Klaynberg v Dibrienza
2017 NY Slip Op 32562(U)
December 5, 2017
Supreme Court, New York County
Docket Number: 152252/2017
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

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LAUREN KLAYNBERG a/k/a LAUREN PEPIN,

Plaintiff,

Index No. 152252/2017
Motion Seq: 002 & 003

DECISION & ORDER

-against-

HON. ARLENE P. BLUTH

STEPHEN DIBRIENZA, ESQ.,

Defendant.

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Motion Sequence Numbers 002 and 003 are consolidated for disposition. The motion to dismiss the amended complaint (Motion Sequence 002) is granted and the motion to restore this case (Motion Sequence 003) is denied as moot.

Background

This defamation case arises out of commercial space rented by defendant from plaintiff (the landlord) in Brooklyn. After a dispute arose concerning defendant's alleged illegal subleasing of the premises, the parties engaged in acrimonious litigation in Civil Court (in Kings County). According to the amended complaint, this litigation is still pending.

On April 27, 2017, defendant put up two signs on his storefront windows which stated that "After more than 25 years serving our neighborhood at this location (First as a City Council Member, then for years as a neighborhood based attorney) I am being forced to move from this building due to the greed of the new landlord. I will be relocating to a new office across the street at 161 East 4th Street."

Defendant moves to dismiss on the grounds that the allegedly defamatory statement is an opinion and that plaintiff's reputation was not harmed.

In opposition, plaintiff claims that the storefront is on a busy street and many people passing by have seen the signs. Plaintiff argues that every other tenant in the building knows that defendant is referring to plaintiff when he calls the "landlord" greedy. Plaintiff further contends that any person with Internet access can find who the landlord is for a particular building. Plaintiff concludes that the statement is a mix of opinion and fact, and therefore, is actionable.

After plaintiff filed her initial complaint, defendant moved to dismiss (*see* NYSCEF Doc. No. 7 [Mot Seq 001]). Plaintiff subsequently amended her complaint (NYSCEF Doc. No. 17) and defendant moved to dismiss again under Motion Sequence 002 (*see* NYSCEF Doc. No. 23). However, plaintiff failed to oppose Motion Sequence 001 or take other action to resolve the motion. Accordingly, the Court granted that motion (motion sequence 001) without opposition (NYSCEF Doc. No. 52). In the interest of judicial economy, the Court will consider the merits of the motion to dismiss the amended complaint (Motion Sequence 002) before addressing whether the case should be restored (Motion Sequence 003).

Discussion

"On a motion to dismiss under CPLR 3211, the pleading is to be given a liberal construction, the allegations contained within it are assumed to be true and the plaintiff is to be afforded every favorable inference" (*Simkin v Blank*, 19 NY3d 46, 52, 945 NYS2d 222 [2012]).

Defamation is "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 N.Y.2d 744, 751, 642 N.Y.S.2d 583, 665 N.E.2d 153 [1996] [internal quotation marks omitted]). In order to prove a claim for defamation, the plaintiff must show: (1) a false

statement that is (2) published to a third party (3) without privilege or authorization and that (4) plaintiff is caused harm, unless the statement is one of the types of publications actionable regardless of harm (*see Dillon v. City of New York*, 261 A.D.2d 34, 38, 704 N.Y.S.2d 1 [1st Dept 1999]).

Further, 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, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction" (*id.* at 38). "Loose, figurative or hyperbolic statements, even if deprecating the plaintiff, are not actionable" (*id.*). "A false statement constitutes defamation per se when it charges another with a serious crime or tends to injure another in his or her trade, business or profession" (*Geraci v. Probst*, 61 AD3d 717, 718 [2d Dept 2009]).

"Expressions of opinion, as opposed to assertions of fact are deemed privileged and no matter how offensive, cannot be the subject of an action for defamation" (*Mann v Abel*, 10 NY3d 271, 276, 856 NYS2d 31 [2008]). When considering whether a statement is an opinion, "[t]he key inquiry is whether [the] challenged expression, however labeled by defendant, would reasonably appear to state or imply assertions of objective fact. In making this inquiry, courts cannot stop at literalism. . . . courts must additionally consider the impression created by the words used as well as the general tenor of the expression, from the point of view of the reasonable person (*Immuno AG. v Moor-Jankowski*, 77 NY2d 235, 243, 566 NYS2d 906 [1991]).

Here, the Court finds that the statements contained on the signs were clearly expressions of opinion and are not actionable. It cannot be objectively proven that someone is greedy– the very nature of this adjective implies a subjective analysis. What might constitute greed

inevitably varies from person to person. For instance, a tenant might believe that a 15% rent increase by a landlord constitutes greedy behavior while another might think that any rent increase exhibits greed. There is no way to conclusively establish whether plaintiff was greedy.

Further, the overall context of the signs reinforces the conclusion that the statements express opinion. A reasonable person reading the sign would think that a disgruntled tenant appears to be frustrated with his landlord. It would completely irrational to think that the sign suggests provable facts about the landlord. The fact is that there is only one *negative* statement about the landlord contained on the entire sign. The rest of the sign is defendant's self-promotion and details how long defendant maintained an office at the premises, his previous work experience and where his new office will be located.

The Court also finds that the statements do not constitute defamation per se. There is no reason to believe that creating a sign calling a landlord in New York City "greedy" causes harm to plaintiff's reputation. Almost every person who rents an apartment or a commercial space in New York City thinks that landlords charge too much (And landlords likely think that tenants pay too little given landlords' expenses).

Defendant's request for sanctions, based on plaintiff's alleged meritless conduct, is denied. Defendant cannot put up a sign with a negative characterization of his landlord, allegedly refuse to take it down after being asked by both the landlord and the police and be surprised when a defamation lawsuit is filed against him.

Intentional Infliction of Emotional Distress

The amended complaint also contains a cause of action for the intentional infliction of emotional distress (IIED). "The tort of intentional infliction of emotional distress predicates

liability on the basis of extreme and outrageous conduct, which so transcends the bounds of decency as to be regarded as atrocious and intolerable in a civilized society" (*Freihofer v Hearst Corp.*, 65 NY2d 135, 143, 490 NYS2d 735 [1985]). "The tort has four elements: (I) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress" (*Howell v New York Post Co., Inc.*, 81 NY2d 115, 121, 596 NYS2d 350 [1993]). "[W]here severe mental pain or anguish is inflicted through a deliberate and malicious campaign or harassment or intimidation, a remedy is available in the form of an action for the intentional infliction of emotional distress" (*Nader v General Motors Corp.*, 25 NY2d 560, 569, 307 NYS2d 647 [1970]).

Here, plaintiff failed to demonstrate that defendant engaged in extreme or outrageous conduct. Calling someone greedy does not demonstrate that defendant engaged in campaign to harass plaintiff to cause her severe mental pain. In fact, the sign does not even identify the landlord– plaintiff's name does not appear anywhere on the sign. In order to find the identity of the person who owned the building, a person reading the sign would have to conduct an investigation.[1] The Court cannot find that putting up this sign constitutes an atrocious or intolerable act. Understandably, plaintiff did not like the statements on the signs– but that does not mean plaintiff has stated a cause of action for IIED.

Because the Court is dismissing this action under Motion Sequence 002, it need not consider Motion Sequence 003 (to restore the case), which is denied as moot.

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[1]The tenants in the building, who already know the landlord's name, have their own relationship and opinion of the landlord - and likely have their own opinion of defendant as well.

Summary

Clearly, there is an acerbic relationship between plaintiff and defendant arising out of defendant's inability or unwillingness to pay what plaintiff sought for a renewal term of the lease for the commercial space at plaintiff's building. Of course, defendant should have refrained from name-calling. But the fact that defendant's actions are regrettable does not mean that plaintiff has stated a cause of action for libel. What defendant said was not nice– but it was clearly defendant's opinion.

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted, defendant's request for sanctions is denied and the clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motion to restore the case is denied as moot.

This is the Decision and Order of the Court.

Dated: December 5, 2017
New York, New York

ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH