

Choudhury v Islam

2019 NY Slip Op 32525(U)

July 10, 2019

Supreme Court, Queens County

Docket Number: 704156/2019

Judge: Denis J. Butler

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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER IAS Part 12
Justice

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MIZANUR CHOUDHURY,

Index
Number: 704156/2019

Plaintiff(s),

-against-

Motion Date:
May 28, 2019

RISFA ISLAM, THOUHID R. KHAN, TAYEF
AHMED, FUAD AHMED, SAYEED AHMED, EZAZ
AHMED, TANVIR CHOUDHURY,

Motion Seq. No.: 001

Defendant(s).
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The following papers were read on this motion by defendants Risfa Islam, Thouhid R. Khan, and Tayef Ahmed for an order, pursuant to CPLR 3211 (a) (5) and (7), dismissing plaintiff's complaint and, pursuant to 22 NYCRR 130-1.1, awarding moving defendants' costs for plaintiff's frivolous conduct.

	<u>Papers Numbered</u>
Notice of Motion, Affirmation, Affidavit, Exhibits.....	E8-19
Affidavit In Opposition, Affidavits, Memorandum of Law, Exhibits.....	E20-36
Reply Affirmation, Affidavit.....	E37-38

Upon the foregoing papers, it is ordered that this motion is determined as follows:

This action arises from plaintiff's claims that defendants engaged in defamatory behavior against plaintiff.

Defendants Risfa Islam, Thouhid R. Khan, and Tayef Ahmed now move to, inter alia, dismiss plaintiff's complaint upon the grounds that this matter is barred by the doctrines of res judicata and collateral estoppel (CPLR 3211 [a] [5]), as plaintiff previously filed an identical lawsuit against these defendants which was

dismissed by the Honorable Ulysses B. Leverett on November 21, 2018, and the pleadings fail to state a cause of action (see CPLR 3211 [a] [7]).

Contrary to moving defendants' argument, this action is not barred by the doctrines of res judicata or collateral estoppel. The dismissal order by Justice Leverett was not a determination on the merits, as indicated in the order (Leverett, J.) dated November 30, 2018, which granted plaintiff leave to file a new and separate cause of action setting forth the alleged defamatory language with the specificity required by CPLR 3016 (a). As a general rule, a dismissal for failure to state a cause of action is not on the merits and, therefore, will not be given preclusive effect (see *Jespersen v Li Sheng Liang*, 68 AD3d 724 [2d Dept 2009]; *Berkshire Nursing Ctr., Inc. v Len Realty Co.*, 168 AD2d 475 [2d Dept 1990]).

"It is well settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference" (*Jacobs v Macy's E., Inc.*, 262 AD2d 607, 608 [2d Dept 1999]; see *Leon v Martinez*, 84 NY2d 83 [1994]). The court does not determine whether the plaintiff may ultimately be successful on the merits on a CPLR 3211 (a) (7) motion to dismiss (see *Stukuls v State of New York*, 42 NY2d 272 [1977]; *Jacobs*, 262 AD2d 607), and the court will not examine affidavits submitted on a CPLR 3211 (a) (7) motion for the purpose of determining whether there is evidentiary support for the pleading (see *Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633 [1976]). A plaintiff may submit affidavits and evidentiary material on a CPLR 3211 (a) (7) motion for the limited purpose of correcting defects in the complaint (see *Rovello*, 40 NY2d 633; *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159 [2d Dept 1997]).

Pursuant to CPLR 3016 (a), the particular words complained of as libel and/or slander, which constitutes defamation, must be specified in the pleadings. Further, defamatory statements must be those alleging facts, not opinions. "A pure opinion may take one of two forms. It may be 'a statement of opinion which is accompanied by a recitation of the facts upon which it is based,' or it may be '[a]n opinion not accompanied by such a factual recitation' so long as 'it does not imply that it is based upon undisclosed facts'" (*Davis v Boenheim*, 24 NY3d 262, 269 [2014], quoting *Steinhilber v Alphonse*, 68 NY2d 283, 289 [1986]). Conversely, an opinion that implies it is based upon facts which justify the opinion but are unknown to those reading or hearing it is a mixed opinion and is actionable (see *Davis*, 24 NY3d at 269).

In distinguishing between fact and opinion, the court analyzes statements under a three prong test: "(1) whether the specific language has a precise meaning that is readily understood, (2) whether the statements are capable of being proven true or false, and (3) whether the context in which the statement appears signals to readers that the statement is likely to be opinion, not fact" (see *Silverman v Daily News, L.P.*, 129 AD3d 1054 [2d Dept 2015]). Where a defamation action concerns a public figure, the plaintiff must also prove that the statements were made with "actual malice," with either knowledge that the statements are false or with reckless disregard for the truth (see *Huggins v Moore*, 94 NY2d 296 [1999]). Public figures include persons who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved" (see *Huggins*, 94 NY2d 296 [1999], quoting *Gertz v Robert Welch, Inc.*, 418 US 323 [1974]).

Here, plaintiff's run for public office placed him in the public eye and concern as a public figure. Plaintiff claims that defendants Islam, Khan and Taycf Ahmed were allegedly involved with running a Facebook page called "No Fruadsters in Congress," as well as defamed him on other various social media websites. Plaintiff alleges that, through the "No Fruadsters in Congress" Facebook page, defendants followed plaintiff's public Facebook page and reviewed plaintiff's newspaper clippings, events, posts shared on his page, and comments left by his supporters. Plaintiff has adequately stated a claim, pursuant to the pleading requirements of CPLR 3016 (a), as the complaint specifies the alleged defamatory words by defendants Risfa Islam, Thouhid R. Khan, and Tayef Ahmed. The context of the complained-of statements was not such that a reasonable person would have concluded he or she was reading opinions, and not facts, about the plaintiff (*Silverman*, 129 AD3d at 1055).

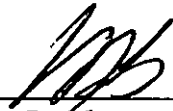
As a public figure, plaintiff was required to adequately plead malice as an element of his causes of action for defamation (see *Konrad v Brown*, 91 AD3d 545 [1st Dept 2012]). Viewing the allegations of the complaint as true, and according plaintiff the benefit of every favorable inference, the complaint adequately pleads that defendants Risfa Islam, Thouhid R. Khan, and Tayef Ahmed acted with actual malice (see *Kamchi v Weissman*, 125 AD3d 142 [2d Dept 2014]; *Weiss v Lowenberg*, 95 AD3d 405 [1st Dept 2012]; *Kotowski v Hadley*, 38 AD3d 499 [2d Dept 2007]). Specifically, the complaint alleges, inter alia, that the defamatory statements were made with actual malice, that said defendants continued to publish them notwithstanding their falsity, and that they did so in order to damage plaintiff's reputation and career (see *Greenberg v Spitzer*, 155 AD3d 27 [2d Dept 2017]). Moreover, "the burden does

not shift to the nonmoving party on a motion made pursuant to CPLR 3211 (a) (7)," and, therefore, "a plaintiff has no obligation to show evidentiary facts to support [his or her] allegations of malice on a motion to dismiss pursuant to CPLR 3211 (a) (7)" (*Shaw v Club Mgrs. Assn. of Am., Inc.*, 84 AD3d 928, 931 [2d Dept 2011]; see *Sokol v Leader*, 74 AD3d 1180, 1182 [2d Dept 2010]).

Accordingly, the motion to dismiss plaintiff's complaint as to defendants Risfa Islam, Thouhid R. Khan, and Tayef Ahmed is denied.

This constitutes the decision and order of the court.

Dated: July 10, 2019



Denis J. Butler, J.S.C.

FILED
JUL 23 2019
COUNTY CLERK
QUEENS COUNTY