Davidowitz v 105 E. 29th St. Owners Corp.
2006 NY Slip Op 30829(U)
August 17, 2006
Supreme Court, New York County
Docket Number: 117788/05
Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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SUSAN DAVIDOWITZ and NOAH KLEIN,

Plaintiffs,

-against-

105 EAST 29TH ST. OWNERS CORP., MILTON McC. GATCH, RENEE KINSELLA, DEBORAH BROWN and ERIC PLOUMIS,

Defendants.

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Decision/Order
Index No.: 117788/05
Seq. No. : 002

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Def Kinsella motion [dismiss] w/RK affid in support, exhs	1
Pltfs affirm in opp (SD) w/exhs, affirm in opp (NK)	2

Upon the foregoing papers, the decision and order of the court is as follows:

Defendant Renee Kinsella ("Kinsella") moves to dismiss the Amended Verified Complaint as to her. Only the seventh and eighth causes of action in the Amended Verified Complaint are directed to Kinsella.[1] The seventh cause of action is for defamation and alleges that on August 12, 2005 Kinsella told Ms. Liz Karlin that plaintiffs did "unthinkable things, sick twisted and frightening". The eighth cause of action is for slander per se and alleges that on January 26, 2005 Kinsella told Mr. Gatch

[1]Subsequent to the submission of this motion on August 10, 2006, the court received a stipulation dated before then to adjourn this motion until August 14, 2006. None of the attorneys brought this stipulation to the court's attention on August 10, 2006; nor did any of them object to the submission of the motion on that date. In an abundance of caution, however, the court has held the motion for consideration only after the August 14, 2006 adjourned date previously agreed to by the parties.

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that the plaintiffs had "pleaded guilty to misdemeanor criminal trespass".

Although defendant denies telling Ms. Karlin the words alleged, she argues that even if she did, it is merely her opinion and not actionable defamation. In addition, she claims that the statements made to Ms. Karlin may not form the basis of a defamation claim without pleading special damages. With respect to the communication to Mr. Gatch, Kinsella argues that it is demonstratably substantially true. In addition, she claims that all of the alleged communications were protected by a qualified privilege.

Plaintiffs oppose the motion in its entirety.

In determining whether a complaint is sufficient so as to withstand a motion to dismiss pursuant to CPLR § 3211 "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." Guggenheimer v. Ginzburg, 43 NY2d 268 (1977). The facts as alleged must be accepted by the court as true, for purposes of such a motion, and are to be accorded every favorable inference. Morone v. Morone, 50 NY2d 481 (1980); Beattie v. Brown & Wood, 243 AD2d 395 (1st dept. 1997). The court may also rely on indisputable facts contained in documentary evidence in connection with determining the sufficiency of a pleading. CPLR § 3211 (a) (1); L & S Motors, Inc. v. Broadview Networks, Inc., 25 AD3d 767 (2nd dept. 2006).

Thus, for purposes of resolving this motion, the court assumes that the communications were made as alleged in the complaint. In addition, the court relies upon Certificates of Disposition from the Criminal Court in the City of New York, evidencing that on January 19, 2005, the plaintiffs, Susan Davidowitz and Noah Klein, each plead guilty to PL 140.05. PL 140.05 is a criminal violation of trespass.

Defamation is injury to one's reputation, either by written expression (libel) or oral expression (slander). Morrison v. National Broadcasting Co., 19 NY2d 453 (196). The elements of plain libel [also known as libel per quod and libel by extrinsic fact] are: [1] a false and defamatory statement of fact; [2] regarding the plaintiff; [3] which are published to a third party; and which [4] result in injury to plaintiff. Idema v. Wager, 120 F Supp2d 361 (SDNY 2000); Ives v. Guilford Mills, 3 FSupp2d 191 (NDNY 1998).

Certain statements are considered libelous per se. They are limited to four categories of statements that: [1] charge plaintiff with a serious crime; [2] tend to injure plaintiff in its business, trade or profession; [3] plaintiff has some loathsome disease, or [4] impute unchastity. Lieberman v. Gelstein, 80 NY2d 429 (1992); Harris v. Hirsh, 228 AD2d 206 (1st dept. 1996). The primary difference between plain libel and libel per se is that plain libel requires proof of special harm, while libel per se does not require such pleading and proof. Lieberman v. Gelstein, *supra*.

Special damages contemplate the loss of something having economic or pecuniary value. Lieberman v. Gelstein, *supra*. While injury to feelings is not recoverable; injury to one's reputation is recoverable. Gertz v. Robert Welch, Inc., 418 US 323 (1974); Hogan v. Herald Co., 84 AD2d 470 (4th dept. 1982) *affd* 58 NY2d 630 (1982). If economic loss or injury to one's reputation is proved, then compensation for emotional distress is also available as an element of libel damages. Sager v. Local 1199 Drug Hosp. and Health Care Union, 238 AD2d 152 (1st dept. 1997).

