Peterson v Maun
2017 NY Slip Op 32960(U)
March 7, 2017
Supreme Court, Westchester County
Docket Number: 51254/2016
Judge: Sam D. Walker

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

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SANDRA PETERSON,

Plaintiff,

-against-

MARY ELLEN MAUN,

Defendant.

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Index No. 51254/2016
Seq# 1
Decision & Order

The following papers were read on Defendant's motion to dismiss the action pursuant to CPLR 3211(a)(1) and 3211(a)(7) based on documentary evidence and failure to state a cause of action for defamation and for intentional infliction of emotional distress:

PAPERS	NUMBERED
Notice of Motion/Affidavit/Exhibits A-E	1-7
Memorandum of Law in Support/Appendices	8-11
Affirmation in Opposition/Exhibits 1-5/Stipulation	12-18
Reply Affirmation in Further Support/Exhibit E	19-20
Memorandum of Law in Reply	21

Plaintiff, Sandra Peterson ("Peterson"), a unit owner, and resident at Edgemont at Tarrytown Condominium ("the condominium"), is a former president of the board of managers. She was a candidate in an election of the condominium board, held in Spring 2015, but was defeated by Defendant, Mary Ellen Maun ("Maun"), who also resides at the condominium. As part of the election process, Maun created and disseminated email communications to other unit owners of the condominium. Peterson alleges that the contents of the emails were false, defamatory and were published by Maun with the specific intent to damage Peterson's good name and reputation in the community.

Peterson commenced this action by filing a summons and complaint on February 2, 2016 and served Maun with the commencement documents. Maun now moves to dismiss the action arguing that the documentary evidence contained in the board minutes and other documents, conclusively substantiate the truth of most of the statements contained in the emails and that the remaining statements are either non-actionable, constitutionally protected statements of opinion, or statements of fact that lack defamatory meaning. Maun also argues that Peterson has failed to properly plead a cause of action for defamation.

DISCUSSION

Rule 3211 of the Civil Practice Law and Rules provides, in relevant part that,

"[a] party may move for judgment dismissing one or more causes of action asserted against [it] on the ground that:
(1) A defense is founded upon documentary evidence; or
(7) the pleading fails to state a cause of action..."
N.Y. Civ. Prac. L. & R. 3211(a)(1) and (a)(7).

In such motions, the facts alleged in the complaint are accepted as true, and the only determination is whether the facts alleged fit within any recognizable legal theory of recovery. However, this rule does not apply to legal conclusions lacking factual support, or to factual claims that are contradicted by documentary evidence. See, *Doria v. Masucci*, 230 A.D.2d 764 (2d Dep't 1996).

"A motion to dismiss pursuant to CPLR 3211(a)(1) may be appropriately granted only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law". *730 J & J LLC v. Fillmore Agency, Inc.*, 303 A.D.2d 486, 755 N.Y.S.2d 887 (2d Dep't 2003). The motion will be granted only

if the documentary evidence resolves all factual issues and conclusively disposes of the plaintiff's claim. *Fontanetta v. John Doe 1*, 73 A.D.3d 78, 83, 898 N.Y.S.2d 569, *see also Palmieri v. Biggiani*, 108 A.D.3d 604, 607, 970 N.Y.S.2d 41, 44 (2d Dep't 2013). "'Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove [his or her] claims...plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss'" *Id. quoting Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 A.D.3d 34, 38, 827 N.Y.S.2d 231).

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must accept as true, the facts "alleged in the complaint and submissions in opposition to the motion, and accord plaintiffs the benefit of every possible favorable inference," determining only "whether the facts as alleged fit within any cognizable legal theory" (*Sokoloff v. Harriman Estates Development Corp.,* 96 N.Y.2d 409, 414 [2001]; see *People ex rel. Cuomo v. Conventry First LLC,* 13 N.Y.3d 108 [2009]; *Polonetsky v. Better Homes Depot,* 97 N.Y.2d 46, 54 [2001]; *Leon v. Martinez*, 84 N.Y.2d 83, 88 [1994]; *Feldman v. Finkelstein & Partners, LLP,* 76 A.D.3d 703 [2d Dep't 2010]). Notably, on a motion to dismiss, the plaintiff is not obligated to demonstrate evidentiary facts to support the allegations contained in the complaint (see, *Stuart Realty Co. v. Rye Country Store, Inc.,* 296 A.D.2d 455 [2d Dep't 2002]; *Paulsen v. Paulsen*, 148 A.D.2d 685, 686 [2d Dep't 1989]; *Palmisano v. Modernismo Pub.*, 98 A.D.2d 953, 954 [4th Dep't 1983]), and "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to

dismiss" (*EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19 [2005]; *International Oil Field Supply Services Corp. v. Fadeyi,* 35 A.D.3d 372 [2d Dep't 2006]).

Plaintiff's first cause of action is for defamation. The elements for 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." *Gaccione v. Scarpinato*, 137 A.D.3d 857, 859, 26 N.Y.S.3d 603, 605 (2d Dep't 2016); *see also Konig v. WordPress.com*, 112 A.D.3d 936, 937, 978 N.Y.S2d 92, 93 (2d Dept. 2013); *Salvatore v. Kumar*, 45 A.D.3d 560, 563 (2d Dep't 2007).

"'Since falsity is a necessary element of a defamation cause of action and only "facts" are capable of being proven false, "it follows that only statements alleging facts can properly be the subject of a defamation action"'" *Rosner v. Amazon.com*, 132 A.D.3d 835, 837, 18 N.Y.S.3d 155, 156 (2d Dep't 2015). "Expressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation" *Melius v. Glacken*, 94 A.D.3d 959, 943 N.Y.S.2d 134 (2d Dep't 2012).

The factors to be considered in determining whether a statement is a non-actionable opinion are: "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal...readers or listeners that what is being read or heard is likely to be opinion, not fact"

Id @ 960. "[T]he dispositive inquiry is whether a reasonable listener or reader could have concluded that the statements were conveying facts about the plaintiff" *Konig v. WordPress.com*, 112 A.D.3d @ 937, *Id.*

"When, 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 v. Alphonse*, 68 N.Y.2d 283, 289, 501 N.E.2d 550, 552-553, 508 N.Y.S.2d 901, 904 (1986).

Maun argues that any statements made by her are either non-actionable statements of opinion or they are statements of fact that lack defamatory meaning. In opposition, Peterson argues that the complaint properly pleads causes of action for both defamation and the intentional infliction of emotional distress; that Maun's documentary evidence submitted does not conclusively dispose of the claims; and that Maun's motion is premature since there are unresolved issues of fact that require discovery.

Here, Maun has submitted sufficient documentary evidence to conclusively establish the facts asserted in the emails. Furthermore, the parties were engaged in an election process for president of the board of managers. In the context and surrounding circumstances in which the challenged statements were made, a reasonable reader would understand that much of the emails were likely opinion and not facts, especially since Maun states that "[y]ou may readily view these things and judge for yourselves...."

In addition, because the owners of the condominium, share a common interest of protecting and preserving their homes and financial investments, any actionable defamatory statements were not actionable because they were conditionally privileged. *Foster v.*

Churchill, 87 N.Y.2d 744, 665 N.E.2d 153, 642 N.Y.S.2d 563 (1996). Conditional or qualified privilege extends to a "communication made by one person to another upon a subject in which both have an interest" *Liberman v. Gelstein*, 80 N.Y.2d 429, 437, 605 N.E.2d 344, 349, 590 N.Y.S.2d 857, 860 (1992) *quoting Bingham v. Gaynor*, 203 N.Y.27, 31, 96 N.E. 84. "Tenants in common are conditionally privileged to communicate among themselves matter[s] defamatory of others which concerns their common interests" *Id. quoting* Restatement § 596 comment *d*. Although, the shield provided by a qualified privilege may be dissolved if the plaintiff can demonstrate that the defendant spoke with malice, *Id.*, which is "knowledge that [the statement] was false or...reckless disregard of whether it was false or not" *Id.* Here, there is no evidence of malice. As previously stated, the emails were sent to owners of the condominium with the purpose of trying to discredit Peterson's ability to be president of the board of managers and to win the president's position on the board of managers.

With respect to Peterson's emotional distress cause of action, "the tort has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress." *Howell v. New York Post Co., Inc.*, 81 N.Y.2d 115, 121, 612 N.E.2d 699, 701, 596 N.Y.S.2d 350, 352 (1993). "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community" *Id.* In this case, none of the five

emails sent by Maun can be described as being outrageous, atrocious or utterly intolerable in a civilized community.

Additionally, the cause of action for intentional infliction of emotional distress based on the same emails, is duplicative of the defamation claim. *Brancaleone v. Mesagna*, 290 A.D.2d 467, 468, 736 N.Y.S.2d 685, 686 (2d Dep't 2002). Since the facts alleged by plaintiff are inseparable from the facts alleged in support of the cause of action of defamation, plaintiff cannot recover on the tort theory. *Como v. Riley*, 287 A.D.2d 416 (1st Dept. 2001).

Based on the foregoing, the motion to dismiss is GRANTED and it is,

ORDERED that the action is hereby dismissed.

The foregoing shall constitute the decision and order of this Court.

Dated: White Plains, New York
March 7 , 2017

Sam D. Walker
HON. SAM D. WALKER, J.S.C.