

Konrad v Brown
2010 NY Slip Op 33852(U)
September 10, 2010
Supreme Court, New York County
Docket Number: 102110/10
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT. **HON. CAROL EDMEAD**PART 35

Index Number : 102110/2010

KONRAD, EVELYN

vs

BROWN, WILLIAM

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE 8.20.10MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that defendant motion to dismiss the Amended Complaint of the plaintiff pursuant to CPLR 3211(a)(1) (documentary evidence), (a)(7) (failure to state a claim), and pursuant to CPLR 3212 for summary judgment, is granted, and this action is hereby dismissed; and it is further

ORDERED that the branch of defendant's motion for an order awarding sanctions against plaintiff is denied; and it is further

ORDERED that plaintiff's application for an order awarding sanctions against defendant is denied; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: 9.10.10
HON. CAROL EDMEAD J.S.C.Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITIONCheck if appropriate: ☐ DO NOT POST ☐ REFERENCE☐ SUBMIT ORDER/JUDG.☐ SETTLE ORDER /JUDG.MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
EVELYN KONRAD,

Plaintiff,

Index No. 102110/10

DECISION/ORDER

-against-

WILLIAM BROWN,

Defendant.
-----X

HON. CAROL ROBINSON EDMOND, J.S.C.

MEMORANDUM DECISION

In this defamation action, defendant William Brown (“defendant”) moves to dismiss the Amended Complaint of the plaintiff Evelyn Konrad (“plaintiff”) pursuant to CPLR 3211(a)(1) (documentary evidence) and (a)(7) (failure to state a claim), and pursuant to CPLR 3211(c) for summary judgment, and for sanctions.

Factual Background

This action stems from a controversy arising from plaintiff’s objection to the construction of homes she calls “McMansions” being built in her community in Southampton, New York.

Defendant submitted to the Southampton Village Board of Architectural Review and Historic Preservation (the “ARB”) plans to build a house. After holding public sessions at which it took comments, the ARB approved the plans. Plaintiff filed an Article 78 proceeding against, *inter alia*, the ARB and defendant, to annul the approval, and the proceeding was later dismissed. In another Article 78 proceeding, the Court ordered a builder to resubmit plans to the ARB a second time due to a failure to place a notice in the newspaper of a hearing on his application. (This decision was later vacated on renewal and reargument, when a public notice from

September 2007 was later uncovered and presented to the Court).

On October 15, 2009, an article titled “Angry neighbor wins small victory, forces developer back to review” was published on 27east, a website of *The Southampton Press* and *East Hampton Press*, reporting plaintiff’s “small victory” in the second Article 78 proceeding (the “Angry Neighbor” or “27east” article).

Plaintiff wrote a letter to the editor entitled “Not neighborly,” which was published in *The Southampton* on December 17, 2009. In that letter, plaintiff described herself as “stand[ing] up against the lawless takeover of our Rosko Place development by speculative builders, aided by an administration riddled with conflicts of interest.” She described her Article 78 proceeding naming the ARB and defendant as one of “the three lawsuits I paid for.” She referred to defendant’s claim that his property and another were not part of the “Rosko neighborhood” as a fabrication and further referred to defendant as “fabricat[ing] false evidence to get his way.”

In response, defendant wrote a letter to the editor, entitled “Plant a tree” (the “Letter”). The Letter states, in relevant part:

We live in the Rosko neighborhood and built one of the houses Evelyn Konrad opposes . .

* * * * *

. . . Ms. Konrad *wanted the ARB to deny our application, made false statements* and attempted to delay the process. Videotapes of the meetings memorialize her actions. Upon unanimous ARB approval . . . we built the house largely as designed. Our neighbor, Ms. Konrad sued us, seeking to have our house “chopped down.” . . .

In Ms. Konrad’s letter to the editor . . . she provided justification for suing us. There is no justification. If you read the lawsuit or letter we submitted at the November ZBA meeting, you’ll see we never said the things she claimed. Ms. Konrad seems to like suing people—she’s suing *a former client in Manhattan that “discharged” her*. . . .

* * * * *

... Out of 73 properties in the neighborhood, 47 are in the [Rosko Place] subdivision - and we're not one of them. The maps we presented to the ZBA prove it. ...

* * * * *

The same article suggests Ms. Konrad *won a decision* against another neighbor by making a *false statement*. I'm surprised that's considered a "victory" of any size. The article failed to mention that Ms. Konrad is bound, as an attorney, by the New York State Bar Association's Rules of Professional Conduct to report *her misstatement* to the court.

