

Willert v Klein
2025 NY Slip Op 35435(U)
January 10, 2025
Supreme Court, Nassau County
Docket Number: Index No. 610698/2024
Judge: Francis Ricigliano
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS PART 23

Present: HON. FRANCIS RICIGLIANO
Justice of the Supreme Court

-----X
WAYNE WILLERT,

Plaintiff,

-against-

SHERRI KLEIN,

Defendant.

-----X

DECISION AND ORDER

INDEX NO.: 610698/2024

Motion Seq. 1

The following e-filed documents were reviewed in the consideration of this motion:

Notice of Motion, Affidavits, Affirmations, Exhibits, etc. 8 - 12;
Affirmation in Opposition, Exhibits, etc. 15 - 26;
Reply 27 - 42.

By Notice of Motion, defendant SHERRI KLEIN moves to dismiss the Complaint in this action on the grounds the Complaint fails to state a cause of action pursuant to CPLR 3211 (a) (7) and fails to assert allegations of defamation with particularity as required by CPLR 3016 (a).

The Complaint in this action purports to assert causes of action for defamation, slander, libel, and punitive damages/fees. It alleges that, on or around June 5, 2024, the defendant "caused to be published a 'supporting deposition' to the New York State Department of Environmental Conservation alleging plaintiff WAYNE WILLERT caused 'dust particles on her vehicle and property' at 33 Kennworth Road, Port Washington, New York, on June 4, 2024." The Complaint also alleges the defendant made oral statements to the same effect after contacting officials from the Department of Environmental Conservation ("the DEC"), and that plaintiff knew "said statements and publications" were false. In addition, the Complaint alleges that defendant "has a history of making false and defamatory statements

about plaintiff including, but not limited to, false publications made against plaintiff and plaintiff's company on Angie's list stemming from plaintiff's illegal conversion of insurance proceeds."

In opposing the motion, the plaintiff submits an affidavit he executed personally, wherein he asserts the parties have a long history arising out of work performed by non-party Alf's Roofing, Inc., and litigation that followed. Plaintiff identifies Alf's Roofing as his company, and he acknowledges that Alf's Roofing performed work on a property in proximity to the defendant's property on the date in question. In response to the work being performed by Alf's Roofing on the property in proximity to her own, defendant contacted the DEC and filed a supporting deposition wherein she complained that the work being performed at the proximal property resulted in clouds of dust being blown all over the neighborhood, including her house, car and property, that workers used leaf blowers to blow the dust off the roof and scaffolding and on to her property and elsewhere on June 3, 4, and 5, 2024, and that a man in charge threatened her and said she would pay, "just like you did years ago." Defendant submits an affidavit of her own in reply on the motion, and both parties submit numerous photos and/or videos purporting to show either dust on the defendant's house, car and property, or other work being done by other entities at the same time which could have been the cause of said dust.

CPLR 3211 (a) (7) provides that a party may move to dismiss one or more causes of action asserted against them on the grounds that the pleading fails to state a cause of action, while CPLR 3016 (a) provides that in an action for libel or slander, "the particulars words complained of" must be set forth in the Complaint. Notably, libel or slander are both forms of defamation – defamation is defined as a false statement that is injurious to another's reputation, either in written form (libel) or oral expression (slander). See e.g. *Biro v. Conde Nast*, 883 F. Supp. 2d 441, 456 (SDNY 2012).

Defamation is defined as a false statement that tends to expose a person to "public contempt, hatred, ridicule, aversion, or disgrace," which is made or published to a third party without privilege or authorization, and which either causes that person either some special harm or which is so egregious as to constitute defamation per se. See e.g. *Tsatskin v.*

Kordonsky, 189 AD3d 1296 (2d Dept 2020)(internal quotation omitted); *Greenberg v. Spitzer*, 155 AD3d 27, 41 (2d Dept 2017); *Arvanitakis v. Lester*, 145 AD3d 650 (2d Dept 2016). Stated differently, 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 the community.” *Golub v. Enquirer/Star Group*, 89 NY2d 1074 (1997).

On a motion to dismiss a cause of action for defamation, the court’s role is to determine whether the particular published statement is susceptible of a defamatory meaning, and whether the published statement is “of and concerning” the plaintiff. *Knut v. Metro International, S.A.*, 91 AD3d 915, 916 (2d Dept 2012)(internal citations omitted). The motion to dismiss must be denied if, taking the words at issue in their ordinary meaning and context, the statement is susceptible to a defamatory connotation. *David v. Boenheim*, 24 NY3d 262 (2014). If the court finds the statement or statements at issue are susceptible of a defamatory meaning, and that they were of and concerning the plaintiff, it is then for a jury to determine whether the statement or statements were likely to be understood by “the ordinary and average reader” as defamatory. *Id.* Moreover, falsity is a necessary element of a cause of action for defamation because truth is an absolute defense against any claim of defamation. *Udell v. NYP Holdings, Inc.*, 169 AD3d 954 (2d Dept 2019).

In this case, the Court finds defendant’s motion must be granted for a number of reasons. First, the allegedly defamatory statement at issue – that plaintiff caused dust particles to accumulate on her vehicle and property – is simply not susceptible of a defamatory meaning. Second, it cannot be said that the allegedly defamatory statement was of or concerning plaintiff as the defendant did not assert that the plaintiff personally and intentionally caused dust particles to accumulate on her vehicle and property, or that plaintiff directed his employees to intentionally cause dust particles to accumulate on her vehicle and property. In addition, to the extent the defendant’s published statement to the DEC also asserted or implied the plaintiff threatened her, that allegation was not particularized in the Complaint, as required by CPLR 3016 (a). Finally, other than simple bald assertions that plaintiff sustained special damages and special harm as a result of defendant’s allegedly defamatory statement, and that plaintiff sustained significant injury to or loss of a pecuniary opportunity as a result of plaintiff’s allegedly defamatory statement, defendant failed to

allege that the defamatory statement caused him any actual harm. In fact, while plaintiff alleges that the defamatory statement was published to the DEC (only), plaintiff acknowledges in his own affirmation in opposition to defendant's motion that the DEC did not issue a stop work order, and plaintiff does not allege there were otherwise any actual repercussions or consequences as a result of the defendant's complaint to the DEC.

In addition, it cannot be said that the allegedly defamatory statement was so egregious as to constitute defamation per se. A statement is defamatory per se if it charges the plaintiff with a serious crime, tends to injure the plaintiff in her or his trade, business, or profession, imputes that the plaintiff has a loathsome disease, or imputes unchastity to a woman. *Laquerre v Maurice*, 192 AD3d 44, 50 (2d Dept 2020). Here, defendant has not charged plaintiff with a serious crime, imputed that the plaintiff has a loathsome disease, or imputed he is an unchaste woman, and it cannot be said that the allegedly defamatory statement at issue is injurious to plaintiff's trade, business, or profession absent an assertion the plaintiff personally and intentionally caused dust particles to accumulate on her vehicle and property, or that plaintiff directed his employees to intentionally cause dust particles to accumulate on her vehicle and property. Moreover, while plaintiff's counsel makes arguments with respect to a cause of action for defamation per se in his Affirmation in Opposition to defendant's motion, plaintiff's Complaint does not actually assert, let alone particularize, a cause of action for defamation per se.

For the foregoing reasons, while it is certainly possible that the defendant's complaint to the DEC was intended to harass the plaintiff or cause him some distress, the Court finds plaintiff has not properly asserted any cause of action for defamation, even construing the Complaint liberally and accepting all factual allegations in the complaint as true.

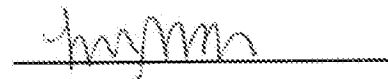
Accordingly, it is hereby

ORDERED, that the motion by defendant SHERRI KLEIN for dismissal of the Complaint on the grounds the Complaint fails to state a cause of action pursuant to CPLR 3211 (a) (7) and fails to assert allegations of defamation with particularity as required by CPLR 3016 (a) is GRANTED, and plaintiff's Complaint is hereby dismissed in its entirety.

The foregoing constitutes the Decision and Order of this Court. Any relief not specifically addressed herein is denied.

Dated: January 10, 2025

ENTER:



HON. FRANCIS RICIGLIANO, J.S.C.

ENTERED

Jan 17 2025

NASSAU COUNTY
COUNTY CLERK'S OFFICE