

Keeling v Salvo

2019 NY Slip Op 34075(U)

July 9, 2019

Supreme Court, Bronx County

Docket Number: 0302945/2016

Judge: Alison Y. Tuitt

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART: 05

-----X
KEELING, CHERYL

Index No. 0302945/2016

-against-

Hon. ALISON Y. TUITT,

SALVO, SILVINA,
-----X

Justice Supreme Court

The following papers numbered 1 to 3 Read on this motion, (Seq. No. 1) for
DISMISSAL, noticed on **September 21 2018**.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). <u>1</u>
Answering Affidavit and Exhibits	No(s). <u>2</u>
Replying Affidavit and Exhibits	No(s). <u>3</u>

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the annexed memorandum decision*

Motion is Respectfully Referred to Justice: _____
Dated: _____

Dated: 7/9/19

Hon. *A. Y. Tuit*
ALISON Y. TUITT, J.S.C.

1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT REFEREE APPOINTMENT

NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

CHERYL KEELING,

INDEX NUMBER: 302945/2016

Plaintiff,

-against-

Present:
HON. ALISON Y. TUITT
Justice

SILVINA SALVO, CHINTAN TRIVEDI,
REMAX/ITC REALTY COMPANY,

Defendants.

The following papers numbered 1 to 3,

Read on this Defendants' Motion to Dismiss the Complaint

On Calendar of 2/25/19

Notice of Motion/Exhibits and Affidavit	1
Affirmation in Opposition and Exhibits	2
Reply Affirmation	3

Upon the foregoing papers, defendants' motion to dismiss the complaint is granted in part and denied in part for the reasons set forth herein.

Plaintiff filed her complaint in the Bronx County Clerk's Office on August 29, 2016 alleging causes of action against defendants for defamation and tortious interference with economic advantage. The defendants in this action bring the instant motion which seeks dismissal of plaintiff's complaint on the grounds that the action is barred by the applicable statute of limitations and that the complaint fails to state a cause of action. The action is in essence a dispute between plaintiff, a condominium owner and the building as to the amount of common charges owed by the plaintiff. In her complaint, plaintiff alleges that she is a condo owner at 3614 Johnson Avenue, Bronx, New York; defendant Silvina Salvo ("Salvo") is also a condominium owner at the same building; defendant Chintan Trivedi ("Trivedi") was a property manager for the building; and, defendant

Trivedi operated defendant Remax/ITC Realty Company (“Remax”).

Plaintiff alleges in her complaint that in August 2015, defendants made certain comments about her that constitute defamation. Specifically, plaintiff alleges that in August 2015, defendants held a special meeting in which more than 30% of owners were not given notice and defendant Salvo made the statement “[t]hat Keeling should be removed from the Board because she has not paid her common charges since 2008” and that plaintiff failed to “turn over the books and records”. Plaintiff further alleges that these false statements resulted in plaintiff being removed from the Board. With respect to defendant Trivedi, plaintiff alleges that he operates Remax and “published and continues to publish that plaintiff owes \$83,000 in common charges as a result of failing to pay common charges... since 2008. The first publication was June 2015, the most recent 2016... Defendant has published these remarks to owners in both board and regular meetings, and to members of the community.” Regarding Remax, plaintiff alleges that “[d]efendant [Trivedi] while conducting business from this location did publish false and defamatory statements to employees and vendors” and “while in the course of conducting business did publish the false and defamatory statements to all owners stating that ‘people do not pay their maintenance, that is why we cannot pay our bills’ referring to plaintiff with plaintiff present.”

In her complaint, plaintiff alleges that the defamation and tortious interference occurred in August, 2015. In her bill of particulars, plaintiff alleges that the acts occurred on August 28, 2015. In her affidavit in opposition to the motion, plaintiff claims that the conduct occurred on August 29, 2015. Plaintiff exchanged a copy of the board meeting minutes for August 27, 2015 which reflect that the meeting was called to vote for the removal of plaintiff as a board of manager and defendant Salvo “explained that Cheryl Shelley Keeling has not paid her common charges since 2009. She also has not showed documents to the board since she was the manager of the building, even though this has been requested several times.” Thus, it appears from the documentary evidence, i.e., the minutes of the board meeting that the acts occurred on August 27, 2015.

When a defendant moves to dismiss the complaint based on legal insufficiency, plaintiff has no obligation to show evidentiary facts to support the allegations of the complaint. Generally, on a motion to dismiss made pursuant to C.P.L.R. §3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory". Leon v. Martinez, 84 N.Y.2d 83 (1994). Defendant here has moved pursuant to C.P.L.R. §3211(a)(7). On a motion to dismiss pursuant to C.P.L.R. §3211(a)(7), the complaint survives when it gives notice of what is intended to be proved and the material elements of each cause of action. Rovello v. Orofino Realty Co., Inc. 40 N.Y.2d 633 (1976); Underpinning & Foundation Construction v. Chase

Manhattan Bank, 46 N.Y.2d 459 (1979). Furthermore, on a motion to dismiss for legal insufficiency, it is proper to consider the facts in plaintiff's affidavit for the limited purpose of sustaining the pleading. Ackerman v. Ackerman, 462 N.Y.S.2d 657 (1st Dept.1983).

Defamation arises from "the making of a false statement which tends to 'expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society' ". Dillon v. City of New York, 704 N.Y.S.2d 1 (1st Dept.1999) citing Foster v. Churchill, 87 N.Y.2d 744, 751 quoting Rinaldi v. Holt, Rinehart, & Winston, Inc., 42 N.Y.2d 369, 379, *cert. denied*, 434 U.S. 969 quoting Sydney v. MacFadden Newspaper Publishing Corp., 242 N.Y. 208. The elements of 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. Dillon supra citing Restatement of Torts, Second §558. C.P.L.R. 3016(a) requires that "the particular words complained of ... be set forth in the complaint." The complaint also must allege the time, place and manner of the false statement and to specify to whom it was made. Dillon supra citing Arsenault v. Forquer, 602 N.Y.S.2d 653; Vardi v. Mutual Life Insurance Co. of New York, 523 N.Y.S.2d 95.

In evaluating whether a cause of action for defamation is successfully pleaded, "[t]he words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction." Dillon citing Silsdorf v. Levine, 59 N.Y.2d 8, *cert. denied*, 464 U.S. 831. Loose, figurative or hyperbolic statements, even if deprecating the plaintiff, are not actionable. Dillon supra citing Gross v. New York Times, 82 N.Y.2d 146, 152-153. If the words are conclusory rather than accusatory, fail to specify time, place and manner of the communication, then there can be no cause of action for defamation. Arsenault, supra; Vardi, supra.

Pursuant to CPLR §215(3), an action for defamation must be commenced within one year. A defamation cause of action generally accrues on the date of the first publication. See, Biro v. Condé Nast, 95 N.Y.S.3d 799 (1st Dept. 2019) citing Gregoire v. Putnam's Sons, 298 N.Y. 119 (1948); Firth v. State of New York, 98 N.Y.2d 365 (2002). In the instant matter, defendant's argue that plaintiff's cause of action for defamation against defendants Salvo and Remax are barred by the one year statute of limitations. Plaintiff's contention in her affidavit in opposition that the defamatory conduct occurred on August 29, 2015, that she learned of the defamation on August 30, 2015, and that the statute begins to run from the date the defamed party

Plaintiff states in her complaint that “[d]efendant [Trevedi] while conducting business from this location did publish false and defamatory statements to employees and vendors... stating that “people do not pay their maintenance, that is why we cannot pay our bills” referring to plaintiff with plaintiff present”. Here, plaintiff’s allegations pertaining to the defamation cause of action are provided in general terms and not in the verbatim language as required. These allegations merely provide conclusory information and fails to identify the “employees and vendors” to whom the alleged statements were made, as well as the date and time it was made.

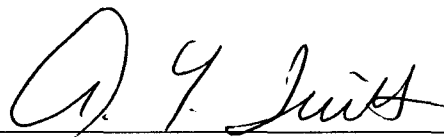
With respect to the tortious interference with prospective economic advantage, it is subject to a three year statute of limitations and to prevail on such a claim, plaintiff must prove 1) that it had a business relationship with a third party; 2) that the defendant knew of that relationship and intentionally interfered with it; 3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and 4) that the defendant's interference caused injury to the relationship with the third party. See, Amaranth LLC v. J.P. Morgan Chase & Co., 888 N.Y.S.2d 489 (1st Dept. 2009); Carvel Corp. v. Noonan, 3 N.Y.3d 182 (2004); NBT Bancorp v. Fleet/Norstar Fin. Group, 87 N.Y.2d 614 (1996); Guard-Life Corp. v. Parker Hardware Mfg. Corp., 50 N.Y.2d 183 (1980). Defamation is a predicate wrongful act for a tortious interference claim. Id. citing Stapleton Studios LLC v. City of New York, 810 N.Y.S.2d 657 (1st Dept. 2006). It is well settled that where a statement impugns the basic integrity or creditworthiness of a business, an action lies and injury is conclusively presumed. Id. citing John Langenbacher Co. v. Tolksdorf, 605 N.Y.S.2d 34 (1st Dept. 1993). The tortious interference cause of action must be supported by facts that would establish an independent tort. See, Northern Stamping, Inc. v. Monomoy Capital Partners, L.P., 967 N.Y.S.2d 326 (1st Dept. 2018). Conduct constituting tortious interference with business relations is, by definition, conduct directed not at plaintiff itself, but at the party with which plaintiff has or seeks to have a relationship. See, Arnon Ltd v. Beierwaltes, 3 N.Y.S.3d 31 (1st Dept. 2015).

Here, the complaint alleges that she attempted to sell her condominium and that Trivedi and Remax tortiously interfered in that with their false and defamatory statements regarding plaintiff’s failure to pay her common charges. Plaintiff alleges that the statements were published to brokers, attorneys for buyers and plaintiff seller and that defendants refused to complete necessary documents for the sale to proceed. Plaintiff claims that as a result, she was caused to incur charges from both brokers and the attorney. It should be noted that the prospective buyers, brokers and attorneys are not identified. See, Mehrhof v. Monroe-Woodbury Central School District, 91 N.Y.S.3d 503 (2d Dept. 2019)(In order to state a cause of action to recover for tortious interference with prospective economic advantage, plaintiff must allege a specific business relationship with an

identified third party with which the defendants interfered. Plaintiff did not adequately plead a cause of action to recover for tortious interference with prospective economic advantage as plaintiff did not identify any third parties with which he had a current or prospective economic relationship) citing New York Tile Wholesale Corp. v. Thomas Fatato Realty Corp., 61 N.Y.S.3d 136 (2d Dept. 2017); Business Networks of N.Y. v. Complete Network Solutions, 696 N.Y.S.2d 433 (1st Dept. 1999); Burns Jackson Miller Summit & Spitzer v. Lindner, 452 N.Y.S.2d 80 (2d Dept. 1982), aff'd 59 N.Y.2d 314 (1983). The alleged contract of sale for plaintiff's condominium is not identified. No dates are provided for when this allegedly occurred. Moreover, the complaint does not allege that any tortious activity was directed at the alleged prospective buyers. See, Devash LLC v. German Am. Capital Corp., 959 N.Y.S.2d 10 (1st Dept. 2013], lv. denied 21 N.Y.3d 863 (2013) ("Nor does the complaint allege that any tortious activity was directed at the prospective lessees, rather than directly against plaintiff"); Rockwell Global Capital, LLC v. Soreide Law Group, PLLC, 954 N.Y.S.2d 22 (1st Dept. 2012); Arnon Ltd v. Beierwaltes, 3 N.Y.S.3d 31 (1st Dept. 2015). Instead, it alleges actions directly against plaintiff that caused her to allegedly sustain damages in losing unidentified prospective buyers and having to pay brokers and attorneys' fees. The claim also fails as plaintiff has not demonstrated that defendants acted solely for the purpose of harming her. See, Steier v. Schreiber, 810 N.Y.S.2d 431 (1st Dept. 2006). A plaintiff's allegation that the cooperative board's minutes referring to the allegedly illegal work performed in their apartment discouraged a potential purchaser has been found insufficient to support their claim of tortious interference with contract or with prospective business relations. See, Bridgers v. West 82nd Street Owners Corp., 915 N.Y.S.2d 265 (1st Dept. 2011). Thus, with respect to defendant Trivedi and Remax, the claims must be dismissed. Additionally, plaintiff's second cause of action of tortious interference against defendant Keeling, does not identify a specific business relationship or the resulting injury to the business relationship. Therefore, the claim must be dismissed.

This constitutes the decision and Order of this Court.

Dated: 7/9/19



Hon. Alison Y. Tuitt