

| |
|--|
| Jarmuth v Nunnerley |
| 2019 NY Slip Op 30927(U) |
| April 5, 2019 |
| Supreme Court, New York County |
| Docket Number: 153095/2014 |
| Judge: Kelly A. O'Neill Levy |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. |
| This opinion is uncorrected and not selected for official publication. |

**KELLY O'NEILL LEVY
JSC**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

-----X

SANDRA JARMUTH,

Plaintiff,

- v -

SANDRA NUNNERLEY (a/k/a TERESE NUNNERLEY),

Defendant.

INDEX NO. 153095/2014

MOTION DATE 01/23/2019

MOTION SEQ. NO. 002

DECISION AND ORDER

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86

were read on this motion to/for

SUMMARY JUDGMENT

HON. KELLY O'NEILL LEVY:

This is an action where the plaintiff alleges defamation per se.

Defendant Sandra Nunnerley a/k/a Terese Nunnerley moves for an order, pursuant to CPLR § 3212, granting summary judgment in her favor and dismissing the complaint. Plaintiff Sandra Jarmuth opposes and cross-moves for an order, pursuant to CPLR § 3212, granting summary judgment in her favor. Defendant opposes the cross-motion.

BACKGROUND

This defamation action relates to a series of emails and statements allegedly made by defendant.

In the second cause of action, plaintiff alleges that on April 5, 2013, defendant sent an email to various third parties falsely stating that plaintiff had resumed her pattern of harassment against her to publicly ridicule her. In the third cause of action, plaintiff alleges that on April 10, 2013, defendant made false statements to third parties accusing plaintiff of illegally trespassing

her apartment and office. In the fourth cause of action, plaintiff alleges that on May 22, 2013, defendant sent an email to third parties falsely stating that there was a break-in to defendant's apartment, that a bag was stolen, and that it appears that plaintiff was involved. In the fifth cause of action, plaintiff alleges that on August 8, 2013, defendant made false statements to third parties that plaintiff signed someone else's name on the cooperative's board minutes.

Plaintiff testified that on one occasion she went to defendant's office, at which point defendant screamed at her to get out [Plaintiff tr. (ex. J to the Hyer aff.) at 52-53]. She did not go to defendant's office on any other occasion (*id.* at 60). Plaintiff also testified that she hired someone to shadow and videotape an engineer's inspection of defendant's apartment (*id.* at 64). Plaintiff admitted that she went inside defendant's apartment with the engineer (*id.* at 65). The engineer was trying to restore steam to the bathroom in Apartment 6A of the building (*id.*). The videotaping was not authorized by the board of directors (*id.* at 66). In an April 5, 2013 email, defendant references letters sent to plaintiff by defendant's attorney (*id.* at 113). On April 10, 2013, defendant made a statement at a board meeting regarding plaintiff trespassing her apartment (*id.* at 118). Plaintiff contends that she was not trespassing at the time (*id.* at 119). At an December 18, 2012 board meeting, plaintiff took her own minutes in addition to Christine Barnes from the building's management, who also took minutes at that meeting (*id.* at 129). In plaintiff's minutes, she put Ms. Barnes' name at the bottom as the recording secretary and typed Ms. Barnes' name below her own signature (*id.* at 131-132). Plaintiff contends that she never signed someone else's name on the minutes (*id.* at 134).

Defendant testified that in a May 22, 2013 email, she stated that a bag was stolen from her apartment [Defendant tr. (ex. K to the Hyer aff.) at 14-15]. Another shareholder of the cooperative corporation, Francine Coffy, was arrested in connection with the stolen bag (*id.* at

16). Defendant saw plaintiff coming out of Ms. Coffy's apartment on the evening of the incident (*id.* at 18). The police found the bag in Ms. Coffy's apartment and said that they believed there were more people involved in the theft (*id.* at 20). Ms. Coffy told defendant that she was not the only person involved (*id.* at 23).

Defendant submitted an affidavit attesting that in her April 5, 2013 email, her statement is true, based upon the fact that plaintiff had previously made an unauthorized visit without permission to her office and also entered and videotaped her apartment without her permission [Defendant aff. (ex. M to the Hyer aff.) at ¶ 11]. She states that the board of directors and shareholders were entitled to know about the incidents as part of their common interest in the building (*id.*). She also attests that her April 5, 2013 email constitutes her opinion that plaintiff's actions constituted a violation of her privacy and that the email indicates her intention at that time to report same to the police (*id.* at ¶ 12). In terms of her alleged statements on April 10, 2013 to board members and shareholders of the building, defendant states that those statements regarding plaintiff entering her apartment in her absence were true and the statements expressed her opinions regarding plaintiff's actions and were an exchange of information with people who have a common interest therein (*id.* at ¶ 13). In her May 22, 2013 email to members of the board of directors, shareholders, the cooperative's attorney, and the cooperative's managing agent regarding theft in her apartment, defendant attests that the statement is true and based upon fact (*id.* at ¶ 14). Her statement regarding plaintiff being involved in the robbery was an expression of her opinion at the time based upon information provided by the police (*id.*). The recipients of the email had a common interest in the information, since a crime in a cooperative building is a matter that should be shared (*id.*). In terms of the statements defendant allegedly made at an August 8, 2013 board meeting, defendant attests that they were true, that they involve matters

that concern board members and shareholders, and that they constitute her opinion about plaintiff regarding what she had done in submitting a second set of board minutes and replacing the recorder's name on her version of the minutes (*id.* at ¶ 15). At a previous board meeting, a representative of the managing agent was designated by the board of directors to record the minutes of the meeting and plaintiff was not designated to record the minutes (*id.*). Defendant attests that her statements were true, they were made to persons who had an interest regarding same, and the statements constitute an opinion as to plaintiff's qualifications to remain on the board of directors (*id.*).

The first cause of action, alleging assault and battery, was discontinued on consent of both parties and memorialized in a stipulation dated January 24, 2018 [Stipulation (ex. I to the Hyer aff.)].

Plaintiff has commenced four actions against the board of directors of the cooperative, the cooperative corporation, the cooperative corporation's counsel, and various shareholders (in addition to the present action, *Jarmuth v. Leonard*, Supreme Court, New York County, Index No. 152535/2018; *Jarmuth v. Leonard*, Supreme Court, New York County, Index No. 152754/2014; *Jarmuth v. Wagner*, Supreme Court, New York County, Index No. 155922/2018).

DISCUSSION

Defendant moves for summary judgment in her favor and dismissal of the complaint in its entirety. Plaintiff cross-moves for summary judgment in her favor.

On a summary judgment motion, the moving party has the burden of offering sufficient evidence to make a prima facie showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in

admissible form, that material factual issues exist. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or factual findings. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 (2012).

The elements to prove defamation are: (1) a false statement, (2) published without privilege or authorization to a third party, (3) constituting fault as judged by, at a minimum, a negligence standard, and, (4) it must either cause special harm or constitute defamation per se. Restatement of Torts, Second § 558; *Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dep't 1999). A defamation plaintiff must plead special damages unless the defamation falls into any one of four per se categories: (1) statements charging the plaintiff with a serious crime; (2) statements that tend to injure the plaintiff in her trade, business or profession; (3) statements that impute to the plaintiff a "loathsome disease"; and (4) statements that impute unchastity to a woman. *Lieberman v. Gelstein*, 80 N.Y.2d 429, 434-435 (1992); *Nolan v. State*, 158 A.D.3d 186, 195 (1st Dep't 2018). Whether particular statements are considered defamatory per se is a question of law. *Geraci v. Probst*, 15 N.Y.3d 336, 344 (2010). "Generally, a written statement may be defamatory if it tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number of the community." *Golub v. Enquirer/Star Group, Inc.*, 89 N.Y.2d 1074, 1076 (1997) (internal quotation omitted). Truth provides a complete defense to defamation claims. *Dillon*, 261 A.D.2d at 39.

The Second Cause of Action

The second cause of action relates to an April 5, 2013 email from defendant and addressed to the board members and shareholders. In the email, defendant states that plaintiff “has resumed her pattern of harassment against [her]” and that defendant asked her attorney to address this with plaintiff in writing [April 5, 2013 Email (ex. D to the Brett aff.)]. This statement is not false, as plaintiff admits that she went to defendant’s place of work without defendant’s permission. Also, plaintiff admits that she entered defendant’s apartment and hired someone to videotape the engineer inside defendant’s apartment. She did this on her own accord and without the permission of the board of directors. The court will not consider whether plaintiff’s actions rise to the level of harassment.

Plaintiff asserts that this email falsely accuses her of harassment. Harassment is a relatively minor offense in the New York Penal Law, as it does not rise to the level of a misdemeanor, and thus the harm to the reputation of a person falsely accused of harassment would be correspondingly insubstantial. *Lieberman*, 80 N.Y.2d at 436. Thus, this statement, even if it alleges harassment, does not fall within the “serious crime” defamation per se exception.

As plaintiff does not plead special damages and defendant’s statement does not fall within any of the defamation per se categories, the second cause of action is meritless. Thus, the court grants defendant’s motion for summary judgment and denies plaintiff’s cross-motion for summary judgment as to the second cause of action and dismisses same.

The Third Cause of Action

The third cause of action relates to certain verbal statements defendant allegedly made at an April 10, 2013 board meeting, accusing plaintiff of illegally trespassing her apartment and office.

Plaintiff asserts that trespass is a serious crime. As stated above, plaintiff admits in her deposition that she did in fact enter defendant's place of work and her apartment without defendant's permission. Since truth is an absolute defense to defamation claims, this cause of action must be dismissed. Thus, the court grants defendant's motion for summary judgment and denies plaintiff's cross-motion for summary judgment as to the third cause of action and dismisses same.

The Fourth Cause of Action

The fourth cause of action relates to a May 22, 2013 email where defendant states that there was a break-in at her apartment, that a bag was stolen, and that it appears that plaintiff was involved [May 22, 2013 Email (ex. H to the Brett aff.)].

Defendant attests that the statement is true and based upon fact (Defendant Affidavit at ¶ 14). Her statement regarding plaintiff being involved in the robbery was an expression of her opinion at the time based upon information provided by the police (*id.*). Defendant testified that police had notified her that others were involved in the robbery (Defendant tr. at 20). Defendant also saw plaintiff exiting the accused perpetrator's apartment on the evening of the incident (*id.* at 18), which provides a basis for her opinion that plaintiff may have been involved with the robbery.

Since defendant was expressing her opinion in the email, based on her observations and interactions related to the robbery, her statements in the May 22, 2013 email are not defamatory. Moreover, defendant's statements do not accuse or charge plaintiff with committing a serious crime. Thus, the court grants defendant's motion for summary judgment and denies plaintiff's cross-motion for summary judgment as to the fourth cause of action and dismisses same.

The Fifth Cause of Action

The fifth cause of action relates to certain oral statements made on August 8, 2013 at a board meeting regarding plaintiff submitting a second set of minutes and typing in the name of the recorder at the bottom of her own set of minutes.

Plaintiff admits in her deposition that she composed a second set of minutes from a previous board meeting and that she typed the name of the recorder at the bottom of her own set of minutes (Plaintiff tr. at 129, 131-132). Defendant stated in her affidavit that her statement at the board meeting constituted her opinion as to the suitability of a board member who submits a second set of board minutes inferring that they were submitted by a recorder who was assigned to take the minutes (Defendant Affidavit at ¶ 15). Since truth is an absolute defense to defamation claims, this cause of action must be dismissed. Moreover, the statements made did not charge plaintiff with a serious crime, and therefore do not qualify as defamation per se.

Thus, the court grants defendant's motion for summary judgment and denies plaintiff's cross-motion for summary judgment as to the fifth cause of action and dismisses same.

The court has considered the remainder of the arguments and finds them to be without merit.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendant Sandra Nunnerley a/k/a Terese Nunnerley's motion for an order, pursuant to CPLR § 3212, granting summary judgment in her favor and dismissing the complaint is granted and the complaint is dismissed in its entirety; and it is further

ORDERED that plaintiff Sandra Jarmuth's cross-motion for an order, pursuant to CPLR § 3212, granting summary judgment in her favor is denied.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

4/5/19
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

KELLY O'NEILL LEVY
JSC

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE