

Thomas v Kiriluk

2010 NY Slip Op 33383(U)

November 10, 2010

Supreme Court, Suffolk County

Docket Number: 06-22739

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

COPY

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 9-1-10
ADJ. DATE 10-8-10
Mot. Seq. # 002 - MG; CASEDISP

-----X
MARK H. THOMAS, MARK H. THOMAS :
DESIGNER/BUILDER, INC., :
 :
 : Plaintiffs, :
 :
 : - against - :
 :
 : WILLIAM S. KIRILUK and PATRICIA :
 : DARLING KIRILUK, :
 :
 : Defendants. :
-----X

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Upon the following papers numbered 1 to 29 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002) 1 - 21; Notice of Cross Motion and supporting papers; Answering Affidavits and supporting papers 22-26; Replying Affidavits and supporting papers 27-29; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (002) by the defendants for an order pursuant to CPLR §3212 granting summary judgment dismissing the complaint is granted and the complaint and counterclaims are dismissed with prejudice.

This is an action for breach of contract, quantum meruit, and slander concerning certain residential home improvement work provided by the plaintiffs to the defendants at their home located at 110 California Avenue, Port Jefferson, New York (hereinafter home). The plaintiffs claim that the defendants have failed to pay the balance due for the construction work and services provided in the amount of \$40,000.00 and quantum meruit for the outstanding balance for services in the amount of \$13,757.26. The third cause of action is one for defamation.

The defendants counterclaim in their answer that the plaintiffs have commenced a frivolous lawsuit, intentional infliction of emotional distress, that the plaintiffs billed excessively and contrary to the agreed upon billing and profit margins and that the plaintiffs wrongfully billed the defendants for windows when the windows were debited to the defendant Patricia Darling Kiriluk's American Express account in the amount of \$17,637.04. However, these counterclaims are dependent upon the resolution of the causes of action stated in the complaint

The 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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3

NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been produced, the burden then shifts to the opposing party who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form sufficient to require a trial of any issue of fact (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [1979], *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980].) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the Court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

The defendants have submitted a copy of the complaint filed with the Suffolk County Office of Consumer Affairs (hereinafter Consumer Affairs) against Mark H. Thomas (hereinafter Thomas), signed by William S. Kiriluk (hereinafter Kiriluk), dated March 4, 2005, which states that, after ongoing months of hostility, threats and vulgarity by Thomas, the defendants filed a police report; that Thomas threatened to close the job down; that Thomas ordered the wrong set of custom windows and insisted that the defendants pay for them and their reordering; that Thomas engaged in deceptive and excessive billing throughout the project and that he deliberately prolonged work months beyond reasonable completion. The addendum attached to Kiriluk's complaint to Consumer Affairs states, inter alia, that on April 10, 2004, the defendants contracted with Thomas to renovate their home, with the work to be completed around October 2004.

The defendants have submitted the affidavit of William Baessler (hereinafter Baessler), dated March 14, 2009, in which he states that he was, among other capacities, the Consumer Affairs Director of the Bureau of Licensing until his retirement in 2007. The Consumer Affairs Bureau of Licensing is charged with the administration and enforcement of Chapter 345 of the Suffolk County Code which involves, among other things, the licensing of home improvement contractors. On March 5, 2005, Kiriluk filed a consumer complaint against Thomas arising from the home improvement work performed by Thomas on the defendants' home. Following an investigation of that complaint, the Consumer Affairs Bureau of Licensing determined that there was sufficient evidence that Thomas had committed violations of Chapter 345 of the Suffolk County Code and Thomas was issued certain violations as follows: #34004-performing work without having a written and signed contract; #34005-engaging in a home improvement contract without having the required signatures; #34070-failure to specify start and completion dates; #34071-failure to give proper notice of right of cancellations; and #34072-making a false statement on a license renewal application by falsely stating that there were no outstanding judgments against him, when, in fact, there was an outstanding judgment against him for the failure to pay child support.

Baessler's affidavit further states that on September 8, 2005 he presided as the Consumer Affairs Bureau of Licensing Administrative Hearing Officer on Kiriluk's complaint. Prior to the hearing he conducted a settlement conference at which time an agreement was purportedly reached. According to the proposed agreement, Thomas' counsel was to submit the settlement

agreement, which was never signed by the parties. Thereafter, Baessler retired from his position and had no subsequent knowledge about the Thomas matter. He later learned that the tapes of the Administrative Hearing were missing.

The defendants have also submitted the affirmation of Leonard J. Tartamella, Esq. (hereinafter Tartamella), their prior attorney, dated July 19, 2010. Tartamella states that he had a conversation with Baessler about Baessler's role as the Administrative Hearing Officer concerning Kiriluk's complaint. Tartamella further stated that an agreement was made at the settlement conference to resolve the matter. He later learned that the tape recording of the hearing had been lost.

The defendants have further submitted copies of the unsigned settlement agreement with a letter, dated February 7, 2006, from Barry Leibowicz, Esq. (hereinafter Leibowicz), then Thomas' counsel; a further letter of October 12, 2005 from Leibowicz to Baessler expressing concern regarding what was actually agreed to between the parties at the settlement conference and another letter, dated May 12, 2006, wherein new counsel for Thomas, Lawrence A. Kushnick, Esq. (hereinafter Kushnick), indicated that the settlement negotiations fell through and that a subsequent hearing had been scheduled. An additional letter, dated June 1, 2006, from Kushnick to Baessler indicated that Thomas agreed to pay the sum of \$400.00 as an imposed fine and that Thomas entered into an agreement with Nassau Suffolk Lumber whereby he would pay off the sums that he owed to Nassau Suffolk Lumber. Kushnick further indicated that the defendants' property was free and clear of the mechanics' liens of both Thomas and Nassau Suffolk Lumber as both liens had expired and had not been renewed.

The defendants also submit an affidavit, dated August 4, 2010, from John J. Senesi, CPA, in which he stated he was the accountant for the defendants and that he had reviewed the various records maintained on behalf of his clients as well as disclosures made during the course of this lawsuit which he itemized in his affidavit. Included in his review was the "Contract Summary" of March 8, 2005 which stated the "Contract Price to Date" (including extras) was \$201,529.06. On March 10, 2005, after Thomas stopped working on the defendants' home, Thomas filed a notice of mechanic's lien against the defendants' real property. Thomas' sworn statement in support of the notice of the mechanic's lien indicated that the "total agreed price and value" of the materials and labor which he provided (including subcontractors and materials) was \$201,529.06. Based upon Senesi's review of documents provided by the defendants i.e., checks and cash and American Express receipts, Senesi stated that the defendants had paid a total payment of \$208,204.85, revealing an overpayment of \$6,675.79 by the defendants.

The defendants have also submitted the affidavit, dated August 4, 2010, of Richard Preuss (hereinafter Preuss), in which he stated he was a custom builder and home improvement contractor and the president of RHP Management and Construction (hereinafter RPH) and that he conducted an extensive study and inspection of the labor and materials provided by Thomas in connection with the defendants' home improvement project. He also reviewed both sets of drawings and priced them as to labor and materials. The first set of drawings would have priced out and been bid by RPH at \$156,894.00 for labor and materials. The second set of drawings, on which Thomas depicted the so-called extras, would have been priced out and bid by RPH at \$172,545.00 showing an additional charge of \$15,651.00 for the extras which were agreed upon by

the parties involved and noted on the drawings. He also did a site walk through with Kiriluk to identify work not completed which required the hiring of other contractors to complete it, including a raised hearth at the fireplace, decking at the Bilco door, ceiling joists and sheetrock at the second floor bedroom walk-in closet, completion of the structural ridge in the den, addition of terra cotta caps to the fireplace chimney, additional bathroom tile work and fixtures and additional heating work, all at a cost of \$14,058.

Based upon the foregoing, the defendants have demonstrated prima facie entitlement to summary judgment dismissing the first and second causes of action.

In opposing this motion, Thomas, in an affidavit, dated September 16, 2010, states that the undisputed amount of payments made by the defendants to him was \$205,009.04. Not included in that amount was a payment of \$1,500.00 to Bernie's Plumbing and Heating, and a payment of \$1,695.81 which he claims had nothing to do with the defendants. He concluded that the total reasonable value of the time and materials provided to the defendants was \$242,092.57. However, he does not provide any documentary evidence in support of this conclusory statement. Thomas further stated that the amount of \$201,529.06 set forth in the mechanic's lien was the reasonable value of the time and materials put into the project by the plaintiffs but was not the amount he was going to accept from the defendants had they paid that amount on time. He stated that he agreed to accept a discounted amount in order to wrap up the project, and filed the mechanic's lien with the discounted amount claimed. However, Thomas has not submitted any evidence to support this claim as to the discounted amount.

The plaintiffs' complaint states that the defendants have failed to pay the balance due for the construction work and services provided in the amount of \$40,000.00 and quantum meruit for the outstanding balance for services in the amount of \$13,757.26. However, these amounts claimed in the complaint are different from those claimed by Thomas in his opposing affidavit, and no evidentiary proof has been submitted for any of the amounts claimed to be due and owing and there is no itemized statement and no explanation concerning how the amounts claimed were determined, discounted or otherwise. Thomas has raised his own factual issues concerning his own submissions and statements.

Thomas further claims that Senesi was not only the accountant for the defendants but was also his accountant and therefore Senesi has a conflict which Thomas has not agreed to waive. However, Thomas has not submitted any evidence in support of this claim. Even without considering Senesi's affidavit, the defendants have submitted proof supporting their claim that they paid \$208,204.85 for the labor and services and materials for the renovation. Even if this Court subtracts the \$1,500.00 the defendants paid to Bernie's Plumbing and Heating, and a payment of \$1,695.81, which Thomas claims has nothing to do with the plaintiffs, the defendants have still provided documentary evidence supporting their claim that they paid Thomas an amount in excess of the lien of \$201,529.06.

Based upon the foregoing, the plaintiffs have failed to raise an issue of fact to preclude summary judgment dismissing the first and second causes of action.

Accordingly, the first and second causes of action are dismissed with prejudice.

As to the plaintiffs' third cause of action for slander, as a matter of law, the words complained of constitute nonactionable opinion.

The plaintiffs state in the complaint that Kiriluk wrote a defamatory letter, dated August 8, 2005, to Nassau Suffolk Lumber and to the Consumer Affairs Bureau of Licensing Director stating "Mark's dishonesty, greedy billing practices, etcetera, have brought him greater problems. It is unfortunate, he is a talented builder/carpenter who has truly lost his way. I hope my letter will enlighten you as to who is responsible for the outstanding balances due Nassau Suffolk Lumber." Thomas alleges that these statements are falsehoods and that on other occasions Kiriluk had uttered the same or similar words to unknown individuals including, but not limited to Nassau Suffolk Lumber, but he has not specified what was communicated and therefore the plaintiffs have failed to comply with the pleading requirements in CPLR §3016(a).

Whether particular words are defamatory presents a legal question to be resolved by the Court in the first instance (**Spewell v NYP Holdings, Inc.** 1 Misc3d 847, 772 N.Y.S.2d 188 [Supreme Court of New York, New York County 2003]). In determining whether a reasonable listener would have viewed Kiriluk'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, 721 NYS2d 885 [1st Dept 2001]). In all defamation cases, the threshold issue which must be determined, as a matter of law, is whether the statements at issue constitute fact or opinion (**Parks v Steinbrenner**, 115 AD2d 395, 520 N.Y.S.2d 374 [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 a 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 a recitation of facts upon which it is based, it is deemed "pure opinion" and is afforded complete immunity, even though the facts do not support the opinion (**Parks v Steinbrenner, supra**).

In **Brian v Richardson**, 85 NY2d 808, 637 N.Y.S.2d 347 [1995], the Court of Appeals stated "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 a recitation of facts upon which it is based or, if not accompanied by such factual recitation, a statement that does not imply it is based upon undisclosed facts (**Steinhilber v Alphonse**, 68 N.Y.2d 283, 508 N.Y.S.2d 901 [1986]). 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 v. Alphonse, supra**, the Court of Appeals referred to a 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,” (**Steinhalber v Alphonse**, *supra*, citing from **Ollaman v Evans**, *supra*).

The four factors are applied 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. The specific language used by Kiriluk in his letter, dated August 8, 2005, is clear, definite and unambiguous and the basis for his claim filed with the Consumer Affairs is stated in that letter.

(2) A determination of whether the statement is capable of being objectively characterized as true or false. Kiriluk’s statement is that of opinion accompanied by a recitation of facts upon which it is based and does not imply it is based upon undisclosed facts. The statement is not capable of being objectively characterized as true or false and expresses an opinion.

(3) An examination of the full context of the communication in which the statement appears. The examination of the full context of the communication in which the statement appears is that of an opinion stated in a report prepared by Kiriluk based upon his experience with Thomas during the course of the renovation project and his opinion concerning that experience.

(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, Kiriluk does not claim to be an expert in renovation and bases his opinion upon the representations he believed were made to him during the course of the renovations, and the events as they unfolded concerning deadlines, billing, costs and the alleged agreements concerning cost containment.

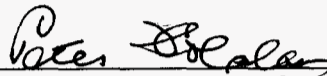
Although Thomas alleges by counsel that the statement by Kiriluk is slander per se, the plaintiffs have not pleaded slander per se. Even if this Court construes the cause of action to be one for slander per se, the statements do not allege that Thomas committed a serious crime but instead impute behavior amounting to no more than minor offenses for which Thomas was charged with violations by Consumer Affairs pursuant to Chapter 345 of the Suffolk County Code. The references to these minor offenses are not actionable without proof of damages (see, generally **Sharratt et al v Hickey et al**, 20 AD3d 734, 799 NYS2d 299 [3rd Dept 2005]), and the plaintiffs have not submitted any proof of damages. Furthermore, the letter, dated June 1, 2006, from Kushnick to Baessler indicated that Thomas had agreed to pay the sum of \$400.00 as an imposed fine and that Thomas entered into an agreement with Nassau Suffolk Lumber whereby he would be paying off the sums he owed to it. Therefore, the term “dishonesty” as used by Kiriluk in the subject

letter does not have a precise or readily understood meaning and would be understood by a reasonable reader or listener to be a figurative expression of how Kiriluk felt about Thomas' actions regarding billing and agreements. Thus, as a matter of law, the statement is a non-actionable opinion (see, **Springer et al v Almontaser**, 75 AD3d 539, 904 NYS2d 765 [2nd Dept 2010]).

Based upon the foregoing application of the four factors listed above, and considering the totality of the circumstances, as a matter of law, the words contained in Kiriluk's letter of August 8, 2005 constitute non-actionable opinion. The plaintiffs have raised no factual issues to preclude summary judgment dismissing this cause of action.

Accordingly, the third cause of action is dismissed.

Dated: November 10, 2010



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION