

Tupper v Rauli

2012 NY Slip Op 31152(U)

May 1, 2012

Sup Ct, Onondaga County

Docket Number: 11-5375

Judge: John C. Cherundolo

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF ONONDAGA

JOSEPH TUPPER,

Plaintiffs,

Index No. 11-5375
 RJI No. 33-11-3440

vs.

CORRIE RAULLI,

DECISION

Defendants.

This is a defamation action brought by the plaintiff against the defendant. The defendant has also filed a SLAPP countersuit.

The plaintiff moves for an Order directing the defendant to accept the plaintiff's late reply to defendant's counterclaim.

The defendant cross-moves for (1) default judgment on the defendant's SLAPP counterclaim; (2) summary judgment on her affirmative defense of truth and dismissing the plaintiff's complaint in its entirety; and (3) for an order of preclusion for plaintiff's failure to comply with the Court's scheduling order.

During oral argument at motion term, the defendant agreed to accept the plaintiff's reply to defendant's verified counterclaim. There having been an agreement reached, the plaintiff's motion for an order directing the defendant to accept the plaintiff's reply is moot, as is the defendant's cross-motion for default judgment.

The defendant has also cross-moved for a conditional order of preclusion for plaintiff's failure to comply with this Court's November 21, 2011 order which ordered certain discovery be done within sixty (60) days of said order. In light of the instant motion practice and the decision below, the Court now grants this relief and directs that

any and all outstanding discovery demands with regard to the defendant's counterclaim be served within thirty (30) days of the date of the order on this decision. Any failure by the plaintiff to comply with this order will result in his reply to defendant's counterclaim being stricken in its entirety.

This now leaves only the defendant's cross-motion for summary judgment on her affirmative defense of truth, dismissing the plaintiff's complaint in its entirety.

Truth is an absolute, unqualified defense to a civil defamation claim. As a defense, truth need not be established to an extreme literal degree. Ingber v. Lagarenne, 299 AD2d 608. Even if a publication is not technically true in all respects, the defense of truth applies as long as the publication is "substantially true." Carter v. Visconti, 233 AD2d 473. Thus, a basically accurate account is not actionable. Nekos v. Kraus, 62 AD3d 1144.

In the instant action, the plaintiff alleges that the defendant defamed him by creating, publishing and emailing a letter to Darya Rotblat at her office of Off Campus Housing Services at Syracuse University. The plaintiff alleges that said letter was false, defamatory, malicious and libelous with regard to the plaintiff in that it contained the following statement, "I am not certain what Mr. Tupper is doing and this could be innocent, but from past experience, he has been known to lie and to disregard the law if it doesn't favor him." The plaintiff alleges that this caused him injury.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient evidentiary proof in admissible form to demonstrate the absence of any material issue of fact. Winegrad v. New York University Medical Center, 64 NY2d 851; Zuckerman v. City

of New York, 49 NY2d 557. Thus, the motion must be supported by an affidavit from a person having knowledge of the facts, by a copy of the pleadings and by other available proof, such as depositions. CPLR §3212(b). A party can prove a prima facie entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence. Zuckerman v. City of New York, *supra*; Prudential Securities, Inc v. Rovello, 262 AD2d 172.

The defendant submits documentary evidence in support of her summary judgment motion on her affirmative defense of truth, which proves that it is “substantially true” that the plaintiff lied and disregarded the law in an attempt to evade the City of Syracuse Zoning Rules and Regulations that required him, as a landlord, to obtain a certificate of suitability for a property he purchased on Livingston Avenue in the City of Syracuse. Attached to her motion papers is defendant’s detailed answer that asserts affirmative defenses and a counterclaim. Multiple exhibits are attached to this pleading and it is verified by the defendant herself.

The defendant provides a copy of the plaintiff’s application for a certificate of suitability with regard to his property located at 867 Livingston Avenue, Syracuse, wherein he knowingly represented in the floor plans that the property had only three bedrooms when he knew it had six bedrooms. The defendant also points to the same application wherein the plaintiff declared, under penalty of perjury, that the statements he made in his attachments were true to the best of his knowledge, when he knew that his floor plans attached to his application wrongly labeled only three rooms as bedrooms while the property in fact had six bedrooms. The plaintiff’s application for a certificate of suitability was denied by the Planning Commission, in part, based on the plans

submitted by the plaintiff that exhibited that there were “at least four and possibly six bedrooms, including the room labeled as an office.”

In support of her motion for summary judgment on her affirmative defense of truth, the defendant also submitted proof that the plaintiff knowingly occupied or caused to be occupied the residence at 867 Livingston Avenue when he knew it was not to be occupied without a certificate of suitability. At the public hearing on his application to the Planning Commission, plaintiff stated, “I cannot occupy this house without a Certificate.” Yet, the plaintiff rented the residence out to multiple tenants without the necessary certificate of suitability.

The defendant has made out a prima facie defense of truth. As stated above, the defendant need not establish truth to an extreme literal degree (Ingber v. Lagarenne, supra), the defense applies as long as the publication is substantially true (Carter v. Visconti, supra). The defendant has submitted evidentiary proof that shows that her statements in her email to Darya Rotblat were substantially true - that the plaintiff has lied and disregarded the law when it was not in his favor.

To defeat a motion for summary judgment, the nonmoving party must show facts sufficient to require a trial of any issue of fact. CPLR §3212(b). Thus, where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so. Vermette v. Kenworth Truck Co., 68 NY2d 714; Zuckerman v. City of New York, supra; Forrext v. Jewish Guild for the Blind, 309 AD2d 546.

The plaintiff has provided nothing whatsoever that raises an issue of fact in order to defeat the defendant's motion for summary judgment, nor has he offered a reasonable excuse for his failure to do so. While his complaint is verified, this is the only sworn statement of the plaintiff and it is attached as an exhibit to the defendant's motion papers, it is insufficient in and of itself to preclude the grant of summary judgment to the defendant; it raises no question of fact. In opposition to the defendant's motion, there is solely the affidavit of plaintiff's attorney, in which he points to an unsworn letter composed by the plaintiff, Joseph Tupper, and sent to the Zoning Administration. This is clearly inadmissible. An attorney's affidavit, from an attorney who has no personal knowledge of the operative facts, is without probative value and consequently is insufficient to defeat a motion for summary judgment. Bronson v. Algonquin Lodge Association, Inc., 295 AD2d 681.

After having scoured the papers submitted, the Court finds nothing in admissible form that raises a question of fact sufficient to defeat the defendant's motion for summary judgment. There is no affidavit or any kind of statement under oath from the plaintiff himself, or anyone with personal knowledge of that matter, submitted in opposition to the defendant's motion, sufficient to raise a triable issue of fact.

As such, the plaintiff's motion for an order directing the defendant to accept the plaintiff's reply to defendant's verified counterclaim and the defendant's cross-motion for default judgment on her verified counterclaim is MOOT; the defendant's motion for a conditional order of preclusion is GRANTED; plaintiff's reply shall be stricken in its entirety unless plaintiff fully and completely responds to all outstanding discovery demands; and the defendant's cross-motion for summary judgment on her affirmative

defense of truth is GRANTED; and the plaintiff's complaint is DISMISSED in its entirety.

Counsel for the defendant is directed to submit a proposed order consistent with the terms of this decision, attaching a copy of this decision thereto, and submit the order to this Court upon notice to plaintiff's counsel.

DATED: May 1, 2012.

S/ John C. Cherundolo

Hon. John C. Cherundolo, A.J.S.C.