Trump Vil. Section 4, Inc. v Shvadron
2020 NY Slip Op 34518(U)
January 2, 2020
Supreme Court, Kings County
Docket Number: 502589/2017
Judge: Karen B. Rothenberg
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 2nd day of January, 2020.

PRESENT:

HON. KAREN B. ROTHENBERG,
Justice.

-----------------------------------X

TRUMP VILLAGE SECTION 4, INC. AND IGOR OBERMAN,

Plaintiffs,

- against -

Index No. 502589/17

MS 5

JERRY SHVADRON A/K/A JERRY SHVADRONOV,

Defendant.

-----------------------------------X

The following papers numbered 1 to 5 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3
Opposing Affidavits (Affirmations)	4
Reply Affidavits (Affirmations)	5

Upon the foregoing papers, plaintiffs Trump Village Section 4, Inc. (Trump Village) and Igor Oberman (Mr. Oberman) (collectively, plaintiffs), move, in motion sequence five, pursuant to CPLR 3212, for summary judgment on the issue of liability against defendant Jerry Shvadron a/k/a Jerry Shvadronov (Mr. Shvadron or defendant) on their causes of action for libel, trade libel and slander.[1]

[1] Although plaintiffs' notice of motion states that they are seeking partial summary judgment, they are in fact seeking summary judgment dismissing the complaint.

Trump Village is the owner of a four-building, residential cooperative corporation located (within six street addresses) at 2928, 2930, 2932, 2940, 2942 and 2944 West 5th Street in Brooklyn, New York. The corporation is governed by a nine-member volunteer board (The Board) pursuant to Trump Village's bylaws, proprietary lease and other governing documents.[2] Plaintiff Oberman is the General Manager at Trump Village. Prior to obtaining this position, Mr. Oberman, who had moved into Trump Village in July, 2008, had been elected to serve on the Board in June, 2010, and was then chosen to be Board President in January, 2012, a position he held until June, 2015. Plaintiffs are responsible, among other obligations, for processing applications and conducting interviews for prospective purchases and share transfers at the cooperative.

Defendant is the beneficiary of the shares of his late mother's cooperative apartment in Trump Village and the trustee of her revocable trust (the Trust) which holds these shares. Pursuant to the Trust Agreement, upon his mother's death on February 6, 2016, defendant was appointed trustee of the Trust, and the shares appurtenant to the Apartment were transferred to him individually as the beneficiary of his mother's estate, subject to the approval of the transfer by Trump Village.

On or about June 22, 2016, approximately five months after his mother died, defendant, in his individual capacity, submitted a transfer application to Trump Village to

[2]Certain portions of this factual recitation are taken from the decision and order, dated April 6, 2017, of the Honorable Richard Velasquez, entitled *Shvadron, as Trustee of Faina Shvadronov Revocable Trust v Trump Village Section 4 Inc.* (Sup Ct, Kings County, April 6, 2017, Velasquez, J., index No. 512291/16) (plaintiffs' exhibit 5).

transfer the shares of the Apartment from the Trust to himself. On June 29, 2016, the Board met to consider defendant's application, which was unanimously denied, based in part, upon defendant and his wife's low credit scores and an unexplained misrepresentation by defendant about a tax lien.

On July 9, 2016, at approximately 12:00 p.m., defendant entered the management office of Trump Village and, according to the affidavit of Mr. Oberman, "caused a scene," which was recorded on videotape (plaintiffs' notice of motion, aff of Mr. Oberman at 4, ¶ 19). According to plaintiffs' counsel, defendant demanded a photocopy of his file from Joseph Gaba, a Trump Village employee. Defendant thereafter engaged in an exchange with Mr. Gaba, in the presence of other Trump Village employees and residents, during which defendant was "accusing Trump Village of running a 'scam' and of denying his application because he did not 'put $5,000.00 under the table'" (*id.* at 4-5, ¶ 19, quoting defendant). Mr. Oberman also avers that defendant stated that Mr. Oberman thinks he is a "'Russian . . . gangster . . . [and]/or mobster,'" and a "'connected mobster'" (*id.* at 5, ¶19, quoting defendant).[3]

On or about July 19, 2016, Mr. Shvadron filed a summons and moved by order to show cause for a preliminary injunction in his capacity as the trustee of the Trust, to enjoin Trump Village from preventing him (i.e. Mr. Shvadron, as trustee), from exercising any of his shareholders rights. Mr. Shvadron subsequently filed a verified complaint asserting

[3]More of this exchange is set forth in plaintiffs' memorandum of law at 7-9 and in the verified complaint at ¶¶ 24-26 (plaintiffs' notice of motion, affirmation in support, exhibit 1).

various causes of action, including a cause of action seeking a declaration that he was the lessee of the Apartment under the proprietary lease and that the shares appurtenant to the Apartment were his property.

On or about October 20, 2016, Trump Village moved pursuant to CPLR 3211 (a) (1) and (a) (7) to dismiss six causes of action asserted in the complaint.

On or about December 9, 2016, defendant created a petition on the website Moveon.org (the online petition) which, according to Mr. Oberman, is still available for viewing (plaintiffs' notice of motion, affirmation in support, exhibit 1 at ¶11, aff of Mr. Oberman at 4, ¶ 17; 6, ¶ 27). The petition states:

> "**To be delivered to Trump Village West**
>
> "We are the shareholders of Trump Village and we are tired of being treated unfairly by the management. We are tired of being afraid to speak up against the management. *Stop Trump Village harassment and intimidation of its shareholders and residents* (emphasis added).
>
> "**Background**
>
> "*I am starting this petition to help the shareholders and residents fight the corruption of Trump Village management and its board of directors*. I have been part of the Trump Village community since 1993, but after my mother's passing in February of 2016, the management has denied my right to live there and has tried to force me to sell the apartment. *In June the Trump Village Management has started a campaign of harassment and intimidation by barring my entrance to my mother's apartment by taping the door and locks shut [][and] [p]lacing stickers on my car and towing it* (emphasis added).

> "Please sign and share this petition to show support for the shareholders and residents of Trump Village West. *Help the residents put a stop to these unlawful and unethical practices* so that no one else has to go through this nightmare when they are mourning a family member" (emphasis added) (aff of defendant at 5-6).

By order dated April 6, 2017, this court (Velasquez, J.), dismissed six of Mr. Shvadron causes of action against Trump Village and denied Mr. Shvadron's order to show cause for a preliminary injunction, stating, among other things, that Mr. Shvadron had failed to establish a likelihood of success on the merits on his two remaining claims that he was the lessee under the proprietary lease and that he was entitled to exercise those rights. In particular, the court held that Mr. Shvadron had failed to "cite any authority supporting his claim that he possesses shareholder rights, least of all rights enabling him to have undefined 'unfettered access' to the Apartment" (plaintiffs' notice of motion, affirmation in support, exhibit 5 at 28). Further, the court held that Trump Village had "acted within its authority to deny [Mr. Shvadron's] transfer application," stating that:

> "even assuming [Trump Village] were required to provide justification for its decision, the record reveals that [Mr. Shvadron] would still fail to succeed on the merits based upon, among other things, [Mr. Shvadron's] financial history, i.e. low credit scores of [Mr. Shvadron] and his wife reported by at least one financial institution due to charged off credit cards, and an unexplained misrepresentation about a tax lien on [Mr. Shvadron's] 'Bankruptcy and Tax Lien History'" (*id.* at 29).

After discovery was exchanged and defendant deposed, plaintiffs made the instant summary judgment motion.

Arguments

Plaintiffs argue that they are entitled to summary judgment on their claims for libel, trade libel and slander on the grounds that defendant admitted publishing defamatory statements about them, which falsely accuse them of serious crimes and tend to injure their trade, occupation or business. Based upon the foregoing, plaintiffs also assert that they are entitled to special damages because the statements constitute defamation per se and libel per se.

In opposition, defendant argues that Mr. Oberman has committed perjury because he failed to disclose in his affidavit that in addition to his position as General Manager, he holds the position of Assistant Secretary at Trump Village. Defendant also asserts that Mr. Oberman improperly makes decisions, such as those regarding shareholder evictions, as a non-Board member without Board approval. Procedurally, defendant asserts that Mr. Oberman lacks the authority to bring this action, and that plaintiffs have failed to provide him with documents he requested during discovery.

Defendant further maintains that the court should deny plaintiffs' motion because there are triable issues of fact. In particular, defendant states that:

1. The statements made in his Moveon.org petition are true, accurate and factual and were "published with [the] intention of exposing the Truth to the public about Trump Village;" and the statements published by him are not defamatory per se because the statements are "accurate and true."

2. He did not accuse Mr. Oberman of soliciting $5,000 bribes to approve transfer applications, but rather was exercising his "right as an uncontested shareholder" of the shares of his mother's apartment "in furtherance of [his] undisputed ownership of the apartment;"

3. The statements in his petition are "direct repetitions of numerous public and private correspondences, media articles, and tenant shareholder accusations that have been made directly to plaintiffs in the past" and which are "a matter of public record and records of the coop;"

4. "Any reference to [his] having accused plaintiffs of crimes, taking bribes and other such false accusations are the plaintiffs' improper interpretations of [his] reference to accusations already in the public domain" which include "references to settled court cases in which Mr. Oberman and Trump Village . . . [were] convicted of harassment and paid restitution and penalties;" and plaintiffs have a "history of commencing frivolous lawsuits, harassment, and [sic] intimidation tactics against shareholders, contractors, and employees;"

5. As to plaintiffs' accusation that he harmed plaintiffs' business reputation, defendant states it has "already been established through public and media records that [p]laintiffs have a sullied . . . business reputation;"

6. Mr. Oberman lied to and misled him and his wife by telling them that:

a) they had to pay a 25% flip tax upon the transfer of his mother's shares in her apartment to defendant, which was not true because he was exempt from paying this tax as a child who inherited the shares from his mother;

b) that so long as he and his wife did not have a criminal history or were not registered sex offenders, defendant would be permitted to transfer the shares of his mother's apartment to himself and live in his mother's apartment; (also, that the Transfer Application contained an invalid Criminal History section);

c) there was no formal minimum credit score or salary requirement needed to obtain approval of the transfer of his mother's shares to defendant; (also, that the credit score used to evaluate his financial position was inaccurate and that the Board falsely accused him and his wife of having only one income when his wife was employed, and the Board told them to list only defendant's employer);

7) Mr. Oberman is a pubic figure because he "has run for elected office, [has] given many public interviews, and has been commented upon in derogatory terms in local and national news;"

8) His allegedly defamatory statements in the online petition enjoy a qualified privilege because he made them to "warn others about a harm or danger" and because he "wanted to expose the truth and prevent a similar situation" from happening "to others, unsuspecting of the long history of tenant/shareholder harassment and intimidation;"

9) Plaintiffs are using the court system to harass, intimidate and evict residents for personal financial gain (i.e. the lawsuit is a SLAPP suit [strategic lawsuit against public participation]), and have conspired "to harass and defraud original tenant-shareholders that voted for the reconstitution of the [Trump Village] [c]oop based upon representations made in the [b]ylaws of the [c]oop" because:

> (a) the heirs of shareholders are being forced to pay an unnecessary flip tax on transfers of shares from revocable trusts;
>
> (b) "early shareholders" and elderly residents "have been abused psychologically" and are harassed into selling their apartments; and
>
> (c) new rules require shareholders to pay $60,000 for parking spaces made available after a sale, which particularly affects elderly residents because they are unable to defend themselves when served eviction notices with claims of nonconforming activities;

10) Mr. Oberman, a former Taxi and Limousine attorney, was found guilty (fine imposed) by the Taxi and Limousine Commission for using his office to conduct his political campaign for New York City Councilman;

11) The Board implemented an illegal flip tax, namely it deems transfers into trusts as a sale to which a 25% flip tax is imposed, even when no monetary consideration is involved in the transfer;

12) Other problems: a) the cooperative taking its "first right" to purchase an apartment, buying it at a depressed price, and selling it shortly thereafter at a much higher price; b) shareholders being denied the right to run for Board positions based upon accusations of illegal campaigning, just like incumbent Board members have used, and subjecting these shareholders to intrusive apartment inspections and evictions; and c) requiring shareholders with no legal/accounting skills to take a training course before they may run for the Board.

Discussion

"Defamation can either be in writing (libel) or verbal (slander)" (*O'Neill v Deutsche Bank Securities., Inc.*, 2019 NY Slip Op 30398 [U], *4 [Sup Ct, NY County 2019]).

> "The elements of a cause of action for defamation are (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] [internal citations and quotation marks omitted]).

Further, "[a] statement is defamatory per se if it (1) charges [among other things], the plaintiff with a serious crime; [or] (2) tends to injure the plaintiff in her or his trade, business or profession" (*id.*).

"The elements of libel are: (1) a false and defamatory statement of fact; (2) regarding the plaintiff; (3) which is published to a third party; and which (4) results in injury to plaintiff" (*Penn Warranty Corp. v DiGiovanni*, 10 Misc 3d 998, 1002 [Sup Ct, NY County [2005]; *see Sheridan v Carter*, 48 AD3d 444, 446 [2d Dept 2008] ["The essence of the tort of libel is the publication of a statement about an individual that is both false and defamatory"]). "Since falsity is a necessary element of a libel claim, and only 'facts' are capable of being proven false, it follows that a libel action cannot be maintained unless it is premised on published assertions of fact" (*Guerrero v Carva*, 10 AD3d 105, 111 [1st Dept 2004] [internal citations and quotation marks omitted]). "Words are 'published' within the meaning of the law of libel when they are in writing and are read by someone other than the

person libeled and the person making the charges" (*Fedrizzi v Washingtonville Cent. School Dist.*, 204 AD2d 267, 268 [2d Dept 1994]). "Absent some communication to a third person, no damage, either actual or presumed, can result" (*id.*). However,

> "[a] false written statement is libelous per se, and thus actionable without allegation or proof of special damage, if it 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" (*Rosenthal v MDX Med., Inc.*, 152 AD3d 811, 811 [2d Dept 2017], *lv denied* 30 NY3d 906 [2017] [internal citations and quotations marks omitted]).

As with a statement that is defamatory per se, "[a] false written statement is also libelous per se if it tends to disparage a person in the way of his office, profession or trade" (*id.* [internal citations and quotation marks omitted]), or "charge[s] the commission of crime[]" (*Halperin v Salvan*, 117 AD2d 544, 546 [1st Dept 1986]). "To be actionable as words that tend to injure another in his or her profession, the challenged statement must be more than a general reflection upon [the plaintiffs'] character or qualities" (*Golub v Enquirer/Star Group*, 89 NY2d 1074, 1076 [1997]). Instead, "the statement must reflect on her performance or be incompatible with the proper conduct of her business" (*id.*).

"The elements of a cause of action for slander are: (i) a defamatory statement of fact, (ii) that is false, (iii) published to a third party, (iv) of and concerning the plaintiff, (v) made with the applicable level of fault on the part of the speaker, (vi) either causing special harm or constituting slander per se, and (vii) not protected by privilege" (*Pawar v The Stumble Inn*, 2012 NY Slip Op 32667 [U], * 4-5 [Sup Ct, NY County 2019] [internal citation and internal

quotation marks omitted]). "Generally, a plaintiff alleging slander must plead and prove that he or she has sustained special damages, i.e., the loss of something having economic or pecuniary value" (*id.* [internal citations and quotation marks omitted]). However, "[a] plaintiff need not prove special damages . . if he or she can establish that the alleged defamatory statement constituted slander per se" (*id*). Statements are considered slander per se when they disparage the plaintiff's business or trade and or charge the plaintiff with a serious crime (*id*). "When statements fall within one of these categories, the law presumes that damages will result, and they need not be alleged or proven" (*id.*).

Plaintiffs have made a prima facie showing entitling them to summary judgment on their causes of action for libel, trade libel and slander. First, plaintiffs have demonstrated that defendant made false and defamatory statements of fact. As an initial matter, "[w]hether particular words are defamatory presents a legal question to be resolved by the court in the first instance ... and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction" (*Golub,* 89 NY2d at 1076 [internal citations and quotation marks omitted]). More specifically, "[w]hether a particular statement constitutes an opinion or an objective fact is a question of law" (*Stolatis v Hernandez*, 161 AD3d 1207, 1208 [2d Dept 2018]). "The dispositive inquiry . . . is whether a reasonable [reader or person] could have concluded that [the statements were] conveying facts about the plaintiff" (*Gross v New York Times Co.*, 82 NY2d 146, 152 [1993]

[internal citations and quotation marks omitted]). The factors to be considered "[i]n distinguishing between statements of opinion and fact" are:

> "(1) whether the specific language at issue has a precise, readily understood meaning, (2) whether the statements are capable of being proven true or false, and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal readers that what is stated is likely to be opinion, not fact" (*Stolatis v Hernandez*, 161 AD3d 1207, 1209-1210 [2d Dept 2018]).

Here, the statements defendant made in the online petition that: he started it to "help shareholders and residents fight the *corruption* of Trump Village community;" that "after [his] mother's passing . . . *the management* . . . denied [his] right to live there [and] . . . tried to force [him] to sell the apartment;" that "*the Trump Village Management* . . . started a campaign of *harassment and intimidation* by barring [his] entrance to [his] mother's apartment by taping the door and locks shut" and "[p]lacing stickers on [his] car and towing it" - as well as his entreaty to others to sign the petition in order to help the residents of Trump Village to "put a stop to these *unlawful and unethical practices* (emphasis added)" - have a "precise, readily understood meaning," (*Stolatis,* 161 AD3d at 1209-1210), namely that defendant was unfairly/illegally prevented by plaintiffs' corrupt/illegal/unethical acts from inheriting and living in his mother's apartment. Further, these statements are capable of being proven true or false, particularly in light of the court's decision finding that Trump Village was justified in denying defendant's transfer application. Finally, given the subject matter, the unambiguous nature of defendant's claims and, again, his attempt to persuade

others to join his cause, it is likely that defendant's statements are interpreted by the reader as facts, not opinion.

The court comes to the same conclusion with respect to the statements defendant made at the Trump Village management office to Trump Village employee Mr. Gaba in the presence of other Trump Village employees and residents of Trump Village. In this regard, defendant accused plaintiffs of "running a 'scam;'" namely, forcing people to pay a bribe of $5,000 in order to ensure that their transfer applications were granted, and denying defendant's transfer application because he did not "'put $5,000.00 under the table.'" These statements have a precise meaning, i.e. pay the bribe or your transfer application will be denied. Further, the statements are capable of being proven true or false by other Trump Village shareholders who have allegedly been subjected to the same treatment. Lastly, while defendant's statement that Mr. Oberman thought himself a Russian gangster was not likely understood as fact, given that defendant prefaced this accusation by stating that "[w]hat you guys did to me, you're never doing to do it [to] anyone else . . . because people are smart [and] they are going to catch on," the full context of his statement signals to the listener that defendant was making a statement of fact that Mr. Oberman was engaging in unethical/corrupt behavior, i.e. acting like a gangster, and thus was not opinion. In any event, defendant also testified that he told Mr. Gaba that people say that Mr. Oberman is a Russian gangster and that he may have made this statement to other people.

Plaintiffs have also made a prima facie showing that defendants' statements were false. As an initial mater, at his deposition, defendant admitted making the statements in his online petition and at the management office. As to the veracity of these statements, defendant testified that he has never seen plaintiffs accept a bribe. Further, defendant only speculated that Mr. Oberman "tried [taking a bribe] with [him]" by "being really nice to [him]" and, in effect, assuring him his application would be approved because there were no requirements for the credit score and salary, but that plaintiffs then denied his application when he "didn't give a bribe." In addition, Mr. Oberman avers that "Trump Village is not corrupt, we do not engage in unlawful or unethical practices, we do not run a scam, we do not ask for bribes, and I am not involved in organized crime." Moreover, defendant's statement accusing plaintiffs of accepting bribes is undermined by his admission during his deposition that he tried to obtain special treatment from Mr. Oberman in order to get his application approved. In particular, at defendant's urging, defendant's uncle called Mr. Oberman to remind him that when defendant and Mr. Oberman's families lived in the same town in the former Soviet Union, defendant's family had been "very nice to [Mr. Oberman's] family.

Defendant also admitted during his deposition that he understood the court's prior decision that being a trustee of his mother's revocable trust did not make him a shareholder, and that he knew Trump Village could decide to deny his application based on salary, credit score, or tax liens. Defendant nevertheless conceded that he posted the petition online in order to "shame the board and the manager" "into realizing what they are doing and for them

to maybe change their behavior . . . I wanted them to . . . feel that what they are doing is wrong."

Further, defendant admitted during his deposition that Mr. Oberman is not involved in organized crime, stating: "And I know that he is not a Russian gangster. He thinks he's a Russian gangster . . . I know for a fact that he is not a member of the Russian mob, but I know people who are in the real Russian mob." Defendant also testified at his deposition that he was "trying to get [the real Russian mob] involved" because he thought "it would be more effective" in getting his application approved. In this regard, he testified that: "Mr. Oberman doesn't know anything else except for strength. When he sees strength he will probably let me live there, but until then, he will probably try to harass me, continue to harass me."

Plaintiffs have also shown, based upon the foregoing, that defendant made the subject statements about them. Further, plaintiffs demonstrated that these statements were published to third parties. In this regard, defendant testified that he posted the online petition on his Facebook page, emailed it to his friends, relatives, and acquaintances, and asked his friends and relatives to re-post it. Also, as noted above, defendant admitted making the statements at the management office and does not deny that others were present.

Finally, plaintiffs have made a prima facie showing that defendant's statements constitute defamation per se, libel per se and slander per se because they impugn plaintiffs' business or profession and charge them with an indictable crime. First, defendant's statements that plaintiffs solicited bribes in connection with processing his application, that

they harassed shareholders and engaged in "unlawful and unethical practices" "reflect on [plaintiffs'] performance or [are] incompatible with the proper conduct of [their] business" (*Golub*, 89 NY2d at 1076; *see also Wasserman v Haller*, 216 AD2d 289, 289-290 [2d Dept 1995] ["Words which affect a person in his or her profession by imputing to him or her any kind of fraud, dishonesty, misconduct, or unfitness in conducting one's profession may be actionable"]). Here, defendant's statements impugn plaintiffs' profession, which is, generally, to "ensure that the co-op survives and flourishes and that the decisions of the Board are effectuated" (plaintiffs' notice of motion, aff of Mr. Oberman at 3, ¶ 9) and to process "applications for perspective purchases and transfers of share to the apartment complex" (plaintiffs' notice of motion, affirmation in support, exhibit 1, verified complaint at 1, ¶ 1).

Second, defendant's comments posted on Facebook and those made at the management office accusing plaintiffs of soliciting bribes in exchange for approving transfer applications charges plaintiffs with larceny by extortion, a serious indictable crime (Penal Law § 155.05; *Caffee v Arnold*, 104 AD2d 352, 353 [2d Dept 1984] ["While slanderous language need not consist of the technical words of a criminal indictment it is necessary that the language be reasonably susceptible to a connotation of criminality"]; *Light v Light*, 64 AD3d 633, 634 [2d Dept 2009] ["as the complaint alleges that the defendants filed a false report accusing the plaintiff of a crime, it states a valid cause of action to recover damages for libel per se and slander per se"]).

In opposition to plaintiffs' prima facie showing, with respect to defendant's procedural claims, plaintiffs point out that on June 8, 2018, after oral argument, they received a protective order as to many of defendant's discovery demands, and that they have responded to all demands which were not stricken. Further, defendant fails to support his claims that Mr. Oberman has committed perjury, that he makes decisions with respect to the cooperative without Board approval, and that he lacked the authority to commence this action.

Addressing the merits of defendant's further claims in opposition to plaintiffs' motion, defendant does not deny that he published the online petition. Instead, he asserts that its contents are true, and merely consist of statements made in the past about plaintiffs in private and public by shareholders and the media. However, as to their veracity, defendant conceded at his deposition that this court has already found that plaintiffs did not act improperly by denying defendant's transfer application. Moreover, that others have allegedly made defamatory statements about plaintiffs does not shield defendant from liability.

With respect to defendant's exchange at the management office regarding plaintiffs' purported solicitation of bribes, defendant states that he did not accuse Mr. Oberman of soliciting bribes. Rather, defendant asserts that in making these statements, he was merely exercising his right as a shareholder "in furtherance of [his] undisputed ownership of his mother's apartment." However defendant characterizes these statements, at his deposition, he conceded making them at the management office and testified that he may have told people personally and commented on Facebook that his application was not approved

because he did not give plaintiffs a bribe. Further, defendant testified that he had never seen plaintiffs accept a bribe and that he knew that Mr. Oberman was not a gangster. Moreover, defendant only speculated at his deposition that Mr. Oberman "tried [taking a bribe] with [him]" by "being really nice to [him]" and, in effect, assuring him his transfer application would be approved but then plaintiffs denied his application when defendant "didn't give a bribe." Further, defendant only provided hearsay testimony that his mother and residents of the cooperative told him that the "management company" "take bribes."

Defendant also argues that these accusations have already been made in the public domain. However, that others have made these statements does not shield defendant from liability.

Defendant has also failed to raise a triable issue of fact that his accusations have not harmed plaintiffs' business reputation because he merely states that plaintiffs' reputation was already impugned.

Defendant also claims that this action is a SLAPP action, or like one, because plaintiffs are allegedly using the court system "to harass, intimidate and evicts residents for personal financial gain . . ." and have a history of "unlawful and unethical behavior" in violation of Penal Law § 460. In particular, defendant asserts that plaintiffs are imposing an unnecessary flip tax on heirs of these shareholders; that newly available parking spaces at the cooperative are being sold to new shareholders for $60,000, which discriminates against shareholders who have been on a waiting list for a parking space for many years; and

that plaintiffs are making false allegations against "early" shareholders[4] to harass them into selling their apartments. This action does not fall within the definition of a SLAPP action, which is "an action involving public petition and participation" (Civil Rights Law § 70-a [1]; *see also Zervos v Trump*, 171 AD3d 110, 117 [1st Dept 2019] ["strategic lawsuits against public participation' [are] (lawsuits brought primarily to chill the valid exercise of free speech in connection with a public issue)"]). Further, the exhibits defendant annexes in support of these claims (aff of defendant, exhibits D-L) - including the decision of the Department of Housing and Urban Development finding plaintiffs in violation of discriminatory housing practices with respect to two married shareholders - as well as defendant's additional claims that plaintiffs engaged in "[e]lder abuse, harassment, and [o]ther corruption" (essentially a repetition of the instant claim), fail to raise a triable issue of fact that plaintiffs are or were behaving corruptly in violation of Penal Law § 460 (*see People v Newspaper & Mail Deliverers' Union* of N.Y. & Vicinity, 250 AD2d 207, 213 [2d Dept 1998], *lv denied* 93 NY2d 877 [1999], *lv denied on reconsideration* 93 NY2d 1023 [1999], *cert denied* 528 US 1081 [2000] ["The intent of article 460 was to provide a statutory vehicle to indict pervasively corrupt associations"]).

Defendant also argues that Mr. Oberman is a public figure because he "has run for elected office, [has] given many public interviews, and has been commented upon in

---

[4]Defendant's reference to "early shareholders" means "[t]hose shareholders who bought their apartments prior to or shortly after the reconstitution of [Trump Village 4] in 2007" (aff of defendant at 7), i.e. before or shortly after the cooperative was converted from a Mitchell-Lama limited-equity cooperative to a privately-owned cooperative.

derogatory terms in the local and national news." However, defendant provides no competent support for this claim. In any event, [t]hose classified as a 'public figure' have thrust themselves to the forefront" (*Maule v NYM Corp.*, 76 AD2d 58, 62 [1st Dept 1980], quoting *Gertz v Robert Welch, Inc.*, 418 US 323, 345 [1974]). In particular, "[a] general purpose public figure is a person who has obtained general fame or notoriety in the community, and pervasive involvement in the affairs of society" (*Huggins v Moore*, 253 AD2d 297, 311 [1st Dept 1999] [internal citations and quotation marks omitted]). "In the public figure calculus is included such considerations as whether the figure ever held a remunerative public office, held news conferences or affirmatively made an issue public, or engaged in purposeful activity which amounted to a thrusting of [one's] personality into the vortex of an important public controversy" (*Crowe Deegan LLP v Schmitt*, 12 Misc 3d 1152 [A], *5 [Sup Ct, Nassau 2006] [internal quotation marks omitted], *modified* 38 AD3d 590 [2d Dept 2007]). However, [e]ven a person who had been a public figure does not retain that status unless he or she maintain[s] regular and continu[ed] access to the media" (*Huggins,* 253 AD2d at 311 [internal citations and quotation marks omitted]).

The exhibits defendant annexes in support of his other arguments indicate that: (1) while working as an attorney for the Taxi and Limousine Commission (TLC), and running (unsuccessfully) for the City Council, Mr. Oberman was fined in 2013 for using his TLC telephone during business hours to work on his political campaign, and (2) that in February, 2014, Crain's New York Business wrote a newspaper article about it, in which it also wrote

about a lobbying contract Trump Village allegedly entered into with Mr. Oberman's main campaign consultant (aff of defendant, exhibits F, N). Even assuming these exhibits are sufficient to establish that Mr. Oberman was a public figure, the underlying events took place six years ago, and fail to show that Mr. Oberman retained that status. Defendant's related claim, presumably that Mr. Oberman is corrupt because he was fined by the TLC, also fails to raise a triable issue of fact because it is unrelated to Mr. Oberman's position at Trump Village.

Defendant further claims that he is entitled to a qualified privilege with respect to his online petition because he wanted to "expose the truth" in order to "prevent a similar situation" from happening to others who are "unsuspecting of the long history of tenant/shareholder harassment and intimidation."

"A qualified privilege extends to a communication made by one person to another upon a subject in which both have an interest" (*Udeogalanya v Kiho*, 169 AD3d 957, 959 [2d Dept 2019]). Under this privilege, "[p]rotection from defamation is afforded where the person making the statements does so fairly in the discharge of some public or private duty, legal or moral, or in the conduct of his [or her] own affairs, in a matter where his [or her] interest is concerned" (*New York Horse Rescue Corp. v Suffolk County Socy. for the Prevention of Cruelty to Animals*, 164 AD3d 909, 911 [2d Dept 2018] [internal citations and quotation marks omitted]).

However, the shield provided by this privilege does not protect a defendant who has disseminated the statements in a manner which exceeds the scope of this privilege (i.e. where the statements "were disseminated to those who did not have either a common interest in them, or a legal, moral, or social duty to speak upon the subject of the communications") (*Skarren v Household Fin. Corp.*, 296 AD2d 488, 489-490 [2d Dept 2002]; *see also Rosen v Piluso*, 235 AD2d 412, 412 [2d Dept 1997]) or constitutes "excessive publication" (*Stukuls v State of New York*, 42 NY2d 272, 281 [1977]; *see also Sokol v Leader*, 74 AD3d 1180, 1182 [2d Dept 2010]).

Defendant has failed to raise a triable issue of fact via any competent evidence that he is entitled to this privilege with respect to his online petition. Even assuming that the privilege is applicable to the statements made in the online petition, defendant admitted at his deposition that he told "people in person, on the telephone and ["everywhere"] on the Internet," including on Facebook and "social sites," and on a Trump Village Facebook group he created, which can now be found by using a search engine, about what he believed to be the unfair denial of his application; that he also connected with "100, maybe 1000 people;" and that he repeats the contents of the petition to "[a]nyone [he] can."

In addition, defendant admitted that he published his petition online, emailed it to friends, relatives and acquaintances, and asked his friends and relatives to re-post it. He further testified that based upon his profession as a computer programmer, he was "aware of the widespread reach of the Internet," and that by posting the petition online, he wanted

to "optimize" the number of people who saw it. Since defendant disseminated the petition in a manner that exceeded the scope of the privilege and which constituted excessive publication (*Sokol*, 74 AD3d at 1182]), he is not entitled to the protection of this privilege.[5]

Lastly, defendant avers that Mr. Oberman "lied and misled" him and his wife about the application process with respect to the flip tax, salary and credit score requirements, and whether to add his wife's employment on his application. It appears that defendant makes these allegations to demonstrate that his statements regarding plaintiffs' allegedly corrupt conduct were truthful ("I am starting this petition to help shareholders and residents fight the corruption of Trump Village community since 1993 . . .").

In support of this claim, plaintiff relies upon an undated copy of a portion of the proposed bylaws for the cooperative, containing the added notation "From the Trump IV Reconstruction Plan at page 8" (aff of defendant, exhibit A5). In relevant part, this document states at paragraph six that if the "amendments to the Certificate of Incorporation, Occupancy

---

[5]The privilege is also inapplicable if "the plaintiff can demonstrate that the defendant made the allegedly false statement with malice" (*Diorio v Ossining Union Free School Dist.*, 96 AD3d 710, 712 [2d Dept 2012] [internal citations and quotation marks omitted]). "To establish the 'malice' necessary to defeat the privilege, the plaintiff may show either common-law malice, i.e., spite or ill will, or may show actual malice, i.e., knowledge of falsehood of the statement or reckless disregard for the truth" (*id.* [internal citations and quotation marks omitted]). Plaintiffs argue, in effect, that defendant made these false statements with malice because he testified that he wanted "to shame" plaintiffs, that he knew Mr. Oberman was not associated with organized crime, and that he understood the court's prior decision finding that plaintiffs had not acted improperly in denying his application. However, defendant also testified that he wanted to shame plaintiffs because he felt he *and others* were being treated unfairly, and that he believed plaintiffs were taking advantage of senior citizens. Under the circumstances, "plaintiffs have failed to establish that malice was the one and only cause for the publication" so as to remove the privilege (*Hull v Town of Prattsville*, 145 AD3d 1385, 1390 [3d 2016]).

Agreement and Bylaws" are approved, they would provide that "any tenant-shareholder who sold his or her shares and proprietary lease would have to pay a transfer fee to the Cooperative in amounts fixed" by the Board, called a "flip tax." The paragraph further provides that:

> "The transfer fee applicable to the first sale of every apartment after reconstitution that would be in effect at the time of reconstitution would be 20% of the gross selling price. *Some transactions would be exempt from the transfer fee, and the transfer fee would then be due on the first non-exempt sale of that apartment*" (emphasis added).[6]

Further, below the added notation "at page 10," the document states:

> "(b) The seller would have to pay a transfer fee ('flip tax') to the Cooperative. The amount of the transfer fee and the applicable rules and policies, including those transactions on which the transfer fee would not be charged but would instead be deferred, are described below:"

Under the title "Transfer Fees," the document states:

> "(c) Bequests by stockholders and bona fide gifts by stockholders to members of their immediate family are exempt from the transfer fee, *but, if the apartment bequeathed or given had not been previously sold after reconstitution, the first sale of the apartment by the stockholder (s) who receive[s] the bequest or gift shall be deemed to be the first sale after reconstitution for the purpose of calculating the transfer fee due on such sale. Immediate family for this purpose shall consist of a stockholder's spouse . . . children, grandchildren . . .*" (emphasis added).

---

[6]There is a footnote indication at the end of this paragraph, but the footnote, itself does not appear on the page.

Defendant also annexes an email from Mr. Oberman to the Board, dated February 6, 2012, which states that in preparation for the Board meeting the following day, he had asked "Jim Colombo" to compile "the most frequently asked questions he gets about trusts" (aff of defendant, exhibit P). The first question listed is: "1. When are transfer taxes due?" The answer is: "*The policy now has been if the beneficiary is the exempt class then 25% when they sell.* If not exempt class 20% on transfer to trust 5% when they sell. Or we can just collect the 20% upon the transfer to trust" (emphasis added).

"Truth is an absolute defense to a defamation action, and the test to determine whether a statement is substantially true is whether [the statement] as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced" (*Udell v NYP Holdings, Inc.*, 169 AD3d 954, 956 [2d Dept 2019] [internal citations and quotation marks omitted]). "A libel action will fail even where a substantially true statement contains minor inaccuracies" (*id*).

Here, it is true, as Mr. Oberman asserts, that defendant testified that he understood that Trump Village could decide to deny his application based on salary, credit score, or tax liens. Further, defendant conceded at his deposition that he did not include his wife's employment information because he was not going to include her name on the stock certificates, but also because she had a poor credit rating. This testimony demonstrates that defendant knew that this information was a factor the Board considered in determining his application. Similarly, defendant also conceded, in effect, that his own salary was an important factor the Board considered based upon his testimony that he waited four months after his mother died to

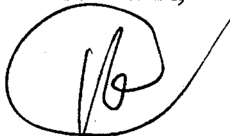
submit his application because "I was looking for a job, I'm not an idiot. I'm not going to apply without being unemployed [sic] with my wife's credit being low." Finally, Mr. Oberman denies that the statements made by plaintiff in his online petition and at the management office "are utterly devoid of truth" and are "outrageous lies" (plaintiffs' notice of motion, aff of Mr. Oberman at 5, ¶ 22; 3, ¶ 11).

Nevertheless, in his affidavit, Mr. Oberman does not address defendant's claim that he lied when he told defendant and his wife that they had to pay a 25% flip tax upon the transfer of his mother's shares in the apartment to defendant. Further, the record is unclear as to whether defendant was required to pay the flip tax at the time he submitted his application. First, defendant states that he was not required to pay the flip tax. However, defendant also avers in his affidavit that the Board had implemented an "illegal flip tax" which would have required him to pay it. Second, the email appears to indicate that in 2012, heirs were exempt from paying the flip tax until they sold the apartment. In any event, neither Trump Village nor Mr. Oberman refute defendant's claim that the flip tax was not applicable to defendant, and Mr. Oberman fails to address defendant's claim that he lied when he told defendant that he would have to pay a flip tax if he wanted to live in the Apartment. Under the circumstances, defendant has raised a triable issue of fact as to whether plaintiffs engaged in corrupt conduct by advising him that he had to pay the flip tax upon transfer of the shares of the Apartment to himself. Therefore, that branch of plaintiffs' summary judgment motion on their libel and trade libel causes of action with respect to defendant's statement in the online petition that plaintiffs are corrupt is denied.

In summary, that branch of plaintiffs' summary judgment motion, motion sequence five, on their claim for slander is granted, and those branches of their summary judgment motion on their claims for libel and trade libel are granted as to the statements made by defendant in his petition except for his statement alleging that plaintiffs engage in corrupt conduct.

This constitutes the decision and order of the court.

ENTER,



J. S. C.

Karen B. Rothenberg
Justice, Supreme Court

KINGS COUNTY CLERK
FILED
2020 JAN 15 AM 10:37