My Space NYC Corp. v Crown Heights Assembly
2014 NY Slip Op 32229(U)
August 15, 2014
Supreme Court, Kings County
Docket Number: 500762/2013
Judge: David I. Schmidt
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At an IAS Term, Part 47 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 6th day of March, 2014.

P R E S E N T:

HON. DAVID I. SCHMIDT,
Justice.

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MY SPACE NYC CORP., SHLOMI AVDOO and GUY HOCHMAN,

Plaintiffs,

- against -

Index No. 500762/2013

Seq no 4

CROWN HEIGHTS ASSEMBLY, et al.,

Defendants.

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The following papers numbered 1 to 4 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	4
Affidavits (Affirmations)	
Other Papers	

Upon the foregoing papers, defendants Michael Kunitzky and Launch Pad 721, Inc. (Launch Pad) move for an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing the fourth, fifth and seventh causes of action asserted against them by plaintiffs My Space NYC Corp., Shlomi Avdoo and Guy Hochman.

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Background

Plaintiffs commenced this action by filing a summons and complaint on February 15, 2013; on August 16, 2013, plaintiffs filed an amended pleading. The amended complaint asserts that: (1) plaintiff My Space NYC Corp. (hereinafter MSNYC) is a State of New York Corporation and a "licensed real estate agency based in the Crown Heights section of Kings County with multiple apartment listings for rent in Crown Heights, and other sections of Kings County and New York County"; (2) plaintiff Shlomi Avdoo is the founding member and a shareholder of MSNYC, as well as its president; and (3) plaintiff Guy Hochman is a shareholder of MSNYC, as well as its vice president. As relevant to the instant motion,[1] plaintiffs assert that Launch Pad is a local competing real estate brokerage company.

Plaintiffs contend that on June 21, 2012, Launch Pad, through Kunitzky, its principal, published a statement on a social media website that, among other things, accused MSNYC of using "unethical, unscrupulous, borderline illegal tactics to force out longtime residents" of Crown Heights. The statement further asserted that MSNYC would "then charge MUCH higher rents to new residents" and claimed that MSNYC engaged in "ruthless actions" to remove residents.

Plaintiffs further contend that a subsequent online article, published on or about January 15, 2013, contained statements made by Kunitzky. This subsequent article, among other things, quotes Kunitzky, who stated that he and MSNYC employees almost had a

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[1] By letter to chambers dated December 26, 2013, plaintiffs have advised this court that they have discontinued the instant action as against the remaining defendants.

violent altercation after he threatened legal action against MSNYC. The article also contains statements by Kunitzky that negatively characterize MSNYC's business practices; Kunitzky stated that MSNYC was offering payments to Crown Heights residents to entice them to vacate MSNYC residential properties.

Based on these articles and statements, plaintiffs assert three causes of action against movants. First, plaintiffs allege that the assertions in the first statement were libelous, were made "with actual malice, gross irresponsibility, ill will and aforethought," and caused plaintiffs to suffer special damages (e.g. negative public perception of MSNYC business) as a result. Next, plaintiffs assert that the subsequent article contained defamatory statements, again made "with actual malice, gross irresponsibility, ill will and aforethought," that caused plaintiffs to suffer special damages as a result. Lastly, plaintiffs contend that movants "have engaged in a pattern of harassing behavior . . . intentionally to inflict financial and social harm to plaintiffs [and] . . . plaintiffs' business in the future." Plaintiffs claim that movants' actions constitute tortious interference with prospective contractual relations and have caused plaintiffs to lose profits and income.

In lieu of an answer, movants seek an order dismissing the instant action.

Arguments Advanced by Movants

In support of their motion, movants first assert that plaintiffs do not have a sustainable, well-pleaded cause of action for tortious interference with prospective contractual relations. Movants argue that such a cause of action must allege specific parties

with whom plaintiffs have contractual relationships. Specifically, movants claim that plaintiffs must identify third parties (e.g. future tenants, property owners, banks) with whom they had business relationships that movants have allegedly interfered with. Movants point out that the amended complaint identifies no such business relationship, and conclude that plaintiffs' failure to do so is fatal to this cause of action.

Next, movants attack plaintiffs' libel and defamation claims. Movants characterize these claims as attempts to "shut[] up the little guy" who does not agree with plaintiffs' business practices—specifically, plaintiffs "who seek to profit from the gentrification of Crown Heights." Movants claim that the law favors early disposition of defamation cases to prevent a chilling effect on the exercise of free speech rights.

In any event, argue movants, these claims must be dismissed as a matter of law. Movants note that, in the subject online article,[2] the first statement attributed to Kunitzky concerned Crown Heights residents who were willing to vacate their premises for a financial incentive; this statement, claim movants, does not concern plaintiffs and thus does no injury to their reputations. Movants further contend that the second statement, in which Kunitzky claimed that he had a near-violent encounter with MSNYC employees, was a statement of Kunitzky's opinion and thus not sufficient for a defamation claim. Moreover, movants argue that any other of Kunitzky's statements (such as the alleged threat to sue MSNYC) do not injure any of plaintiffs' reputations.

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[2] Occasionally referred to as the "2013 Article" by plaintiffs.

Movants likewise assert that the social media statement[3] is not actionable. Movants claim that the adjectives "unethical," "unscrupulous," "borderline illegal," "harass[ing]" and "ruthless" demonstrate that the subject statement consists of opinion. Movants further argue that the subject statement contains simple facts that are common actions (e.g. eviction) of real estate companies such as MSNYC; movants therefore reason that it is thus not defamatory for the social media statement to assert that "[r]eal estate agencies evict people . . .[t]hat is the very nature of being a real estate agency." For these reasons, movants conclude that, as a matter of law, the complained-of statements are not defamatory.

Additionally, movants contend that plaintiffs have not adequately pleaded facts to support their claim for special damages stemming from per se defamation. Movants note plaintiffs' allegation that the allegedly defamatory statements injured their business reputation; movants nonetheless argue that plaintiffs' allegation is insufficient for special damages. Movants maintain that plaintiffs must plead facts showing that the allegedly defamatory statements suggest "incompetence, incapacity or unfitness in the plaintiffs' abilities to perform in their profession." However, argue movants, "[n]one of the alleged statements directly attack the plaintiffs' abilities as real estate brokers." Thus, reason movants, plaintiffs have no sustainable claim for special damages stemming from per se defamation.

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[3] Occasionally referred to as the "Launch Pad article" or "the Facebook post" by the parties.

Alternatively, movants claim that the complained-of statements do not concern the non-corporate plaintiffs. Movants note that the subject statements were made solely about MSNYC and do not refer to any officers or shareholders. Thus, movants reason that the individual claims of Shlomi Avdoo and Guy Hochman should be dismissed.

Opposition of Plaintiffs

In opposition to the motion, plaintiffs first assert that, contrary to movants' suggestion, the subject social media statement is defamatory. Plaintiffs criticize movants for discussing adjectives such as "unethical" and "unscrupulous" in isolation; plaintiffs submit that this court should instead determine whether the publication as a whole, tested against the average reader, is defamatory. Read holistically, plaintiffs claim, the subject statement falsely imputes that plaintiffs use unethical tactics, remove longtime residents of the community, and harass tenants. Plaintiffs argue that, taken as a whole, these statements are defamatory.

Plaintiffs also reject movants' arguments concerning the statement that MSNYC evicted tenants. Plaintiffs claim that MSNYC does not generally commence eviction proceedings; instead, such proceedings are commenced by property owners after MSNYC is no longer involved. Thus, reason plaintiffs, the statement that MSNYC has evicted people is false.

Plaintiffs do not agree that the social media statement could be construed as non-actionable opinion. First, plaintiffs suggest that the subject statement is devoid of neutral terms; instead, plaintiffs allege that movants made the subject statement "with the sole

purpose of harming plaintiffs' reputation in the community at large by imputing criminal conduct to plaintiffs." Plaintiffs also claim that the subject statement does not sound in opinion, since it purports to present facts about MSNYC to the reader. Plaintiffs argue that courts have found similar language defamatory because the subject language implies that plaintiffs have engaged in illegal, dishonest or unethical conduct. Plaintiffs assert that the social media statement in this action is thus actionable.

Likewise, plaintiffs contend that the comments in the online article are defamatory. Plaintiffs characterize Kunitzky's statement therein that he had a nearly violent encounter with MSNYC personnel as "comprised of hearsay and . . . untrue." Plaintiffs assert that this statement would lead the average reader "with an understanding that plaintiffs use force during the course of their business and are hostile towards [*sic*] the community." Plaintiffs assert that, read in context, the statement is thus defamatory.

Also, plaintiffs argue that even if the statements are merely "susceptible to a defamatory connotation," the instant motion to dismiss should thus be denied. Plaintiffs claim that a jury should determine the "true meaning" of the social media statement. Next, plaintiffs characterize as "absurd" movants' contention that the statements did not concern plaintiffs Avdoo and Hochman, the officers and shareholders of MSNYC. Lastly, plaintiffs maintain that special damages have been adequately pleaded; specifically, plaintiffs note that the pleading alleges that, as a consequence of movants' actions, plaintiffs have lost business

income and customers. Plaintiffs reason that these assertions thus suffice as a sustainable claim for special damages.

Lastly, plaintiffs claim that they have adequately pleaded a cause of action for tortious interference with prospective contractual relations. Plaintiffs note movants' arguments but reject them; plaintiffs contend that they are not required identify specific lost transactions at the pleading stage of litigation. Plaintiffs argue that, instead, it suffices to "merely allege that defendants engaged in wrongful conduct which interfered with a prospective contractual relationship" [internal quotation marks omitted]. Plaintiffs also note that this tort is not listed in CPLR 3016, which imposes a heightened pleading requirement for certain claims. Plaintiffs maintain that, by pleading facts that demonstrate movants' harassing behavior, the pleading standards have been met. Therefore, conclude plaintiffs, the instant motion should be denied.

Discussion

The court denies the motion. First, the court notes that movants' arguments lack merit insofar as movants seek an order dismissing causes of action pursuant to CPLR 3211 (a) (1). In considering a motion to dismiss pursuant to CPLR 3211 (a) (1), the court must give the pleadings their most favorable intendment (*Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]). However, a complaint containing factual claims that are flatly contradicted by documentary evidence should be dismissed (*Well v Rambam,* 300 AD2d 580, 581 [2002];

Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159, 162 [1997], *cert. denied* 522 US 967 [1997]).

The "documentary evidence" referred to in CPLR 3211 (a) (1) and that properly supports a motion for dismissal must be "essentially undeniable" (*Fontanetta v John Doe 1*, 73 AD3d 78, 85-85 [2d Dept 2010], citing Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 21-22). Examples of documents that contain statements that are "essentially undeniable" include judicial records, mortgages, deeds, contracts, written agreements (such as trust and lease agreements) and notes (*Fontanetta*, 73 AD3d at 84-85). In contrast, documents that are, in essence, unilaterally created by a party (such as affidavits, letters, notes or file documents) do not contain "essentially undeniable" information and thus do not properly support a motion to dismiss pursuant to CPLR 3211 (a) (1) (*Fontanetta*, 73 AD3d at 85-86). Therefore, in this action, CPLR 3211 (a) (1) does not apply to the complained-of statements, which were either made or published by movants, since the subject statements were unilaterally (i.e. plaintiffs did not take part in creating the subject online article and subject social media statement) created by movants. It follows that the complained-of statements are not "essentially undeniable" information and thus do not support a motion to dismiss pursuant to CPLR 3211 (a) (1) (*id.*). Accordingly, the instant motion is denied insofar as it seeks an order dismissing causes of action pursuant to CPLR 3211 (a) (1).

The court also denies the instant motion pursuant to CPLR 3211 (a) (7). "On a motion pursuant to CPLR 3211(a)(7) to dismiss a complaint for failure to state a cause of action, the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*QK Healthcare, Inc. v InSource, Inc.*, 108 AD3d 56, 63 [2d Dept 2013] [internal quotations omitted], quoting *Nonnon v City of New York*, 9 NY3d 825, 827 [2007] and *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "The complaint must be construed liberally, the factual allegations deemed to be true, and the nonmoving party granted the benefit of every possible favorable inference" (*id.*, citing CPLR 3026; *Leon*, 84 NY2d at 87; *Kopelowitz & Co., Inc. v Mann*, 83 AD3d 793, 797 [2d Dept 2011]). Therefore, and construing the pleading in the manner most favorable to plaintiffs (*id.*), the court discusses the arguments made by movants in the sequence that appears in the moving papers.

First, this court rejects the contention that plaintiff's tortious interference with prospective contractual relations claim must be dismissed. Movants allege that the pleading "fails to identify any specific future tenants, property owners or banks . . . [t]he failure to identify specific contracts is fatal to the claim of tortious interference with business contracts." However, the only authority proffered for this contention is *Nadel v Play-By-Play Toys & Novelties, Inc.* (208 F3d 368 [2d Cir 2000]), and the decision and order in *Nadel* does not support movants' position. In *Nadel*, the United States Circuit Court of Appeals for the Second Circuit stated, in relevant part, that:

> "Under New York law, the elements of a claim for tortious interference with prospective business relations are: (1) business relations with a third party; (2) the defendant's interference with those business relations; (3) the defendant acted with the sole purpose of harming the plaintiff or used dishonest, unfair, or improper means; and (4) injury to the business relationship. *See Purgess v. Sharrock,* 33 F.3d 134, 141 (2d Cir.1994) (citations omitted). Upon a *de novo* review of the record, *see Quinn,* 159 F.3d at 764, we agree with the district court that Play–By–Play *has failed to adduce sufficient evidence* to support its claim for tortious interference with business relations. With respect to Play–By–Play's relations with Wow Wee, Play–By–Play *failed to establish by any competent evidence* that Wow Wee interrupted its business discussions with Play–By–Play because of anything Nadel said or did" (*id.* at 382 [emphasis added]).

Contrary to movants' suggestion, the decision and order in *Nadel* (which reviewed an order of a Federal District Court that determined motions for summary judgment) imposed no requirement that a pleading must "identify specific contracts" for a sustainable claim of tortious interference with prospective business relations. Instead, the pleading standards for this State require plaintiffs only to plead facts that support the causes of action; the question of whether plaintiffs have sufficient evidence to prove this claim is reserved for either summary judgment or trial. Accordingly, since movants have not shown that plaintiffs have failed to adequately plead a claim for tortious interference with prospective business relations, the court denies movants' motion insofar as it seeks an order dismissing the claim.

Next, the court considers movants' contention that plaintiffs' defamation claims have been made to "chill" movants' exercise of their free speech rights under the First Amendment of the United States Constitution. As movants correctly point out, out, the courts of this state

should be mindful that "[t]he threat of being put to the defense of a lawsuit * * * may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself" (*Karaduman v Newsday, Inc.*, 51 NY2d 531, 545 [1980], quoting *Washington Post Co. v Keogh*, 365 F2d 965, 968 [1966], *cert denied* 385 US 1011 [1967]; *see also* Ingber, Defamation: A Conflict Between Reason and Decency, 65 Va L Rev 785, 833-834). However, it is equally true that "[l]ibelous utterances [are] not being within the area of constitutionally protected speech" (*Beauharnais v Illinois*, 343 US 250, 266 [1952]). Although these considerations are important, the only determination this court must make is whether, accepting the allegations in the complaint as true and resolving all inferences in favor of the plaintiff (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), plaintiff has adequately pleaded defamation claims.[4]

Movants make, in essence, four arguments in favor of dismissal. First, movants allege that the subject statements are not defamatory because they do not injure plaintiffs' reputation. Next, movants claim that the statements are not defamatory because they are opinions. Also, movants maintain that the statements do not concern plaintiffs Avdoo and Hochman. Lastly, movants contend that plaintiffs have not adequately pleaded either special damages or libel per se.

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[4] "The elements of a cause of action for defamation are a false statement, published without 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" (*Salvatore v Kumar*, 45 AD3d 560, 563 [2007], *lv denied* 10 NY3d 703 [2008]).

The court rejects these arguments. The pleading identifies statements that accuse plaintiffs, an incorporated real estate agency and two of its officers, of using "unethical, unscrupulous, borderline illegal tactics to force out longtime residents of properties they acquire and/or manage . . . [a]fter removing longtime residents, they then charge MUCH higher rents to new residents" and using "ruthless actions . . . including the harassment and eviction of 2 families with disabled children [and] . . . forcing longtime residents out of our community." The pleading also identifies a second statement which includes (among other things) assertions that MSNYC is affiliated with the "Jewish underground mob." The pleading further points out that Kunitzky stated that he "threatened to take legal action" against MSNYC, "was . . . confronted by a MySpace employee, an ex-Marine, and . . . [p]unches were almost thrown." The contention that plaintiffs' reputation is not harmed by these statements is nonsensical.[5] Indeed, "[t]he rule is that if the words taken in their natural and ordinary meaning are susceptible to a defamatory connotation, then it is for the jury to decide how it would be understood by the average reader" (*Carney v Memorial Hosp. & Nursing Home of Greene County*, 64 NY2d 770, 772 [1985]). For these reasons, the court rejects movants' argument that the motion to dismiss should be granted because the subject statements do not injure plaintiffs' reputations.

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[5] The Court of Appeals, in *Carney*, also instructed that "[t]o the extent that defendants argue that plaintiff is wrong in alleging that the statement is false, their argument may not be considered on a motion to dismiss under CPLR 3211 (a) (7) for failure to state a claim" (*Carney*, 64 NY2d at 772).

Next, the court rejects the contention that the subject statements are non-actionable opinions. To be sure, expression of opinion is generally constitutionally protected and may not be the subject of a cause of action for defamation (*see e.g. Steinhilber v Alphonse*, 68 NY2d 283 [1986]). Also, whether a statement is a fact or an opinion is a question of law for the court to decide (*see e.g. Mann v Abel*, 10 NY3d 271, 276 [2008]).[6] The four factors that this court must consider are, stated succinctly: 1) whether the language has a readily-understandable meaning; 2) whether the language can be proven true or false; 3) an examination of the context of the communication; and 4) a consideration of broader social customs or conventions (*Steinhilber*, 68 NY2d at 292). The court considers these factors. First, this court finds that the pleaded statements that, for example, assert that plaintiffs are affiliated with the "Jewish underground mob", that plaintiffs use "borderline illegal tactics to force out longtime residents", and that Kunitzky "was then confronted by a MySpace employee, an ex-Marine . . . [p]unches were almost thrown" are readily understandable to a typical reader. Also, these are assertions that can be proven true or false. Lastly, the pleadings do not indicate that any broader context or social convention requires this court to treat the subject statements as opinions. For these reasons, this court rejects the contention that the subject statements are non-actionable opinion.

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[6] Also, "[w]hen, however, the statement of opinion implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, it is a 'mixed opinion' and is actionable" (*Steinhilber*, 68 NY2d at 289, citing *Hotchner v Castillo-Puche*, 551 F2d 910, 913 [2d Cir 1977], *cert denied sub nom. Hotchner v Doubleday & Co.*, 434 US 834 [1977]).

Also, the court rejects movants' assertion that the statements were not "of and concerning" the natural person plaintiffs. Since the pleading asserts that the statements impugn the acts of MSNYC, the reputations of Avdoo and Hochman—the shareholders and officers of MSNYC—are, by logical implication, also harmed (*cf. Salvatore v Kumar*, 45 AD3d 560, 563 [2d Dept 2007] [statement that refers generally to "certain 'executives and personnel'" of organization not actionable]).

Lastly, the court rejects movants' argument that the alleged statements do not "impute[] incompetence, incapacity or unfitness in the plaintiffs' abilities to perform" their work as a real estate agency. Giving the plaintiff the benefit of all favorable inferences (*QK Healthcare, Inc.*, 108 AD3d at 63), the assertion, for example, that MSNYC, a real estate agency, uses "borderline illegal tactics to force out longtime residents" does in fact impute "incompetence, incapacity and unfitness" to practice a real estate brokerage. Thus, the plaintiffs have adequately stated their plea for special damages based on per se defamation (*see e.g. Knutt v Metro Intl., S.A.*, 91 AD3d 915, 916-917 [2d Dept 2012]; *cf. Zetes v Stephens*, 108 AD3d 1014, 1018 [4th Dept 2013]).

In short, "[h]ere, accepting the facts alleged in the complaint as true, and according the plaintiff the benefit of every favorable inference, the complaint sufficiently state[s] a cause of action to recover damages for libel per se" (*Martino v HV News, LLC*, — AD3d —, 2014 Slip Op 01301 [2d Dept 2014] [internal citation omitted]). For these reasons, the motion to dismiss the defamation causes of action is denied.

[* 16]

Conclusion

In sum, the motion of defendants Michael Kunitzky and Launch Pad 721, Inc. (Launch Pad) for an order dismissing the fourth, fifth and seventh causes of action asserted against them by plaintiffs My Space NYC Corp., Shlomi Avdoo and Guy Hochman is denied.

The foregoing constitutes the decision and order of the court.

E N T E R,

J. S. C.
HON. DAVID I. SCHMIDT

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