

Melius v Glacken
2010 NY Slip Op 34000(U)
February 22, 2010
Supreme Court, Nassau County
Docket Number: 4688/09
Judge: Daniel R. Palmieri
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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----x
GARY MELIUS,

TRIAL TERM PART: 45

INDEX NO.: 4688/09

Plaintiffs,

MOTION DATE: 6-29-09

-against-

SUBMIT DATE: 1-29-10

SEQ. NUMBER - 001

WILLIAM GLACKEN,

Defendant.

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The following papers have been read on this motion:

- Notice of Motion, dated 5-29-09.....1**
- Memorandum of Law in Support, dated 5-29-09.....2**
- Memorandum of Law in Opposition, dated 7-29-09.....3**
- Memorandum of Law in Further Support, dated 8-19-09.....4**

This motion pursuant to CPLR 3211(a)(7) to dismiss the complaint for failure to state a cause of action or, in the alternative, for summary judgment upon conversion pursuant to CPLR 3211(c) is granted to the extent that the motion is converted to one for summary judgment. Additional papers shall be submitted in accord with the terms of this order.

This is a defamation action. The plaintiff alleges in his complaint that a “public meeting” was held in the Village of Freeport Library on February 26, 2009, at approximately 7 p.m., and that approximately 50 people were in attendance. Two such persons are specifically named. At that meeting, the defendant stated that the defendant was “an

extortionist” and was seeking “to extort money.” The plaintiff alleges that these statements were false, adversely affected his reputation in the community, and constituted slander per se.

At the outset, it should be noted that allegations of defamation actions present, in the first instance, an issue of law for judicial determination. *Silsdorf v Levine*, 59 NY2d 8, 12-13 (1983), *cert denied* 464 US 831 (1983); *Dillon v City of New York*, 261 AD2d 34 (1st Dept. 1999). In the present procedural context that is especially true, because in evaluating a motion made pursuant to CPLR 3211(a)[7], the Court must look within the four corners of the complaint, and if any cause of action is discernable therefrom the motion should fail. *See, e.g., Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). In making this determination, the factual allegations asserted in the pleading are to be accepted as true, and the plaintiff is to be accorded the benefit of every favorable inference that may be drawn therefrom. *Konidaris v Aeneas Capital Mgt., LP*, 8 AD3d 244 (2d Dept. 2004); *Leon v Martinez*, 84 NY2d 83 (1994). Here, however, there are separate and additional pleading requirements. CPLR 3016(a) requires that in an action for libel or slander, the particular words complained of must be set forth in the complaint, although their application to the plaintiff may be stated generally.

It is settled that in order to make out such a claim, these strict pleading requirements for such a cause of action must be satisfied, or dismissal will result. *See, Lesesne v Lesesne*, 292 AD2d 507 (2d Dept. 2002); *Siriani v Rafaloff*, 284 AD2d 447 (2d Dept. 2001); *Grynberg v Alexander's Inc.*, 133 AD2d 667 (2d Dept. 1987). A plaintiff must allege 1) the allegedly false statements made, with particularity, 2) the time, place and manner of the utterances, 3)

to whom such statements were made, and 4) special damages flowing from the defamation. CPLR 3016(a); *Lesesne v. Lesesne*, *supra*; *see also*, *Lieberman v Gestein*, 80 NY2d 429, 434 (1992). Special damages are not alleged here.

However, the plaintiff alleges that the statements made about him constitute slander per se. Specifically, he alleges professional disparagement, in that the defendant stated he was guilty of criminal conduct in his business dealings. This form of defamation does not require that the plaintiff plead and prove special damages, because damages are presumed in such a case. *Lieberman*, at 435.

At 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 (3d Dept. 2005). However, for purposes of CPLR 3211(a)(7), the allegation by the plaintiff that the words were false is sufficient to defeat a motion made pursuant to that section. *Guggenheimer v Ginzburg*, 43 NY2d 268, *supra*.

Nevertheless, the Court has before it a request by the movant that the motion be converted to one for summary judgment pursuant to CPLR 3211(c), and it finds that such a conversion is appropriate here. That is the case because the context in which the alleged defamatory words were uttered can be critically important. *See, Trustco Bank of N.Y. v Capital Newspaper Div. Of the Hearst Corp.*, 213 AD2d 940 (3d Dept. 1995). The present complaint is devoid of the context, but it has been raised by the defendant – a heated

campaign for mayor of the Village of Freeport, in which the defendant was the incumbent and plaintiff's business dealings with the Village had become an issue.

Among other things (without making any finding or drawing any conclusions at this time), this may mean that a privilege attached to the statements, because statements intended for dissemination as a matter of public interest have been found shielded if made by public officials or their spokespersons. *Wyllie v District Attorney of County of Kings*, 2 AD3d 714 (2d Dept. 2003); *Santivicca v City of Yonkers* (2d Dept. 1987). Set against the background the defendant alleges, the statements may also be shown to be the type of opinion or verbal hyperbole that is not actionable. *600 West 115th Corp. v Von Gutfield*, 80 NY2d 130 (1992); *Trustco Bank of N.Y. v Capital Newspaper Div. Of the Hearst Corp.*, 213 AD2d 940, *supra*.

Thus, while the plaintiff may rest on his pleading if the sole basis of the motion is failure to state a cause of action, the Court finds from a review of the papers that summary judgment may be the appropriate vehicle for reviewing this defamation claim. The defendant should be given a chance to present the full context of events underlying the meeting of February 26, 2009, and the plaintiff should be given an opportunity to submit what ever proof he deems appropriate to respond thereto.

Accordingly, this motion is hereby converted to one for summary judgment pursuant to CPLR 3221(c). The parties are directed to submit their papers according to the following schedule:

The defendant shall serve a notice of motion and supporting papers on the plaintiff, by delivery to counsel's office or by overnight delivery service on or before March 22, 2010. The plaintiff shall serve his opposing papers by the same method on or before April 5, 2010.

The defendant may submit a reply, and the return date of the motion shall be April 14, 2010.

The parties may adjust the foregoing dates by stipulation, but shall advise the Court, in writing, of any changes.

No personal appearance is required, and the parties may submit photocopies of any memoranda, affirmations or affidavits submitted on this present motion in support of their positions.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: February 22, 2010


HON. DANIEL PALMIERI
Acting Supreme Court Justice

TO: Rosenberg Calica & Birney, LLP
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ENTERED

FEB 24 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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