

**Charas v Ames**

2011 NY Slip Op 32731(U)

October 7, 2011

Supreme Court, New York County

Docket Number: 117591/2009

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JOAN M. KENNEY  
J.S.C.  
Justice

PART 8

Index Number : 117591/2009  
CHARAS, SOLANGE  
vs.  
AMES, ROBIN  
SEQUENCE NUMBER : 009  
SUMMARY JUDGMENT

INDEX NO. 117591/09  
MOTION DATE 6/13/11  
MOTION SEQ. NO. 009  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits <sup>including</sup> ... Depo transcripts  
Answering Affidavits — Exhibits + memo of law  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
1-9  
10-12  
13, 14

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE  
WITH THE ATTACHED MEMORANDUM DECISION**

**FILED**

OCT 17 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 10/7/11

JMK  
JOAN M. KENNEY J.S.C.  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check 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: IAS PART 8

-----X

SOLANGE CHARAS,  
Plaintiff,  
-against-

DECISION & ORDER  
Index No.: 117591/2009

ROBIN AMES,  
Defendant.

-----X

JOAN M. KENNEY, J.:

In this action sounding in defamation, tortious interference with contractual relations and breach of fiduciary duty, defendant moves, pursuant to CPLR 3212, for an order dismissing the complaint.

**FILED**  
OCT 17 2011  
NEW YORK  
COUNTY CLERK'S OFFICE

FACTUAL & PROCEDURAL BACKGROUND

Plaintiff and defendant are both tenants and shareholders in the Eastbrook apartment building, located at 333 East 75<sup>th</sup> Street, New York, NY (the Eastbrook). Plaintiff moved into the Eastbrook in 1996, and was president of the Coop Board (Board) for 11 years until she resigned in 2007. Defendant became a director on the Board in 2007.

From late 2006 through early 2007, plaintiff began renovations on her apartment. In February 2007, plaintiff fixed faulty electrical wiring in her apartment. Plaintiff claims that she received prior approval from the managing agent of the coop for the installation of the new conduit. However, according to plaintiff, the new electrical line was exposed and became a "source of consternation for some of the Eastbrook's 11<sup>th</sup> floor residents." Charas Affidavit, ¶ 35. Plaintiff and the Board eventually worked

out a solution to the 11<sup>th</sup> floor conduit problem and, on March 30, 2007, the shareholders received a letter from the Director of Management Services explaining the solution. Plaintiff's Exhibit 1, CHA 0085-0086.

After the installation of the electrical line, the defendant allegedly began informing residents and shareholders that plaintiff, while performing renovations on her apartment, had "stolen money from the Building or had otherwise misappropriated Building funds in order to complete the renovations." Defendant's Exhibit B, Complaint, ¶ 12 (a). Defendant allegedly started her campaign against plaintiff by sending a letter to the shareholders in which she accused plaintiff of "illegality, impropriety, self-dealing and no penalties," and she also stated that plaintiff "took the least costly root [sic] for herself."<sup>1</sup> Plaintiff's Exhibit 1, at CHA 0130.

Plaintiff further alleges that defendant and another tenant, Nanette Garcia (Garcia), "went door-to-door visiting with over 53 non-sponsor shareholders, making allegations that I had done illegal things, embezzled money from the building reserve fund, and manipulated all of the staff ... ." Charas Affidavit, ¶ 44. Plaintiff maintains that defendant's statements are false.

In June 2007, plaintiff, as one of the principal owners of S&E

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<sup>1</sup>While the court is aware that many of these statements fall outside the statute of limitations, this type of communication continued throughout 2009, as set forth below.

Real Estate Ventures (S&E), purchased unit 1F as an investment unit. S&E was the shareholder/owner of this apartment. After her purchase, plaintiff claims that defendant attempted to have 1F's renovations stymied by, among other things, advising the Eastbrook staff, including the building superintendent, not to provide plaintiff with any services. Plaintiff explains that defendant's warnings did not just pertain to unit 1F, but also to her residential apartment. These directives included directing staff, under threat of termination, "not to assist me in any manner, to not get me cabs, deliver my packages, provide me any maintenance services . . . ." *Id.*, ¶ 63.

Defendant's behavior allegedly resulted in "stop work orders," which resulted in a delay in 1F's renovations. Additionally, plaintiff claims that defendant's application of the lobby rules were selectively and only applied to plaintiff, one of which being that construction materials could no longer be transported through the lobby. *Id.*, ¶ 69.

In December 2007, the Board settled with S&E to resolve the issue of the renovations to 1F and the stop work orders. S&E, through plaintiff, signed a release from future claims against the Board, including the directors of the Board, arising out of the renovation of 1F. Defendant's Exhibit Q.

In April 2008, defendant e-mailed other members of the Board, accusing plaintiff of violating "every rule and law" while

renovating 1F. Plaintiff's Exhibit 1, CHA 0168. In response to one of defendant's e-mails, in which she suggests that the building litigate against plaintiff, another Board member, Raymond Pride (Pride) wrote that this sounds like "retribution on your part." *Id.* at CHA 0165. Pride also e-mailed defendant that defendant seemed "single focused on Solange Charas, to an excess," and that she was "fixating" on plaintiff's actions. *Id.* at CHA 0167-0168.

Plaintiff believes that it is defendant's intention to destroy her quiet enjoyment of her apartment and to make plaintiff so uncomfortable in the building that she will be forced to leave. The alleged defamation started in 2007 and continued through the date the complaint was filed on December 15, 2009. For example, Rebecca Klein, a resident of Eastbrook, testified that defendant approached her when Klein first moved into the building and started to tell her how plaintiff allegedly stole money from the Board. Klein testified that in the summer of 2009, defendant came up to her and "started going off about [plaintiff] doing this, and how [plaintiff] has put our whole building in financial ruin because of all of the money and - I mean, half of it you sort of stop listening to. And she was using foul language." Plaintiff's Exhibit 3, Klein TR, at 21. Klein continued that defendant also said to her, in the same conversation, that plaintiff was "doing all this illegal renovation, [plaintiff] didn't check," and that plaintiff has stolen money for her apartment, "taken from the

[\* 6]  
building, and did some windows without checking." *Id.* at 74-75.

Osman Lukolic, the former Resident Manager of the Eastbrook testified that defendant said to him, in reference to plaintiff, "you know, Al, you guys shouldn't do anything for that piece of shit. Get that piece of shit out of here ... I'm talking about Solange. You guys shouldn't do anything for her. Don't give her packages, don't assist her with her cab." Plaintiff's Exhibit 8, Lukolic TR, at 6.

Plaintiff further alleges that the building superintendent testified that defendant continued to defame plaintiff in the lobby of the Eastbrook in 2009. She additionally claims that at least nine people may testify that defendant made several verbal defamations of plaintiff as late as May 2009.

Plaintiff commenced this action on December 15, 2009 alleging causes of action for defamation, tortious interference with contractual relations and breach of fiduciary duty. Defendant brought a pre-answer motion to dismiss the second cause of action of tortious interference with a contract. On April 7, 2010 this court dismissed plaintiff's second cause of action, holding that "any claim stemming from the business venture involving 1F, is solely S&E's claim to make." Defendant's Exhibit H, at 4. The court continued that plaintiff "cannot act in her individual capacity but rather as a principal on behalf of S&E," and that "S&E executed a release from claims against defendant, arising out of

the renovation of 1F." *Id.*

Specifically with respect to defamation, plaintiff claims that she has been forced to hire attorneys to defend herself against defendant's harassment. Plaintiff has also allegedly suffered damage to her reputation as a result of defendant's statements and has been deprived of the quiet enjoyment of her property. In the complaint, plaintiff states that "[d]efendant's statements were false and defamatory in that the statements alleged that plaintiff stole from the Building to pay for the renovations in plaintiff's apartment." Defendant's Exhibit A, ¶ 23. Plaintiff is also seeking punitive damages for the "malicious, spiteful and vindictive repetition of the defamatory statements against plaintiff." *Id.*, ¶ 28.

Plaintiff explains her current living situation, in pertinent part:

I now live in a place where I hurry through the lobby because I don't want to have any potential interaction with someone who might call the police and file an unfounded complaint for simply saying "hello" and personal safety concerns because I have seen on my own and have heard from others that Ames can get violent with people. I make sure that there isn't anyone at the mailboxes when I collect my mail, I never wait in the lobby, I don't have conversations with people in any of the common spaces, and I don't ride the elevator with anyone.

Defendant's Exhibit F, Plaintiff's second supplemental responses to defendant's interrogatories, at 10.

In support of her claim for breach of fiduciary duty,

plaintiff alleges that defendant "focused her directorial activities almost exclusively against [plaintiff] ... ." Plaintiff's Memorandum of Law, at 4. Defendant also shared the December 2007 settlement with Garcia, who was not a member of the Coop Board. In the complaint, plaintiff states that defendant violated her fiduciary duty as Coop Board Director by "disseminating to shareholders confidential information gleaned." Defendant's Exhibit A, ¶ 36. Plaintiff continues that defendant also used her position as a Coop Board Director to frustrate plaintiff's "business and relationships with regard to apartment 1F." *Id.*, ¶ 37. She states that because of the defendant's breach of fiduciary duty, plaintiff has been "embarrassed and damaged in her reputation." *Id.*, ¶ 38.

#### I. Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1<sup>st</sup> Dept 2007), citing *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima face case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1<sup>st</sup> Dept 2008),

quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). In considering a summary judgment motion, evidence should be viewed in the "light most favorable to the opponent of the motion." *Grasso*, 50 AD3d at 544, citing *Marine Midland Bank v Dino and Artie's Automatic Transmission Co.*, 168 AD2d 610 (2d Dept 1990). The function of the court is one of issue finding, not issue determination. *Ferrante v American Lung Assn.*, 90 NY2d 623, 630 (1997).

Statue of Limitations:

Defendant properly argues that, pursuant to the one-year statute of limitations for a defamation claim, all of the alleged defamatory statements and e-mails which pre-date December 15, 2008, are time-barred. See CPLR 215.

Defamation:

Defamation is defined as "the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society [internal quotation marks and citations omitted]." *Foster v Churchill*, 87 NY2d 744, 751 (1996). Slander per se, which consists of statements "charging plaintiff with a serious crime," among other accusations, does not require any proof of damages. *Lieberman v Gelstein*, 80 NY2d 429, 435 (1992).

In the present case, defendant has accused plaintiff of

stealing from the shareholders and embezzling funds from the Eastbrook reserve account. As plaintiff set forth, stealing and embezzlement are serious crimes in New York. See Larceny, as defined in New York Penal Law § 155.05. As such, since defendant's statements about plaintiff fit into the category of slander per se, "the law presumes that damages will result, and they need not be alleged [internal quotation marks and citation omitted]." *Arts4All, Ltd. v Hancock*, 5 AD3d 106, 109 (1<sup>st</sup> Dept 2004).

Plaintiff argues that defendant repeatedly made false accusations to shareholders, residents and staff at the Eastbrook that plaintiff stole from her fellow shareholders and that she embezzled funds from the Eastbrook's reserve accounts to complete her renovations.

Defendant denies making any statements about plaintiff. However, even if defendant made those statements, defendant argues that they would be protected by a qualified privilege. As set forth in *Foster v Churchill* (87 NY2d at 751), "[e]ven though a statement is defamatory, there exists a qualified privilege where the communication is made to persons who have some common interest in the subject matter." Defendant argues that the building staff and shareholders would have an interest in plaintiff's purported expenditure of Building funds.

Nonetheless, the defense of a qualified privilege can be defeated "where it is demonstrated that the defendant's statements

were uttered with malice, which includes either common-law malice (motivated by spite or ill will) or constitutional malice (statements made with a high degree of awareness of their falsity)." *Silverman v Clark*, 35 AD3d 1, 11 (1<sup>st</sup> Dept 2006).

"Spite and ill will refer to the speaker's motivation for making the allegedly defamatory comments, not to the defendant's general feelings about the plaintiff." *Curren v Carbonic Systems, Inc.*, 58 AD3d 1104, 1106 (3d Dept 2009).

Plaintiff does not dispute that there may have been a qualified privilege, however she argues that there are triable issues of fact with respect to common-law and constitutional malice. The testimony presented in this case suggests that defendant's motivation for making the statements was out of ill will and that she also had reckless disregard for the statements' truth or falsity. For instance, defendant herself acknowledged that she did not investigate whether or not the statements she made that plaintiff stole the Building's money, were false. In her deposition, defendant admits that she made no efforts to find out the legitimacy of plaintiff's expenditures on the renovations of plaintiff's apartment. She argues that she had heard the statements from someone else. Yet, without verifying if the allegations were true, defendant purportedly spread them to various people in the building.

Accordingly, since triable issues of fact remain as to whether

defendant spoke with malice, defendant's motion for summary judgment dismissing the first cause of action is denied.

Punitive Damages:

Plaintiff seeks punitive damages under her defamation cause of action. Punitive damages are permitted only when a "defendant's wrongdoing is not simply intentional but evince[s] a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations [internal quotation marks and citation omitted]." *Ross v Louise Wise Services, Inc.*, 8 NY3d 478, 489 (2007). Since plaintiff has not alleged that defendant's conduct rises to this high level, despite claims of malice, punitive damages will not be awarded.

Breach of Fiduciary Duty

Plaintiff argues that defendant breached her fiduciary duty by showing the settlement between the Board and S&E to non-board members. Plaintiff continues that defendant used her position on the Board to instruct building staff not to provide services to plaintiff under threat of termination. Likewise, renovations to 1F were allegedly obstructed due to defendant's involvement in issuing stop work orders. However defendant argues that, as a board member, defendant, acting alone did not have the authority to issue stop work orders, arbitrarily enforce some building rules to some tenants and not others, or terminate employees.

As defendant properly notes, the court already dismissed any

claim that stems from 1F, since S&E, not the plaintiff, is the proper party to assert those claims. Therefore, plaintiff's allegations that defendant breached her fiduciary duties by obstructing renovations to 1F and by disseminating the settlement between S&E and the Board, are precluded.

Plaintiff's other allegations, including that she suffered defamation to her reputation and that she has to pay for legal costs, are the same allegations that plaintiff set forth in her defamation cause of action. As such, this cause of action for breach of fiduciary duty is dismissed as duplicative. See e.g. *Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 (1<sup>st</sup> Dept 2009). Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted with respect to dismissing the third cause of action, and is otherwise denied; and it is further

ORDERED that the action shall continue as to the remaining causes of action; and it is further

ORDERED that the parties proceed to mediation on October 13, 2011.

Dated: October 7, 2011

ENTER:  
**FILED**  
  
 OCT 17 2011 Kenney, J.S.C.

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