[* 1]
SCANNED ON 9/30/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan Justice — PART 36

Index Number : 103028/2012
KHALON, JOSEPH
vs
LEWIS, BRUCE
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for Summary Judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits + memo | No(s). 1, 2, 3

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion ~~is~~ for Summary judgment by plaintiff is decided in accordance with the attached memorandum decision.

FILED

SEP 30 2013

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 9/27/13

DORIS LING-COHAN, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 36
----------X

JOSSEF KAHLON,

Index No. 103028/2012

Plaintiff,

- against -

Motion Seq. # 002

BRUCE LEWIS.,

Defendant.
----------X

DORIS LING-COHAN, J.:

Upon the foregoing papers, as detailed below, it is

ORDERED that plaintiff's motion for summary judgment is denied. Upon searching the record, summary judgment of dismissal is granted in favor of defendant and this case is dismissed, as a matter of law. *See* CPLR 3212(b).

Plaintiff commenced this case against defendant, a resident of Georgia, asserting two causes of action for: (1) defamation; and (2) harassment. According to the complaint, plaintiff alleges that defendant posted defamatory statements on the Facebook page of defendant's daughter (plaintiff's ex-wife), and that with the intention of harassing plaintiff, defendant filed a false report with New York City's Administration for Children's Services ("ACS"). Plaintiff demands judgment in the amount of $250,000, on each of his causes of action, and has moved for summary judgment on both causes of action. Plaintiff also seeks attorneys' fees, in its notice of motion, pursuant to New York State Banking Law.

The standards for summary judgment are well settled. The movant must tender evidence, by

proof in admissible form, to establish the cause of action "succinctly to warrant the court as a matter of law in directing judgment." CPLR § 3212 (b); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "Failure to make such [a] showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v NYU Medical Ctr.*, 64 NY2d 851, 853 (1985).

Moreover, defendant's failure to file a cross-motion for summary judgment, does not preclude the granting of summary judgment in defendant's favor, as it is within this Court's authority and discretion pursuant to CPLR §3212, to grant summary judgment to a non-moving party. *See Frieman v. Carey Press Corp.*, 117 AD2d 568, 569 (1st Dept 1986). CPLR §3212(b) provides that "[i]f it shall appear that any party other than the moving party is entitled to summary judgment, the court may grant such judgment without the necessity of a cross-motion". *See also Lennard v. Khan*, 69 AD3d 812 (2nd Dept 2010)(court is empowered to search the record and award summary judgment to a nonmoving party); *News America Marketing, Inc. v. Lepage Bakeries*, 16 AD3d 146 (1st Dept 2005)("[b]y moving for accelerated judgment, a party submits the case for disposition on the record evidence").

Applying the above principles herein, plaintiff's motion for summary judgment is denied, and, upon searching the record, summary judgment of dismissal is granted in favor of defendant. That portion of plaintiff's motion for summary judgment which seeks attorneys' fees, pursuant to New York State Banking Law, is denied as no specific Banking Law statue is referred to by plaintiff and the court is unaware of any Banking Law provision, which would entitle plaintiff to an award of attorneys' fees, under the within circumstances. Thus, plaintiff's claim for attorneys' fees is denied and dismissed as a matter of law.

Additionally, summary judgment of dismissal is warranted as to plaintiff's second cause of action for harassment, as a matter of law, as New York does not recognize a civil claim for harassment. *Jacobs v. 200 E. 36th Owners Corp.*, 281 AD2d 281 (1st Dept 2001); *Broadway Central Property v. 682 Tenant Corp.*, 298 AD2d 253 (1st Dept 2002).

With respect to plaintiff's cause of action for defamation, despite defendant's default on this motion, this court is obligated to nevertheless determine whether the words at issue are defamatory, such that plaintiff can sustain an action for defamation, as a matter of law. The Court of Appeals has explained that:

> "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, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a stained or artificial construction"

Aronson v Wiersma, 65 NY2d 592, 593-593 (1985); *see also Golub v Enquirer/Star Group, Inc.*, 89 NY2d 1074, 1076 (1997).

The elements of defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at minimum, a negligence standard, which causes either special harm or constitutes defamation per se. *See Dillon v. City of New York*, 261 AD2d 34, 38 [1st Dept 1999]). To be actionable, a false statement of fact is required, rather than merely an obvious expression of opinion. *See Parks v. Steinbrenner*, 131 AD2d 60 (1st Dept 1987); *Gross v. New York Times Co.*, 180 AD2d 308 (1st Dept 1992), *affirmed* 82 NY2d 146 (1993). If the statement is of pure opinion, "even if false and libelous, and no matter how pejorative or pernicious [it] may be, such statement...[is] safeguarded and may not serve as a basis for an

action in defamations...". *Parks v. Steinbrenner*, 131 AD2d at 62 (citations omitted). The "dispositive inquiry...is 'whether a reasonable [reader] could have concluded that [the alleged statements] were conveying facts about the plaintiff...". *Gross v. New York Times Co.*, 82 NY2d 146, 152 (1993).

In addition, CPLR §3016(a) requires that the particular words complained of be set forth in the complaint and the complaint must allege the time, place and manner of the false statement and to whom the statement was made. *Id.* Here the within complaint is deficient, in that the "particular words" that plaintiff alleges were defamatory, are absent from the complaint. Thus, summary judgment of dismissal is warranted on that basis alone. *See Khan v. Reade*, 7 AD3d 311 (1st Dept 2004); *Sassower. v. Finnerty,* 96 AD2d 585, *appeal dismissed* 61 NY2d 756 (1984).

Additionally, as detailed below, the alleged defamatory statement posted by defendant, which plaintiff has now included in his memorandum of law, in support of the within motion for summary judgment, is not defamatory, as a matter of law.

Plaintiff asserts that the following statement was posted on defendant's daughter's Facebook, page on April 28, 2012:

> "I need to let you know that I contacted NYC Child Protective Services last night. I let them know about your x monsters [sic] behavior. If the legal system won't stop it I will. If his family knew what he has done they would disown him! There is no excuse for any human being to behave this way. Maybe he will have the balls to confront me instead of innocent children and their mother".

Memo of Law, at 2.

Upon review of such statement, it is noted that plaintiff is not specifically identified in the post,

since his name is not included. Moreover, portions of the posted statement, are clearly matters of non-actionable expressions of opinion, by defendant, plaintiff's former father-in-law, of which a reasonable reader would not view as factual. *See Brian v. Richardson*, 87 NY2d 46, 51. Further, while plaintiff maintains that defendant filed a fraudulent and false report with ACS, the alleged Facebook posting is truthful, in that, defendant *did in fact contact ACS*, as evidenced by the August 6, 2012 letter from ACS, indicating that an assessment was made and that the report "has been determined "unfounded"; it s noted that defendant, in his answer, admits that he contacted ACS and filed a report which he believed to be "true and honest'. Notice of Motion, Exhibits A and B, ¶5. *See Dillon v. City of New York*, 261 AD2d 34 (1st Dept 1999)("truth provides a complete defense to defamation claims..." [citations omitted]). It is also noted that the Facebook post fails to include any specific allegations of criminal behavior or conduct. In addition, while plaintiff notes this alleged defamatory statement in a memorandum of law, such is not a sworn statement, by someone with personal knowledge and is, therefore, insufficient.

It is noted that while defendant, a resident of the state of Georgia, has defaulted on the within motion, in his answer, which he filed without the assistance of counsel, defendant maintains that he:

> "accidently posted the message on his daughter['] [F]acebook wall. It was intended to be sent as a private message and not posted. As soon as the mistake was known[,] it was removed...The posting was not intentional.

Notice of Motion, Exh. B, ¶6. As stated above, defendant further maintains that he did not file a false report with ACS and that the report was "honest and intended to be in [his] grand-daughter's best interest". *Id.* ¶ 22. The court notes that while defendant has filed an answer, he also sent correspondence to the court indicating that he is not financially able to travel from

Georgia to New York , nor financially able to retain counsel, to defend this action.

As such, plaintiff failed to sustain its burden on his motion for summary judgment. Morever, upon searching the record, plaintiff's claims are deficient as a matter of law, and, thus, summary judgment of dismissal is granted in favor of defendant.

Accordingly, it is

ORDERED that the motion by plaintiff Josseff Kahlon for summary judgment is denied; and it is further

ORDERED that, upon searching the record, as this court is permitted to do on this motion for summary judgment, in accordance with CPLR §3212(b), summary judgment of dismissal is granted in favor of defendant; and it is further

ORDERED that the Clerk of the Court shall forthwith, enter judgment of dismissal in favor of defendant, *without costs;* it is further

ORDERED that within 30 days of entry of this order, defendant shall serve a copy of this order upon plaintiff, with notice of entry.(1)

Dated: September 24, 2013

Hon. Doris Ling-Cohan,J.S.C.

J:\Summary Judgment\SEARCHING THE RECORD\kahlon.lewis.wpd

(1) Should defendant need help as to this, he may call the Court Help ~~Center~~ Office at 646-386-3025.