It is the court's responsibility in the first instance to determine whether a publication is susceptible to the defamatory meaning ascribed to it. Golub v. Enquirer/Star Group., Inc., 89 NY2d 1074 (1997); Aronson v. Wiersma, 65 NY2d 592

(1985); Rejent v. Liberation Publications Inc., 197 AD2d 240 (1st dept. 1994). A court should neither strain to place a particular construction on the language complained of nor should the court strain to interpret the words in their mildest and most inoffensive sense to hold them non-libelous. Rejent v. Liberation Publications, Inc., *supra.*

As with any claim for defamation, both libel per se and libel per quod are defeated in total by a showing that the published statements are substantially true. Newport Service & Leasing v. Meadowbrook Distributing Corp., 18 AD3d 454 (2nd dept. 2005). At common law, defamatory statements were generally presumed false so that "truth" was a defense that had to be proven by the defendant. Rinaldi v. Holt, Rinehart & Winston, Inc., 42 NY2d 369 (1977). This rule no longer applies where the plaintiff is a public official or public figure, or the speech relates to a matter of public concern. In such circumstances a plaintiff must prove as part of its prima facie case that a defendant acted with actual malice (knowing the statement was false or recklessly disregarding whether it was true). Chapadeau v. Utica Observer Dispatch, 38 NY2d 196 (1975). Where, as here, the plaintiff is a private individual and the statements upon which the claim is based do not relate to a matter of public concern, then it is still the defendant's burden to prove a defense of truth. In this regard, the defense is established by a showing that the material is "substantially" true. It need not be literally or technically true in all respects. Carter v. Visconti, 233 AD2d 473 (2nd dept. 1996).

Competing with an individual's right to protect one's own reputation, is the constitutionally guaranteed right to free speech. One of the staples of a free society is that people should be able to speak freely. United States Constitution v. New York State Constitution, Article I § 8. Consequently, statements that merely express opinion

are not actionable as defamation, no matter how offensive, vituperative or unreasonable they may be. Immono AG v. Moore-Jankowski, 77 NY2d 235 (1991). If the material, when read in context, could be perceived by a reasonable person to be nothing more than a matter of personal opinion no claim for libel exists. Immuno AG v. Moor-Jankowski, 77 NY2d 235 (1991). Whether a potentially actionable statement is one of fact or opinion is a question of law. Millus v. Newsday, 89 NY2d 840 (1996)

The New York Court of Appeals has held that the following factors should be considered in distinguishing fact from opinion: [1] whether the language used has a precise meaning or whether it is indefinite or ambiguous; [2] whether the statement is capable of objectively being true or false, and [3] the full context of the entire communication or the broader social context surrounding the communication. Brian v. Richardson, 87 NY2d 46 (1995). Moreover, pure opinion is a statement that is accompanied by a recitation of the facts on which the opinion is based or which does not give the impression that it is based upon undisclosed facts. Gross v. New York Times, 82 NY2d 146 (1993).

Both libel per se and libel per quod may be protected by privilege. A qualified privilege has been extended to communications made by one person to another in which both parties have an interest. Lieberman v. Gelstein, *supra*.

Applying these principals of law to the complaint at hand, the court finds that dismissal of the complaint is mandated.

Kinsella telling a third party that plaintiffs did "unthinkable things, sick twisted and frightening" is not actionable as defamation. They clearly relate Kinsella's personal opinion about the plaintiffs. The statement is ambiguous and not susceptible to

objective verification. In addition, contrary to plaintiffs' arguments on this motion, such statements are not slanderous per se. Even were the statements not protected as opinions, plaintiffs' claim would be dismissed, because they did not plead any special damages, which are a required element of the cause of action.

The second claim is based upon statements that would otherwise constitute slander per se, because they pertain to the commission of a crime by plaintiffs. Kinsella's defense is substantial truth. Kinsella allegedly reported to a third party that the plaintiffs pled guilty to the "misdemeanor" crime of Trespass. The "truth" is that they pled guilty to a criminal "violation" of Trespass. While a "violation" and "misdemeanor" have different legal ramifications under New York State Penal Law, those differences are not significant in ordinary usage that would give rise to a claim for defamation. The statements made by Kinsella were substantially true in that they impart that plaintiffs pled guilty to Trespass in a pending Criminal Court matter. As a defense to a defamation claim, truth need not be established to an extreme literal degree. If the defamatory material on which the action is based is substantially true with minor inaccuracies, the claim to recover damages must fail. Ingber v. Lagarenne, 299 AD2d 608 (3rd dept. 2002). Here the truth was near enough to preclude recovery.

In view of the court's conclusion that the statements made are not actionable, it need not determine whether any privilege attaches to the communications allegedly made. Shapiro v. Health Ins. Plan of Greater New York, 7 NY2d 56 (1959).

Conclusion

In accordance herewith it is hereby:

ORDERED that defendant Renee Kinsella's motion to dismiss the seventh and eighth causes of action asserted in the Amended Verified Complaint is granted; and it is further

ORDERED that the seventh and eighth causes of action are hereby severed and the Clerk of the court is directed to enter a judgment in favor of defendant Renee Kinsella and against plaintiffs Susan Davidowitz and Noah Klein dismissing such causes of action; and it is further

ORDERED that any requested relief not expressly granted herein is denied; and it is further

ORDERED that this shall constitute the decision and order of the court

Dated: New York, New York
August 17, 2006

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.