

<b>North Shore Towers Apts. Inc. v Kozminsky</b>
2020 NY Slip Op 34302(U)
March 9, 2020
Supreme Court, Queens County
Docket Number: 710793/2019
Judge: Leslie J. Purificacion
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**FILED**

Short Form Order

**5/12/2020  
11:36 AM**

NEW YORK SUPREME COURT - QUEENS COUNTY

**COUNTY CLERK  
QUEENS COUNTY**

Present: HONORABLE LESLIE J. PURIFICACION IA Part 39  
Justice

NORTH SHORE TOWERS APARTMENTS x  
INCORP., GLEN KOTOWSKI AND  
STEVEN CAIRO,

Index  
Number 710793/ 2019

Plaintiffs

Motion  
Date December 12, 2019

-against-

Mot. Seq. No. 1

ERIC KOZMINSKY,

Defendant.

\_\_\_\_\_ X

The following numbered papers were read on this motion by defendant seeking dismissal of the complaint, allegedly seeking damages arising from defamation, pursuant to CPLR 3211 (a) (1), (3) and (7).

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Exhibits.....	E10-E16
Answering Affirmation - Exhibits .....	E19-E32
Reply Affirmation .....	E33

Upon the foregoing papers, it is ordered that the instant motion to dismiss, pursuant to CPLR 3211 (a) (1), (3), and (7), is determined as follows:

Plaintiff, North Shore Towers Apartments, Inc. (North Shore Towers) is a large cooperative apartment complex in Queens, New York. Plaintiff, Glen Kotowski is the General Manager of the cooperative, and plaintiff, Steven Cairo, is the General Superintendent for North Shore Towers. Defendant lives at North Shore Towers as the son of a shareholder of record of the premises. In May 2019, defendant submitted a post on the website "www.NextDoor.com," a social networking website, which allegedly "concerned the plaintiffs and conditions at North Shore ... containing the defamatory language, which upon

information and belief, is libelous per se,” according to the complaint. Plaintiffs commenced this action against defendants seeking compensatory and punitive damages for defamation and defamation per se. Defendant now moves to dismiss plaintiffs’ complaint, pursuant to CPLR 3211 (a) (1), (3), and (7).

One branch of defendant’s motion seeks to dismiss plaintiff’s complaint on the ground that plaintiff did not have “legal capacity to sue.” “Standing to sue requires an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant’s request” (*Catnap, LLC v Cammeby’s Mgt. Co., LLC*, 170 AD3d 1103, 1104 [2d Dept 2019], quoting *Caprer v Nussbaum*, 36 Ad3d 176, 182 [2d Dept 2006]). Plaintiffs have, prima facie, demonstrated such interest in the claim, permitting them to commence this action, and defendant has failed to present any argument to rebut such showing. As such, the branch of the motion seeking dismissal pursuant to CPLR 3211 (a) (3) is denied.

Additionally, defendant moves to dismiss the complaint, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action. In such a case, the court must afford the pleading a liberal construction, accept as true all the facts alleged therein, give the nonmoving plaintiff the benefit of all favorable inferences, and determine only whether the alleged facts fit within any cognizable legal theory, and not whether plaintiff can ultimately prove such facts (*see J.P.Morgan Securities, Inc. v Vigilant Ins. Co.*, 21 NY3d 324 [2013]; *People ex rel. Cuomo v Coventry First LLC*, 13 NY3d 108 [2009]; *Webster v Sherman*, 165 AD3d 738 [2d Dept 2018]; *Murphy v Department of Educ. of the City of N. Y.*, 155 AD3d 637 [2017]; *Bank of New York Mellon Trust Co., N.A. v Universal Dev., LLC*, 136 AD3d 850 [2016]). A motion to dismiss merely addresses the adequacy of a pleading, and does not reach the substantive merits of plaintiff’s cause of action (*see Kaplan v New York City Dep’t. of Health and Mental Hygiene*, 142 AD3d 1050 [2d Dept 2016]; *Lieberman v Green*, 139 AD3d 815 [2d Dept 2016]). Whether the pleading will later survive a summary judgment motion, or plaintiff will ultimately prevail on the claims, is not relevant on a pre-discovery motion to dismiss (*see Zurich American Ins. Co. v City of New York*, 176 AD3d 1145 [2d Dept 2019]; *Jadidian v Drucker*, 171 AD3d 1146 [2d Dept 2019]).

A cause of action for defamation must contain “(a) a false statement that tends to expose a person to public contempt, hatred, ridicule, aversion, or disgrace, (b) published without privilege or authorization to a third party, (c) amounting to fault as judged by, at a minimum, a negligence standard, and (d) either causing special harm or constituting defamation per se (*Kasavana v Vela*, 172 AD3d 1042, 1044 [2d Dept 2019] quoting *Stone v Bloomberg, L.P.*, 163 AD3d 1028, 1029 [2d Dept 2018]). A statement is defamatory per se if it (1) charges the plaintiff with a serious crime; (2) injures the plaintiff in her or his trade, business or profession; (3) imputes to the plaintiff a loathsome disease; or (4) imputes

unchastity to s woman” (*Levy v Nissani*, – AD3d –, 2020 NY Slip Op. 00113, \*2 [ 2d Dept 2020]; see *Lieberman v Gelstein*, 80 NY2d 429 [1992]). Further, “[t]he complaint must set forth the particular words allegedly constituting defamation, and it must also allege the time when, place where, and manner in which the false statement was made, and specify to whom it was made” (*Kimso Apartments, LLC v Rivera*, – AD3d –, 2020 NY Slip Op. 01338, \*1 [2d Dept 2020], quoting *Epifani v Johnson*, 65 AD3d 224, 233 [2d Dept 2009]).

A defamation action “is subject to dismissal if the statements are insufficiently pleaded, constitute nonactionable opinion, or are subject to a qualified privilege defense” (*Landa v Capital One Bank (USA), N.A.*, 172 AD3d 1052, 1053 [2d Dept 2019]).

“Since falsity is a necessary element of a defamation cause of action and only ‘facts’ are capable of being proven false, ‘it follows that only statements alleging facts can properly be the subject of a defamation action’ ” (*Gross v New York Times Co.*, 82 NY2d 146, 152-153 [1993], quoting *600 W. 115<sup>th</sup> St. Corp. v Von Gutfeld*, 80 NY2d 130, 139 [1992]; see *Kasavana v Vela*, 172 AD3d 1042). Consequently, “[a]n expression of pure opinion is not actionable ..., no matter how vituperative or unreasonable it may be” (*Steinhilber v Alphonse*, 68 NY2d 283, 289 [1986]; see *Udell v NYP Holdings, Inc.*, 169 AD3d 954 [2d Dept 2019]). However, an opinion that implies it is based upon facts which would justify such opinion, but which are unknown to those hearing or reading it, is a mixed opinion, and is actionable, because a reasonable reader or listener would infer that the one disseminating such opinion knows such facts, unknown to the audience, which support the opinion (see *Davis v Boenheim*, 24 NY3de 262, 269 [2014]; *Gross v New York Times Co.*, 82 NY2d 146).

“Whether a particular statement constitutes an opinion or an objective fact is a question of law” (*Mann v Abel*, 10 NY3d 271, 276 [2008]; see *Kasavana v Vela*, 172 AD3d 1042), to be decided on what meaning the average person hearing or reading such statement would give to it, taking into account the overall context in which such statements were made, the content of the statement as a whole, its tone and apparent purpose (see *Steinhilber v Alphonse*, 68 NY2d 283; *Landa v Capital One Bank (USA), N.A.*, 172 AD3d 1052). “In distinguishing between facts and opinion, the factors the court must consider are (1) whether the specific language has a precise meaning that is readily understood, (2) whether the statement is 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” (*Brummel v Board of Trustees of the Vil. of E. Hills, N.Y.*, 155 AD3d 818, 819 [2d Dept 2017]; see *Greenberg v Spitzer*, 155 AD3d 27 [2d Dept 2017]).

Assessing the adequacy of the complaint, in light of the present motion to dismiss, the court must grant the pleadings a liberal construction, accept the allegations therein as true, and give plaintiff every possible favorable inference (see *Leon v Martinez*, 84 NY2d 83

[1994]; *Kimso Apartments, LLC v Rivera*, – AD3d –, 2020 NY Slip Op. 01338). Here, the amended complaint “set forth the elements of a viable defamation cause of action” (id. at \*1), by including a copy of the alleged defamatory post with the complaint. Defendant has failed to establish, prima facie, that at least some of the statements contained in the post did not constitute false assertions of fact; could not be readily proven to be true or false, given the tone and overall context of the post; and/or that a reasonable reader would not have inferred that defendant had knowledge of facts, unknown to the reading audience, which supported some of the assertions he made, resulting in an actionable mixed opinion herein.

While “[a] court is, of course, permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211(a)(7)” (*Gugliotta v Wilson*, 168 ASD3d 817, 818 [2d Dept 2019], quoting *Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]; see CPLR 3211 [c]), defendant has failed to proffer any such evidentiary material herein.

Defendant’s contention that the action may not be brought against him because he is protected by the “common interest” qualified privilege defense, as a tenant in plaintiff’s property, is without merit at this stage of the proceeding. Plaintiff has sufficiently alleged “malice” in its complaint. “[T]he burden does not shift to the nonmoving party on a motion made pursuant to CPLR 3211 (a) (7), a plaintiff has ‘no obligation to show evidentiary facts to support [his or her] allegations of malice on [such] motion’” (*Sokol v Leader*, 74 AD3d 1180, 1182 [2d Dept 2010], quoting *Kotowski v Hadley*, 38 AD3d 499, 500 [2d Dept 2007]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*EBC 1, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; see *Zurich American Ins. Co. v City of New York*, 176 AD3d 1145). Therefore, with regard to the issue of whether defendant’s statements may be protected by any qualified privileges, “the allegations of malice that were set forth in the complaint ... preclude dismissal of the complaint insofar as asserted against the defendants for failure to state a cause of action” (*Trump Vil. Section 4, Inc. v Bezvoleva*, 161 AD3d 916, 918 [2d Dept 2018]).

With respect to the defense of utilizing absolutely privileged communication of libels charged in the course of judicial proceedings, so long as the issue of relevance to the instant proceeding pertains (see *Gugliotta v Wilson*, 168 AD3d 817 [2d Dept 2019]; *Brady v Gaudelli*, 137 AD3d 951 [2d Dept 2016]; *El Jamal v Weil*, 116 AD3d 732 [2d Dept 2014]), such question must, necessarily, await the outcome of the aforesaid issue of protection under the “common interest” qualified privilege defense, and cannot be determined at this time.

In the case at bar, plaintiffs have sufficiently asserted causes of action for defamation and defamation per se. Construing the pleadings liberally, and giving the nonmoving

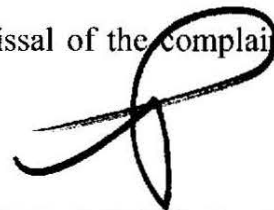
plaintiffs the benefit of all favorable inferences (*see Leon v Martinez*, 84 NY2d 83; *Hampshire Properties v BTA Building & Developing, Inc.*, 122 AD3d 573 [2014]; *Carillo v Stony Brook Univ.*, 119 AD3d 508 [2014]), plaintiffs have established, prima facie, the necessary elements of the included causes of action. In opposition, defendant has failed to raise a factual issue warranting the dismissal of such causes of action. Consequently, such causes of action have been sufficiently stated herein against defendant, and the branch of said defendant’s motion to dismiss, based upon CPLR 3211 (a) (7), is denied.

The branch of the motion seeking dismissal pursuant to CPLR 3211 (a) (1) is, likewise, denied. The evidence submitted in support, in the form of the text of the web post by defendant, was not “documentary” within the meaning of CPLR 3211 (a) (1), as it did not conclusively establish defenses to plaintiffs’ claims as a matter of law (*see Greenberg v Spitzer*, 155 AD3d 27]; *Shofel v DaGrossa*, 133 AD3d 649 [2015]). Such evidence, taken alone, failed to undeniably support movant’s claims or utterly refute plaintiffs’ factual allegations (*see Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]; *Bulbin v O’Carroll*, 173 AD3d 825 [2d Dept 2019]; *Clarke v Laidlaw Tr., Inc.*, 125 AD3d 920 [2015]; *Comprehensive Mental Assessment & Medical Care, P.C. v Gusrae Kaplan Nussbaum, PLLC*, 130 AD3d 670 [2015]). For the evidence to be considered “documentary” under that statute, such evidence must be of undisputed authenticity, unambiguous and undeniable (*see Qureshi v Vital Transp., Inc.*, 173 AD3d 1076 [2d Dept 2019]; *Anderson v Armento*, 139 AD3d 769 [2016]; *Pasquaretto v Long Island University*, 106 AD3d 794 [2013]; *Kopelowitz & Co., Inc. v Mann*, 83 AD3d 793 [2011]). “To succeed on a motion to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence which forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of plaintiff’s claim” (*Sciadone v Stepping Stones Associates, L.P.*, 148 AD3d 953, 954 [2017]; *see Pacella v RSA Consultants, Inc.*, 164 AD3d 806 [2d Dept 2018]; *Philips v Taco Bell Corp.*, 152 AD3d 806 [2017]). Such proffered evidence did not achieve the required effect herein, as it “failed to utterly refute the plaintiff’s factual allegations” (*Jadidian v Drucker*, 171 AD3d at 1148).

Defendant’s remaining contentions and arguments either are without merit, or need not be addressed, in light of the foregoing determinations.

Accordingly, defendant’s motion seeking dismissal of the complaint, pursuant to CPLR 3211 (a) (1), (3) and (7), is denied.

Dated: **MAR 09 2020**



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Hon. Leslie J. Purificacion, J.S.C.

**FILED**

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11:36 AM**

**COUNTY CLERK  
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