

Melius v Glacken

2010 NY Slip Op 33460(U)

December 7, 2010

Supreme Court, Nassau County

Docket Number: 4688/09

Judge: Ute Wolff Lally

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 4**

**Present: HON. UTE WOLFF LALLY
Justice**

MB

GARY MELIUS,

**Motion Sequence #2
Submitted October 5, 2010**

Plaintiff,

-against-

INDEX NO: 4688/09

WILLIAM GLACKEN,

Defendant.

The following papers were read on this motion for summary judgment:

Notice of Motion and Affs.....	1-7
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This motion by defendant William Glacken for an order pursuant to CPLR 3212 summary judgment in his favor dismissing the plaintiff's complaint is denied.

This action arises out of alleged defamatory statements made by defendant William Glacken against plaintiff at a public meeting (debate) on February 26, 2009 at the Village of Freeport Public Library. Defendant Glacken describes the meeting as a vigorous and heated political debate among the candidates for position of mayor including the now former mayor, Mr. Glacken, and challenger and current mayor, Andrew Hardwick. Among the subjects discussed during the debate was a lawsuit brought by Water Works Realty

Corp.¹ and Gary Melius against the Incorporated Village of Freeport, et al. currently pending in the United States District Court for the Eastern District of New York under docket no. 08-4754. The complaint alleges that before approximately fifty people present at the meeting defendant William Glacken called plaintiff an “extortionist” who was seeking “to extort money” presumably from the Village of Freeport.

By prior order of this Court (Palmieri, J.) dated February 22, 2010, defendant William Glacken’s motion pursuant to CPLR 3211(1)(7) to dismiss the complaint was converted to a motion for summary judgment. The Court therein found conversion appropriate for the purpose of affording the defendant the opportunity to present the full context of events in which the alleged defamatory words were uttered and provide plaintiff with an opportunity to submit proof in response thereto.

Defendant William Glacken, who does not deny making the statements in question now seeks summary judgment dismissing the complaint predicated on the grounds that the challenged statements represent an expression of non-actionable opinion which, given the context in which the words were uttered, could not have been considered as an accusation of criminal conduct by a reasonable listener. Moreover, he argues that the statements were made in the course of a vigorous and heated debate and are protected by qualified privilege. In this regard, defendant Glacken further asserts that the offending statements were made in response to a question raised by an attendee at the meeting regarding the status of the *Water Works* litigation which were of deep concern to both him and his

¹According to defendant Glacken, plaintiff is the sole shareholder, officer and director of Water Works Realty Corp. which is the record owner of two parcels of property located within the Village of Freeport having purchased the property in 1989.

audience.

In opposition to the summary judgment motion, plaintiff maintains that the accusations leveled against him do not constitute non-actionable expressions of opinion. Rather, they are actionable statements of fact which constitute slander *per se* which, at a minimum, are susceptible of a defamatory meaning. At the very least, plaintiff avers there are triable issues of fact as to the context in which the statements were spoken and how an average person hearing those statements understood and reacted to them.

The elements of a cause of action to recover damages for defamation are: a false statement; published without privilege or authorization to a third party; constituting fault as judged by, at a minimum, a negligence standard; which causes special harm or constitutes defamation *per se*. (*Salvatore v Kumar*, 45 AD3d 560, *lv to app den.* 10 NY3d 703). A false i.e., defamatory statement is libelous *per se* if it charges another with a serious crime or tends to injure another in his or her trade, business or profession. (*Matovcik v Times Beacon Record Newspapers*, 46 AD3d 636, 367). Upon a finding that a false statement has alleged a serious crime, a court may, absent any privilege, send the issue to a jury for a determination of damages. (*Geraci v Probst*, 61 AD3d 717, 718).

Whether particular words are reasonably susceptible of a defamatory meaning presents a question to be determined by the court in the first instance. (*Kamalian v Reader's Digest Ass'n, Inc.*, 29 AD3d 527, 528). The court must look at the content of the entire communication, its tone and apparent purpose, to determine whether a reasonable person would consider it as conveying facts about the plaintiff. (*Gjonlekaj v Sot*, 308 AD2d 471, 473). Merely because words are offensive or impute unlawful behavior does not

render them slanderous in and of themselves i.e., slander *per se*. Words, however, which have a tendency to disparage an individual, *inter alia*, with respect to his office, trade or business are slanderous *per se* and a plaintiff need not plead/prove that he has sustained special damages. Statements which 1) charge plaintiff with a serious crime; 2) that tend to injure another in his trade, business or profession; 3) that indicate that plaintiff has a loathsome disease; or 4) impute unchastity to a woman constitute slander *per se*. As such, the law presumes that damages will result. They need not, therefore, be alleged or proven. (*Epifani v Johnson*, 65 AD3d 224, 234).

The challenged statements should be considered in the context in which they were used and whether they can be readily interpreted as imparting to plaintiff fraud, dishonesty, misconduct or unfitness in his business. Here, it bears noting that in the aforementioned prior order of this Court, it was found that:

“[a]t first blush, it would appear that a cause of action in defamation is stated. The specific words, the time, place and manner of their dissemination, and the persons to whom they were uttered are plead. Further, inasmuch as extortion is a felony (Penal Law § 155[2][e]), that is sufficient for the showing of *per se* defamation unless the words were in fact true. See, *Proskin v Hearst Corp.*, 14 AD3d 782 [3rd Dept. 2005].”

Based on this finding, the Court sought further exploration of the context in which the statements were made in order to evaluate them more accurately.

It is well established that many statements that might otherwise be considered defamatory may be protected by a qualified privilege. A privileged statement is one, which, but for the occasion on which it is uttered would be defamatory and actionable. (*Park Knoll Associates v Schmidt*, 59 NY2d 205, 208). Good faith communications made by a party

having an interest in the subject, or a moral or societal duty to speak, are protected by a qualified privilege if made to a party having a corresponding interest. (*El-Hennawy v Davita, Inc.*, 50 AD3d 625, 626).

If the plaintiff is a public figure at the time the alleged defamatory statements are made, then anything said of him is subject to qualified privilege unless motivated by actual malice. (*Long Island University v Grucci For Congress, Inc.*, 10 AD3d 412, 413). Public figures are generally defined as persons who have assumed roles of special prominence in the affairs of society. The essential element is whether the publicized person has taken affirmative steps to attract public attention. (*James v Gannett Co., Inc.*, 40 NY2d 415, 422).

If the statements at issue are found to be qualifiedly privileged, it becomes the plaintiff's burden in opposing a motion for summary judgment, to demonstrate a triable issue of fact by proffering evidentiary proof that defendant was motivated by actual malice, ill-will, personal spite, negligence, etc. (*Kasachkoff v City of New York*, 107 AD2d 130, 135, *aff'd* 68 NY2d 654). A qualified privilege is conditioned on its proper exercise and cannot shelter statements published with malice or with knowledge of their falsity or reckless disregard as to their truth or falsity. (*Loughry v Lincoln First Bank, N.A.*, 67 NY2d 369, 376). Where the relevant facts are not in dispute, it is for the court, not the jury, to decide whether a qualified privilege exists. (*Harris v Hirsh*, 228 AD2d 206, 207 *lv to app den.* 89 NY2d 805).

With respect to statements of opinion, it is well recognized that "[o]pinions, false or not, libelous or not, are constitutionally protected and may not be the subject of private

damage actions, provided that the facts supporting the opinions are set forth.” (*Rinaldi v Holt, Rinehardt & Winston, Inc.*, 42 NY2d 369, 380, *cert den.* 434 U.S. 969). The issue of distinguishing between actionable fact and non-actionable opinion is a question of law for the court. (*Springer v Almontaser*, 75 AD3d 539). In making that determination the factors to be considered are: (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. (*Colantonio v Mercy Medical Center*, 73 AD3d 966, 968).

A pure opinion is a statement of opinion which is accompanied by a recitation of the facts upon which it is based or a statement which does not imply that it is based on some undisclosed facts. (*Kamalian v Reader's Digest Ass'n, Inc.*, *supra* at p. 528).

Although a statement of opinion, accompanied by a full recitation of the facts on which it is based, will be deemed pure opinion – a statement of opinion that implies a basis in undisclosed facts is actionable mixed opinion. (*Wilcox v Newark Valley Cent. School Dist.*, 74 AD3d 1558). A mixed statement of opinion and fact is actionable inasmuch as it gives rise to the inference that such statement is based upon certain facts known to the speaker that are undisclosed to the listener and are detrimental to the person who is the subject of the opinion. (*Rossi v Attanasio*, 48 AD3d 1025, 1027).

Thus an accusation of criminal conduct may be considered non-actionable rhetorical hyperbole only when no reasonable person would believe that the speaker was accusing

the subject of an actionable criminal offense or when the circumstances and general tenor of the remarks negate the impression of a factual assertion. (*Rossi v Attanasio, supra* at p. 1027). With respect to the matter at bar, the dispositive question is whether a reasonable listener present at the meeting could have concluded that defendant William Glacken was conveying facts about plaintiff.

While the use of the word extortion, or a form thereof, which is defined as a felony in Penal Law § 155.05(2)(e), does not necessarily make defendant William Glacken's remarks actionable statement of fact (*600 West 115th Street Corp. v Von Gutfeld*, 80 NY2d 130, 143-145, cert. den. 508 U.S. 910), the context in which the word "extortion" was used, was not, in the Court's opinion, such that the attendees at the meeting would have considered it "rhetorical hyperbole" or a "vigorous epithet." (*Gross v New York Times, Co.*, 82 NY2d 146, 155).

As movant for summary judgment, defendant bears the initial burden of demonstrating entitlement to judgment as a matter of law. (*Zuckerman v City of New York*, 49 NY2d 557, 562). Only upon such a showing does the burden shift to plaintiff to demonstrate the existence of a triable issue of fact. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

In the view of this Court, the statements at issue do not fall into the category of rhetorical hyperbole, but, rather, are mixed statements of opinion and fact such that a reasonable person would believe that they were supported by facts, of which the general public was unaware, but which defendant Glacken, by virtue of his position as mayor, was privy to. As such, they are actionable.

Moreover, the conclusory allegation that plaintiff is a public figure i.e., an individual who has thrust himself to the forefront of a particular public controversy in order to influence resolution of the issues involved, and invites attention to himself and comment, does not pass muster. (*Samuels v Berger*, 191 AD2d 627, 630). A person is considered a limited public figure regarding a particular issue or subject when he voluntarily injects himself into a public controversy with a view toward influencing it. A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention. (*Krauss v Globe Intern., Inc.*, 251 AD2d 191, 192).

The record is devoid of any basis to conclude that plaintiff is a public figure either general or limited, or that defendant's statements were either true or protected by privilege.

Accordingly, defendant William Glacken has failed to meet his burden of demonstrating entitlement to summary judgment dismissing the complaint. This motion for such relief is, therefore, denied.

Therefore, the attorneys for both parties are directed to appear for a Preliminary Conference on January 11, 2011, at 9:30 A.M. in Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. There will be no adjournments, except by formal application pursuant to 22 NYCRR §125.

Movant shall serve a copy of this order upon the attorney for plaintiff.

Dated: December 7, 2010



UTE WOLFF LALLY, J.S.C.

ENTERED
DEC 10 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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