

**Hamlet Golf & Country Club
Homeowners Assn., Inc. v Brodsky**

2025 NY Slip Op 35567(U)

February 10, 2025

Supreme Court, Suffolk County

Docket Number: Index No. 622984/2023

Judge: Deanna D. Panico

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SHORT FORM ORDER

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Supreme Court of the State of New York
IAS Part 23 - County of Suffolk

PRESENT: Hon. Deanna D. Panico

HAMLET GOLF & COUNTRY CLUB
HOMEOWNERS ASSOCIATION, INC.,

Plaintiff,

- against-

SCOTT BRODSKY,

Defendant.

ORIG. RETURN DATE: 6/6/24
ADJOURNED DATE: 12/12/24
MOTION SEQ. NO.: 001- MotD

Plaintiff's Attorneys:

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Defendant's Attorney:

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Upon efiled documents numbered 24-37, 49-61, 63-64; it is

ORDERED that the portion of Plaintiff's motion seeking dismissal of Defendant's counterclaims pursuant to CPLR§3211(a)(7), is granted.

The within action arises from alleged violations of Home Owners Association rules and regulations regarding the location of trash receptacles, excessive dog feces on Defendant's lawn, and other violations. Plaintiff asserts that Defendant has failed and refused to comply with community rules regarding trash collection, despite having been given notice that he is in violation. Plaintiff seeks injunctive relief to ensure that Plaintiff abides by trash collection rules, and asserts breach of contract, nuisance, trespass, and entitlement to attorneys' fees. Issue has been joined and Defendant asserts a first counterclaim of "Discriminatory Practices" based upon age (he is apparently younger than his neighbors). He claims that rules are enforced disproportionately against him and that he is fined for violations, where similar violations by neighbors are ignored. Defendant's second

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counterclaim asserts private nuisance by Plaintiff, in “issuing violations and intentionally and unreasonably substantially interfering with Defendant's use and enjoyment of the Property and by trespassing on Defendant's Property,” and Defendant's third counterclaim accuses Plaintiff of slander, in that its President allegedly “wrongfully and falsely informed people in the community that Defendant sexually harasses women and told people ‘This is not the type of person we want living here.’” Plaintiff now moves to dismiss Defendant's counterclaims for failure to state a cause of action, pursuant to CPLR §3211(a)(7), and based upon documentary evidence, pursuant to CPLR§3211(a)(1).

In support of its motion, Plaintiff submits an affidavit by Oded Ben-Ami (“Ben-Ami”), a director of Plaintiff Homeowners Association. He states that Plaintiff is a not-for-profit corporation formed “to own, operate, manage and control certain common properties including recreational facilities, as well as providing various services to the community, which is built on property controlled by Plaintiff for the benefit of the community's homeowners and residents.” Ben-Ami attests that Defendant purchased the residential unit located at 27 Hamlet Drive, Commack NY 11725, in or about September 2021, and that he has received numerous warnings and fines for his repeated failure to abide by Plaintiff's Declaration, By-Laws and Rules and Regulations. Ben-Ami further attests that numerous other individuals have received warnings for various infractions including failure to power wash their home, putting out trash earlier than 6:00 p.m. or failing to put trash receptacles away by 10:00 a.m., parking a vehicle with commercial plates in the driveway, leaving trash cans in the driveway, failing to repair driveway cracks, and failing to clean up dog feces, along with other complaints. Ben-Ami further states, “[u]pon information and belief, almost every resident within the community has received a warning, notice, or fine between December 2020 and December 2023, regardless of their age.” Redacted copies of notices sent to residents are annexed to Ben-Ami's affidavit.

In opposition, Defendant attests that he is being discriminated against as a working person, in that “the community is comprised of mostly retired or independently wealthy homeowners who do not work” and that, as a working person, he cannot comply with the community mandate that garbage cans must be removed from the curb by 10:00 a.m. on the morning of garbage collection. Defendant further complains that Plaintiff has commenced a foreclosure action on his home “due to [his] inability as the result of [his] status as a working individual, to comply with Plaintiff's discriminatory garbage mandate.” The referenced action, 612145/2024, appears to be a lien foreclosure action based upon Defendant's alleged failure to pay “assessment charges” in the amount of \$4,530.32. Defendant further states that he was assessed thousands of dollars in legal charges before suit was filed, but that he is not aware of any legal services rendered prior to litigation, in that the violation letters were sent by Plaintiff. Defendant's arguments in opposition to Plaintiff's motion largely dispute the claims Plaintiff alleges in the complaint, rather than offering facts in support of his counterclaims. He states that Plaintiff intentionally failed to tell him about an increase in common charges, then assessed late fees, and that he was assessed fines for “occasional” infractions, when Plaintiff had a stated policy of not doing so. Defendant further claims he was improperly instructed that his house must be power washed, despite having recently been washed, that his driveway must be repaved, despite it being in good condition, and that a stump must be removed from his yard, despite it being very small. Defendant also sets forth a list of deprivations

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such as being denied access to the clubhouse, not being given a gate pass to enter the community, being cut off from access to the community online portal and his account, not receiving a working key for the mailbox, not having his garbage picked up, and not having his lawn mowed, along with other complaints. Defendant additionally states that, "In or about June of 2023, Plaintiff, via Mr. Andrew Weiss, the President of the Homeowners Association, slandered me and wrongfully and falsely informed people in the community that I sexually harass women and told people 'This is not the type of person we want living here.'"

Defendant argues, "Plaintiff has chosen to enforce its rules including selectively, targeting me while looking the other way with other residents" and "Plaintiff's acts set forth herein all point to Plaintiff's discrimination against me, presumably based upon my age and status as a working person, as Plaintiff's mandate requiring that garbage bins be removed from the curb following the morning garbage collection, before 10:00 am(Exhibit "B") can be complied by only non-working residents in the community." Defendant's counsel argues that the within motion is an attempt to get documents without providing discovery. She also states that if Defendant's counterclaims are dismissed, they will move to amend to add them back in once they get discovery.

Plaintiff's counsel points out that Defendant never cites what statute his alleged age discrimination claim arises under. The court notes that there is no indication in the record of Defendant's age. Defendant's opposition focuses on his status as a "working person," which seems to be the basis of his discrimination claim. This court is not aware of any statute that includes "working person" as a protected class.

In considering a party's motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a) (7), the pleadings must be given a liberal construction, the allegations must be accepted as true and the stated claims must be given every possible favorable inference in determining whether or not they fit into any cognizable legal theory (*Chanko v. Am. Broad. Companies Inc.*, 27 NY3d 46, 29 NYS3d 879 [2016]; *Goshen v. Mut. Life Ins. Co. of New York*, 98 NY2d 314, 746 NYS2d 858 [2002]; *Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]). Bare legal conclusions are not presumed to be true and do not receive the benefit of such favorable inference (*Grant v. DiFeo*, 165 AD3d 897, 86 NYS3d 575 [2d Dept. 2018]; *TMCC, Inc. v. Jennifer Convertibles, Inc.*, 176 AD3d 1135, 111 NYS3d 102 [2d Dept. 2019]).

Affidavits submitted by a plaintiff to remedy any defects in the complaint may be considered (*Chanko v. Am. Broad. Companies Inc.*, *supra*; *Leon v Martinez*, *supra*). However, if evidentiary material submitted by the defendant movant is considered, "the criterion then becomes 'whether the proponent of the pleading has a cause of action, not whether he has stated one'" (*Sokol v. Leader*, 74 AD3d 1180, 1180–82, 904 NYS2d 153 [2d Dept. 2010] (quoting *Guggenheimer v Ginzburg*, 43 NY2d at 275); *Porat v. Rybina*, 177 AD3d 632, 111 NYS3d 625 [2d Dept. 2019]; *see also Williams v. Silverstone*, 215 AD3d 787, 788, 185 NYS3d 699 [2d Dept. 2023]). In considering evidentiary material in support of a motion to dismiss for failure to state a cause of action, whether or not plaintiff might ultimately survive a summary judgment motion or prevail on the merits is not part of the analysis (*Doe v. Ascend Charter Sch.*, 181 AD3d 648, 121 NYS3d 285 [2d Dept. 2020]; *Neuman v. Echevarria*, 171 AD3d 767, 97 NYS3d 203 [2d Dept. 2019]; *Sokol v. Leader*, *supra*).

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Although it is rare, dismissal under CPLR 3211 (a) (7) may be granted based upon an affidavit if such affidavit conclusively establishes that the claimant has no cause of action (*Sokol v. Leader, supra*; *Porat v. Rybina, supra*). Dismissal may be appropriate where a material fact alleged is conclusively determined not to be a material fact; however, dismissal should not eventuate unless there is no significant dispute (*Doe v. Ascend Charter Sch., supra*; *McMahan v. McMahan*, 131 AD3d 593, 15 NYS3d 190 [2d Dept. 2015]; *Guggenheimer v. Ginzburg*, 43 NY2d 268, 401 NYS2d 182[1977]; *TMCC, Inc. v. Jennifer Convertibles, Inc.*, 176 AD3d 1135, 111 NYS3d 102 [2d Dept. 2019]).

Here, Defendant states in his first counterclaim that, "Plaintiff has unlawfully discriminated against Defendant based on Defendant's age. The other community members are significantly older than Defendant." He then goes on to state that Plaintiff penalizes him and harasses him and does not cite other residents for infractions of the rules. In his affidavit, Defendant cites his working person status as the basis for discrimination.

The court is unable to determine Defendant's age, is unable to determine if he is actually asserting his "working person status" as the basis for discrimination, and is unable to determine the statute under which Defendant seeks to recover. As Defendant has failed to sufficiently state a claim for age discrimination and has failed to address the deficiencies in his pleading, Defendant's first counterclaim for "Discriminatory Practices" is dismissed, pursuant to CPLR§3211(a)(7).

Defendant's second counterclaim is for private nuisance. "The elements of a private nuisance cause of action are an interference (1) substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act (*Wlody v. Birch Family Services, Inc.*, 210 AD3d 1036, 1037, 179 NYS3d 675, 677 [2d Dept. 2022]; *Shrage v. Con Edison Co.*, 216 AD3d 1023, 188 NYS3d 691[2d Dept. 2023]).

Defendant's second counterclaim states, in part, "Plaintiff has created a nuisance by issuing violations and intentionally and unreasonably substantially interfering with Defendant's use and enjoyment of the Property and by trespassing on Defendant's Property." There are insufficient allegations in Defendant's counterclaim to support a private nuisance cause of action, and Defendant's affidavit does not remedy this deficiency. Defendant has failed to state a claim for private nuisance, and his second counterclaim is dismissed on this basis, pursuant to CPLR§3211(a)(7).

Defendant's third counterclaim for slander, as set forth above, is a general assertion that the President of the homeowners association "falsely informed people in the community that Defendant sexually harasses women and told people 'This is not the type of person we want living here.'"

"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"

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(*Greenberg v. Spitzer*, 155 AD3d 27, 41, 62 NYS3d 372, 383 [2d Dept. 2017]; *Udell v. NYP Holdings, Inc.*, 169 AD3d 954, 94 NYS3d 314 [2d Dept. 2019]; *Tsamasiros v. Jones*, 232 AD3d 816, 223 NYS3d 144 [2d Dept. 2024]).

A claim for libel or slander must set forth the particular words complained of but their application to the plaintiff may be stated generally (CPLR §3016; *see Tsamasiros v. Jones, supra*). The complaint must allege that the defendant, without privilege or authorization, negligently or intentionally published a false statement of fact about Plaintiff to a third party (*El Jamal v. Weil*, 116 AD3d 732, 986 NYS2d 146 [2d Dept 2014]; *Weinstock v. Sanders*, 144 AD3d 1019, 42 NYS3d 205 [2d Dept. 2016]). If the language complained of is not one of the "*per se*" exceptions, then special damages, the loss of something with economic or pecuniary value, must be plead (*Elias v. Massimillo*, 166 AD3d 726, 85 NYS3d 775 [2d Dept. 2018]; *El Jamal v. Weil, supra*). If the alleged defamation is libel *per se* or slander *per se*, the law presumes damages will result (*Kasavana v. Vela*, 172 AD3d 1042, 100 NYS3d 82 [2d Dept. 2019]). Accusation of involvement with a serious crime is a *per se* exception (*Lieberman v. Gelstein*, 80 NY2d 429, 605 NE2d 344 [1992]) as is injury to a party in his trade, business or profession (*LeBlanc v. Skinner*, 103 AD3d 202, 214–15, 955 NYS2d 391, 401 [2d Dept. 2012]; *Kasavana, supra*; *Lieberman v. Gelstein*, 80 NY2d 429, 590 NYS2d 857 [1992]). It is up to the Court to decide whether or not the statements at issue are "reasonably susceptible of a defamatory connotation..." (*Silsdorf v. Levine*, 59 NY2d 8, 462 NYS2d 822[1983] quoting *James v Gannett Co.*, 40 NY2d 415, 419). The Court must consider the full content of the statement and the circumstances of its issuance and the likely effect on the ordinary reader or listener (*Silsdorf v. Levine, supra*). The full context surrounding the communication and the general tenor of the expression must be considered from the point of view of a reasonable person (*Immuno AG. v. Moor-Jankowski*, 77 NY2d 235, 566 NYS2d 906 [1991]). Furthermore, a pure expression of opinion, which does not suggest that it is based upon facts unknown to the reader and is not predicated upon false facts, is speech protected by the First Amendment of the United States Constitution (*Steinhilber v. Alphonse*, 68 NY2d 283, 508 NYS2d 901 [1986]; *Davis v. Boenheim*, 24 NY3d 262, 998 NYS2d 131 [2014]; *Udell v NYP Holdings, Inc, supra*; *Perchuk v. Perfect Body Image, LLC*, 220 AD3d 894, 198 NYS3d 562, 564 [2d Dept. 2023]).

Here, Defendant's claim of slander does not set forth the exact language complained of, to whom it was spoken, when and where it was spoken, or the overall context of the statements. The only quote contained in Defendant's third counterclaim is the part about not wanting his type of person living there. This quoted statement is non-actionable opinion. The statement regarding sexually harassing behavior, as alleged, cannot be construed as the actual utterance, so it cannot be evaluated on its face. Furthermore, it is devoid of context, and the damages alleged (\$100,000.00) seem to have no factual connection to any actual pecuniary loss. Plaintiff's third counterclaim alleging slander fails to state a cause of action, and the evidentiary proof offered by Defendant in opposition is insufficient to establish that Defendant has a cause of action (*Tsamasiros v. Jones, supra*). Defendant's third counterclaim alleging slander is dismissed for failure to state a cause of action, pursuant to CPLR §3211(a)(7).

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Based upon the foregoing, the court finds that Defendant has failed to state a cause of action for discrimination, private nuisance, or slander, and his opposition to Plaintiff's motion fails to present sufficient evidence to establish that Defendant actually has a cause of action for any of these claims. Accordingly, Plaintiff's motion to dismiss Defendant's counterclaims is granted, pursuant to CPLR§3211(a)(7). Plaintiff's arguments regarding dismissal based upon CPLR§3211(a)(1) are not considered.

Dated: February 10, 2025
Riverhead, New York


DEANNA D. PANICO, J.S.C.

CHECK ONE: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION