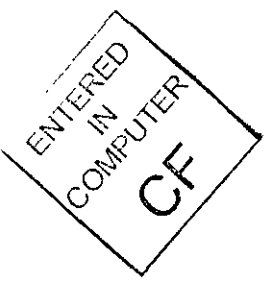


Baumgarten v Klotz
2020 NY Slip Op 31276(U)
February 14, 2020
Supreme Court, Nassau County
Docket Number: 601030/17
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice



HERBERT BAUMGARTEN,

Plaintiff,

- against -

NANCY KLOTZ,

Defendant.

TRIAL/IAS PART 33
NASSAU COUNTY

Index No.: 601030/17
Motion Seq. No.: 06
Motion Date: 11/25/19
XXX

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits and Memorandum of Law	1
Affirmation in Opposition	2
Reply Affirmation and Exhibits	3

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

Defendant moves, pursuant to CPLR § 3211, for an order dismissing plaintiff's Verified Second Amended Complaint. Plaintiff opposes the motion.

In support of the motion, counsel for defendant submits, in pertinent part, that, "[p]laintiff Herbert Baumgarten's Complaint (the 'Complaint') alleges two causes of action against Defendant Dr. Nancy Klotz (hereinafter 'Dr. Klotz'), namely: (1) violation of Part IV, Title I, Chapter 272 Section 99C(3) of the General Laws of Massachusetts ('Massachusetts Wiretapping Statute'); and (2) defamation. Plaintiff alleges Dr. Klotz violated the Massachusetts Wiretapping Statute by causing an allegedly secretly obtained recording of Plaintiff to be

disclosed to the New York Supreme Court in a divorce proceeding between Plaintiff and Deborah Baumgarten (hereinafter 'Deborah'), Dr. Klotz's daughter. Plaintiff then alleges that Dr. Klotz directed Sheree Belsky to post five allegedly defamatory statements relating to the divorce and custody arrangements between Plaintiff and Deborah to a Facebook Group. Plaintiff's entire Complaint should be dismissed as a matter of law, because (1) Plaintiff's Counsel, Maurice Baumgarten, has violated Judiciary Law §470 by failing to maintain an in-state office at the time he commenced this action, or at any point during the pendency of this action; (2) it is the established law of the case, based upon Judge Anthony Parga's prior Orders, that Plaintiff cannot maintain an action alleging a violation of (*sic*) Massachusetts Wiretapping Statute for actions committed by New York Defendants in New York, which is a one-party consent state, thus requiring dismissal of Count I; (3) Plaintiff failed to state a cognizable claim of defamation against Dr. Klotz, thus mandating dismissal of Count 2; and (4) even if Plaintiff plead (*sic*) a cognizable claim of defamation, the cause of action must fail as a matter of law as the allegedly defamatory statements are non-actionable opinions protected by the First Amendment."

Counsel for defendant further asserts, in pertinent part, that, "Count One of the Complaint alleges that Dr. Klotz violated the Massachusetts Wiretapping Statute.... Specifically, Plaintiff alleges that he and Deborah Baumgarten, Dr. Klotz's daughter, were married in October 2013.... Thereafter, in May 2015, Plaintiff and Deborah were vacationing in Boston, Massachusetts, when an argument arose between him and Deborah, wherein Deborah made an allegedly 'secret' audio recording of the argument with her cell phone.... Then, in July 2015, Deborah commenced a divorce action against Plaintiff in New York Supreme Court.... Plaintiff alleged that during the divorce action, Dr. Klotz, 'on her own or jointly with Deborah ... caused

the [Seidemann & Mermelstein law] firm to file the recording with the Court.’... Count Two of the Complaint alleges defamation against Dr. Klotz.... By way of background, Plaintiff states that he and Deborah Baumgarten were married to each other until September 12, 2017, wherein the Baltimore City Circuit Court issued a Judgment of Absolute Divorce.... Through their marriage, Plaintiff and Deborah had one minor child, Eva Baumgarten.... Further, as both Plaintiff and Deborah are Orthodox Jews, in addition to a civil divorce, Deborah was required to receive a Jewish divorce document known as a ‘Get’ from Plaintiff in order for her to re-marry in accordance with Orthodox Jewish practice.... On September 18, 2018, Plaintiff gave Deborah a Get.... Plaintiff alleges five instances of defamation wherein Dr. Klotz ‘directed’ Sheree Belsky, a long-time neighbor and friend of Dr. Klotz, to publish statements to a Facebook Group, which Ms. Belsky did publish.” See Defendant’s Affirmation in Support Exhibit A.

Counsel for defendant also asserts, in pertinent part, that, “[p]laintiff filed the original Complaint in this action on February 6, 2017, in Nassau Supreme Court, naming Dr. Klotz as the sole defendant and alleging only that Dr. Klotz violated the Massachusetts Wiretapping Statute.... Then, on March 20, 2017, Plaintiff filed an Amended Complaint, also naming David J. Seidemann, Laurie E. Mermelstein, and Seidemann & Mermelstein (collectively the ‘Firm Defendants’) as Co-Defendants who had violated the Massachusetts Wiretapping Statute.... On April 24, 2017, the Firm Defendants filed a Motion to Dismiss the Amended Complaint pursuant to CPLR § 3211(a) for failure to state a cause of action..... In their Motion, the Firm Defendants argued that Plaintiff, a resident of Maryland, may not maintain a civil action pursuant to the Massachusetts Wiretapping Statute premised upon conduct that allegedly occurred in New York State against New York residents.... On August 10, 2017, over Plaintiff’s opposition, Judge Anthony Parga granted the Firm Defendants’ Motion.... In granting the Firm Defendants’

Motion, Judge Parga held that ‘New York uses an interest analysis, under which the ‘law of the jurisdiction having the greatest interest in resolving the particular issue is given controlling effect...where the plaintiff and defendant are domiciled in different states, the applicable law in an action where civil remedies are sought for tortious conduct is that of the site of the injury.... On November 6, 2017, Plaintiff filed a Motion for Leave to File a Second Amended Complaint to allege that the Firm Defendants violated Maryland’s recording law instead of Massachusetts’s recording law... On January 24, 2018, Judge Anthony Parga denied Plaintiff’s Motion for Leave to File a Second Amended Complaint.... In so doing, Judge Parga held that ‘in this action, the site of injury was Nassau County, New York,’ and therefore he dismissed Plaintiff’s Complaint with prejudice as against the Firm Defendants for failure to state a cause of action....” See Defendant’s Affirmation in Support Exhibits B-M.

Counsel for defendant argues, in pertinent part, that, “[i]n New York, ‘the doctrine of the ‘law of the case’ is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned.’ [citations omitted]. The law of the case doctrine ‘operates to foreclose re-examination of the question absent a showing of subsequent evidence or change of law,’ and ‘applies to all legal determinations that were necessarily resolved on the merits in a prior decision.’ [citation omitted]. Plaintiff’s first cause of action alleging that Dr. Klotz violated the Massachusetts Wiretapping Statute must be dismissed as it is the law of the case that Plaintiff’s claim that a New York defendant violated the Massachusetts Wiretapping Statute in New York cannot be sustained as a matter of law. Plaintiff’s Amended Complaint alleged that Dr. Klotz and the Firm Defendants all violated the Massachusetts Wiretapping Statute by causing the allegedly secretly obtained recording to be used in the divorce proceeding between Plaintiff and Deborah Baumgarten in New York State Court.... The Firm Defendants moved to Dismiss Plaintiff’s Complaint for failure to state a cause of action,

arguing that Plaintiff, a resident of Maryland, may not maintain a civil action pursuant to the Massachusetts Wiretapping Statute, which is in direct conflict with New York State law which allows the taping of conversations if one party to the taping consents, premised upon conduct which allegedly occurred in New York State against New York residents.... Judge Parga agreed with the Firm Defendants, and in an August 10, 2017 Order granted the Firm Defendants' Motion to Dismiss.... Judge Parga determined that New York choice of law applies, that New York is the site of injury for this matter, and therefore a cause of action alleging (*sic*) violation of (*sic*) Massachusetts Wiretapping Statute cannot be sustained in New York. Therefore, it is the law of the case that New York law applies, New York is the site of injury for this matter, and therefore, Plaintiff's cause of action alleging Dr. Klotz violated Massachusetts Wiretapping Statute cannot be sustained in New York, and must be dismissed as a matter of law." See Defendant's Affirmation in Support Exhibits C-E.

Counsel for defendant further argues, in pertinent part, that, "[u]nder New York law, the elements of a defamation claim are: (1) a false statement; (2) published to a third party without privilege or authorization; (3) with fault amounting to at least negligence; and (4) that caused special harm or defamation per se. [citation omitted]. Of note, CPLR § 3016(a) requires that in a defamation action, 'the particular words complained of...be set forth in the complaint.' In addition, the complaint must also allege the time, place and manner of the false statement and specify to whom it was made. [citation omitted]. Further, in New York, neither conspiracy to commit a tort, nor a conspiracy to libel is a cognizable cause of action. [citations omitted].... Similarly, here Plaintiff's second cause of action must fail as a matter of law as Plaintiff fails to make a prima facie case for defamation, and conspiracy to defame is not cognizable cause of action. First, in his Complaint, Plaintiff alleges that Dr. Klotz 'directed' Sheree Belsky to publish allegedly defamatory statements to the Facebook Group arising from the acrimonious divorce and custody proceedings between Plaintiff and Deborah Baumgarten.... Plaintiff does not allege

that Dr. Klotz herself ever made a false statement about Plaintiff to a third party.... As such, Plaintiff's Complaint does not establish the first element of a defamation action, namely that Dr. Klotz published a false statement, and Plaintiff's defamation cause of action against Dr. Klotz must be dismissed as a matter of law.... Second, although Plaintiff does not use the words 'conspiracy to defame,' the entire second cause of action relies on the allegedly false statements of Sheree Belsky, a non-party to this lawsuit.... Plaintiff's Complaint simply puts forth conclusory and vague assertions that Dr. Klotz 'directed' Ms. Belsky to publish the allegedly defamatory statements.... At a minimum, Plaintiff's second cause of action should be dismissed as a matter of law as the Complaint fails to plead sufficient particularity pursuant to CPLR § 3016(a). However, even if Plaintiff were permitted to amend his pleading to provide further particularity as to the allegations, again the cause of action must still fail, as Plaintiff is essentially arguing that Dr. Klotz conspired with Ms. Belsky to defame Plaintiff, and conspiracy to defame is not a cognizable cause of action in New York. [citations omitted]. Even assuming *arguendo* that Plaintiff sufficiently plead (*sic*) a cause of action for defamation, Plaintiff's second cause of action must still fail as a matter of law as the alleged defamatory statements are non-actionable opinions.... '[E]xpressions 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.' [citation omitted].... In the present case, the five allegedly defamatory statements are all pure opinion.... For all five of the alleged defamatory statements, it is not possible to prove whether the statements are true or false.... Moreover, the broader social context and circumstances surrounding these alleged statements are that all five of the allegedly defamatory statements were published to a Facebook Group Chat where an ordinary and reasonable reader would believe the statements were simply opinions about the Plaintiff, not facts. The average Facebook user viewing the alleged statements all together, which discuss an extremely acrimonious divorce proceeding and subsequent custody hearings, would anticipate the use of

fiery rhetoric, hyperbole, and overall personal expressions of protected opinion. As the alleged statements cannot be proven true or false, and appeared on a Facebook Group Chat discussing a rancorous divorce and subsequent child custody battles, the statements are pure opinion protected by the First Amendment, and Plaintiff's second cause of action alleging defamation should be dismissed with prejudice as a matter of law." See Defendant's Affirmation in Support Exhibit A.

In opposition to the motion, counsel for plaintiff argues, in pertinent part, that "[p]laintiff does not intend to proceed against Defendant on Count I of the Complaint. With regard to Count II - Defamation, Defendant erroneously claims that it fails to state a cause of action because allegedly there is no cause of action for conspiracy to commit the tort of defamation in New York. First, the Complaint alleged that **Defendant herself** published defamatory statements about Plaintiff Second, contrary to Defendant's assertion, New York **does** recognize a tort of conspiracy to commit defamation so long as there is an underlying defamation. [citations omitted]. Here, the Complaint, in addition to alleging that Defendant herself defamed Plaintiff, clearly alleges that Defendant conspired with Sheree Belsky ('Belsky'), her long time neighbor and friend, to have Belsky publish defamatory statements about Plaintiff. Accordingly, Plaintiff also states a valid claim of defamation against Defendant based on her conspiring with Belsky. Defendant's further contention that the defamatory statements that Defendant made about Plaintiff constitute non-actionable opinions is baseless. Each of the defamatory statements are false statements of fact,... All of these [alleged] statements recite facts which are either true or not. Defendant's assertion that it is impossible to prove whether the [alleged] statements are true or not is ridiculous. There are documents and fact witnesses who have knowledge of the subject matter of these statements, and whether or not they are true. Equally ridiculous are Defendant's assertions on a motion to dismiss about how 'the average Facebook user' would view the

[alleged] statements. Obviously, that too is an issue of fact which can't be decided on a motion to dismiss.”

CPLR § 3211(a)(7) states that a party may move to dismiss a complaint for failure to state a cause of action. On such an application, the complaint is to be liberally construed and the plaintiff afforded every favorable inference which may be drawn therefrom. *See Leon v. Martinez, supra; Nonnon v. City of New York*, 9 N.Y.3d 825, 842 N.Y.S.2d 756 (2007). The facts as alleged are to be accepted as true, although bare legal conclusions, in addition to factual assertions which are squarely contradicted by the record, are not entitled to any such consideration. *See Doria v. Masucci*, 230 A.D.2d 764, 646 N.Y.S.2d 363 (2d Dept. 1996); *Mayer v. Sanders*, 264 A.D.2d 827, 695 N.Y.S.2d 593 (2d Dept. 1999). In entertaining such an application, the function of the motion court is only to determine whether the facts, as alleged, fall within a cognizable legal theory. *See Leon v. Martinez, supra; Nonnon v. City of New York, supra.*

“In reviewing a motion to dismiss pursuant to CPLR 3211(a)(7), “the court will 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 within any cognizable legal theory.” *Mills v. Gardner, Tompkins, Terrace, Inc.*, 106 A.D.3d 885, 965 N.Y.S.2d 580 (2d Dept. 2013) quoting *Matter of Walton v. New York State Dept. of Correctional Servs.*, 13 N.Y.3d 475, 893 N.Y.S.2d 453 (2009) quoting *Nonnon v. City of New York*, 9 N.Y.3d 825, 842 N.Y.S.2d 756 (2007); *ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 N.Y.3d 208, 928 N.Y.S.2d 647 (2011); *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); *Fay Estates v. Toys “R” Us, Inc.*, 22 A.D.3d 712, 803 N.Y.S.2d 135 (2d Dept. 2005); *Collins v. Telcoa, International Corp.*, 283 A.D.2d 128, 726 N.Y.S.2d 679 (2d Dept. 2001). The task of the Court on such a motion is to determine whether, accepting the factual averment of the complaint as true, plaintiff can succeed on any reasonable view of facts stated. *See Campaign for Fiscal Equity v. State of New York*, 86

N.Y.2d 307, 631 N.Y.S.2d 565 (1995). In analyzing them, the Court must determine whether the facts as alleged fit within any cognizable legal theory (*see Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 729 N.Y.S.2d 425 (2001)), not whether plaintiff can ultimately establish the truth of the allegations. *See 219 Broadway Corp. v. Alexander's Inc.*, 46 N.Y.2d 506, 414 N.Y.S.2d 889 (1979). The test to be applied is whether the complaint gives sufficient notice of the transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from the factual averments. *See Treeline 990 Stewart Partners, LLC v. RAIT Atria, LLC*, 107 A.D.3d 788, 967 N.Y.S.2d 119 (2d Dept. 2013). However, bare legal conclusions are not presumed to be true. *See Goel v. Ramachandran*, 111 A.D.3d 783, 975 N.Y.S.2d 428 (2d Dept. 2013); *Felix v. Thomas R. Stachecki Gen. Contr., LLC*, 107 A.D.3d 664, 966 N.Y.S.2d 494 (2d Dept. 2013). “In assessing a motion to dismiss under 3211(a)(7) . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint.” *Leon v. Martinez, supra* at 88.

With respect to the first cause of action, for a violation of the Massachusetts Wiretapping Statute, besides the law of the case warranting dismissal of this cause of action, counsel for defendant indicated that, “[p]laintiff does not intend to proceed against Defendant on Count I of the Complaint.” *See* Plaintiff’s Affirmation in Opposition ¶ 6.

Therefore, the branch of defendant’s motion, pursuant to CPLR § 3211, for an order dismissing Count I, of plaintiff’s Verified Second Amended Complaint, a violation of the Massachusetts Wiretapping Statute, is hereby **GRANTED**.

Whether the statements at issue are reasonably susceptible of a defamatory connotation is, in the first instance, a legal determination for the court. *See Weiner v. Doubleday & Co.*, 74 N.Y.2d 586, 550 N.Y.S.2d 251 (1989). The elements of 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, which causes special harm or constitutes

defamation *per se*. See *Salvatore v. Kumar*, 45 A.D.3d 560, 845 N.Y.S.2d 384 (2d Dept. 2007). A defamatory statement is one which 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 people in the community. See *Knuttt v. Metro Intl., S.A.*, 91 A.D.3d 915, 938 N.Y.S.2d 134 (2d Dept. 2010). It is for the court to determine in the first instance whether a particular publication, when considered as a whole, is susceptible of a defamatory meaning. See *Aronson v. Wiersma*, 65 N.Y.2d 592, 493 N.Y.S.2d 1006 (1985). A cause of action sounding in defamation which fails to comply with CPLR § 3016(a) mandates dismissal. See *Simpson v. Cook Pony Farm Real Estate, Inc.*, 12 A.D.3d 496, 784 N.Y.S.2d 633 (2d Dept. 2004).

A defamation complaint must set forth the particular words allegedly constituting defamation, and it must also allege the time, place, and manner of the false statement and specify to whom it was made. See *Arvanitakis v. Lester*, 145 A.D.3d 650, 44 N.Y.S.3d 71 (2d Dept. 2016).

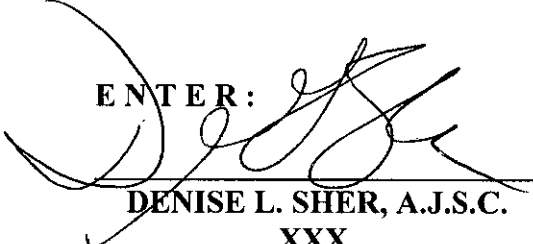
Plaintiff's defamation allegations are not sufficiently specific with respect to the particular words that defendant allegedly used, nor do they allege the time, place and manner of the alleged false statements.

Furthermore, as argued by counsel for defendant, conspiracy to defame is not a cognizable cause of action. See *Arvanitakis v. Lester, supra*; *Rivera v. Greenberg*, 243 A.D.2d 697, 663 N.Y.S.2d 628 (2d Dept. 1997). Therefore, counsel for plaintiff's argument that, "[h]ere, the Complaint, in addition to alleging that Defendant herself defamed Plaintiff, clearly alleges that Defendant conspired with Sheree Belsky ('Belsky'), her long time neighbor and friend, to have Belsky publish defamatory statements about Plaintiff. Accordingly, Plaintiff also states a valid claim of defamation against Defendant based on her conspiring with Belsky" is completely without merit. See Plaintiff's Affirmation in Opposition ¶ 10.

Additionally, the Court finds that the statements, as alleged in Count II of plaintiff's Verified Second Amended Complaint, constitute *opinions* when the criteria of *Mann v. Abel*, 10 N.Y.3d 271, 856 N.Y.S.2d 31 (2008) is applied (emphasis added).

Therefore, based upon the above, the branch of defendant's motion, pursuant to CPLR § 3211, for an order dismissing Count II, of plaintiff's Verified Second Amended Complaint - Defamation, is also hereby **GRANTED**.

This shall constitute the Decision and Order of this Court.

ENTER: 
DENISE L. SHER, A.J.S.C.
XXX

Dated: Mineola, New York
February 14, 2020

ENTERED
FEB 19 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE