

Harpaz v Dunn

2021 NY Slip Op 31689(U)

May 18, 2021

Supreme Court, New York County

Docket Number: 152313/2020

Judge: Shawn T. Kelly

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 57

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HADAS HARPAZ,

Plaintiff,

INDEX NO. 152313/2020

- v -

MOTION DATE 02/08/2021

SUANNE DUNN, JOHN DOES

Defendant.

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

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HON. SHAWN TIMOTHY KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 39, 40, 42, 43 were read on this motion to/for DISMISSAL

Upon the foregoing documents, it is

Defendant Suanne Dunn (“Defendant”) moves for an Order dismissing the Complaint pursuant to CPLR §3211 (a) (7) alleging that Plaintiff Hadas Harpaz fails to state a cause of action against Defendant. The Complaint alleges two causes of action. The First Cause alleges defamation against Dunn. The Second Cause of Action seeks a Preliminary and Permanent Injunction against all Defendants, Dunn and John Does I-X, “enjoining Defendants from continuing to defame Plaintiff by stating or implying that she has harassed employees of the Condominium”.

Plaintiff contends that Defendant made slanderous statements concerning Plaintiff, accusing her of engaging in a pattern of harassment of the building’s on-site manager Mohammed Nohan and other staff of the building. Plaintiff is the former Condominium Board Treasurer. She alleges that at a Condominium Board meeting on October 22, 2019, Defendant, who was the Condominium Board President, stated that, “based on Mo's report, the Board will vote to rebuke Hadas on harassment charges." Plaintiff claims that this statement was based on Mr. Nohan’s accusations of harassment which

Defendant knew to be untrue. (NYSCEF Doc. No. 1, Comp. ¶ 41). Plaintiff further alleges that Defendant caused the rebuke to be published in the minutes of the Board meeting, stating that "Super indicated continued pattern of harassment of himself and staff by Board Treasurer. Board voted 3-0 to formally rebuke Treasurer and insist she refrain from interaction with staff on building-wide business that has not been approved by full board." (NYSCEF Doc. No. 1, Comp. ¶ 41).

Plaintiff further contends that on December 2, 2019, at the annual meeting of Condominium Unit Owners, Defendant told the Unit Owners that "at the October board meeting, the members of the Board voted to rebuke Hadas [Harpaz-Segal] for harassment of Mo [Nohan] that this was recorded in the Board minutes, and all Unit Owners can look at the minutes." (NYSCEF Doc. 1, Compl. ¶ 45).

In support of its motion, Defendant contends that the only statements made were truthful and as such, she has a complete defense against defamation. Further, Defendant argues that notwithstanding the veracity of the statements, Defendant is also entitled to the protection of the common interest privilege. In opposition, Plaintiff alleges that Defendant's affidavit with its accompanying affidavits cannot be relied upon to show the truth of Defendant's statements. Further, Plaintiff contends that common interest privilege does not apply as Defendant acted with malice.

Analysis

On a CPLR §3211(a)(7) motion to dismiss for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true" (*Alden Global Value Recovery Master Fund, L.P. v KeyBank National Association*, 159 AD3d 618, 621-22 [2018]). In addition, "on such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff" (*Id.* at 622). However, vague and conclusory allegations cannot survive a motion to dismiss (*see, Kaplan v Conway and Conway*, 173 AD3d 452, 452-53 [2019]; *D. Penguin Brothers Ltd. v City National Bank*,

270 NYS3d 192, 192 [2018] [noting that “conclusory allegations fail”]; *R & R Capital LLC, et al., v Linda Merritt*, 68 AD3d 436, 437 [2010]).

The criterion for establishing whether a Complaint should be dismissed pursuant to §3211(a)(7) is “whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; see also *Foley v D’Agostino*, 21 AD2d 60, 64-65 [1964]). Whether the pleader will ultimately be able to establish the allegations in the pleading is irrelevant to the determination of a motion to dismiss pursuant to CPLR §3211(a)(7) (see *EBC I, Inc., v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]; *Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001][motion must be denied if “from [the] four corners [of the pleadings] factual allegations are discerned which taken together manifest any cause of action cognizable at law”]).

Defamation

Defamation arises from “the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society” (*Foster v Churchill*, 87 NY2d 744, 751 [1996] [internal quotation marks and citations omitted]). “The elements are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se” (*Dillion v City of New York*, 261 AD2d 34, 38 [1st Dept 1999] [internal citation omitted]). To establish a prima facie case of defamation, a plaintiff “must show that the matter published is ‘of and concerning’” the plaintiff (*Three Amigos SJJ Rest., Inc. v CBS News Inc.*, 28 NY3d 82, 86 [2016] [internal citation omitted]). “Truth provides a complete defense to defamation claims” (*Dillon*, 261 AD2d at 39, citing *Rinaldi v Holt, Rinehart & Winston, Inc.*, 42 NY2d 369

[1977]), *cert denied* 434 US 969 [1977]).

Common Interest Privilege

Even when defamatory statements are made, they may be protected by a qualified privilege which arises when a communication is made to persons having some common interest in the subject matter. (*Foster*, 87 NY2d at 751). This “common interest” privilege applies not only when there is a common interest but also when a speaker makes “statements upon a subject in which the speaker has some legal, moral, or social duty to speak and the communication is made to a person having such a corresponding interest or duty.” (*see Cusimano v United Health Servs. Hosps., Inc.*, 91 AD3d 1149, 1150, 937 NYS2d 413 [3d Dept 2012]).

To rebut the qualified privilege and establish liability, the plaintiff must prove that the defendant made untrue statements, and abused the privilege by either acting outside the scope of the privilege or acting with either common law or constitutional malice (*Lieberman v Gelstein*, 80 NY2d 429, 438 [1992]). Despite Plaintiff’s contentions, the complaint is clear that the alleged defamatory statements were made by the Condominium Board President, in her capacity as Board President, during Board meetings. Further, the complaint does not establish either common law malice or constitutional malice. Accordingly, Defendant’s motion to dismiss the first cause of action is granted.

Permanent and Preliminary Injunction

To obtain a preliminary injunction, Plaintiff must establish “probability of success, danger of irreparable injury in the absence of an injunction, and a balance of the equities in their favor.” (*see Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862 [1990]). “[W]hen ‘key facts’ are in dispute and the basis for the injunction rests upon ‘speculation and conjecture’ the injunction must be denied.” (*Faberge International, Inc. v Di Pino*, 109 AD2d 235 [1st Dept 1985]). As Plaintiff’s complaint fails to establish

a cause of action for defamation, the cause of action for a permanent or preliminary injunction similarly fails.

Accordingly, it is hereby,

ORDERED that Defendant's motion to dismiss is granted and the complaint is dismissed in its entirety as against Defendant Dunn, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

5/18/2021
DATE



SHAWN TIMOTHY KELLY, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: