

Southampton Day Camp Realty, LLC v Gormon
2012 NY Slip Op 31767(U)
July 3, 2012
Supreme Court, Suffolk County
Docket Number: 11-32983
Judge: John J.J. Jones Jr
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SHORT FORM ORDER

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 2-21-12
ADJ. DATE 4-25-12
Mot. Seq. # 001 - Mot D

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SOUTHAMPTON DAY CAMP REALTY, LLC,
and JAY JACOBS, in his capacity as manager of
Southampton Day Camp Realty, LLC, and
individually,

Plaintiffs,

- against -

JOHN GORMON and JOHN BARONA,

Defendants.
-----X

HARRIS BEACH PLLC
Attorney for Plaintiffs
333 Earle Ovington Boulevard, Suite 901
Uniondale, New York 11553

PHILLIPS NIZER LLP
Attorney for Defendants
666 Fifth Avenue
New York, New York 10103-0084

Upon the following papers numbered 1 to 31 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 19 - 25; Replying Affidavits and supporting papers 26 - 28; Other 29, 30, 31; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants for an order (1) granting them summary judgment pursuant to CPLR 3212 (h) dismissing the complaint and awarding costs and attorney's fees; (2) granting them summary judgment on their counterclaim; and (3) imposing sanctions upon plaintiffs for commencing a patently frivolous lawsuit is considered by the Court and decided as follows:

This is an action commenced by plaintiffs seeking, inter alia, damages for allegedly defamatory statements made by defendants about plaintiffs. Plaintiff Southampton Day Camp Realty, LLC (hereinafter Southampton Day Camp) is the owner of certain real property located at 665 Majors Path, Southampton, New York. The individual plaintiff, Jay Jacobs, is the manager of Southampton Day Camp and has been in the business of operating day camps for children since 1980. In early 2011, plaintiffs submitted a proposal to the Town of Southampton for the renovation and expansion of an existing tennis camp located on the aforementioned property on Majors Path. As part of that process,

counsel for Southampton Day Camp sent a letter to the Chief Building Inspector of the Town of Southampton in which he sought an opinion from him as to certain land use issues, including whether the proposal would constitute a change of the pre-existing non-conforming use. The Building Inspector responded with a letter, dated August 19, 2011, in which he concurred with counsel's assertion, *inter alia*, that the plan did not constitute a change or expansion of the pre-existing non-conforming use. On October 20, 2011, an appeal of that decision by the Building Inspector was filed by the Little Fresh Pond Association, North Sea Neighbors and the Lake Missapogue Association, associations of neighborhood residents in the areas surrounding the proposed development.

After the Building Inspector's letter, a number of public meetings were held. Many of the neighbors of the proposed camp were vocal opponents of the project. The Town of Southampton's Planning Board and Zoning Board scheduled a hearing on the proposal for October 20, 2011. Just prior to that meeting, a flier was circulated on which it was alleged that the proposal would have adverse impact on the environment and "destroy our way of life." That flier further alleged that the developer was "hiding these harms" and "lying his way to get exemption." At the bottom of that flyer, it indicated that for more information, John Barona or John Gormon, the defendants herein, could be called. Based upon these statements, which plaintiffs characterize as defamatory, the present action was commenced for both damages as well as injunctive relief. Plaintiffs contend that these statements were "intentionally, recklessly and maliciously designed to cause Plaintiffs personal and economic damages..." (Plaintiffs' complaint, paragraph 29).

Defendants now move for summary judgment pursuant to CPLR 3212 (h). That section provides that:

(a) motion for summary judgment, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation, as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law, shall be granted unless the party responding to the motion demonstrates that the action, claim, cross claim or counterclaim has a substantial basis in fact and law or is supported by a substantial argument for an extension, modification or reversal of existing law.

Civil Rights Law section 76-a was passed by the Legislature in 1992 (L.1992, c.767) to protect citizens facing law suits arising out of their public opposition to certain applications for permits, zoning changes, leases, licenses or other permission to act from a government body (*see, 600 W. 115th Street Corp. v Von Gutfeld*, 80 NY2d 130, 589 NYS2d 825 [1992], cert. denied 508 US 910, 113 SCt 2341 [1993]). It's purpose was to deter Strategic Litigation Against Public Participation, also known as SLAPP suits, brought by public applicants seeking to discourage public opposition to their project (*see, Singh v Sukhram*, 56 AD3d 187, 866 NYS2d 267 [2d Dept 2008]). As part of that same bill, provisions were enacted to permit successful defendants to recover costs and attorney's fees (Civil Rights Law section 70-a) and to require a plaintiff to demonstrate, on a motion to dismiss or for summary judgment, that the SLAPP suit "has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law" (CPLR 3211 [g] and CPLR 3212

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[h]). Further, Civil Rights Law section 76-a subd 2 requires that in a SLAPP suit, a plaintiff may only recover if, in addition to all other necessary elements, he or she establishes by clear and convincing evidence that “any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false...”. Thus, where a defendant in a SLAPP suit moves to dismiss the complaint or for summary judgment, plaintiff must demonstrate not only that the action has a substantial basis in law or is supported by a substantial basis for an extension of existing law, but also that the communication which is the basis of the action was made with knowledge of its falsity or a reckless disregard for whether the communication was false.

Defendants have moved under CPLR 3212 (h) for summary judgment dismissing the complaint, for summary judgment on their counterclaims for costs and counsel fees and for the imposition of sanctions. In support of their motion, defendants argue that under the provisions of CPLR 3212 (h) the burden is on plaintiffs to establish by clear and convincing evidence that the allegedly defamatory statements were made and, under the provisions of Civil Rights Law section 76-a subd 2, that they were made with knowledge of their falsity or with reckless disregard as to whether they were false. In support of their motions, the individual defendants have each submitted an affidavit in which they individually deny drafting the flier that is the subject of the defamation action and contend that their names were apparently placed at the bottom of the flier since they are the President and Vice President, respectively, of the Little Fresh Pond Association, an association of residents in the neighborhood near the proposed day camp. In addition, defendants both contend that the statements complained of by plaintiffs are accurate and that plaintiffs, in their submissions to the Town, have falsely represented several important facts regarding the prior use of the property in question including that the property had previously been used as a children’s day camp. To support their claims, defendants have also submitted the affidavits of a number of individuals who live in the area and who support their position.

In their opposition, plaintiffs argue that their defamation action is not a SLAPP suit and that the statements by defendants are per se defamatory since they “impute a crime” and tend to disparage plaintiff Jay Jacobs in his “office, profession or trade.” Plaintiffs further contend that summary judgment is not warranted since discovery has not yet occurred and there are material issues of fact in dispute.

The Court initially finds that the instant action is indeed a SLAPP suit as defined in Civil Rights Law section 76-a subd 1. That section defines a SLAPP suit as “an action, claim, cross claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission.” A “public applicant or permittee” is defined in that section as “any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission.”

Here, plaintiffs had applied to the Town of Southampton for approval of a proposal to operate a day camp on property they owned within the Town and were, therefore, public applicants within the

meaning of the statute.¹ The flier, which is the subject of the action and which allegedly defamed plaintiffs, was an effort, allegedly by defendants, to oppose this application and to generate public support in opposing plaintiffs' efforts to win permission to operate the day camp. The flier was certainly part of an effort to "challenge or oppose such application" and therefore, places the instant action squarely within the special provisions of that statute.

In the instant motion before the Court, defendants have sought summary judgment dismissing the complaint under CPLR 3212 (h). While the proponent of a motion for summary judgment ordinarily bears the burden of establishing their position by evidentiary proof in admissible form sufficient to warrant judgment for them as a matter of law (*see, Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1980]); CPLR 3212 (h) reverses the usual burden of proof on a motion for summary judgment and places it on the party opposing the motion (*Singh v Sukhram*, *supra*). Thus, in order to successfully defeat such an application, plaintiffs in an action involving public petition and participation must establish that the action has either a "substantial basis in fact and law" or "is supported by a substantial argument for an extension, modification or reversal of existing law" (CPLR 3212 [h]). In addition, plaintiffs bear the burden of establishing "by clear and convincing evidence that defamatory false statements were made with knowledge of their falsity or with reckless disregard to whether the statements were true or false" (*Singh v Sukhram*, *supra* at p. 194; *see also, T.S. Haulers v Kaplan*, 295 AD2d 595, 744 NYS2d 193 [2d Dept 2002]).

In their complaint in this action, plaintiffs allege that the statements made in the subject flier, which accused plaintiffs of lying in their application to the Town, were made "with willful disregard of true and known facts" (paragraph 23). Plaintiffs assert that "(d)efendants were fully aware that Jay Jacob's (sic) and/or Southampton Realty did not violate any State and/or local laws, or regulations, in connection to ... its summer camp development plans...." (paragraph 20). Thus, plaintiffs do allege that the allegedly defamatory statements were made by defendants with knowledge of their falsity or, at the very least, willful disregard of the truth, as required by Civil Rights Law section 76-a. However, on a motion for summary judgment under CPLR 3212 (h), plaintiffs must also come forward with evidentiary proof to support their position. This they have failed to do. Plaintiffs have not come forward with facts supporting their claims that defendants knew the statements were false or that they made those statements with reckless disregard to whether the statements were true or false. In fact, plaintiffs have not come forward with any proof tending to establish that defendants were even responsible for making those statements let alone that defendants were aware of their falsity.

In light of the failure of plaintiffs to meet their burden of proof on this motion for summary

¹ In fact, in a letter to the Chief Building Inspector of the Town of Southampton dated August 4, 2011, counsel for plaintiffs acknowledges that plaintiffs had applications pending before both the Southampton Town Zoning Board of Appeals and the Planning Board "to permit the renovation and expansion of an existing tennis camp...".

judgment under CPLR 3212 (h), the application must be granted. Plaintiffs' complaint is dismissed.² In dismissing plaintiffs' complaint the Court rejects their argument that the lack of discovery compromised their ability to adequately oppose defendants' motion. "It is settled that a claimed need for discovery, without some evidentiary basis indicating that discovery may lead to relevant evidence, is insufficient to avoid an award of summary judgment" (*Hariri v Amper*, 51 AD3d 146, 152, 854 NYS2d 126 [1st Dept 2008]; *see also*, *Cioe v Petrocellie Elec. Co., Inc.*, 33 AD3d 377, 823 NYS2d 359 [1st Dept 2006]; *Bank of America v Tatham*, 305 AD2d 183, 757 NYS 2d 855 [1st Dept 2003]). Here, plaintiffs have not indicated any basis to conclude that relevant evidence to support their claims might be found through discovery.

Having granted defendants summary judgment dismissing plaintiffs' complaint, the Court must next consider defendants' counterclaim for attorney's fees and costs. That counterclaim is based upon Civil Rights Law section 70-a which provides that a defendant in an action brought under Civil Rights Law section 76-a "may maintain an action, claim, cross claim or counterclaim to recover damages, including costs and attorney's fees, from any person who commenced or continued such action...". That section goes on to provide that "costs and attorney's fees may be recovered upon a demonstration that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law."

In the case at bar, the Court is satisfied that this action was commenced without a substantial basis in fact. Indeed, plaintiffs have not come forward with any basis upon which they could substantiate that defendants were aware that the flier in question was being circulated, that defendants had anything to do with its preparation or, most importantly, that defendants were aware that the statements made in the flier were false. In reaching that conclusion, it must be noted that "New York State public policy strongly disfavors SLAPP suits designed to chill the exercise of a citizen's right to petition the government or appropriate administrative agency for redress of a perceived wrong" (*Matter of Entertainment Partners Group v Davis*, 198 AD2d 63, 64, 603 NYS2d 439 [1st Dept 1993]). And, while the use of the term "may" in the statute makes the decision to award attorneys' fees and costs discretionary rather than mandatory (*see*, *McKinney's Cons Laws of NY*, Book 1, Statutes § 76; *Matter of Daniel C.*, 99 AD2d 35, 41, 472 NYS2d 666 [2d Dept 1984]; *Matter of West Branch Conservation Assn. v Planning Bd. of Town of Clarkstown*, 222 AD2d 513, 636 NYS2d 61 [2d Dept 1995]), the Court is satisfied that the award of attorney's fees and costs is appropriate under these circumstances.

Finally, to the extent that defendants seek other compensatory damages, punitive damages (Civil Rights Law section 70-a, subd 1 b and c) or the imposition of sanctions (CPLR section 8303-a), the Court declines to grant such an award. Defendants have failed to offer evidence to establish that this action was commenced by plaintiffs for the purpose of harassing, intimidating, punishing or

²Although defendants seek dismissal of the three causes of action in the complaint based upon three separate and in some respect, different arguments, the Court finds that the entire complaint, based as it is on the alleged publication of the subject flier, constitutes the SLAPP suit and that dismissal of all three causes of action is appropriate under CPLR 3212 (h).

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otherwise maliciously inhibiting the free exercise of speech, petition or association rights or that the action was commenced in bad faith.

However, to the extent that the Court has granted defendants' application for counsel fees and costs, this matter will be set down before the Court on August 8, 2012 at the Criminal Courts Building, 210 Center Drive, Riverhead, New York for a hearing to determine the amount of attorney's fees and costs to which defendants are entitled.

Dated: 3 July 2012



J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION