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SHORT FORM ORDER

INDEX No. 06-18109

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. RALPH F. COSTELLO
Justice of the Supreme Court

MOTION DATE 8-29-08
ADJ. DATE 8-25-09
Mot. Seq. # 002 - MotD

FLOYD HARBOR ANIMAL HOSPITAL, and BARBARA J. ETZEL, D.V.M., suing in her Individual and Official Capacity,	:	SCOTT MICHAEL MISHKIN, P.C. Attorney for Plaintiffs One Suffolk Square, Suite 240 Islandia, New York 11749
Plaintiffs,	:	CHARLES X. CONNICK, P.L.L.C. Attorney for Plaintiffs, on Counterclaim 114 Old Country Road Mineola, New York 11501
- against -	:	
ERIC S. DORAN and KRISTI W. DORAN,	:	HENNESSEY & DENATALE Attorneys for Defendants 501 William Floyd Parkway Shirley, New York 11967
Defendants.	:	

Upon the following papers numbered 1 to 20 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 12-18 ; Replying Affidavits and supporting papers 19-20 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (002) by the defendants, Eric S. Doran and Kristi W. Doran, pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted to the extent that the third and fourth causes of action for libel and libel per se as dismissed as a matter of law with prejudice, and the first and second causes of action are dismissed with leave to replead, only as to the claims for slander and slander per se premised upon the statement that the plaintiff has four lawsuits for malpractice pending against her, within thirty days of the date of this order.

The defendants seek an order granting summary judgment dismissing the complaint on the basis that it is legally defective and fails to comport with the heightened pleading requirements set forth in CPLR 3016(a); the third and fourth causes of action for libel and libel per se must be dismissed in that the alleged statement constitutes opinion and rhetorical hyperbole and is not actionable.

It is claimed that the defendants' pet dog "Minnie" was a patient at Floyd Harbor Animal Hospital and on or about March 2006 had two teeth removed. During the surgical procedure, it is alleged, the dog's jaw sustained a fracture and required wiring. On or about June 5, 2006, the dog was suffering from a cough and was treated for one month by Floyd Harbor without success. The dog was therefore brought to another veterinarian and was diagnosed with a collapsed trachea and vaginal prolapse, allegedly due to the cough.

When the defendants sought a refund of the monies paid to Floyd Harbor for the treatment of their dog, the same was refused so the defendants picketed outside the animal hospital. On or about August 1, 2006, the plaintiff filed an Order to Show Cause seeking to restrain the defendants from engaging in further picketing, and by stipulation between the parties, the Dorans agreed to refrain from any and all picketing and/or protesting, and utilizing statements denoting a defamatory interpretation against Floyd Harbor Animal Hospital and Dr. Barbara Etzel, and the petition was withdrawn.

The complaint sets forth in the preliminary statement that the action is premised upon slander, slander per se, libel and libel per se which occurred in the County of Suffolk. It is claimed that the defendants, on or about July 17, 2006, held two signs stating, "Danger to your Pets," printed over a picture of a skull and crossbones and spoke to clients of the veterinary hospital about Millie's treatment by the plaintiff and that Dr. Etzel was a terrible veterinarian who misdiagnosed their pet's condition; that Dr. Etzel was a greedy veterinarian who is only after their money; that she caused the dog to sustain a collapsed trachea on or about March 5, 2006 during a procedure for dental work; that Dr. Etzel charged them $700.00 for ineffective treatment; that Dr. Etzel was unable to diagnose a uterine prolapse directly caused by the cough; and that Dr. Etzel has about four pending lawsuits for malpractice. It is also set forth in the complaint that the defendants told stories of Millie's treatment to numerous clients of the hospital as well as "cars passing by" for the purpose of explaining their version of the events that occurred. The plaintiff asserts in the complaint that she called the police to file a complaint and to prevent the protesting, but the police only relocated the defendants across the street opposite the hospital. The complaint further alleges that the animal hospital was vandalized with eggs on July 21, 2006, and that it must have been the defendants or someone they knew who did it.

CPLR 3016(a) requires that the particular words complained of be set forth in a complaint alleging defamation. Defamation is the injury to one's reputation, either by written expression (libel) or oral expression (slander). The application of the particular words complained of shall be set forth in the complaint but their application to the plaintiff may be stated generally. Judicial interpretation of this section requires that the defamatory words be set forth in haec verba, Conley v Gravitt et al, 133 AD2d 966 [3rd Dept 1987]. The general rule is that libel or slander is not actionable unless the plaintiff suffers special damages, i.e., those contemplating the loss of something having economic or pecuniary value, Wadsworth v Beaudet et al, 267 AD2d 727 [3rd Dept 1999]. Publication is a term of art, signifying communication of the defamatory statement to a third party. Moreover, a communication to an agent of the person defamed is considered a publication to a third party.

It is the court's responsibility in the first instance to determine whether a publication is susceptible to the defamatory meaning ascribed to it. 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. Competing with an individual's right to protect one's own reputation is the constitutionally guaranteed right to free speech. One of the staples of a free society is that people should be able to speak freely. Consequently, statements that merely express opinion are not actionable as defamation, no matter how offensive, vituperative or unreasonable they may be. Moreover, in the context of statements pertaining to issues of consumer advocacy, courts have been loathe to stifle someone's criticism of goods or services. The courts have recognized that personal opinion about goods and services are a matter of legitimate public concern and protected speech, see, Penn Warranty Corporation v DiGiovanni et al, supra.

In deciding whether the challenged language constitutes statements of fact or opinion, the court's role is to determine whether the reasonable reader would have believed that the statements were conveying facts about the plaintiff. The analysis requires the court to look at the content of the whole communication, its tone and apparent purpose, in order to determine whether a reasonable person would view them as expressing or implying facts. The New York Court of Appeals has held that the following factors should be considered in distinguishing fact from opinion: (1)whether the language used has a precise meaning or whether it is indefinite or ambiguous, (2) whether the statement is capable of objectively being true or false, and (3) the full context of the entire communication or the broader social context surrounding the communication. Moreover, the Court of Appeals makes a distinction between a statement of opinion that implies a factual basis that is not disclosed to the reader and an opinion that is accompanied by a recitation of facts on which it is based. The former is actionable, the later is not, see, Penn Warranty Corporation v DiGiovanni et al, supra.

Whether particular words are defamatory presents a legal question to be resolved by the court in the first instance, Sprewell v NYP Holdings, Inc, 1 Misc3d 847 [Supreme Court of New York, New York County 2003]. In determining whether a reasonable listener would have viewed defendant's communication as an expression of opinion or a statement of fact that would support a defamation claim, it is necessary to consider the content of the whole communication, its tone and apparent purpose, Cook v Relin, 280 AD2d 897 [1st Dept 2001]. In all defamation cases, the threshold issue which must be determined, as a matter of law, is whether the complained of statements constitute fact or opinion, Parks v Steinbrenner, 115 AD2d 395 [1st Dept 1985]. If they fall within the ambit of "pure opinion" then even if false and libelous, and no matter how pejorative or pernicious they may be, such statements are safeguarded and may not serve as a basis for an action in defamation, Parks v Steinbrenner, supra. A statement falls within the ambit of "pure opinion" so as not to give rise to a defamation claim, if it is a statement of opinion, and if it is accompanied by recitation of facts upon which it is based or does not imply that it is based on any undisclosed facts, Parks v Steinbrenner, supra. So long as opinion is accompanied by recitation of facts upon which it is based, it is deemed "pure opinion and is afforded complete immunity, even though facts do not support opinion, Parks v Steinbrenner, supra).

The law governing defamation actions involving communications purporting to convey opinion has been explored in a quartet of recent Court of Appeals decisions. As set forth in Brian v Richardson, 85 NY2d 808 [1995], "the essence of the tort libel is the publication of a statement about an individual that is both false and defamatory. Since falsity is a sine qua non of a libel claim and since only assertions of fact are capable of being proven false, we have consistently held that a libel action cannot be maintained unless it is premised on published assertions of fact." Non-actionable "pure opinion" is a statement of opinion accompanied by recitation of facts upon which it is based, or, if not accompanied by such factual recitation, statement that does not imply it is based upon undisclosed facts, Steinhilber v Alphonse, 68 N.Y.2d 283 [1986]). It is a settled rule that expressions of an opinion, "false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions," Steinhilber v Alphonse, supra.

In Steinhilber, the Court referred to Judge Starr's plurality opinion in Ollman v Evans, 750 F.2d 970, *see also*, Felder v Sheresky, 1989 NY Misc Lexis 906 [Supreme Court New York, New York County 1989]) which set forth a four factor analysis and which rejected any "mechanistic rule" based on the semantic nature of the assertion in favor of a determination on "totality of the circumstances." In distinguishing between fact and opinion, the four factors are: (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," Steinhilber v Alphonse, supra, citing from Ollaman v Evans, supra). Those factors are applied in the instant action as follows:

(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. It is determined that the specific spoken language used by the defendants relative to the claims for slander and slander per se was not indefinite and ambiguous as the words claimed to be said by the defendants: that Dr. Etzel was a terrible veterinarian who misdiagnosed their pet's condition; that Dr. Etzel was a greedy veterinarian who is only after the defendants' money; that Dr. Etzel caused a collapsed trachea during the dental work she performed on or about March 5, 2006, which was terminal if not treated; that she charged the defendants $700.00 for treatments that proved ineffective; that Dr. Etzel was unable to diagnose a uterine prolapse directly caused by the cough; and that Dr. Etzel had about four lawsuits pending against her for malpractice all have a precise meaning which can be readily understood. Relative to the claim for libel and libel per se, the written words were "Danger to your Pets" printed over a picture of a skull and crossbones also has a precise meaning capable of being understood.

(2) A determination of whether the statements are capable of being objectively characterized as true or false. It is determined that the above-mentioned oral and written statements are capable of being objectively characterized as true or false as the complaint sets forth that the statements were published to others and the basis for the statements were set forth, with the exception concerning the statement that the plaintiff has four lawsuits for malpractice pending against her.

(3) An examination of the full context of the communication in which the statements appear. It is determined that the examination of the full context of the communications in which the statements appear is that of opinion set forth supported by a clear recitation of the facts upon which the defendants based their opinion that Dr. Etzel was a terrible veterinarian who misdiagnosed their pet's condition; that Dr. Etzel was a greedy veterinarian who is only after the defendants' money; that Dr. Etzel caused a collapsed trachea during the dental work she performed on or about March 5, 2006, which was terminal if not treated; that she charged the defendants $700.00 for treatments that proved ineffective; that Dr. Etzel was unable to diagnose a uterine prolapse directly caused by the cough; and that the hospital was a "Danger to your Pets" with the warning of a skull and crossbones. However, the facts upon which the statement that the plaintiff had four malpractice lawsuits pending has not been set forth in the language claimed to be defamatory and implies more facts not disclosed thus rendering the statement actionable.

(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, the broader social context surrounding the communications is that the defendants' dog was a patient at the animal hospital for a period of months for various problems which they claim were either caused, undiagnosed, or improperly treated by Dr. Etzel. The totality of the circumstances strongly suggests to even the most tolerant of individuals that

the defendants were upset with the care and treatment rendered to their pet, expressed their dissatisfaction with the same after taking the dog to another veterinarian. The defendants expressed the opinion and disclosed the facts as set forth in the complaint that they had been charged for the care and treatment which they claimed caused injury to their pet, including the alleged failure to diagnose the conditions of a fractured jaw, damaged trachea, and the alleged failure to diagnose the claimed uterine prolapse, giving rise to the basis of the statement "Danger to your Pets" printed over a picture of a skull and crossbones. This indicates to the reader that the words are the opinion of the defendants.

Based upon the foregoing, it is determined that, except for the statement that Dr. Etzel had about four lawsuits pending against her for malpractice, the remainder of the statements set forth in the complaint as the basis for defamation are deemed to be nonactionable pure opinion. The statement about Dr. Etzel having four lawsuits pending against her for malpractice is deemed actionable.

SLANDER

The first cause of action is premised upon a claim of slander. Slander is the uttering of defamatory words which tend to injure another in his reputation, office, trade, etc., Liffman v Brooke et al, 59 AD2d 687 [1st Dept 1977]. An indispensable element for slander is the communication of the defamation to at least one person other than the person defamed. Whether particular language tends to defame a person depends, at least, in part, upon the temper of the times and the current of public opinion, Romer v Portnick et al, 78 Misc2d 404 [Civil Court of the City or New York, Trial Term, New York County 1974]. Slander is a spoken defamation. The allegations of a slander defamation complaint are insufficient where they fail to set forth the exact words of defamation claimed to have been used by the defendant, , Locke v Gibbons, 164 Misc 877 [Supreme Court of New York, Special Term, New York County 1937]. Because words are not actionable per se, it is necessary for a plaintiff in a slander action, in order to maintain the action, to allege in the complaint that he suffered some special damage from the use of the words in question, and how he suffered damage, Casale v Calderone, 49 Misc 555 [Supreme Court of New York, Appellate Term 1906]. There must be some limit to liability for words not actionable per se, both as to the words and the kind of damages; and a clear and wise one has been fixed by the law. The words must be defamatory in their nature; and must in fact disparage the character; and this disparagement must be evidenced by some positive loss arising therefrom directly and legitimately as a fair and natural result. Expenses incurred in defending suits constitute ground for special damage; injury to reputation does not constitute special damage and the plaintiff in a slander action cannot recover therefor, see, Casale v Calderone, supra. The damage to one's business by a falling off or loss of credit is not special damage, but general damage, and special damages must be pleaded specifically, Hume v Kusche, 42 Misc 414 [Supreme Court of New York, Trial Term, Westchester County 1904].

Here, the actionable words claimed to be slanderous are that Dr. Etzel had about four lawsuits pending against her for malpractice. The plaintiff claims as special damages attorney fees, the loss of current, new and/or prospective clients, disturbing the clientele, and/or disturbing the day to day activities of the hospital. While attorneys fees may be claimed as special damages, the remainder of the damages pleaded are deemed to be only general damages as the alleged losses have not been set forth specifically. The loss of a particular customer is a special damage and cannot be proved unless specifically pleaded. Here the plaintiff has not pleaded the same. A general falling off or decrease in business comes under the heading of general damage, and general damages cannot be recovered for words not libelous per se or

slanderous per se.

SLANDER PER SE

The second cause of action is premised upon a claim of slander per se. "Words which directly tend to injure or prejudice the reputation of the plaintiff in the way of any office held by him, or in the way of any lawful profession or trade carried on by him, are actionable without proof of special damage. In such cases, the plaintiff must allege in his statement of claim, and prove at the trial, the he held the office, or carried on the profession or trade, at the time when the words complained of were published. He must also allege and prove that the words were spoken in reference to his character or conduct in such office, profession or trade. There must be some reference, direct or indirect, in the words or in the circumstances attending their utterance, which connects the slander with such office, profession or trade. If the words merely impute to the plaintiff some misconduct unconnected with his office, profession or trade, they are not actionable without proof of special damage; it is not sufficient that they are calculated to injure him therein, see, Shakun v Sadinoff, 272 AD2d 721 [1st Dept 1947]. Words impute slander per se if they impute: (1) the commission of a crime, (2) a loathsome disease, (3) unchaste behavior in a woman, or (4) homosexual behavior, or if they (5) affect plaintiff in his trade, occupation or profession, Kinsler, et al v Internatiopnal house of Pancakes, Inc., et al, 8 Misc3d 836 [Civil Court of the City of New York, Queens County 2005]; Privitera et al v Town of Phelps, et al, 79 AD2d 1 [4th Dept 1981]. If words are such that the law will permit a presumption of general damage to reputation or to business therefrom, then they are libelous or slanderous per se, Hume v Kusche, supra. Here, the words set forth in the second cause of action, that Dr. Etzel had about four lawsuits pending against her for malpractice, form a basis for slander per se and the plaintiff was not required to plead special damages if the words are slanderous per se, as the law presumes damage to reputation and business, Steward et al v Work-Wide Automobiles Corp. et al, 20 Misc 2d 188 [Supreme Court of New York, Special Term, Queens County 1959].

LIBEL

The third cause of action is premised upon a claim of libel. The elements of libel are: (1) a false and defamatory statement of fact, (2) regarding the plaintiff, (3) which are published to a third party and which (4) result in injury to plaintiff, see, Penn Warranty Corporation v DiGiovanni et al, 10 Misc3d 998 [Supreme Court of New York, New York County 2005]. Libel is always considered as written, Locke v Gibbons, supra. The mere falsity of a libel does not give the right to exemplary damages. In order to permit a jury to assess such damages they must find as a matter of fact that malice existed either through personal ill will or wanton or reckless conduct in the publication, or that the words themselves were of such a character as to impute a degree of wrongdoing which called for, Amory v Vreeland, 125 AD2d 850 [1st Dept 1908]. In reviewing the complaint, it is determined that the complaint sets forth that Doran and his wife were holding two signs stating "Danger to your Pets" printed over a picture of a skull and crossbones, thus establishing a written statement which this court has determined as a matter of law is nonactionable opinion

Accordingly, summary judgment is granted as a matter of law dismissing the third cause of action premised upon libel.

LIBEL PER SE

The fourth cause of action is premised upon a claim of libel per se. Certain statements are considered libelous per se. They are limited to four categories of statements that (1) charge plaintiff with a serious crime, (2) tend to injure plaintiff in its business, trade or profession, (3) plaintiff has some loathsome disease, or (4) impute unchastity. Where statements are libelous per se, the law presumes that damages will result and they need not be separately proved, Penn Warranty Corporation v DiGiovanni et al, supra. As with any claim for defamation, libel per se is defeated by a showing that the published statements are substantially true. They are also subject to a defense that the material, when read in context, would be perceived by a reasonable person to be nothing more than a matter of personal opinion, Penn Warranty Corporation v DiGiovanni et al, supra. Here, the words upon which libel per se are based are "Danger to your Pets" printed over a picture of a skull and crossbones, have been determined to be nonactionable opinion.

Accordingly, summary judgment is granted as a matter of law dismissing the fourth cause of action premised upon libel per se.

In that the causes of action for libel and libel per se have been dismissed as a matter of law on the basis of nonactionable opinion, this court now turns to the remainder of the application for summary judgment concerning the remaining two causes of action for slander and slander per se relative to the remaining statement that the plaintiff has four lawsuits pending against her for malpractice. The plaintiff has pleaded special damages in the nature of attorney's fees which support a claim of slander. A general falling off or decrease in business comes under the heading of general damage, and general damages cannot be recovered for words not slanderous per se.

Here the defendants claim that the plaintiff has not properly pleaded causes of action pursuant to CPLR 3016 as the complaint does not set forth with specificity the time, manner and persons to whom the defamatory publication was made that the plaintiff has four malpractice suits pending against her. In that the pleading must set forth the time, manner and persons to whom the publication was made, see, CPLR 3016: Wadsworth v Beaudet, 267 AD2d 727 [3rd Dept 1999], it is determined that the first and second causes of action for slander and slander per se do not comport with the pleading requirements.

Accordingly, the first and second causes of action for slander and slander per se premised upon the statement that the plaintiff has four lawsuits for malpractice pending against her are dismissed without prejudice with leave to replead within thirty days of the date of this order, if the plaintiff is so advised.

Dated: Dec 3 2009

Ralph J. Costello
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION