Short Form Order

S

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

---x

JAY LEVY,

Plaintiff(s),

Index No. 2851/09

Motion Submitted: 12/23/11
Motion Sequence: 004, 005

-against-

SHARON JOHNSON, ENIS JOHNSON, CABLEVISION SYSTEMS CORPORATION, RAINBOW MEDIA HOLDINGS, INC., NEWS 12 LONG ISLAND, SCOTT FELDMAN, LEA TYRELL, HOLLI HAERR, JAMES WHITEMAN, NASSAU SUFFOLK LAW SERVICES COMMITTEE, INC., and ROBERT HALPERN, ESQ.,

Defendant(s).

---x

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XX
Answering Papers.....X
Reply.....
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....XXX

Motion by defendants, Cablevision Systems Corporation, Rainbow Media Holdings, Inc., News 12 Long Island, Scott Feldman, Lea Tyrell, Holli Haerr, and James Whiteman (collectively, "media defendants"), pursuant to CPLR §3212, for an Order granting summary judgment, dismissing the complaint of plaintiff, Jay Levy, is granted.

Cross motion by defendants, Nassau Suffolk County Law Services Committee, Inc., and Robert Halpern, Esq., (collectively "Nassau Suffolk Law Services defendants"), pursuant to CPLR §3212, for an Order granting summary judgment, dismissing the complaint of plaintiff, is granted.

The instant motions arise from an underlying complaint where the plaintiff alleges, *inter alia*, acts of defamation by all defendants. The plaintiff, as a result of such actions, claims irreparable harm to his reputation, and emotional distress resulting therefrom.

Co-defendants, Sharon Johnson and her husband Ennis Johnson, applied for an apartment rental in a building owned by plaintiff, located at 51 Smith St. in Merrick, NY. The plaintiff allotted certain apartments for Section 8 tenancy, a program where Nassau County subsidizes the monthly rent while the tenant pays the remainder. Individuals seeking tenancy under the program, are required to submit proof of employment and/or an ability to pay their portion of the rent, and Section 8 governmental certification prior to being issued a lease. According to plaintiff, the Johnsons represented that they were Section 8 eligible, and plaintiff agreed to rent them an apartment.

On February 5, 2009, Ms. Suzanne Campbell, an assistant and/or employee of the plaintiff, who was out of town on this date, arranged to meet the Johnsons at a Nassau County Department of Social Services Hempstead office for the purposes of collecting the rental security, the first month's rent, and executing the lease agreement. The parties were to meet with a caseworker, "Ms. Pearson". According to Ms. Campbell, when she arrived, only Ms. Johnson was present and she requested that Ms. Campbell transport her to a notary public as she needed a certain document notarized. Ms. Campbell then contacted the plaintiff by telephone, who advised her to assist Ms. Johnson.

While Ms. Campbell transported Ms. Johnson in her vehicle, Ms. Johnson informed her that her husband was unemployed, and that he was receiving an AIDS treatment at Nassau University Medical Center. Ms. Campbell also noted that Ms. Johnson did not have the Section 8 guarantee. She again contacted plaintiff and relayed the information she received from Ms. Johnson, in addition to informing him that Ms. Johnson did not have the governmental guarantee. Plaintiff then instructed her not give the Johnsons a lease, and Ms. Campbell advised Ms. Johnson accordingly. Ms. Johnson then contacted plaintiff directly where he reportedly said that he did not want AIDS in his building because children were living there, nor did he want addicts in the building.

The Johnsons contacted Nassau Suffolk Law Services staff attorney and co-defendant, Robert Halpern, who in turn contacted plaintiff to intervene on their behalf. According to Halpern, plaintiff initially told him that he did not want AIDS in his building as there were

families with children residing therein, and then stated that the Johnsons failed to meet the conditions required for tenancy and that they misrepresented themselves. The Johnsons then sought legal counsel from a personal injury attorney, who arranged a meeting with News 12 reporters at her office.

Plaintiff and his attorney were contacted by the media defendants by its staff reporter, Holli Haerr, and the story aired on February 10, 2010. The media defendants used the following language to introduce the featured story:

> "Another setback for a couple who lost everything in a fire. They thought they finally found a home but their landlord said they couldn't move in.";
> "News 12 Long Island's Holli Haerr tells us now the shocking reasons they claimed they were turned away.":
> "They thought they found a place to call home, but the landlord pulled the rug out from under them."

According to plaintiff, the media defendants never mentioned the letters which were issued to the Nassau County case worker and the Johnsons, setting forth the condition that the Johnsons were required to meet prior to acquiring the apartment nor did the media defendants mention that the Johnsons failed to meet the conditions. Plaintiff filed the underlying summons and complaint on or about February 18, 2009.

In July, 2009, the Johnsons commenced an action against plaintiff and other parties having an ownership interest in the subject premises, in the Eastern District of New York, under the caption, ***Ennis Johnson, Sharon Johnson v. Jay Levy and et al***, 10-CV-3217. Therein, the Johnsons alleged, *inter alia*, violations of the federal and state statutes based on housing discrimination and defamation. The court, by the September 19, 2011 Order of the Hon. Arthur D. Spatt, granted Levy's motion to dismiss without prejudice as the Johnsons' complaint failed to allege that they were qualified to rent the subject apartment. The court granted the Johnsons leave to amend the complaint accordingly.

The plaintiff contends that the media defendants deliberately omitted that they had in their possession, a copy of documentation citing that a governmental rent guarantee was a condition precedent to tenancy, and that the defendants never made reference to the documentation nor did they inquire of the Johnsons as to whether they met the condition precedent to the rental. Consequently, the media defendants "styled" the story to make plaintiff appear as a landlord who discriminates against individuals infected with the AIDS virus. Further the Nassau Suffolk Law Services defendants acted with malice. The plaintiff submits a copy of the federal court order, the deed of the subject premises, an offer letter

regarding the subject apartment, and transcripts of deposition testimony from defendants, Ennis Johnson, Sharon Johnson, and News 12 reporter, Holli Haerr.

The media defendants argue that they reported on a dispute of legitimate public concern and such has been held to be legally permissible, that the news report was derived from facts and evidence that was carefully investigated by their reporters, that the plaintiff does not dispute the essential facts as reported by the media, that omissions of certain facts in the news story do not rise to an actionable claim, and that plaintiff has failed to show that the media defendants were grossly irresponsible in its presentation of the dispute. In sum, the plaintiff has not established a legal basis for a claim of defamation and/or libel.

In support of their motion, the media defendants attach copies of the pleadings, a letter dated January 26, 2009 from plaintiff addressed to Mr. Johnson stating an intent provide a one year lease to the subject premises after the receipt of one month's rent and a rent guarantee by governmental agency, and a letter dated January 27, 2009 from plaintiff to a Nassau County Department of Social Services caseworker, "Mrs Pearson", confirming the same, transcripts of depositions of: Sharon Johnson; Ennis Johnson; Suzanne Campbell; Halpern; freelance News 12 reporter, Holli Haerr; defendant and assistant news director of News 12, James Whiteman; non-party witness and attorney for plaintiff, Jaime D. Ezratty, and a transcript of the News 12 story.

Nassau County Law Services defendants argue that they had a qualified privilege in that they had a common interest in the landlord/tenant issue regarding their clients, the Johnsons, and that the plaintiff has not met his burden in proving that the defendants acted with malice in reporting statements allegedly made by the plaintiff. In addition to the pleadings, these defendants submit the transcripts, already submitted by the media defendants, as supporting evidence.

"The elements of a cause of action for defamation 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" (***Salvatore v. Kumar***, 45 A.D.3d 560, 845 N.Y.S.2d 38 [2d Dept., 2007]). Defamation, can take one of two forms—slander or libel (***Ava v. NYP Holdings, Inc.***, 64 A.D.3d 407, 885 N.Y.S.2d 247 [1st Dept., 2009]). "Generally speaking, slander is defamatory matter addressed to the ear while libel is defamatory matter addressed to the eye" (***Ava v. NYP Holdings, supra***).

However, where an individual can demonstrate that the alleged defamatory statements were "fairly made by a person in the discharge of some public or private duty, legal or moral, or in the conduct of [their] own affairs, in a matter where [their] interest is concerned" they

are to "be afforded the protection of qualified immunity" (***Blackman v. Stagno***, 35 A.D.3d 776, 778, 828 N.Y.S.2d 152 [2d Dept., 2006]).

As to the media defendants, the Court will employ the two-pronged analysis set forth in ***Greenberg v. CBS Inc.***, 69 A.D.2d 693, 419 N.Y.S.2d 988 [2d Dept., 1979]). First, the form, content, effect, and falsity of the allegedly defamatory statements are examined since the plaintiff bears the burden of showing that the statements are in fact libelous. Second, the First Amendment limitations on recovery are then applied; the burden of defeating the constitutionally mandated privileges raised by the defendants are also on the plaintiff. In making such two-pronged analysis, the following issues are to be considered: (1) the defamatory nature of the statements; (2) whether the status of plaintiff, Jay Levy was that of a private individual and (3) the media defendants' duty of care in assessing the accuracy of the News12 feature story. It is undisputed that Levy is a private individual.

Historically, in ***Gertz v. Robert Welch, Inc.***, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the United States Supreme Court ruled that the states were free to define their own standards of liability for the actionable defamation of a private individual. The Court of Appeals in ***Chapadeau v. Utica Observer-Dispatch***, 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975), in response, declared that where the content of the article and/or news report is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition, the party defamed may recover; however, to warrant such recovery he must establish, by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by reasonable parties (*see* ***Chapadeau v. Utica Observer-Dispatch, supra***).

New York courts have frequently deferred to editorial judgments holding that "[d]etermining what editorial content is of legitimate public interest and concern is a function for editors" *(see* ***Gaeta v. New York News***, 62 N.Y.2d 340, 465 N.E.2d 802, 477 N.Y.S.2d 82 [1984]). Looking at the nature of the offending communication in the subject news story, it is clear that the content of the communication is within the sphere of legitimate public concern warranting public exposition. It is well settled that New York residents are clearly concerned about housing and its availability or lack thereof. Discrimination in housing against individuals infected by HIV, is certainly newsworthy by this standard.

Thus, the sole issue remaining is whether the complaint, together with the known circumstances, sufficiently sets forth facts alleging, as a matter of law, that media defendants were "grossly irresponsible." In ***Lee v. City of Rochester***, 174 Misc.2d 763, 663 N.Y.S.2d 738 (N.Y. Sup. Ct. 1997), that court reasoned that because the undisputed evidence shows that the reporter relied on an unsworn report of a law enforcement officer, although such

information was inaccurate, those media defendants were entitled to summary judgment dismissing the complaint against them. The court may have decided otherwise if the plaintiff showed that the reporter had reason to doubt the accuracy of that news source (***Lee v. City of Rochester, supra***).

Additionally, a reporter can even draw the wrong conclusion from an official account and not be grossly irresponsible if his conclusion was not "unwarranted." (*see* ***Simonsen v. Malone Evening Telegram***, 98 A.D.2d 905, 470 N.Y.S.2d 898 [3d Dept., 1983]). Moreover, a reporter does not have to interview every possible witness, as long as he or she bases the story on a reliable source (*see* ***Mitchell v. Herald Co.***, 137 A.D.2d 213, 529 N.Y.S.2d 602 [4th Dept., 1988]).

Courts have dismissed defamation cases against media defendants even where an inaccuracy is material. However, the court in ***Hairston v. Bancorp Inc.***, 1992 WL 368789 (N.Y.Sup.), 20 Media L. Rep. 1600, determined that such inaccuracy was not attributable to the media's actions but originated with an outside source. As such, that plaintiff has failed to allege that the media acted in a grossly negligent manner in its reporting (*see* ***Hairston v. Bancorp Inc., supra***).

However, if a reporter "professes little or no recall concerning his sources or how he obtained the information" the Court cannot grant the media summary judgment on liability (*see* ***Meadows v. Taft Broadcasting Co.***, 98 A.D.2d 959, 470 N.Y.S.2d 205 [4th Dept., 1983]). Here, the featured news story was aired only after other appropriate sources had been consulted, and it was not published until it had been reviewed by supervising personnel. Further, the transcript of the report attributes the statements alleging discrimination to the Johnsons and Halpern, and there is no indication that News 12 defendants set forth the facts of the story as their own. This is hardly indicative of gross irresponsibility. Rather it appears that the publisher exercised reasonable methods to insure accuracy.

Further, truth is a defense to defamation (see ***Fantaco Enterprises, Inc. v. Iavarone***, 161 A.D.2d 875, 555 N.Y.S.2d 921 [3rd Dept., 1990]), and the Johnsons and Halpern repeated the same facts not just that the Johnsons were being refused an apartment, but the plaintiff stated that he did not want HIV tenants in his building. It is noted that the plaintiff did not attach a copy of his transcript to his opposition, nor is there an abject denial of the HIV/AIDS statement in his Affirmation in Opposition. Instead, the crux of plaintiff's argument is that the Johnsons did not have the governmental guarantee nor did they have sufficient income to pay rent.

As previously stated herein, in order to maintain a cause of action for defamation, the language complained of must be reasonably susceptible of a defamatory meaning as to the

plaintiff. Whether particular words are reasonably capable of being viewed as defamatory is a threshold question of law for the Court to determine. Plaintiff, in this case, asks the court to find defamation not based on the factual statements expressly contained in the article, but rather based on the impressions and implications of seemingly accurate facts (*see* ***Rappaport v. VV Publ. Corp.***, 163 Misc.2d 1, 618 N.Y.S.2d 746 [N.Y. Sup. Ct. 1994]).

Courts have described the significant obstacles in the way of such a claim, and have therefore reasoned that defamatory implication must be present in the plain and natural meaning of the words used. Because the Constitution provides a sanctuary for truth, in an implied defamation case, the plaintiff must make an especially rigorous showing where the language must not only be reasonably read to import the false innuendo, but it must also affirmatively suggest that the author intends or endorses the inference (*see* ***Chapin v. Knight–Ridder, Inc.***, 993 F.2d 1087, 1092–93, 21 Media L. Rep. 1449 (4th Cir.1993). In evaluating plaintiff's allegations, this court is constrained to interpret the challenged speech from the viewpoint of the average viewer, without straining to find a defamatory meaning beyond the natural and ordinary meaning of the language at issue (*see* ***Tracy v. Newsday, Inc.***, 5 N.Y.2d 134, 155 N.E.2d 853, 182 N.Y.S.2d 1 [1959]).

Here, although the language employed by the media defendants in their reporting and introduction of the subject news feature, may be somewhat colorful, it does not, in its plain meaning, indicate that the defendants endorse the Johnsons' position or are defamatory in any way. The plaintiff specifically objects to the broadcasted references that the Johnsons had secured a place to live until the last moment when he "pulled the rug out" from underneath them, and other "teases" employed by the defendants to introduce their story. However, the phrasing as used by the media defendants, does not contain a provably false factual connotation, cannot reasonably be interpreted as stating actual facts, and is the sort of "loose, figurative or hyperbolic language" that is constitutionally protected opinion (*see* ***DRT Const. Co. v. Lenkei***, 176 A.D.2d 1229, 576 N.Y.S.2d 724 (4th Dept., 1991); ***Greenbelt Cooperative Publishing Assn. v. Bresler***, 398 U.S. 6 1970, 90 S. Ct. 1537 [1970]).

The general basis of plaintiff's claim is libel by omission. As such, this Court must determine as to whether such omissions were material. Although, according to plaintiff, the inclusion of the fact that the Johnsons misrepresented themselves and that there were documents evincing the conditions for the rental of the premises, would have cast doubt on the validity of the charges of discrimination, this Court notes that such was covered by plaintiff's attorney. Further the omission of the foregoing did not necessarily render what was reported as untrue (*see* ***Janklow v. Newsweek***, 788 F.2d 1300, 54 USLW 2526 [4th Cir., 1986]).

Further, courts have generally suggested that editorial judgment as to the facts to be included in a story must best be left to the media. Courts must be slow to intrude not only with respect to choices of words, but also with respect to inclusions in or omissions from news stories. Accounts of past events are always selective, and under the First Amendment the decision of what to select must always be left to writers and editors (***id*** at 1306).

As to the Nassau Suffolk Law Services defendants, and where, as here, a plaintiff is a private individual, a communication made by one person to another upon a subject in which both have an interest is protected by a qualified privilege (*see* ***Stillman v. Ford***, 22 N.Y.2d 48, 238 N.E.2d 304, 290 N.Y.S.2d 893 [1968]). It is undisputed that these defendants made the statements as alleged in plaintiff's complaint; however, these defendants met their initial burden by establishing that the alleged statements were protected by a qualified privilege. Given that among the many facets of responsibilities performed by Nassau Suffolk Law Services, its service to the indigent, includes assisting its clients in procuring housing. As the Johnsons were its clients, it had a legitimate interest in whether the plaintiff, in his refusal to rent to the Johnsons, possibly violated state and federal statutes prohibiting discrimination in housing (*see* ***Mancuso v. Allergy Associates of Rochester***, 70 A.D.3d 1499, 895 N.Y.S.2d 756 [4th Dept., 2010]).

As Halpern's statements to the press were covered by a common law qualified privilege, plaintiff, in opposition, is required to produce evidence in admissible form raising a question whether the statements were made with ill will, or spite, malice in the common law sense (see ***Lee v. City of Rochester***, 174 Misc.2d 763, 663 N.Y.S.2d 738 [N.Y. Sup. Ct. 1997]). Here, the plaintiff has produced no such evidence. There is nothing in the record to support that Halpern had any knowledge of Levy prior to his contact with him regarding the subject apartment. This undermines any finding of malice on Halpern's part.

It is noteworthy that plaintiff claims that he was not aware of "a Mr. Johnson" nor did he know about his AIDS condition until Halpern confronted him. This strains credulity as his own employee, Ms. Campbell, testified that she needed the signatures of both parties on the lease, as per Levy's instruction, and her first telephone call to Levy arose out of concern that Mr. Johnson was not present. Her next call, according to her deposition testimony, was to inform plaintiff that Mr. Johnson was receiving an AIDS treatment at the hospital.

Regarding the relevancy and impact of Judge Spatt's Order on the case at bar, just because that court dismissed the Johnsons' complaint alleging housing discrimination due to their failure to set forth therein that they met the criteria to rent the subject apartment, it does not follow that the instant defendants have defamed the plaintiff. It is also noted that

the Johnsons were given leave to amend their federal complaint. As such, the July, 2011 Order of that court has no bearing on the instant issues.

The Court has considered plaintiff's' other arguments in opposition and has determined them to be unavailing.

Accordingly, the news media defendants' motion is granted, the Nassau Suffolk Law Services defendants' motion is granted, and the complaint of the plaintiff is dismissed.

Settle Judgment on Notice.

The foregoing constitutes the Order of this Court.

Dated: February 22, 2012
Mineola, N.Y.

J. S. C.
XXX