To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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SOPHIA A. LOWE,

Plaintiff,

-against-

CHRISTINE ROBBINS,

Defendant.

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DECISION and ORDER

Sequence Nos. 4 and 5
Index No. 69138/2018

RUDERMAN, J.:

The following papers were considered on defendant's motion for an order pursuant to CPLR 3013, 3016 (a), 3211(a) (7) and 3212 (b) granting judgment in favor of defendant and dismissing the causes of action of the complaint (sequence 4), and plaintiff's cross-motion pursuant to CPLR 3212 (b) granting her summary judgment (sequence 5):

Papers	Numbered
Notice of Motion, Affirmation, Exhibits A - R, and Memorandum of Law	1
Notice of Cross-Motion, Affidavit, Affirmation, Exhibits A - K	2
Reply Affirmation, Exhibit A	3
Reply Affirmation on Cross-Motion	4

This action arises out of statements made at a December 17, 2017 meeting of the homeowners association for the real property development known as "The Wood Lot," in Somers, New York, in which both parties reside. Plaintiff Sophia A. Lowe alleges that in the presence of members of the homeowners association, defendant Christine Robbins said, concerning plaintiff,

> "oh, you should see the nasty emails I didn't share with everyone that she sent, and there are a lot of them. The emails she sent to me personally were so vicious you wouldn't want to see them."

Plaintiff's complaint contains one cause of action sounding in defamation and another for intentional infliction of emotional distress.

In the present motion defendant challenges the sufficiency of the complaint, and also contends that plaintiff lacks evidence supporting her claims; she submits in support the deposition transcripts of the third parties who were purportedly present to hear the claimed statement, but whose testimony fails to support that claim. Defendant submits papers denying that she made any defamatory statements as alleged in the complaint, and argues that in any event, the alleged statement is hyperbolic and not susceptible to a defamatory meaning. Moreover, she contends that based on the allegations, it was made during a group discussion at the homeowners association meeting and therefore protected by a qualified privilege. Finally, she maintains that plaintiff does not allege, and cannot establish, special damages as required, since she only makes a subjective claim of harm to her personal reputation.

Plaintiff responds that since discovery remains incomplete – in that she has not obtained the deposition of defendant's husband, despite her service of a subpoena on him – plaintiff may not be awarded summary judgment at this time. She contends that a cognizable cause of action for defamation is pleaded, and that the issue of whether the alleged statement is susceptible of a defamatory meaning presents a question of fact.

Plaintiff also suggests, based on an answer defendant gave at her deposition, that defendant admitted making the defamatory statements at issue. Defendant was asked during her deposition to specify what she disagreed of what plaintiff testified at her deposition, and in

setting forth the testimony with which she disagreed, defendant failed to specifically referred to plaintiff's statement as to the defamatory words uttered.

In addition, plaintiff disputes defendant's right to claim a qualified privilege, both because she withdrew her qualified privilege defense in her July 11, 2019 supplemental response to plaintiff's discovery demands, and because the qualified privilege defense is lost when the motivation for making such statements was malice, spite or ill will (citing *Foster v Churchill*, 87 NY2d 744 [1996]). To demonstrate that defendant acted with such malice, plaintiff asserts that defendant has not specifically challenged plaintiff's assertions that defendant vilifies anyone who challenges her. Plaintiff argues that, at least, a question of fact is presented on the issue of malice that precludes defendant from relying on the claimed privilege to obtain relief on the present motion.

To the extent defendant relies on a common interest defense, plaintiff also argues that since defendant was not a member of the homeowners association at the time, she was not entitled to be in attendance at the meeting.

With regard to her claim for intentional infliction of emotional distress, plaintiff maintains that the malevolent purpose of defendant's utterance, undertaken for the sole purpose of destroying plaintiff's reputation in the community at large and vilifying plaintiff, because plaintiff was questioning the status quo, was outrageous in character and to an extreme degree as to satisfy the elements of the tort (citing *Murphy v American Home Prods. Corp.*, 58 NY2d 293 [1983]).

Discussion

The particularity requirement of CPLR 3013 and the pleading requirements for

defamation claims (*see* CPLR 3016 [a]) are satisfied by the complaint's recitation, in quotation marks, of the complained-of statement and the identification of its time and place.

With regard to defendant's application to dismiss for failure to state a cause of action pursuant to under CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true [and] accord plaintiffs the benefit of every possible favorable inference" (*see Leon v Martinez,* 84 NY2d 83, 88 [1994]). Among those factual allegations accepted for this purpose is the assertion that defendant made the alleged statement.

Defamation is generally defined as "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" (*Foster v Churchill*, 87 NY2d 744, 751 [1966] [internal citation and quotation marks omitted]). Only statements of fact can be the subject of a defamation claim (*see Galanos v Cifone*, 84 AD3d 865 [2d Dept 2011]). "Expressions 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" (*Mann v Abel*, 10 NY3d 271, 276 [2008], cert denied 555 US 1170 [2009]). Non-actionable opinion includes insults and "rhetorical hyperbole" (*see Greenbelt Coop. Publishing Assn. v Bresler*, 398 US 6, 14 [1970]; *Immuno AG v Moor-Jankowski*, 77 NY2d 235 [1991]). If statements are not capable of being proven true or false, they are likely to be non-actionable opinion rather than actionable statements of fact (*see Brian v Richardson*, 87 NY2d 46, 51 [1995]).

The asserted statement by defendant, accusing plaintiff of creating and sending "nasty" and "vicious" emails, amounts to a characterization of the tone of those emails, and as such the

statement cannot be proven true or false; whether a writing qualifies as "nasty" or "vicious" is a matter of opinion.

Even if the language of the alleged statement was considered to be a question of fact sufficiently susceptible of defamatory meaning to leave the question to the fact-finder, dismissal would be required pursuant to CPLR 3211 (a) (7) because when an action concerns an allegation of spoken slander rather than written libel, the plaintiff must do more than allege that the statement exposed one to "public contempt, ridicule, aversion or disgrace" (*see Matherson v Marchello*, 100 AD2d 233, 236 [2d Dept 1984]). Rather, a plaintiff alleging slander must allege and prove that she sustained "special damages," which contemplates "the loss of something having economic or pecuniary value" (*see Liberman v Gelstein*, 80 NY2d 429, 434-435 [1992]). This special damages requirement for slander claims is only avoided where the asserted defamatory statement (1) alleges that the plaintiff committed a crime, (2) tends to injure the plaintiff in his or her trade, business or profession, (3) alleges that plaintiff has contracted a loathsome disease, or (4) imputes unchastity to a woman (*Liberman v Gelstein, supra*).

The complaint merely alleges that "[p]laintiff has been injured in her good name and reputation, and has suffered great pain and mental anguish and has been held up to ridicule and contempt by her neighbors and the public." Even construing the complaint liberally, this allegation fails to satisfy the special damages pleading requirement for a slander claim. Therefore, for the two foregoing reasons the branch of defendant's motion seeking dismissal pursuant to CPLR 3211 (a) (7) must be granted: the statement is one of non-provable opinion, and the pleading fails to allege special damages.

Moreover, even if that infirmity in the complaint did not require dismissal, defendant

would be entitled to summary judgment pursuant to CPLR 3212, based on the lack of any evidentiary showing demonstrating the existence of special damages in opposition on the summary judgment application.

In addition to the foregoing grounds for granting summary judgment in defendant's favor, an additional basis for summary judgment is provided by defendant's unrebutted prima facie showing that there is no third party who heard the alleged statement by defendant. "A cause of action for slander requires publication of the defamatory matter, *which occurs when it is heard by some third party*" (*Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 294, 298 [1st Dept 1999] [emphasis added]; *see Rabushka v Marks*, 256 AD2d 562, 563 [2d Dept 1998]). Defendant has submitted deposition testimony from an array of other persons present at the meeting, and at each deposition the witness denied hearing the allegedly slanderous statement; this constitutes a prima facie showing of no publication (*Snyder, supra.*). In response, plaintiff failed to come forward with proof of any third party who heard defendant make the alleged statement.

On a motion for summary judgment, a party opposing the motion must lay bare her proof (*see Morgan v New York Telephone*, 220 AD2d 728 [2d Dept 1995]). In order to defeat a motion for summary judgment on the grounds that discovery is still outstanding, the opponent must demonstrate that the incomplete discovery might lead to relevant evidence or facts essential to assist in proving or defending the action (*see Torres v Beth Israel Med. Ctr.,* 134 AD3d 1097, 1097 [2d Dept 2015]).

Plaintiff asserts that summary judgment is improper at this time because discovery is not complete, in that she was unable to depose defendant's husband, Lorne Robbins. However, the subpoena for Lorne Robbins' deposition was dated December 9, 2019, scheduling a deposition

on January 14, 2020. Upon learning that Robbins was in Florida and would not attend, plaintiff had him personally served with the subpoena on February 14, 2020. Yet, nothing in plaintiff's submissions, which are dated August 5, 2020, demonstrate what steps, if any, were taken between February and August to enforce her asserted right to take that deposition. Notably, the Compliance Conference Order dated October 31, 2019 directed that non-party depositions would be completed by December 18, 2019, and the subsequent Compliance Conference Order dated December 11, 2019, directed that depositions would be completed by January 14, 2020. Those orders also provide that "Any disclosure demands not raised at the Compliance Conference are deemed waived." Plaintiff's failure to demonstrate that she sought a court directive for that particular non-party deposition at any point up to August 5, 2020 precludes her from relying on the lack of that particular deposition as grounds for rejecting a summary judgment application at this time. The Court notes that during those intervening months, plaintiff demonstrated that she was capable of making an application regarding the sought deposition of Lorne Robbins, given the parties' litigation regarding plaintiff's testimonial subpoena served on defendant's attorney, which was resolved by the June 12, 2020 order of the court (Hon. Joan B. Lefkowitz, J.) quashing that subpoena.

Were dismissal and summary judgment not warranted, the issue of whether defendant was entitled to rely on the common interest qualified privilege would be left for trial (see Ferrara v Bank, 153 AD3d 671, 673 [2d Dept 2017]), since a qualified privilege "may be overcome by a showing of common law malice, such as spite or ill will, or by a showing of actual malice, such as knowledge of the falsehood of a statement or reckless disregard for the truth" (Gottlieb v Wynne, 159 AD3d 799, 800 [2d Dept 2018]).

The complaint's cause of action for intentional infliction of emotional distress must also be dismissed. "The tort has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress" (*Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]). "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 56 [2016]). The allegations in the pleading do not rise to that level, nor does evidentiary support submitted in opposition to defendant's application for summary judgment.

Plaintiff's cross-motion would be denied in any event, since her moving papers fail to establish entitlement to judgment as a matter of law.

Accordingly, it is hereby

ORDERED that the branches of defendant's motion seeking an order pursuant to CPLR 3211 (a) (7) and CPLR 3212 dismissing the complaint are granted, and the Clerk is directed to enter judgment dismissing the complaint; and it is further

ORDERED that plaintiff's cross-motion is denied.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
October 1, 2020

Terry Jane Ruderman
HON. TERRY JANE RUDERMAN, J.S.C.