

Ravnikar v Potter

2017 NY Slip Op 31693(U)

March 7, 2017

Supreme Court, Richmond County

Docket Number: 100146/16

Judge: Kim Dollard

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

STEPHEN RAVNIKAR,

Plaintiff,

-against-

GEORGE POTTER,

Defendant.

X

DCM PART 4

Present:

HON. KIM DOLLARD

**DECISION, ORDER
and JUDGMENT**

Index No. 100146/16

Motion No. 4120-001

The following papers numbered 1 to 3 were marked fully submitted on the 3rd day of February, 2017.

	Papers Numbered
Notice of Motion (with Supporting Papers, Exhibits and Memorandum of Law) (dated October 6, 2016).....	2
Affidavit in Opposition (with Exhibits) (dated January 13, 2017).....	2
Reply Affirmation (dated January 27, 2017).....	3

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Upon the foregoing papers, defendant's motion to dismiss the complaint in the above-entitled action is granted, and the complaint is dismissed, without prejudice.

This action for defamation and tortuous interference with contract arises out of certain comments purportedly made by defendant during a meeting of the Board of Directors of Skyline Credit Ride, Inc. (hereinafter "Skyline") on February 17, 2015. To the extent relevant, it is alleged that defendant stated in front of the entire board that plaintiff

RAVNIKAR v POTTER

was "a crook, a thief and an embezzler", comments which, plaintiff claims, caused him to be dismissed from his position as Skyline's treasurer. It is further alleged that said comments, made without privilege or authority, were intended to impugn plaintiff's integrity before the board in advance of an election in which he was running against defendant for the office of president.

Defendant contends that the complaint is legally insufficient (*see* CPLR 3211[a][7]).

The well known elements of an action for defamation are (1) a false statement; (2) published without privilege to a third party; (3) which tends to expose a person to hatred, contempt or aversion (or to induce an evil or unsavory opinion of him or her in the minds of a significant number of the community); (4) causing special harm; or (5) constituting defamation per se (*see Dillon v City of New York*, 261 AD2d 38). Pertinently, it has been held in this context that imputing a serious crime to a plaintiff constitutes defamation per se (*see Sharrat v Hickey*, 20 AD3d 734, 735). In addition, the CPLR requires that "the particular words complained of . . . be set forth in the complaint" (*see* CPLR 3016[a]), which must also allege the time, place and manner of the false statement, and to whom it was made (*Arsenault v Forquer*, 197 AD2d 554). Moreover, when adjudicating the sufficiency of a complaint, the court is enjoined to construe the words complained of in the context of the statement as a whole, when viewed from the perspective of an average listener. If the result is not reasonably susceptible of a defamatory meaning, the statement will be deemed non-actionable (*see Dillon v City of New York*, 261 AD2d at 38).

It is also well settled that on a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court is required to afford the complaint a liberal

RAVNIKAR v POTTER

construction (see CPLR 3026), "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Knutt v Metro Intl S.A.*, 91 AD3d 915). Accordingly, plaintiff's ability to prove his or her allegations is irrelevant (*id.* at 915-916, as are the affirmative defenses (*e.g.*, privilege) which a defendant might assert to defeat the action. In the absence of an affidavit by someone with personal knowledge, the same is true of any attempt to undermine the complaint with allegations of falsity. Thus, an attorney's affirmation will generally be insufficient.

Here, it is the opinion of this court that the allegations in the complaint are legally sufficient, if true, to state a cause of action for defamation, since plaintiff has pleaded the particular words accusing him of a crime; the place and manner in which the alleged false statements were uttered, and the context in which they were published. Furthermore, since plaintiff and defendant were both present at the time of publication, plaintiff's failure to allege the time of day when the alleged defamation is claimed to have taken place is clearly *de minimus*, and an omission that is readily curable in the bill of particulars.

Nevertheless, the motion must be granted and the complaint dismissed.

On or about November 27, 2012, the parties presently before the court executed a So-Ordered "Settlement Agreement" signed by both parties, entitled "Future Disputes", in it is provided that

"in the event that any further dispute arises between or among Ravnikar, Essay-R (including any principals of Essay-R) and Skyline and/or any of its officers or directors, no litigation may be commenced against Skyline or any of its

RAVNIKAR v POTTER

officers or directors unless and until a written demand is sent to Skyline setting forth the basis of the claim in reasonable detail and the parties first endeavor to negotiate a resolution in good faith for a period of sixty (60) days (*emphasis supplied*).

Plaintiff at bar has made no attempt to demonstrate his compliance with this condition precedent to suit.

Plaintiff argues that the above provision, executed in connection with an earlier action in the Supreme Court, Kings County, was never intended to apply to any subsequent litigation, at least, where, as here, the action in which it is asserted is claimed to "ha[ve] nothing to do with the issues and claims [raised] in the [Kings County] action". However, as defendant accurately notes, the stipulation is devoid of any language restricting the application of the condition to the issues raised in the Kings County action. Rather, it is stated to apply to "any further dispute" that may arise "between or among" its signatories, and contains no limitation as to time or venue or of the dispute. In addition, while it is argued that defendant's disclosure of the provision violated the "Confidentiality" clause of the agreement, defendant's disclosure is strictly limited to this single matter of procedure, and does not address the substance of the agreement. On the other hand, if plaintiff is correct in arguing that the Confidentiality provision was intended to be strictly enforced, he, too, is in breach thereof merely by asserting same as a bar to disclosure of the condition precedent to suit. In fact, if literally applied, the Confidentiality provision would preclude any attempt at enforcement, rendering the stipulation unenforceable.

A contractual provision cannot be enforced if it cannot be disclosed.

RAVNIKAR v POTTER

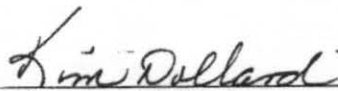
In view of the foregoing, there is no need to consider the sufficiency of plaintiff's cause of action for tortious interference with contract, which has been rendered moot.

Accordingly, it is


ORDERED that defendant's motion to dismiss the complaint is granted, and the complaint is dismissed, without prejudice; and it is further

ORDERED that the Clerk mark his records accordingly.

ENTER,



Kim Dollard, A.J.S.C.

Dated: March 2⁷, 2017 

GRANTED

MAR 13 2017

STEPHEN J. FIALA