This kind of behavior is not constructive, nor should it be condoned. . . If you really want to beautify Rosko, plant a tree.

(Emphasis added)

Plaintiff then commenced this action, citing the entire text of the Letter, and alleging that the Letter defamed her by stating that she (1) "made false statements" as an attorney to a "regulating agency"; (2) "won a decision by making false statements, as an attorney"; (3) was "discharged by a client, as the attorney"; and (4) "failed to meet her obligation to report false statements to the court, as an attorney" (the "Statements").

In support of dismissal, defendant argues that the Amended Complaint fails to meet the requirement of CPLR 3016(a) that, in a defamation action, "the particular words complained of shall be set forth in the complaint" Plaintiff's inclusion of the entire text of the Letter does not meet Rule 3016(a)'s requirement any more than annexing and incorporating it by reference would. Plaintiff's paraphrase of what she claims that the Letter "states" is insufficient. And, plaintiff's paraphrases are inaccurate, leaving defendant to guess at her claims. The Letter does not "state" that plaintiff made false statements "as an attorney to a regulatory agency." The Letter refers to plaintiff as an attorney in another connection altogether, and only when necessary to illustrate a point. Nor does the Letter state that plaintiff won a court decision by making false statements, as an attorney; instead, the Letter refers to the "Angry neighbor" article. Nor does the

Letter “state,” that Konrad failed to meet her obligation to report false statements to the court, as an attorney; the Letter says that the 27east article failed to mention the reporting obligation. It does not refer to “false statements,” but to “a” “misstatement,” that, in defendant’s view, the article suggested that plaintiff made. Given plaintiff’s persistence in failing to plead the particular words of which she complains, the dismissal should be without leave to amend. Alternatively, plaintiff should be limited to the four Statements that defendant actually made in the Letter that most closely match plaintiff’s paraphrases.

Defendant further argues that under *Brian v Richardson* (87 NY2d 46 [1995]), the Letter expressed defendant’s opinion concerning a matter of public controversy and is therefore not actionable. Defendant contends that in the Letter, he marshaled several sources of information, and cited particular sources, to support his opinion that plaintiff’s actions and approach were “not constructive and should not be condoned,” and advocated a moderate and political approach as preferable to an extreme and litigious one. Further, while not dispositive, the Letter appeared in the “Letters to the Editor” section, “a forum traditionally reserved for the airing of ideas on matters of public concern,” where readers would expect to find the expression of opinion. Finally, the Letter fell within long-running public debates in Southampton that included debate over plaintiff’s litigious approach, which she herself touted. Plaintiff’s voice had been predominant in these debates; she had ample opportunity to publish her disagreement with the Letter in the same forum in which it appeared. To allow plaintiff to pursue her complaint in these circumstances would contravene the policy of the New York courts and “cast[] a pall over citizens’ ability to engage in robust debate through the print ... media.”

Further, the Statements in the Letter are true, substantially true, or are themselves

opinion, and therefore not defamatory. Documentary evidence, *i.e.*, the video recording (the "Video") and transcript of the ARB's public hearing on February 11, 2008 (the "ARB Transcript"), establish that defendant's first Statement that plaintiff "made false statements" in connection with his ARB application was accurate. The second Statement regarding the 27east article report of plaintiff's "small victory" constitutes an opinion, that by its nature, was not defamatory. The third Statement does not refer to plaintiff as an attorney - only as someone discharged by a client. When language is not libelous on its face, the plaintiff should plead the innuendo, and its basis, which plaintiff failed to do. Even assuming that plaintiff's status as a lawyer is sufficiently clear from context, a statement implying a client's discharge of a lawyer cannot support a claim of defamation, especially viewing the statement in its entirety; in context, the word "discharged" is part of description incidental to defendant's opinion that plaintiff is excessively litigious. As an expression of opinion, the third Statement does not support a defamation claim; nor could a reasonable fact-finder conclude that the appearance of the word "discharged" in this context is defamatory. Further, the transcript of an argument before the Court demonstrates that this third Statement was true, as plaintiff said that she had sued a client for her attorney's fees "Because, I have been discharged." And, the fourth Statement does not refer to any source other than the 27east article as the basis for inferring that suggestion or address whether plaintiff had failed to report what defendant gathered was a misstatement. Defendant's pure opinion that the article suggested a misstatement cannot be defamatory.

Furthermore, plaintiff is a limited-purpose public figure and defendant did not make any of the statements with knowledge of its falsity or in reckless disregard of whether it was true or false. The documents establish that plaintiff was a public figure in Southampton with respect to

the public controversy over limits on house-size, that she thrust herself "to the forefront of [these] particular public controversies in order to influence the resolution of the issues involved," who offered herself as a potential candidate for public office based on the controversy that she herself had done much to raise. The documents and other evidence also establish that, defendant could not, as a matter of law, have said the Statements with knowledge of their falsity or in reckless disregard of whether or not they were true.

Finally, argues defendant, plaintiff's maintenance of her Amended Complaint despite defendant's counsel's repeated identification of plaintiff's failure to identify the particular words of which she complains, and defendant's counsel's identification of "material factual statements," warrant sanctions pursuant to 22 NYCRR 130-1.1(a), (c)(2), and (c)(3). The Amended Complaint is facially deficient pursuant to CPLR 3016(a), and in correspondence, defendant's counsel proposed to narrow or eliminate the dispute. Defendant's counsel provided the video to establish that plaintiff made multiple false statements to the ARB; yet, plaintiff's counsel purported to substantiate entirely different statements. Similarly, while defendant's counsel repeatedly referred to the second Statement as opinion concerning the "Angry neighbor" article, plaintiff's counsel repeatedly referred to assertions about the actual record in the underlying case, which are irrelevant to what the article said. Plaintiff's counsel refused to address the effect of plaintiff's own statement that she had been "discharged" by a client had on her claim.

In opposition, plaintiff argues that defendant's objection pursuant to CPLR 3016 lacks a factual basis as the Letter was not summarized but was included verbatim and identified as such.

Further, plaintiff contends that she sufficiently alleges that the Letter was wilfully and maliciously authored by defendant with the intent of causing plaintiff injury to her reputation as

an attorney on matters which defendant has no common interest and that the statements made by defendant were not the product of opinion. Defendant has no common interest in the subject for which he speaks; he does not share such interest in two of the cases about which he makes three libelous statements, namely *Windsor Owners Corp. v. the City Council of NYC, et al.*, nor the case against *Southampton Village and developer Christopher Tufo*, which is on appeal.

Although expressions of opinion are constitutionally protected, accusations of criminal or illegal activity are not. Thus, in considering the content of the communication as a whole, as well as its tone and apparent purpose, the Letter is defamatory *per se*. Defendant accused plaintiff of violating her oath as an attorney by making false statements when to do so would violate her duty as an attorney and violate the Penal Law if the filing of false instruments was reasonably extracted by the offending claims made by defendant. Clearly the publication is libel *per se* as it imputes wrongful and illegal conduct on the part of plaintiff as an attorney.

Plaintiff also argues that defendant's Statements were not an expression of pure opinion, but was an actionable "mixed opinion." The actionable element of a "mixed opinion" is not the false opinion itself; it is the implication that the speaker knows certain facts, unknown to his audience, which support or justify his opinion and are detrimental to the person about whom he is speaking. The Letter attempts to convey facts about plaintiff; not opinion.

And, plaintiff argues, because defendant has no common interest in the subject for which he speaks, defendant cannot claim that his Statements are protected by any qualified privilege. In any event defendant does not argue that the communication was expressed in a reasonable manner and for a proper purpose - and the privilege is now lost and/or dissolved if the communication was made with malice, spite, ill will, or probability of falsity. The submissions fail to demonstrate the

applicability of the common interest privilege as a matter of law, or that the offending statements were not made with malice - or in a light most favorable to defendant it cannot be said that the movant has demonstrated the absence of any questions of fact concerning his motive for creating the offending publication and having it published.

Further, as defendant has submitted extrinsic evidence in support of his defense of truth, the standard of review is whether plaintiff has stated a cause of action, and the extrinsic evidence does not negate *beyond substantial question the elements of plaintiff's defamation claim*.

Plaintiff also denies being discharged by any client, and denies making any false statements to a public regulating agency or making a false statement to win a decision against another neighbor, in violation of Judiciary Law §487 and Rule DR 1-102 [1200.3], which provides that a lawyer shall not engage in conduct that is prejudicial to the administration of justice. Plaintiff also claims that she did not fail to meet her obligation to report "her misstatement" to the court, in violation of New York State Bar Association Rules of Professional Conduct, which upon information and belief would be in violation of DR 1-105 [1200.5-a].

Plaintiff also contends that defendant annexed an uncorrected transcript to prove the truth of his statement that plaintiff was "Discharged" - a matter in which defendant shares no common interest. Defendant did not offer the transcript to plaintiff for correction; nor did he proceed to inquire about what the Appellate Division wrote on this case because to do so would prove that his statement was false. Plaintiff was not discharged, and the decision of the Appellate Division indicates that plaintiff was constructively dismissed without cause.

Plaintiff further argues that she is not a public figure. There is no "Association" that she represents. Plaintiff, like other individuals who spoke out against the development of oversized

homes in the community, is a private citizen entitled to express her opinions, especially as it impacts the land where she maintains a residence. A plain reading of the Letter discloses that defendant viewed plaintiff as a private citizen, and not a public figure, speaking on her own behalf or in a limited role as a *pro bono* attorney speaking on behalf of the interests of a client. An issue of fact remains as to whether defendant reasonably believed that his Statements were true, which cannot be decided at this juncture.

Further, the branch of defendant's motion for sanctions is, in itself a frivolous motion and the Court should decide, *sua sponte*, if Rule 130 applies to the conduct by defendant and his counsel, especially since defendant's motion is defective and because of what is not said and/or not included in the voluminous papers submitted in support of defendant's motion.

In reply, defendant argues that plaintiff failed to provide any reasoned basis to deny his motion. Defendant argues that this action is ripe for decision on the documentary evidence, or for summary judgment. Plaintiff does not dispute the authenticity or accuracy of the documents defendant offered as evidence, nor does she dispute that, on their face, they refer to and say exactly what defendant, in his opening submission said that they did. Plaintiff addresses the summary judgment standard, and indicates no need for discovery pursuant to CPLR 3212(f). Thus, the parties are deliberately charting a summary judgment course and the disposition of this motion pursuant to CPLR 3211(a)(1) and (a)(7), or alternatively, CPLR 3211(c), is appropriate. Despite her conclusory assertion that "there are multiple issues of fact," plaintiff fails to identify any such issues, or to demonstrate how the truth, substantial truth, or status as opinion of the Statements about which she complains is not resolved by the documentary record.

Plaintiff does not challenge defendant's claim that the Letter was an opinion on matters of

public concern under *Brian v Richardson*. The sifting and parsing that plaintiff urges are inappropriate, given the contents and circumstances of the Letter.

The Video and Transcript establish the first Statement's accuracy in saying that plaintiff "made false statements" in connection with defendant's ARB application. Plaintiff's conclusory denial and assertions about her representation of defendant's neighbors is insufficient; none of the false statements that defendant identified in his motion, however, concerned whether plaintiff represented any of defendant's neighbors. Also, defendant need not establish that everything that plaintiff told the ARB was false, or that any particular statement was false. It is enough to show that plaintiff made "false statements" to the ARB.

Plaintiff's conclusory denial and mischaracterization of the second Statement, is insufficient. Defendant in no way refers to whether evidence of the public notice of an ARB hearing was included in a "Certified Record." Plaintiff offers no actual opposition to defendant's argument that the second Statement was protected opinion. Plaintiff also fails to explain how the Penal Law might apply, or how the Letter accuses her of violating the Penal Law or Disciplinary Rules.

As to the third Statement, plaintiff does not contest her failure to plead the innuendo that she was discharged as an attorney, that the word "discharged" is incidental to defendant's opinion that she is excessively litigious, and that it is not defamatory in context. Further, even assuming that plaintiff can now rely on her own failure to make corrections to the transcript, the addition of the word "constructively" before "discharged" would not create an issue as to whether the Statement that she had been "discharged" was substantially true. The leading legal dictionary includes no entry at all for "constructive *dismissal*;" it defines "constructive *discharge*" as "[a]

termination of employment brought about by making the employee's working conditions so intolerable that the employee feels compelled to leave." Thus, a statement that plaintiff's client had *discharged* her would not have a "different effect on the mind of the reader" from one that the client had so adamantly refused to cooperate with her that she felt compelled to quit the engagement, *i.e.*, *constructively* discharged her.

Plaintiff also does not contest defendant's argument as to the fourth Statement, and does not deny her general obligation to report a misstatement on her part. The Letter never refers to the underlying case and, in connection with the fourth Statement, refers only to the article. And, plaintiff admits that she sued her former client.

Defendant also adds that plaintiff does not dispute that, if she is a limited-purpose public figure, then defendant was entitled, in submitting the Letter to the letters to the editor forum, to the same protection to which *The Southampton Press* would be entitled as a media defendant: to be liable for defamation, he must have made the Statements knowing they were false or with reckless disregard of whether they were true or false. Plaintiff's reference to other individuals who cannot be considered limited-purpose public figures is irrelevant as to plaintiff's status in this regard. As to each of the Statements, the absence of defendant's knowledge of falsity or his reckless disregard for truth is patent. Plaintiff cites no authority to support her claim that her status as a "private citizen" renders the limited-purpose public figure doctrine inapplicable, or that the fact that she does not represent an "Association" renders the doctrine inapplicable. Plaintiff also fails to identify any issues of fact as to whether defendant "justifiably erred in believing the statements that he made to be true." Finally, plaintiff's claim that she is not a public figure lacks merit.

Defendant also insists that sanctions are warranted as plaintiff's opposition papers continue to evade defendant's arguments and focuses on irrelevancies.

Discussion

In determining a motion to dismiss pursuant to CPLR 3211(a)(7), the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR § 3026), and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]).

A party may move for judgment dismissing one or more causes of action asserted against him pursuant to CPLR 3211 (a)(1) on the ground that "a defense is founded upon documentary evidence." Where documentary evidence and undisputed facts negate or dispose of the claims in the complaint or conclusively establish a defense to the asserted claims as a matter of law, dismissal may be granted pursuant to CPLR 3211(a)(1) (*Biondi v Beekman Hill Housing Apt.*

Corp., 257 AD2d 76, 692 NYS2d 304 [1st Dept 1999]; *Kliebert v McKoan*, 228 AD2d 232, 43 NYS2d 114 [1st Dept 1996]; *Gephardt v Morgan Guaranty Trust Co. of N.Y.*, 191 AD2d 229, 594 NYS2d 248 [1st Dept 1993]; *Juliano v McEntee*, 150 AD2d 524, 541 NYS2d 232 [1st Dept 1989]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972 [1994]; *Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The test on a CPLR 3211 (a)(1) motion is whether the documentary evidence submitted “conclusively establishes a defense to the asserted claims as a matter of law” (*Scott v Bell Atlantic Corp.*, 282 AD2d 180, 726 NYS2d 60 [1st Dept 2001] *citing Leon v Martinez*, 84 NY2d 83, 88, *supra*; *IMO Indus., Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11, 699 NYS2d 43 [1st Dept 1999]).

Summary judgment is unavailable to either side prior to joinder of issue absent CPLR 3211(c) notice (*Four Seasons Hotels Ltd. v Vinnik*, 127 AD2d 310, 515 NYS2d 1 [1st Dept 1987]). Such notice must come directly from the court and should fairly advise as to the issues it deems dispositive of the action (*id.*). There are, however, three exceptions to the requirement of notice: (1) if the action involves no issues of fact, but only issues of law fully argued by both sides, such as in a declaratory judgment action involving an issue of statutory construction; (2) when a request for CPLR 3211(c) treatment is specifically made by both sides; and (3) when both sides make it unequivocally clear that they are laying bare their proof and deliberately charting a summary judgment course (*id.*).

Here, defendant specifically requested that this Court treat his motion as one for summary judgment, to which plaintiff did not oppose, and both parties submitted numerous documents to support their positions. Plaintiff, in particular, submitted, *inter alia*, her own affidavit explaining her position and denying the Statements made by defendant, a subdivision map, her submissions

in the prior Article 78 proceeding, and prior orders of the Court and Appellate Division. Plaintiff also does not claim the need for further discovery. Given that the parties have charted a summary judgment course, and plaintiff did not oppose defendant's request pursuant to CPLR 3211(c), the Court will treat defendant's motion as one for summary judgment.

Contrary to defendant's contention, the Amended Complaint sufficiently alleges the particular words complained of pursuant to CPLR 3016. Plaintiff specifically quotes portions of the Letter which plaintiff finds objectionable. By alleging that the Letter "made false statements" as an attorney to a "regulating agency," plaintiff is referencing the Letter's statement that she wanted the ARB to deny defendant's application and *made false statements*. Plaintiff also alleges that the Letter indicates that she "won a decision by making false statements, as an attorney" and these words appear in the Letter. Although the Letter does not state that plaintiff was discharged by a client, "as the attorney," the reference to plaintiff as an attorney toward the end of the Letter coupled with the word discharge may lead one to conclude that plaintiff was indeed discharged by a client in her role as an attorney. Further, the Letter's reference to plaintiff's failure to report her misstatement indicates that plaintiff had a duty to make such a report. That defendant stated that the article failed to mention this alleged fact does not remove the indication that plaintiff was duty bound as an attorney to report her purported misstatement pursuant to the New York State Bar Association's Rules of Professional Conduct. Therefore, although plaintiff quotes the entire Letter, the Amended Complaint also identifies the four Statements that plaintiff claims defamed her. Thus, dismissal based on CPLR 3016 is unwarranted, and denied.

However, the challenged Statements in the Letter express opinions about plaintiff that are not actionable and that are substantially true. An action for defamation is one where a defendant

is accused of making a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of her in the minds of right-thinking persons, and to deprive her of their friendly intercourse in society (*Brooks v Anderson*, 18 Misc 3d 1109, 856 NYS2d 22 [Sup Ct Bronx County 2007] citing *Foster v Churchill*, 87 NY2d 744, 751 [1996]). The elements of a defamation action are (1) the publishing of a false statement to a third party; (2) publishing said statement without authorization or privilege; (3) fault, judged at a minimum by a negligence standard; and (4) special harm or defamation *per se* (*Brooks, supra* citing *Dillon v City of New York*, 261 AD2d 34 [1st Dept 1999]). Special harm or special damage means the loss of something having economic or pecuniary value (*Brooks, supra* citing *Liberman v Gelstein*, 80 NY2d 429 [1992]). Special damages need not be pled or proven when the cause of action is for defamation *per se* (*Brooks, supra* citing *Rinaldi v Holt, Rinehart & Winston, Inc.*, 42 NY2d 369 (1977)).

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 (*Brooks, supra* citing *Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]; *see also, Aronson v Wiersma*, 65 NY2d 592 [1985]). Accordingly, whether words are defamatory present a question of law for the court to decide in the first instance, and courts will not strain to find defamation where none exists (*Dillon, supra; Fairley v Peekskill Star Corp.*, 83 AD2d 294 [2d Dept 1981]). Loose, figurative, or hyperbolic statements, even if deprecating are not actionable (*Dillon, supra*).

Further, truth provides a complete defense to an action asserting defamation (*Brooks, supra citing Fleckenstein v Friedman*, 266 NY19 [1934]; *Dillon v City of New York*, 261 AD2d 34 [1st Dept 1999]). Substantial truth, will also suffice to defeat an action for defamation (*Brooks, supra citing Leibowitz v St. Luke's Roosevelt Hosp. Ctr.*, 281 AD2d 350 [1st Dept 2001]). On the issue of substantial truth as a bar to defamation the court in *Fleckenstein v Friedman* (266 NY19 [1934]), articulated what it called a workable test, namely whether the statement as published would have a different effect on the reader or listener than the truth as pleaded (*Brooks, supra citing Fleckenstein*).

A conditional privilege also bars a claim for defamation (*Brooks, supra*). A conditional privilege is one only available in the absence of malice (*Brooks, supra*). As such, under certain circumstances, an otherwise defamatory statement is immune from liability if the same is qualifiedly privileged, *e.g.*, the common interest privilege (*Brooks, supra citing Foster v Churchill*, 87 NY2d 744 [1996]; *Dillon v City of New York*, 261 AD2d 34 [1st Dept 1999]).

With regard to the common-interest privilege a “communication made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although it contained criminating matter which, without this privilege, would be slanderous and actionable; and this though the duty be not a legal one, but only a moral or social duty of imperfect obligation” (*Brooks, supra citing Stukuls v State of New York*, 42 NY2d 272, 278-279 (1977)).

Yet another conditional privilege is the limited issue public figure privilege which is based upon the status of the plaintiff, the burden of proving said status resting on the defendant (*Brooks, supra citing Fairley v Peekskill Star Corp.*, 83 AD2d 294 [2d Dept 1981]). A plaintiff is

considered a limited issue public figure, and thus a defendant's defamatory statements regarding the same are immune from liability if the plaintiff has "voluntarily acted to influence the resolution of a public controversy" (*id. citing Fairley*). In order for the privilege to apply, there must be a controversy, and the same must not merely be a matter of public interest, but it must be a real dispute whose outcome affects the general public or some segment in a substantial way (*Id.*). The controversy must be addressing some specific question rather than a general interest or concern (*Id.*). Like the common interest privilege and the public figure privilege, the limited use public figure privilege can be overcome by proof of actual or common-law malice (*Id.*).

As to defendant's statement that plaintiff "wanted the ARB to deny our application, [and] "made false statements," the Court concludes that such statements are nonactionable statements of opinion. The average person, reading the entire paragraph indicating that plaintiff wanted to delay defendant's construction process, would recognize the allegedly defamatory statement is an expression of defendant's opinion of plaintiff's actions as reflected in the videotape and transcript of the ARB meetings. And, defendant's statement that plaintiff made false statements at the ARB hearing is substantially true; plaintiff initially stated that she was representing "the owners on - - around [the subject] property" (Tr. 2:8-9), but in reality, was representing "their interests" only (Tr. 6:12-13).¹ In any event, the common interest privilege applies to this Statement, as defendant's comment concerns his ARB application and his characterization of plaintiff's conduct at the ARB hearing concerning his application. And, upon a reading of the Letter in its entirety, and in the absence of any showing by plaintiff that defendant made such Statement with malicious

¹ The Court notes that by letter dated February 12, 2008, the ARB wrote plaintiff addressing "several factual inaccuracies" contained in her January 29, 2008 letter to the ARB.

intent, this Court finds that such Statement falls within the protection of the common interest privilege. Therefore, for the reasons stated, this first Statement cannot serve as a basis for plaintiff's defamation claim.

Nor is defendant's statement that the 27east article suggests that plaintiff won a decision by making false statements against a neighbor, a defamatory statement. Defendant clearly referenced the 27east article, and gave his characterization of what such article stated. Following this statement, was defendant's assertion that he was "surprised" that her "win" was considered a victory by any measure. When read in context, it is clear that defendant was offering his opinion of what east27 reported about the case plaintiff filed against another neighbor.

And, the third Statement indicating that plaintiff was discharged by a client does not contain any accusation of criminal conduct on the part of defendant and thus, does not constitute defamation *per se*. A client has the right to discharge his or her attorney at any time, for any reason, or for no reason (*Nabi v Sells*, 70 AD3d 252, 892 NYS2d 41 [1st Dept 2009]). Thus, it cannot be said that a mere reference to the discharge of plaintiff by her client tended to expose her to public contempt, ridicule, aversion or disgrace, or induced an evil opinion of her in the minds of right-thinking persons, or deprived her of their friendly intercourse in society. Since the Letter does not indicate the basis for plaintiff's discharge, the alleged discharge, in and of itself, is not defamatory. Further, while plaintiff contends that she was constructively dismissed, the average person, reading the entire paragraph, would not distinguish "constructively dismissed" from "discharged." Moreover, the transcript of the proceeding before this Court demonstrates the truth of the third Statement. In fact, plaintiff admitted that she was discharged; plaintiff stated that her claim for attorneys' fees was based on *quantum meruit* because she "[had] been discharged" (Tr.

5:8-10). Even accepting as true plaintiff's claim that the word "constructive" was omitted from her statement concerning a prior client, the third Statement cannot support her defamation claim. And, plaintiff's claim that the third Statement accuses her of committing a crime in violation of the Penal Law is wholly lacking in merit.

Finally, the fourth Statement indicating that the 27east article failed to mention that plaintiff is bound, as an attorney, by the New York State Bar Association's Rules of Professional Conduct to report her misstatement to the court, is not defamatory when read in context. The Letter does not state that plaintiff failed to report any misstatement, but indicates that plaintiff is simply *required* to report such a statement. Merely stating that plaintiff has an obligation to report a misstatement to the Court does not tend to expose her to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of her in the minds of right-thinking persons, or deprive her of their friendly intercourse in society, absent an indication that she failed to so report. Therefore, the fourth Statement is not actionable as a defamatory statement.

Furthermore, even if the four Statements had been false and factual, plaintiff would have no cause of action, as the record indicates that defendant did not submit the Letter with actual malice, as required to be shown when the plaintiff is a limited public figure.

There is a four-part test helpful in determining whether plaintiff is a public figure (*Lee v City of Rochester*, 174 Misc 2d 763, 663 NYS2d 738 [Sup Ct Monroe County 1997]). "A defendant must show the plaintiff has: (1) successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily injected himself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing

access to the media” (*Lee v City of Rochester, supra citing Lerman v Flynt Distributing Co.*, 745 F2d 123, 136-37 [2d Cir 1984], *cert. denied*, 471 US 1054, 105 SCt 2114 [1995]). “The New York law of public figure classification uses a similar approach, although it is not articulated in terms of separate elements” (*Lee v City of Rochester, supra*). New York courts have held that plaintiffs who (1) “‘thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved,’” (2) “‘invite attention and comment’” by “tak[ing] an affirmative step to attract public attention” with respect to the subject of the allegedly defamatory commentary; (3) “project” their “name and personality” before the community or “into the limelight” as a “leading authority” on the subject of the litigation “(which seems to be the functional equivalent of ‘assum[ing] a position of prominence’);” and (4) maintain “continuou[s]” contact with the press or media, harbor the limited public figure status only for the particular controversy into which plaintiff thrusts herself (*Lee v City of Rochester, supra citing James v. Gannett Co.*, 40 NY2d 415, 386 NYS2d 871 [1976] and *Maule v N.Y.M. Corp.*, 54 NY2d 880, 444 NYS2d 909 [1981]).

The record indicates that plaintiff has indeed thrust herself to the forefront of and has invited attention and comment on, the controversy concerning the issue of “McMansions” in her neighborhood. Plaintiff has written 36 letters to the editor over the span of three years, complaining about the “eight bedroom” “mega-bombs” and other “McMansions” being built in her community. In one of these letters, plaintiff invited others with similar concerns to come to her house for a “party” to discuss the issues and meet politicians who will support her cause. Plaintiff even provided her telephone number, inviting others to call her to “join this effort,” which included “legal actions against the spec builders” that people could join “at no cost to you.”

Plaintiff also hinted at volunteering to run for public office to address the issue. Plaintiff, the seemingly self-appointed spokesperson in preserving the “small and modest” character of her village neighborhood, is a limited public figure for the particular controversy over the construction of oversized houses in her neighborhood.

Thus, in order to establish her cause of action she must show the existence of actual malice on the part of defendant (*DiBernardo v Tonawanda Pub. Corp.*, 117 AD2d 1009, 499 NYS2d 553 [4th Dept 1986] citing *New York Times Co. v Sullivan*, 376 US 254, 84 SCt 710). Plaintiff must prove that defendant acted with knowledge of the falsity, or with reckless disregard for the falsity of the Letter.

In light of plaintiff’s (albeit minor) misstatements reflected in the Transcript, defendant’s citation to and opinion based on his reliance upon the 27east article, the fact that plaintiff used the word “discharge” to describe her *quantum meruit* claim, and the uncontested fact that an attorney does have an obligation to report misstatements made to a Court (see Verified Complaint ¶¶10-12), it cannot be said that defendant acted in reckless disregard of whether the four Statements were true or false. Further, there is no evidence presented by plaintiff or revealed in the documents submitted by defendants, indicating that defendant acted with knowledge that any of the Statements were false, if false at all.

Therefore, plaintiff’s defamation action cannot be maintained and is dismissed.

However, the Court declines defendant’s and plaintiff’s requests for sanctions against each other. Section 130-1.1 permits Court to award sanctions, in its discretion, for actual expenses reasonably incurred and reasonable attorney’s fees, resulting from frivolous conduct. Pursuant to Section 130-1.1(c), conduct is frivolous if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
 - (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
 - (3) it asserts material factual statements that are false.
- Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

The Court finds that notwithstanding the Amended Complaint's lack of merit and plaintiff's counsel refusal to resolve this matter, plaintiff's complaint was not completely frivolous, within the meaning of 22 NYCRR 130-1.1(c)(1).

And, having prevailed on his motion, defendant's conduct does not warrant sanctions.

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendant motion to dismiss the Amended Complaint of the plaintiff pursuant to CPLR 3211(a)(1) (documentary evidence), (a)(7) (failure to state a claim), and pursuant to CPLR 3212 for summary judgment, is granted, and this action is hereby dismissed; and it is further

ORDERED that the branch of defendant's motion for an order awarding sanctions against plaintiff is denied; and it is further

ORDERED that plaintiff's application for an order awarding sanctions against defendant is denied; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

September 10, 2010

A handwritten signature in black ink, appearing to read 'Carol Edmead', written over a horizontal line.

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMED