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SHORT FORM ORDER

INDEX No. 10-12596

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

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 11-15-10 (#001)
MOTION DATE 12-15-10 (#002)
ADJ. DATE 6-1-11
Mot. Seq. # 001 - MG; CASEDISP
002 - XMD

ELENA RUTH SASSOWER, DORIS L. SASSOWER, and CENTER FOR JUDICIAL ACCOUNTABILITY, INC., Plaintiffs,	SARNO & DeFELICE, LLC Attorney for Plaintiffs Doris L. Sassower & Center for Judicial Accountability, Inc. 235 West 23rd Street, 5th Floor New York, New York 10011
- against -	SATTERLEE STEPHENS BURKE & BURKE, LLP Attorney for Defendants 230 Park Avenue New York, New York 10169
GANNETT COMPANY, INC., THE JOURNAL NEWS, LOHUD.COM, HENRY FREEMAN, CYNDEE ROYLE, BOB FREDERICKS, D. SCOTT FAUBEL, KEITH EDDINGS, and DOES 1-10, Defendants.	ELENA RUTH SASSOWER, Pro Se 64 Towd Point Road Southampton, New York 11968

Upon the following papers numbered 1 to 35 read on this motion to dismiss and cross motion for omnibus relief; Notice of Motion/ Order to Show Cause and supporting papers 1 - 7; Notice of Cross Motion and supporting papers 10 - 21; Answering Affidavits and supporting papers ___; Replying Affidavits and supporting papers 24 -25, 26 - 28, 31 - 33; Other memoranda of law 8 - 9, 22 - 23, 29 - 30, 34 - 35; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the named defendants for an order pursuant to CPLR §3211 (a) (1) and (7) dismissing the complaint is granted to the extent of dismissing the complaint for failure to state a cause of action, and is otherwise denied.

ORDERED that this cross-motion by the plaintiff pro se Elena Ruth Sassower for an order imposing sanctions pursuant to 22 NYCRR 130-1.1, granting a default judgment against DOES 1-10, extending the plaintiffs' time to serve the defendant Keith Eddings, giving notice that the Court will treat the defendants' motion as one for summary judgment, and for various relief directed against the defendants' counsel is denied.

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This action is for libel, libel per se and journalistic fraud arising from the publication of an article in The Journal News (hereinafter Journal), a Westchester County newspaper, on May 6, 2007. The article, written by the defendant Keith Eddings, reported on a public meeting of the Westchester Common Council held at the city hall in White Plains, New York. The meeting's agenda included the judicial confirmation of Judge Brian Hansbury, which the plaintiffs Elena Ruth Sassower (hereinafter E.R. Sassower) and Doris L. Sassower (hereinafter D.L. Sassower) opposed. The plaintiffs allege, *inter alia*, that the article defamed them by characterizing them as "hecklers," by labeling their statements in opposition to the confirmation of Judge Brian Hansbury as "slings and arrows," and erroneously reported on a prior judicial decision which evicted E.R. Sassower and D.L. Sassower from their apartment of 21 years.

The defendant Gannett Company, Inc. is the parent company of Gannett Satellite Information Network, Inc., which operates the Journal and LoHud.com. The remaining named defendants are employees of the Journal. The named defendants (hereinafter defendants) move to dismiss the complaint because the article is substantially true, that it consists of non-actionable statements of opinion, that the statements therein are not defamatory and that a cause of action for journalistic fraud is not recognized in New York. The motion is unopposed by D.L. Sassower and the plaintiff Center for Judicial Accountability, Inc.[1]

Pursuant to CPLR §3211 (a) (7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs ***(Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (***Guggenheimer v Ginzburg***, 43 NY2d 268, 401 NYS2d 182 [1977]). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (***Pacific Carlton Development Corp. v 752 Pacific, LLC***, 62 AD3d 677, 878 NYS2d 421 [2d Dept 2009]; ***Gjonlekaj v Sot***, 308 AD2d 471, 764 NYS2d 278 [2d Dept 2003]). On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (***Leon v. Martinez***, *supra*; ***International Oil Field Supply Services Corp. v Fadeyi***, 35 AD3d 372, 825 NYS2d 730 [2d Dept 2006]; ***Thomas McGee v City of Rensselaer***, 174 Misc2d 491, 663 NYS2d 949 [Sup Ct, Rensselaer County 1997]). Upon a motion to dismiss, a pleading will be liberally construed and such motion will not be granted unless the moving papers conclusively establish that no cause of action exists (***Chan Ming v Chui Pak Hoi et al,*** 163 AD2d 268, 558 NYS2d 546 [1st Dept 1990]).

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[1] The opposition to the motion is not signed by counsel for the above-referenced plaintiffs despite the inclusion of a signature line on the papers submitted. Correspondence between E.R. Sassower and counsel for the defendants indicates that she would forward papers signed by plaintiffs' counsel no later than the date of oral argument herein. The Court's computerized system does not indicate that this was done. Thus, the above-referenced plaintiffs have not submitted opposition to the defendants' motion, nor joined in E.R. Sassower's cross-motion. In any event, D.L. Sassower and the Center for Judicial Accountability, Inc. have not submitted separate or additional papers herein, and the Court's decision would be no different if the papers submitted had been signed by their counsel.

First and Second Causes of Action for Libel and Libel Per Se

"Defamation has long been recognized to arise from 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. The elements are a false statement, published without a privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se" (***Dillon v City of New York***, 261 AD2d 34, 704 NYS2d 1 [1st Dept 1999]). "In cases involving defamation per se, the law presumes that damages will result, and special damages need not be alleged or proven" (***Gatz v Otis Ford,*** 274 AD2d 449, 711 NYS2d 467 [2d Dept 2000]). The per se categories consist of the following statements: (1) the plaintiff committed a crime; (2) the statement tends to injure the plaintiff in his or her trade, business or profession; and (3) the plaintiff has contacted a loathsome disease among others (*see* ***Matherson v Marchello,*** 100 AD2d 233, 473 NYS2d 152 [2d Dept 1984]). When the defamatory statement falls into one of these categories, "the law presumes damage to the slandered individual's reputation so that the cause is actionable without proof of special damages" (***60 Minute Man, Ltd. v Kossman,*** 161 AD2d 574, 555 NYS2d 152 [2d Dept 1990]).

Defamation traditionally consists of two related causes of action i.e. libel and slander. The demarcation between libel and slander rests upon whether the allegedly defamatory words are written or spoken (***Matherson v Marchelleo***, *supra*). Slander is the uttering of defamatory words which tend to injure another in his reputation, office, trade, etc. (***Shapiro v Glens Falls Ins. Co.***, 39 NY2d 204, 383 NYS2d 263 [1976]; ***Liffman v Brooke***, 59 AD2d 687 [1st Dept 1977]. Libel is always considered as written (***Liffman v Brooke***, *id.*; ***Matherson v Marchelleo***, *supra*; ***Locke v Gibbons***, 164 Misc 877, 299 NYS2d 188 [Sup Ct, New York County 1937])

Whether particular words are defamatory presents a legal question to be resolved by the Court in the first instance (***Golub v Enquirer/Star Group***, 89 NY2d 1074, 659 NYS2d 836 [1997]; ***Sprewell v NYP Holdings, Inc.***, 1 Misc 3d 847, 772 NYS2d 188 [Sup Ct, New York County 2003]. In deciding whether the article is defamatory the Court must determine if it constitutes a statement of fact or opinion i.e. whether the reasonable person would have believed that the statements were conveying facts about the plaintiff.

The essence of defamation is the publication of a statement about an individual that is both false and defamatory. Because only assertions of fact are capable of being proven false, a defamation action cannot be maintained unless it is premised on published assertions of fact (***Brian v Richardson***, 87 NY2d 46, 637 NYS2d 347 [1995]). Non-actionable "pure opinion" is a statement of opinion accompanied by recitation of facts upon which it is based, or, if not accompanied by such factual recitation, the statement must not imply that it is based upon undisclosed facts (***Steinhilber v Alphonse,*** 68 NY2d 283, 508 NYS2d 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,*** *id.*).

In ***Steinhilber v Alphonse,*** *supra*, the Court set forth a four factor analysis 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," (***Steinhilber v Alphonse,*** *supra*, citing from ***Ollaman v Evans***, 750 F2d 970 [DC Cir.], *cert denied* 471 US 1127).

An analysis of the four factors mentioned above as applied to this case 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.
It is clear that the specific language used in the article was indefinite and ambiguous. The specific language, in its entirety, is expressed as a description of the actions of the individual plaintiffs, and what transpired during the meeting.
(2) A determination of whether the statement is capable of being objectively characterized as true or false.
It is determined that the relevant statements are not capable of being objectively characterized as true or false in that the words used are hyperbole and would not be considered facts by the average reader of the article. No evidence has been submitted to establish that the statements were false when made.
(3) An examination of the full context of the communication in which the statement appears.
It is determined that the examination of the full context of the communication in which the statement appears is that of a report of a somewhat contentious public meeting of a municipal body wherein the individual plaintiffs vociferously voiced their opinion regarding a public matter.
(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.
The totality of the circumstances strongly suggests that the common attitude regarding civility and decorum in public meetings supports the determination that such language should be protected.

Based upon the foregoing application of the four factors stated above, and considering the totality of the circumstances, the Court finds that the words in the Journal article constitute non-actionable opinion.

In addition, words of general abuse, though vexatious or discourteous, are not actionable in the absence of an allegation and showing of special damages (***Landy v Norwegian America Line Agency, Inc.***, 26 AD2d 923, 274 NYS2d 687 [1st Dept 1966];

Torres v Huner, 150 AD 798, 135 NYS 332 [2d Dept 1912]; ***Todd Layne Cleaners, LLC v. Maloney***, 17 Misc 3d 1114(A), 851 NYS2d 67 [Civ Ct, New York County 2007]; ***Rizzo v Zucker***, 18 Misc 2d 593, 182 NYS2d 246 [Sup Ct, Queens County 1958]). Here, the statements made about the individual plaintiffs were loose, figurative or hyperbolic, which even if deprecating them, were not actionable defamation (***Kaye v Trump***, 58 AD3d 579, 873 NYS2d 5 [1st Dept 2009]; ***Dillon v City of New York***, *supra*; ***Stephan v Cawley***, 24 Misc 3d 1204[A], 890 NYS2d 371 [Sup Ct, New York County 2009]; ***Penn Warranty Corp. v DiGiovanni***, 10 Misc 3d 998, 810 NYS2d 807 [Sup Ct, New York County 2005]). Although it is clear that the language was offensive to the plaintiffs, it is not actionable as libel as it does not falsely relate factually ascertainable facts or characteristics concerning them (***600 West 115th Street Corp. v Von Gutfeld***, 80 NY2d 130, 589 NYS2d 825 [1992]).

E.R. Sassower has failed to plead a cause of action in libel as she has not shown "special damages," i.e. damages contemplating the loss of something having economic or pecuniary value (***Wadsworth v Beaudet***, 267 AD2d 727, 701 NYS2d 145 [3d Dept 1999]). Further, considering the language in the Journal article as a whole, in its ordinary meaning, there is nothing which would establish a cause of action for libel per se (***Scheinblum v Long Island Daily Press Pub. Co.***, 37 Misc 2d 1015, 239 NYS2d 435 (Sup Ct, Kings County 1962), *affd* 18 AD2d 841, 239 NYS2d 533 [2d Dept 1963]).

The Third Cause of Action for Journalistic Fraud

E.R. Sassower bases her third cause of action on two law review articles which explore, respectively, the issues of "journalistic malpractice" and "institutional reckless disregard for the truth" in defamation actions.[2] The article regarding journalistic fraud appeared in the Fordham Intellectual Property, Media and Entertainment Law Journal in 2003. In the article, Professors Clay Calvert and Robert Richards recount the story of Jayson Blair, a reporter at the New York Times, who was fired from his position for plagiarism, fabricating stories and events, and creating false bylines. They concluded that readers of print media should have a cause of action for journalistic malpractice (***14 Fordham Intell. Prop. Media & Ent. L.J. 1*** [2003]).

The Court is unable to find a single jurisdiction that recognizes a cause of action for journalistic fraud. The sole case on the issue is an unreported case, submitted by the defendants, which involves E.R. Sassower herself. In an action by E.R. Sassower against The New York Times, the Court found that "based on the Court's research, no jurisdiction has embraced such cause of action" (***Sassower v The New York Times, Co.***, Sup Ct, Westchester County, July 6, 2006, Loehr, J., Index No. 19841/05).

Accordingly, the defendants' motion pursuant to CPLR §3211 (a) (7) is granted and the complaint is dismissed in its entirety.

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[2] E.R. Sassower does not assert a cause of action based on this second issue and the matter is not before this Court.

E.R. Sassower has filed a cross-motion for an order imposing sanctions pursuant to 22 NYCRR 130-1.1, granting a default judgment against DOES 1-10, extending the plaintiffs' time to serve the defendant Keith Eddings, giving notice that the Court will treat the defendants' motion as one for summary judgment, and for various relief directed against defendants' counsel.

The essence of E.R. Sassower's motion for sanctions is that defendants' counsel has submitted affidavits which contain false and misleading exhibits and a memorandum of law which includes "false and deceitful decisions which besmirch plaintiffs and mislead the Court." Based on the record herein, the Court finds the affidavits and the memorandum of law to be well within the bounds of legitimate advocacy on the part of defendants' counsel. The Court finds this branch of E.R. Sassower's cross-motion is without merit.

E.R. Sassower also has filed a cross-motion for entry of a default judgment against DOES 1-10, who have not appeared and who are not represented in this action. The Court notes that there is a dispute as to whether the unnamed defendants have been properly served. Assuming for the purposes of this cross-motion that DOES 1-10 have been properly served, E.R. Sassower is obligated to establish that she has viable causes of action before a default judgment can be entered against them (***Woodson v Mendon Leasing Corp.***,100 NY2d 62, 760 NYS2d 727 [2003]; *see also* ***Maida v Lessing's Rest. Servs., Inc.***, 80 AD3d 732, 915 NYS2d 316 [2d Dept 2011]; ***Triangle Props. 2, LLC v Narang***, 73 AD3d 1030, 903 NYS2d 424 [2d Dept 2010]). In light of the Court's decision herein that the complaint does not state a cause of action, the branch of E.R. Sassower's cross-motion which seeks a default judgment is denied. On the Court's own motion, the complaint against DOES 1-10 is dismissed.

As the complaint does not state a cause of action, E.R. Sassower's cross-motion pursuant to CPLR §306-b is denied as academic. The remaining relief requested in the cross-motion is denied as the contentions therein are without merit.

Accordingly, E.R. Sassower's cross-motion is denied in its entirety.

Dated: SEP 22 2011

Peter Solomon
J.S.C.

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION