are encouraged to settle this litigation and find alternative ways to co-exist.