

Ben-Simon v Scarsdale10583 LLC
2025 NY Slip Op 35628(U)
January 2, 2025
Supreme Court, Westchester County
Docket Number: Index No. 55082/2024
Judge: Janet C. Malone
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

To commence the 30-day statutory time period for appeals as of right under 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

-----X
BOBBY BEN-SIMON,

Index No.: 55082/2024

Plaintiffs,

-against-

DECISION AND ORDER

SCARSDALE10583 LLC, and JOANNE
WALLENSTEIN,

Motion Sequence No. 1

Defendants.

-----X
MALONE, J.:

This is Defendants' pre-Answer motion to dismiss with prejudice Plaintiff's verified Complaint plus attorney fees, costs and other damages. Defendants' motion is supported by the Affidavit of Joanne Wallenstein with Exhibit A., the Affirmation of Maura J. Wogan, Esq. and Memorandum of Law in Support and Reply (NYSCEF Doc. Nos. 5-9, 14). Plaintiff opposes Defendant' motion with a Memorandum of Law in Opposition (NYSCEF Doc. No. 13).

As relevant background, Plaintiff Bobby Ben-Simon ("Ben-Simon" or "Plaintiff") commenced this libel action on January 3, 2024 alleging that that Defendants Scarsdale10583 LLC ("Scarsdale10583") and Joanne Wallenstein ("Wallenstein") (collectively "Defendants") authored and published an online article on October 18, 2023 entitled "Neighbors Please Save 27 Woods Lane from Demolition" on the website www.scarsdale10583.com (the "website") in which they made false statements about Ben-Simon with actual malice constituting libel *per se* because they injured Plaintiff in his business and profession. (Summons and Complaint, NYSCEF Doc. No. 1). Defendant appeared on February 21, 2024 (NYSCEF Doc. No. 4).

Factual Allegations

Plaintiff, a resident of Fairfield Connecticut, is a real estate developer in Westchester County, New York, and currently owns the property known as 6 Cooper Road, Scarsdale, New York (“6 Cooper Road”). Plaintiff’s development activities occasionally necessitate the demolition of pre-existing structures, which requires Plaintiff to secure approval from certain village’s committee or board responsible for historical preservation. (Complaint [NYSCEF Doc. No. 1] at ¶¶ 2,7).

Defendant Scarsdale10583 is a limited liability company with a principal place of business in Westchester, which operates the website and Defendant Wallenstein resides in Westchester, is the sole member of Scarsdale 10583 and is an author of the article published on the website . *Id.* at ¶¶4-5.

Plaintiff alleges that on October 18, 2023, Defendants authored and published an article called “Neighbors’ Please Save 27 Woods Lane from Demolition” (the “Article”) on the website which discussed a hearing that occurred on October 17, 2023 before the Committee for Historical Preservation of the Village of Scarsdale (the “Committee”). *Id.* at ¶¶13-14. On that date, Plaintiff appeared for his second demolition application for a “1914 garage and carriage house” located at 6 Cooper Road because the prior approval granted on January 29, 2019 expired after a year. *Id.* at ¶¶16-17. Wallenstein was present at the hearing and authored the Article.

In the Article, Plaintiff alleges that Wallenstein made the following false and defamatory statements:

developer Bobby Ben Simon, who owns two sides of the subdivided lot argued with [Lindenbaum, a member of the Committee] and “was yelling and threatening” such that Lindenbaum warned him to calm down and respect the committee or the Board would leave the proceedings.

Plaintiff owns two sides of the subdivided lot.

The committee approved three more demolitions. The first was a 1914 garage and carriage house at 6 Cooper Road that originally went with a historic house at 2 Cooper Road.

The property has since been subdivided and the structure stands alone on one of the lots. It did not win unanimous approval. Committee members Jonathan Lerner argued that the 3,500 square foot carriage house should be preserved.

Ben Simon took down many large trees on the subdivided lot at Cooper Road this week.

Id. at ¶¶18-21.

Plaintiff further alleges that Defendants intended, and any reasonable reader of the Article would understand that Defendants accused Plaintiff of unprofessional or bombastic behavior, as a developer, in the Westchester community. These defamatory statements are false, unprivileged, and directly injure Plaintiff's reputation, character, trade and business and are libelous per se.

The defamatory statements exposed Plaintiff to public contempt, ridicule, aversion and disgrace. Defendants knew or should have known the information was false and Defendants acted with malice. *Id.* at ¶¶ 22-28.

Plaintiff further alleges that as a direct and proximate result of the publication of the Article, Plaintiff suffered general and special damages in an amount not presently known to him but believed to be not less than \$1,000,000.00 because it directly interfered with Plaintiff's efforts to secure new business. Plaintiff also seeks exemplary and punitive damages. *Id.* at ¶¶29-36.

Analysis

When reviewing a motion to dismiss for failure to state a cause of action pursuant to CPLR R. 3211 (a) (7), the "well-settled task [of the court] is to determine whether, accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated". *Aristy-Farer v. State of New York*, 29 N.Y.3d 501, 509 (2017)(citations and internal quotation marks omitted); see *Morgenthau & Latham v. Bank of NY. Co.*, 305 A.D.2d 74, 78 (1st Dept. 2003); see also *Held v. Kaufman*, 91 N.Y.2d 425, 432 (1998). The role of the court is only to determine whether the facts, as alleged, fit within any cognizable legal theory. "Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus." *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 (2005).

However, a "motion pursuant to CPLR 3211(a)(7) and (g) to dismiss cases involving public petition and participation shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law" *VIP Pet Grooming Studio, Inc. v Sproule*, 224 AD3d 78, 83 (2d Dept 2024) (internal citations and quotation marks omitted).

Therefore, the burden of proof is “flipped” such that “the party moving for dismissal need not establish a procedural or substantive defense on the merits of the action, as otherwise required under other provisions of CPLR 3211, but rather, need only establish that the true nature of the action is one within the scope of anti-SLAPP¹” *Id.* “Once the [movant] makes that showing, the burden shifts to the [non-moving party] to demonstrate that the claim has a substantial basis in law” *Reeves v. Associated Newspapers, Ltd.*, 232 A.D.3d 10, (1st Dept. 2024) citing CPLR 3211(g)(1).

Civil Rights Law §76-a(1)(a) defines an action involving public petition and participation as

a claim based upon: (1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or (2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition.

Here, Defendants have met their initial burden of showing that Plaintiff’s libel action is within the scope of anti-SLAPP. The alleged defamatory statements are exactly those contemplated by the statute² wherein the statements reference Plaintiff’s appearance on his demolition application before a Committee, a public forum; which is an issue of public interest. (NYSCEF Doc. No. at ¶2, 3); *see also* Civil Rights Law §74 (“A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any ... official proceeding”).

Now the burden shifts to Plaintiff to demonstrate that the claim has a substantial basis in the law or fact, which requires “such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact” *Smartmatic USA Corp. v. Fox Corporation*, 213 AD 3d 512, 512 (1st Dept. 2023) quoting *Golby v. N & P Engrs. & Land Surveyor, PLLC*, 185 A.D.3d 792, 793-794 (2d Dept. 2020).

Plaintiff fails to meet his burden. Simon’s contentions that Defendants’ false statements do not fall under the fair report privilege; that the statements were made with actual malice or reckless disregard of the truth; and were libel *per se* because they tended “to disparage a person in

¹ SLAPP is an acronym for the term strategic lawsuits against public participation.

² Former Civil Rights Law §76-a(1)(a) was enacted in 1992 “to address rising concern about the use of civil litigation, primarily defamation suits, to intimidate or silence those who speak out at public meetings against proposed land use development and other activities requiring approval of public boards” *Mable Assets v. Rachmanov*, 192 A.D.3d 998, 999 (2d Dept. 2021).

the way of his office, profession or trade” are without merit. (Memorandum in Opposition [NYSCEF Doc. No. 13] at pgs 6-8).

“Defamation is defined as a false statement that exposes a person to public contempt, ridicule, aversion, or disgrace. Whether particular words are defamatory presents a legal question to be resolved by the court in the first instance. The words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader [or listener], and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction.” *G.L. v Markowitz*, 101 AD3d 821, 825-826 (2d Dept 2012) (internal citations omitted); *see also Ava v. NYP Holdings, Inc.*, 64 AD3d 407, 411-412(1st Dept. 2009) (defamation “can take one of two forms – slander or libel” where slander is spoken and libel is published).

Here, the alleged false statements that (1) 2 Cooper Road was a historic house; (2) Plaintiff took down many large trees on the subdivided lot at Cooper Road this week; and (3) that Plaintiff owns two sides of the subdivided lot at the time of the article; are minor errors and have no disparaging connotation. *Stone v. Bloomberg, LP*, 83 NYS3d 78, 78 (2d Dept. 2018) (“Where the plaintiff is a private person, but the content of the article is arguably within the sphere of legitimate public concern, the publisher of the alleged defamatory statements cannot be held liable unless it acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties”).

Additionally, Plaintiff’s argument that the Article falsely states he threatened the committee members is unavailing. The Article actually states that “He was yelling and threatening and Lindebaum [a committee member] warned him to calm down and respect the committee or the Board would leave the proceedings. Ultimately, they approved the demolition of the garage.”

Upon a review of the audio³ (NYSCEF Doc. No. 7) of the Committee hearing, authenticated by Wallenstein, and to which Plaintiff did not object; it is clear that Plaintiff raised his voice; talked over and interrupted committee members and one member asked him to calm down and respect the committee or they would leave (NYSCEF Doc. No. 7).

³ Defendants did not upload a Notice of Hard Copy Submission Form pursuant to the Uniform Rules § 202.5-b(d)(7), however, Exhibit A (NYSCEF Doc. No. 7) includes the link to the audio file and notification that a hard copy was sent via First Class Mail to Plaintiff and the Court.

The phrase “yelling and threatening” coupled together can be interpreted as “hostile” or “aggressive”. Any reasonable reader would view the phrase “yelling and threatening” as opinion to describe Ben-Simon’s behavior at the hearing, and not a statement of fact. *Stolatis v. Hernandez*, 161 AD3d 1207 (2d Dept. 2018)(defendant’s statements that plaintiff’s actions were a “crime” “constituted nonactionable opinion or rhetorical hyperbole”); *see also Konig v. WordPress.com*, 112 AD.3d 936, 937 (2d Dept. 2013)(“on an internet blog during sharply contested election, a reasonable reader would have believed that the generalized reference to ‘downright criminal actions’ ...was merely ...conveying opinion”); *Matter of Abbite v. Carrube*, 159 AD3d 408, 409 (1st Dept. 2018)(“use of the words unethical and detrimental to the members to describe petitioner’s behavior is an expression of pure opinion”).

Therefore, the Article does not amount to libel *per se* as it does not injure Plaintiff’s trade, business, or profession. *Kasavana v. Vela*, 172 A.D.3d 1042, 1044 (2d Dept. 2019) and Defendants’ motion to dismiss under CPLR 3211(a)(7) and (g)⁴ is granted.

Attorney Fees and Costs

Civil Rights Law §70-a(1) provides in relevant part that:

A defendant in an action involving public petition and participation... may maintain an action, claim cross-claim or counterclaim to recover damages including costs and attorney’s fees, from any person who commenced or continued such action: provided that :

- (a) costs and attorney's fees shall be recovered upon a demonstration, including an adjudication pursuant to [CPLR 3211(g)], that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law.

Here, Defendants also seek attorney’s fees and costs, compensatory damages, and punitive damages based on the dismissal. While the award of costs and attorney's fees is mandatory, the award of compensatory and punitive damages is discretionary as the statute further states that they “may only be recovered upon an additional demonstration that the action” was commenced to

⁴ Although Defendants listed in their Notice of Motion that they sought dismissal pursuant to CPLR 3211(a)(1), Defendants made no under arguments under this provision in their Memorandum of Law and accompanying documents.

“harass, intimidate, punish or otherwise, maliciously inhibit free exercise of speech” Civil Rights Law §70-a(1)(b)-(c).

Therefore, Defendants’ motion for attorney’s fees is granted; and the motion for compensatory damages and punitive damages is denied. *Reeves v. Associated Newspapers, Ltd.*, 232 A.D.3d 10 (1st Dept. 2024)(“ If the claim is dismissed, the defendant recovers a mandatory award of attorneys’ fees”).

In light of the foregoing, the Court finds the remaining arguments moot or without merit.

Accordingly, it is hereby

ORDERED, that Defendants motion to dismiss the Complaint under CPLR R. 3211(a)(7) and CPLR R. 3211(g) is granted in its entirety; and it is further

ORDERED, that Defendants’ motion for attorney fees and costs related to the Complaint is granted; and it is further

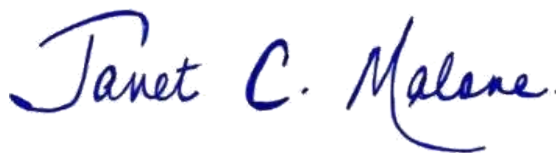
ORDERED, that by uploading this Decision and Order to NYSCEF shall be deemed sufficient service upon the parties; and it is further

ORDERED, that unless resolved between the parties, Defendants shall submit an affirmation regarding attorney fees and costs with a proposed Order, via NYSCEF not later than **January 15, 2025**; and it is further

ORDERED, that Plaintiff’s Complaint is dismissed in its entirety.

This constitutes the Decision and Order of the Court.

Dated: January 2, 2025
White Plains, New York



Hon. Janet C. Malone. J.S.C.