

**Conway v Kaplan**

2018 NY Slip Op 31846(U)

July 25, 2018

Supreme Court, New York County

Docket Number: 160607/2016

Judge: Margaret A. Chan

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

**PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM**

*Justice*

INDEX NO. 160607/2016

LISA CONWAY, ALLURE PROPERTY PARTNERS, LLC,

MOTION DATE \_\_\_\_\_

Plaintiffs,

MOTION SEQ. NO. 003; 004; 005

- v -

HOWARD KAPLAN,

Defendant.

**DECISION AND ORDER**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 46, 47, 48, 49, 50

were read on this motion to/for COMPEL

The following e-filed documents, listed by NYSCEF document number (Motion 004) 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 77, 78, 80, 85, 86, 87, 88, 89, 91, 92, 93, 94

were read on this motion to/for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 005) 68, 69, 70, 71, 72, 73, 74, 75, 76, 79, 82, 83, 84

were read on this motion to/for VACATE NOTE OF ISSUE

In this defamation action, plaintiffs Lisa Conway, a real estate broker, and Allure Property Partners LLC, her company, move for summary judgment as to liability on its claim against defendant Howard Kaplan for the first cause of action, libel per se. Plaintiffs do not address their claims for negligent and intentional infliction of emotional distress, the second and third causes of action, and therefore the court does not address them here. This decision and order also resolves defendant's motions to compel discovery (motion sequence #003) and to vacate the note of issue (motion sequence #005). The decisions and orders are as follows:

**Facts**

In a prior action, Kaplan sued Conway and Allure Partners over a soured real estate transaction (*Howard Kaplan v Allure Property Partners LLC*, Sup Ct, New York Cty, May 1, 2015, index No. 154397/15). The parties settled the matter on July 13, 2015, and they executed releases on July 20, 2015 (NYSCEF Doc. Nos. 59 and 60). The settlement stipulation included a non-disparagement clause between the parties,

which was not raised in this motion nor was the clause the subject of a cause of action in this litigation (NYSCEF Doc. No. 59).

According to Conway's affidavit, on December 19, 2015, defendant Kaplan purchased the domain name "LisaConwayAllure.com" and created the website "LisaConwayAllure.com – The Worst Broker Ever!" (NYSCEF Doc. No. 57 – Aff of Greenberg at ¶5). Defendant's website is a five-page running narrative detailing defendant's gripes with plaintiffs' performance as a broker (NYSCEF Doc. No. 61 – Printout of Website). Defendant's website exhaustively covers the relationship between the parties, the real estate transaction that led to the aforementioned lawsuit, and the lawsuit itself (*id.*). Plaintiff Conway testified that her business was damaged as a result of the website. She claims that she received fewer inquiries from prospective clients and that other brokers were aware of the negative website, harming her reputation (NYSCEF Doc. No. 57 at ¶8).

### Discussion

On a motion for summary judgment it is necessary that the movant establish a cause of action sufficiently to warrant the court directing judgment in its favor, and the movant must do so by tender of evidentiary proof in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). "Where the moving party fails to meet this burden, summary judgment cannot be granted, and the non-moving party bears no burden to otherwise persuade the court against summary judgment. Indeed, the moving party's failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). The facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Plaintiffs seek summary judgment as to liability on its claim for libel per se. The tort of libel sounds in defamation. Thus, to prove a claim for defamation, the plaintiffs must show: (1) a false statement that is; (2) published to a third party; (3) without privilege or authorization, and that; (4) causes harm, unless the statement is one of the types of publications actionable regardless of harm, such as libel per se (*see Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014]). Certain statements are considered libelous per se, such as statements that tend to injure plaintiff in its business, trade, or profession (*see Liberman v Gelstein*, 80 NY2d 429,

435 [1992]). Plaintiffs contend that defendant's website was made with the intention of disrupting her real estate business.

A complete defense to libel per se claims is that the material, when read in context, would be perceived by a reasonable person to be nothing more than a matter of personal opinion (*see Immuno AG v Moor-Jankowski*, 77 NY2d 235, 254 [1991]). "Since falsity is [the] sine qua non of a libel claim and since only assertions of fact are capable of being proven false, [the Court of Appeals] has consistently held that a libel action cannot be maintained unless it is premised on published assertions of fact" (*Brian v Richardson*, 87 NY2d 46, 51 [1995]). Thus, to determine whether the allegedly libelous statement is an actionable statement of fact or a nonactionable expression of opinion, the court looks to: "(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 [to] readers or listeners that what is being read or heard is likely to be opinion, not fact" (*id.*). To separate opinion from fact, the court must look to the content of the whole communication, its tone, and apparent purpose (*Immuno AG*, 77 NY2d at 250).

Defendant's website signals to reasonable readers that its *raison d'être* is as criticism of plaintiffs' services, indicating that it is pure opinion. "A pure opinion is a statement of opinion which is accompanied by a recitation of the facts upon which it is based" and is not actionable as a matter of law (*Steinhibler v Alphonse*, 68 NY2d 283, 289 [1986]). Defendant's website articulates 'facts' upon which he bases his opinion that Conway is the 'worst real estate broker ever', such as the problems he had with Conway regarding finding a new property, her failure to attend the closing, and his subsequent lawsuit with the plaintiffs. Defendant's opinion that Conway is the 'worst real estate broker ever' is predicated on these disclosed facts. Defendant's criticisms signal to readers that it is an opinion because it is a statement that cannot be proven true or false and is understood within the context of the website to be "loose, figurative or hyperbolic" in tone (*Dillon v City of New York*, 261AD2d 34, 38 [1st Dept 1999]).

Courts are loathe to stifle similar consumer advocacy criticism (*see Themed Restaurants, Inc. v Zagat Survey, LLC*, 21 AD3d 826, 827 [1st Dept 2005] [highly critical comments from reviewers in the Zagat guide of a female impersonator's cabaret were mere opinion and thus protected]); (*Frommer v Abels*, 193 AD2d 513 [1st Dept 1993] [travel agent's denunciation of Frommers, a travel advice publication, in a travel industry trade journal was merely spirited advocacy]); (*Behr v Weber*, 172 AD2d 441, 443 [1st Dept 1991] [defendant's picket sign claiming that Behr Inc., a furniture company, did not deliver promised furniture was a personal expression of defendant's disapproval of plaintiff's delivery services, based upon defendant's own documented efforts to obtain a promised delivery, and therefore not actionable under libel law]). Additionally, reasonable readers give less credence to statements made on the internet than statements published in other contexts (*see Sandals Resorts Intl. Ltd. v Google*,

Inc., 86 AD3d 32, 44 [1st Dept 2011]). Therefore, defendant's statements are not actionable, and plaintiffs have failed to make a prima facie showing entitling them to summary judgment.

Turning to defendant's motion to compel discovery (motion sequence #003), defendant requests that plaintiffs turn over financial material relating to income and tax information (NYSCEF Doc. No. 32 at ¶6). Plaintiffs failed to comply with a preliminary conference order from June 7, 2017, that explicitly required them to produce said financial information (NYSCEF Doc. No. 40). Plaintiffs claim to have withdrawn their claim for actual damages via plaintiffs' response to defendant's interrogatories by stating that "[t]he plaintiff does not intend to introduce direct evidence of pecuniary loss in this proceeding" (NYSCEF Doc. No. 41 at ¶29). However, this is insufficient to withdraw the claim. Accordingly, defendant's motion is granted to the extent that plaintiffs shall file a formal amended complaint withdrawing the claim for actual damages within 30 days or plaintiffs must provide the previously ordered discovery within 30 days. Consequently, defendant's motion to vacate the note of issue (motion sequence #005) is held in abeyance.

Accordingly, it is hereby ORDERED that plaintiffs' motion for summary judgment (motion sequence #004) is denied, it is further

ORDERED that defendant's motion to compel discovery (motion sequence #003) is granted consistent with this decision and order, and it is further

ORDERED that the motion to vacate the note of issue (motion sequence #005) is held in abeyance until the next compliance conference.

The parties shall appear for a compliance conference on October 17, 2018, at 10:00am in Part 33.

This constitutes the decision and order of the court.

7/25/2018  
DATE

CHECK ONE:  CASE DISPOSED  NON-FINAL DISPOSITION **J.S.C.**

APPLICATION:  GRANTED  DENIED  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE

*MARGARETA CHAN, J.S.C.*