Trump Vil. Section 4, Inc. v Bezvoleva
2015 NY Slip Op 32507(U)
August 10, 2015
Supreme Court, Kings County
Docket Number: 509277/2014
Judge: Mark I. Partnow
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 43 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of August, 2015.

PRESENT:

HON. MARK I. PARTNOW,

Justice.

------------------------------------X

TRUMP VILLAGE SECTION 4, INC. AND
IGOR OBERMAN,7

Plaintiffs,

- against -

Index No. 509277/2014

YULIYA BEZVOLEVA A/K/A JULIA BEZVOLEVA,
INNA YESELSON, "JOSEF STALIN," "ABORIGEN"
AND JOHN DOES 1-5, BEING THE FICTITIOUS NAME
OF THE DEFENDANTS UNKNOWN TO PLAINTIFF,
A PERSON WHO HAS MADE ANONYMOUS
DEFAMATORY AND/OR UNAUTHORIZED STATEMENTS
REGARDING PLAINTIFFS ON THE WEBSITE
WWW.TV4NEWS.ORG,

Defendants.

------------------------------------X

The following e-filed papers numbered read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	9, 11-15 25, 27-31 45, 47-51
Opposing Affidavits (Affirmations)	16, 18-19 32, 34-41 54, 56-69
Reply Affidavits (Affirmations)	21 71-74
______ Affidavit (Affirmation)	
Memoranda of Law	10, 17, 20 26, 33 46, 55, 70

Upon the foregoing papers, in this action for libel by plaintiffs Trump Village Section 4, Inc. (Trump Village) and Igor Oberman (Oberman) (collectively, plaintiffs) against defendants Yuliya Bezvoleva a/k/a Julia Bezvoleva (Bezvoleva), Inna Yeselson (Yeselson), "Josef Stalin," "Aborigen," and John Does 1-5 (being fictitious names representing persons whose identities are unknown to plaintiffs), Bezvoleva and Yeselson (collectively, defendants) move, under motion sequence number two, for an order, pursuant to CPLR 2304, quashing the subpoena duces tecum (the subpoena) that plaintiffs served on non-party Google, Inc. (Google), based upon the grounds that: (i) plaintiffs failed to serve a copy of the subpoena on them, as required by CPLR 3120 (3) and 2303 (a), (ii) the subpoena is facially defective because it fails to indicate the circumstances or reasons the information sought is required, and (iii) the subpoena is imprecise and overbroad. Defendants move, under motion sequence number three, for an order, pursuant to CPLR 2304, quashing a subpoena duces tecum that plaintiffs served on non-party Google based upon the grounds that: (i) plaintiffs failed to properly serve a copy of the subpoena on defendants' counsel as required by CPLR 2103 (b), (ii) the subpoena is facially defective because it fails to indicate the circumstances or reasons the information sought is required, (iii) the subpoena is imprecise and overbroad, (iv) plaintiffs have not asserted a meritorious defamation claim, and (v) defendants have not complied with CPLR 2304. Defendants move, under motion sequence number four, for an order, pursuant to CPLR 3211 (a) (7) and 3016 (a), dismissing

plaintiffs' complaint as against them based upon the grounds of failure to state a cause of action and the failure to plead with the requisite particularity.

BACKGROUND

Trump Village is a cooperative housing corporation that was incorporated on August 29, 1961, and it owns a residential cooperative complex consisting of the land and apartment buildings located at 2928-20-32 and 2940-42-44 West 5th Street, in Coney Island in Brooklyn, New York. Oberman, who is an attorney admitted in New York State, is the elected president of Trump Village and, as the president, he is the chairperson of the board of directors of Trump Village. In these capacities, Oberman is charged with overseeing 1,144 families in Trump Village.

On September 4, 2012, Bezvoleva, who is a shareholder and resident of Trump Village, allegedly created the website TV4News.org (the website), and Yeselson, who is also a shareholder and resident of Trump Village, allegedly co-created the content of the website. The website was created with the stated purpose of "discuss[ing events and conditions in [Trump Village]." Plaintiffs allege that the website is "designated only for [Trump Village] community tenants," and contains Trump Village news, information, and announcements, and that it also has sections with legal advice concerning cooperative tax abatements, housing discrimination protection, bedbug infestations, and elevator safety. According to plaintiffs, the website purports to provide tenants with factual information concerning Trump Village.

Plaintiffs assert, however, that while the website appears to be a community website for Trump Village, rather than using the website as a forum to benefit the Trump Village community, defendants have used the website in order to defame them by posting, on 18 web pages, at least 19 different statements[1] created over a period of one year. These allegedly defamatory statements were posted anonymously.

These statements make various charges against plaintiffs. On October 11, 2013, defendants allegedly wrote a post on the website, entitled "Trump Village 4 Election Fraud," which charges plaintiffs of committing fraud with respect to the election process of the cooperative. Specifically, in this post, defendants allegedly discussed Trump Village's board election, and stated, among other things, that "by-laws mean nothing if you are Mr. Oberman's friend," "Oberman placed his biography and name on the proxy in first place, even though he did not get number 1 during the election lottery," that Oberman "is neither a practicing lawyer nor a presiding Judge, but continues to misinform citizens of NYC," that Oberman is "the reason that we have a Douglass Elliman Company, who[se] managing activity led to violations and paid fines, and a negative balance of over $513,000 in March [20]13," that under "Oberman's leadership, Trump Village became famous for frivolous cases against Shareholders, discrimination [against] military personnel/veterans and shady contributions of our vendors," and that Gloria Hacken, who is the editor of the Trump

[1]The entire statements of which plaintiffs complain are set forth in their complaint (Document #1). In addition, defendants have provided the full lengthy posts containing these statements in exhibit B to their notice of motion to dismiss (Document #49).

[* 5]

Village newspaper, "gets to praise . . . Oberman on our dime," questioning "why have the proceeds from the newspaper go[] toward [Trump Village]?

In an October 16, 2013 post on the website, entitled "2013 Annual Shareholders' Meeting: Lots of Questions but no Answers," defendants allegedly wrote, among other things, that "when a shareholder, Julia, asked a question to the accountant about the advertising and litigation expenses . . . Oberman kept threatening the Shareholder, that she would reimburse every single dollar of his housing attorney's fees to the Corporation."

In an October 18, 2013 post on the website, entitled "Election Results: Expecting Expectations or Predicted Prediction," defendants allegedly wrote "Cooperators kept asking TrueBallot workers if results were going to be fabricated again. After a few people asked the same questions, election employees stopped smiling and sent them to their Boss for clarification."

In a November 5, 2013 post on the website, entitled "Election is Over or September Lie by Igor Oberman," defendants allegedly wrote that: "[m]any of [the] Shareholders do not support Oberman's Co-op ruling where anyone can be brought to the Court by our Housing Corporation only for opposing his 'view' on principles of democracy and harassing dictator's practices. Unfortunately our Judicial System can easily be abused by the Co-Op President that can file numerous cases against Shareholders while he does not have to pay for consequences from his personal pocket and having a legal background allows for even greater abuse."

[* 6]

In a January 1, 2014 post on the website, entitled "New Year Brings Old Rates," defendants allegedly wrote, among other things, that "both STAR (J-51 and COOP) abatements were withheld from our accounts and taken by the Co-op representatives without our permission or votes."

In a May 1, 2014 post on the website, entitled "Now We Have to Pay More, Are You Surprised?," defendants allegedly wrote, among other things, that "Douglas Elliman Management was brought to [Trump Village] by Igor Oberman who signed the initial agreement [with it] . . . without full Board approval" and that this management company engages in "double dipping." Defendants further allegedly wrote, in this website post, that despite billing of the co-op for exterminating in 2013, which expense "is rising to outrageous sums," "the amount of cockroaches and water bugs remains the same," and that "[i]t is no surprise that the owner of Green Earth Pest Control is one of the bigger donors to the failed political campaign of Igor Oberman."

In a May 27, 2014 post on the website, entitled "Election Game: Is I Real or Delusive?", defendants allegedly wrote that "the phone numbers that are given to the management office are for emergency use only and are considered confidential information, but shareholders are receiving "numerous phone calls (robocalls) asking for a vote for Ms. Tamakhina and Mr. Polack."

In a June 4, 2014 post on the website, entitled "Proxies-Main Election Weapon," defendants allegedly wrote, among other things, that "our elections have not been held fairly

since 2012," and that there are "by-law violations," including seven candidates being "unreasonably disqualified," and "spreading out election flyers and campaigning robocalls through [Trump Village's] emergency system."

In a June 10, 2014 post on the website, entitled "Annual Meeting or Annual Tricks," defendants allegedly wrote, among other things, that Oberman "claimed that [the] rebate that Shareholders were due this year had to be taken away based on a vote taken by the Board in 2009, but failed to show the minutes from that meeting and why would the current Board take action 5 years later?," and also questioned "since when is it legal for a Board of any corporation to take Shareholders' money without their consent?"

In a July 12, 2014 post on the website, entitled "Who Really is 'The Despicable Me'?," defendants allegedly wrote that "our trash is still exposed and with the hot summer days, the odor that it emits through the parking lot and the rodents that find shelter in [it] is standing as it did for years, but the exterminators keep on coming and charging."

In an October 1, 2014 post on the website, entitled "Last Events Summary," defendants allegedly wrote that "no one will ever know, because fair elections don't exist in this beautiful complex."

A November 20, 2013 post on the website, which was published under the name Aborigen, stated, among other things, that Oberman "not only manipulated our co-op election[, h]e disqualified all candidates who don't share his views," and that "I think it's

time for proper authority to start investigating this crook for attempting insult of American laws & freedom," and that "[t]his thief will definitely bankrupt us."

On October 12, 2013, defendants, using the pseudonym "Josef Stalin," allegedly posted a statement in English and Russian on the website, which stated, among other things, that Oberman was "illegally on [the] board of directors at Trump Village," that Oberman "didn't pay for an apartment at Trump Village," and that Oberman's "goal is to destroy Trump Village . . . and sell our buildings to the highest bidder after we are bankrupt for a huge reward."

In a section on the website dedicated to "Discussions," statements were posted in various sections of this "Discussions" section. Specifically, in a section entitled "TV4 Counsel, Dean M. Roberts: Legal Advices/Newspapers Articles," defendants allegedly wrote "Oberman spends corporate money for his personal retaliation (eviction attempts)," and that "[a]ll eviction notices are signed by him, and all cases are initiated by him."

In a section entitled "Who Can Run for the Board," defendants allegedly wrote, on the website, among other things, that Oberman "proactively uses his position to clean up election 2013 and remove opposed candidates by putting them in bad standing without any legitimate reason," that "these Shareholders are victims of harassment, retaliation and abuse of power," that Oberman has "personally refused from giving out corporate dividends to them based on the fact that they were in the Housing Court even though he was under litigation on his own,"

[* 9]

and that "[t]here are different civil cases against him in Civil Supreme Courts and he is under HUD and Div. of Human Rights investigation."

In a section entitled "Wake Up and Count Your Car Tires, defendants allegedly wrote, among other things, that Oberman "has a personal video camera on his floor to monitor his neighbors' life and record all the expected and unexpected guests around his apartment unit," that Trump Village's "security guards are too busy escorting him and is family members," and "are used for threatening Shareholders," and that Oberman "liberally says that he can use our common funds for his personal protection."

In a section entitled "Igor Oberman Promises to Resolve Luna Park Problems," defendants allegedly wrote, among other things, that Oberman "failed to mention that this year . . . Cooperators were not provided with an annual financial statement," and that the election company was handpicked by Mr. Oberman, and many elderly did not receive the full amount of their tax rebates."

In a section entitled " Trump Village Pays For Shareholders' Legal Fees," defendants allegedly wrote that " Oberman who constantly represents himself as an attorney and Judge to the public signed numerous letters regarding termination of the proprietary lease and tried to evict Shareholders who disagree with his doubtful managing methods," and that "[h]e announced at the Annual Shareholders' Meeting that we would pay back each and every dollar that the corporation spent for the litigation that became a giant epidemic during his presidential reign."

In a section entitled "They Finally Made It!!!," defendants allegedly wrote, among other things, that Trump Village's "main parking lot stayed covered in ice till the sun melted it," and that "[d]espite the hefty price tag for 'extermination' the roaches, waterbugs and other creatures are as much of a problem as they were under the previous exterminator."

Due to the above posts on the website, which, plaintiffs claim, defame them, plaintiffs filed the instant action on October 9, 2015. Plaintiffs' complaint seeks damages for libel.

DISCUSSION

Defendants' Motion to Dismiss

The court initially notes that "[w]hen a party moves to dismiss a complaint pursuant to CPLR 3211 (a) (7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action" (*Sokol v Leader*, 74 AD3d 1180, 1182 [2d Dept 2010], *see also Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Foley v D'Agostino*, 21 AD2d 60, 64-65 [1st Dept 1964]). In considering such a motion, the court must "'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'" (*Nonnon v City of New York*, 9 NY3d 825, 827 [2007], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

"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" (*Kamchi v Weissman*, 125 AD3d 142, 156 [2d Dept 2014] [internal quotation marks omitted]). Plaintiffs allege that defendants, acting with knowledge of the falsity of these statements and the implications therefrom, reckless disregard for the truth, and/or with malicious intent, have made false statements which have caused them special damages or which are defamatory per se.

Defendants, in seeking dismissal of plaintiffs' complaint, contend that the challenged statements are not actionable because they are protected by the common interest privilege. The common interest privilege is a qualified common-law privilege for statements made by one person to another on a subject in which both persons share a common interest (*see Liberman v Gelstein*, 80 NY2d 429, 437 [1992]). "The rationale for applying the [common interest] privilege . . . is that so long as the privilege is not abused, the flow of information between persons sharing a common interest should not be impeded" (*id.*).

However, the shield provided by the common interest privilege is dissolved where the defendants disseminate the statements in a manner which exceeds the scope of this privilege or constitutes "excessive publication" (*Stukuls v State of New York*, 42 NY2d 272, 281 [1977]; *Skarren v Household Fin. Corp.*, 296 AD2d 488, 489-490 [2d Dept 2002]). Thus, alleged defamatory statements are not protected by the common interest privilege where they

are "disseminated to those who d[o] not have either a common interest in them, or a legal, moral, or social duty to speak upon the subject of the communications" (*Skarren*, 296 AD2d at 489-490; *see also Stukuls*, 42 NY2d at 281; *Rosen v Piluso*, 235 AD2d 412, 412 [2d Dept 1997]).

Here, the communications contained on the website were not disseminated solely to Trump Village community residents. There was no required password limiting access to the website to Trump Village community residents. Rather, defendants knowingly allegedly published these statements on the worldwide web to the general public to whom its publication was not privileged. While defendants may have directed their statements to Trump Village community residents, they were well aware that anyone having access to the internet could read these statements. Indeed, as pointed out by plaintiffs, when typing the phrase "Trump Village" into the search engine Google, the website appears as the fourth search result out of about 102,000,000 results. In addition, when typing "Igor Oberman," the website appears at the second search result out of 40,800 results. Thus, since defendants allegedly widely published these statements to persons to whom they were not privileged to publish it, the fact that the statements were also communicated to persons to whom they were privileged to publish it does not prevent their conduct from being an abuse of the common interest privilege and excessive publication.

Moreover, the common interest privilege can be overcome by a showing of malice (*see Liberman*, 80 NY2d at 437; *see also Kamchi* , 125 AD3d at 158; *Diorio v Ossining*

Union Free School Dist., 96 AD3d 710, 712 [2d Dept 2012]). "To establish the malice necessary to defeat the privilege, the plaintiff may show either common-law malice, i.e., spite or ill will, or may show actual malice, i.e., knowledge of falsehood of the statement or reckless disregard for the truth" (*Diorio*, 96 AD3d at 712 [internal quotation marks omitted]; *see also Liberman*, 80 NY2d at 437-438; *Kamchi*, 125 AD3d at 158).

Plaintiffs, in their complaint, allege that defendants "acted with knowledge of the falsity of these statements and the implications therefrom, reckless disregard for the truth, and/or with malicious intent, both presumed and actual, in knowingly publishing such false statements to third parties." Defendants contend that plaintiffs have made only conclusory allegations of malice which are unsupported by specific facts. However, "[s]ince . . . the burden does not shift to the nonmoving party on a motion made pursuant to CPLR 3211 (a) (7), a plaintiff has 'no obligation to show evidentiary facts to support [his or her] allegations of malice on a motion to dismiss pursuant to CPLR 3211 (a) (7)'" (*Sokol v Leader*, 74 AD3d 1180, 1182 [2d Dept 2010], quoting *Kotowski v Hadley*, 38 AD3d 499, 500 [2d Dept 2007]; *see also Kamchi*, 125 AD3d at 159; *Colantonio v Mercy Med. Ctr.*, 115 AD3d 902, 903 [2d Dept 2014]; *Weiss v Lowenberg*, 95 AD3d 405, 406 [1st Dept 2012]; *Shaw v Club Mgrs. Assn. of Am., Inc.*, 84 AD3d 928, 931 [2d Dept 2011]; *Pezhman v City of New York*, 29 AD3d 164, 169 [1st Dept 2006]; *Arts4All, Ltd. v Hancock*, 5 AD3d 106, 109 [1st Dept 2004]; *Terry v County of Orleans*, 72 AD2d 925, 927 [4th Dept 1979]; *Mellen v Athens Hotel Co.*, 153 App Div 891, 891 [1st Dept 1912]).

Furthermore, affidavits and other documentary evidence submitted in opposition to the motion "may be used freely to preserve inartfully pleaded, but potentially meritorious, claims" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]). To the extent that extrinsic evidence, including affidavits and documentary evidence, is considered, "the standard of review under a CPLR 3211 motion is 'whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one'" (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000], quoting *Guggenheimer*, 43 NY2d at 275 [1977]).

Plaintiffs assert that there is a history of malicious conduct by defendants against Oberman. To support this assertion, plaintiffs have submitted a copy of the verified complaint in a lawsuit filed against them by Yeselson and others on December 2, 2012, which claims, among other things, that Oberman harassed her and attempted to evict her, and seeks $4,000,000. Defendants also assert that Oberman has made repeated attempts to evict them, which, they claim, were motivated because they have been critical of his services as president of Trump Village. Plaintiffs have also submitted telephone records showing that Oberman called 911, which, they assert, was in response to harassment by defendants. In addition, plaintiffs have submitted Oberman's affidavit, in which he attests that the sole purpose of the website is to present factually inaccurate information about Trump Village, that defendants' sole aim is to disparage and cause grievous harm to Trump Village, and that each of the statements is false and harmfully impact him. Plaintiffs have also submitted a

November 16, 2014 newspaper article, which discloses that when they have public meetings at Trump Village, they need to have "lots of security guards," and that "[s]ometimes police officers get invited to make sure nothing happens."

Thus, while the court finds that the common interest privilege is defeated by excessive publication, the allegations of malice that are set forth in plaintiffs' complaint, along with the above submissions, at this juncture, would, in any event, preclude dismissal of the complaint for failure to state a cause of action (*see* CPLR 3211[a] [7]; *Colantonio*, 115 AD3d at 903; *Alianza Dominicana, Inc. v Luna*, 229 AD2d 328, 329 [1st Dept 1996], *lv dismissed* 89 NY2d 1029 [1997]).

Defendants further contend that dismissal of plaintiffs' complaint is required on the basis that Oberman, as the president of Trump Village and the chairperson of Trump Village's board of directors, and Trump Village are limited-purpose public figures, and that plaintiffs have not demonstrated actual malice. "Public figures for constitutionalized defamation purposes include 'limited-purpose' public figures, those who 'have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved'" (*Huggins v Moore*, 94 NY2d 296, 301-302 [1999], quoting *Gertz v Robert Welch, Inc.*, 418 US 323, 345 [1974]). "A plaintiff is considered a limited issue public figure, and thus a defendant's defamatory statements regarding the same are immune from liability if the plaintiff has 'voluntarily acted to influence the resolution of

a public controversy'" (*Brooks v Anderson*, 2007 NY Slip Op 52482, *9-10 [Sup Ct, Bronx County 2007], quoting *Fairley v Peekskill Star Corp.*, 83 AD2d 294, 298 [2d Dept 1981]).

"In order for the privilege to apply, there must a controversy, and the same must not merely be a matter of public interest, but it must be a real dispute whose outcome affects the general public or some segment in a substantial way" (*Brooks*, 2007 NY Slip Op 52482, *10). "Thus, one may become a limited purpose public figure by 'purposeful activity amounting to a thrusting of his [or her] personality into the "vortex" of an important public controversy'" (*White v Tarbell*, 284 AD2d 888, 889 [3d Dept 2001], quoting *Curtis Publ. Co. v Butts*, 388 US 130, 155 [1967]).

"Significantly, in order to be considered a public controversy for this purpose, the subject matter must be more than simply newsworthy" (*Krauss v Globe Intl.*, 251 AD2d 191, 192 [1st Dept 1998]; *see also Silvester v American Broadcasting Cos.*, 839 F2d 1491, 1494 [11th Cir 1888], citing *Wolston v Reader's Digest Assn.*, 443 US 157, 167 [1979] ["(t)he private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention"]). "Instead, 'it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way'" (*Bevona v Valencia*, 191 AD2d 192, 192 [1st Dept 1993], quoting *Foretich v Capital Cities/ABC*, 37 F3d 1541, 1554 [4th Cir 1994]; *see also Arrigoni v Velella*, 110 AD2d 601, 604 [1st Dept 1985]). Here, the matters at issue cannot be said to be matters of a controversy affecting the public.

Furthermore, "[w]hile the extent to which one becomes a public figure is a matter of degree, . . . the essential element underlying the category of public figures is that the publicized person has taken an affirmative step to attract public attention [internal quotation marks and citation omitted]" (*White*, 284 AD2d at 889). Here, plaintiffs have not voluntary thrust themselves into a public controversy or sought any public attention with respect to any public controversy. Thus, the court does not find that plaintiffs are limited public figures, and cannot grant dismissal of plaintiffs' complaint on this basis.

Defendants additionally argue plaintiffs' complaint should be dismissed on the basis that the challenged statements discuss matters of public concern, and plaintiffs have failed to plead gross irresponsibility. In the case of a private person, as opposed to a public figure (where a plaintiff must show actual malice), if the content of the publication "is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition," the plaintiff must show gross irresponsibility (*see Chapadeau v Utica Observer-Dispatch*, 38 NY2d 196, 199 [1975], *Ortiz v Valdescastilla*, 102 AD2d 513, 519 [1st Dept 1984], *appeal withdrawn* 63 NY2d 773 [1984]). Here, however, even assuming that a matter of public concern was involved, plaintiffs (as discussed above) have pleaded actual malice, and since gross irresponsibility is a lower standard than actual malice, it was unnecessary for plaintiffs to additionally plead gross irresponsibility to sustain their complaint.

Defendants further contend that the allegedly defamatory statements are non-actionable pure opinion. They argue that these statements convey the authors' views and are accompanied by the factual basis for them.

"Distinguishing between fact and opinion is a question of law for the courts, to be decided based on 'what the average person . . . reading the communication would take it to mean'" (*Davis v Boeheim*, 24 NY3d 262, 269 [2014], quoting *Steinhilber v Alphonse*, 68 NY2d 283, 290 [1986]; *see also Mann v Abel*, 10 NY3d 271, 276 [2008], *cert denied* 555 US 1170 [2009] ["(w)hether a particular statement constitutes an opinion or an objective fact is a question of law"], citing *Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 381 [1977], *cert denied* 434 US 969 [1977]). "The dispositive inquiry . . . is 'whether a reasonable [reader] could have concluded that [the statements were] conveying facts about the plaintiff'" (*Gross v New York Times Co.*, 82 NY2d 146, 152 [1993], quoting *600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d 130, 139 [1992], *rearg denied* 81 NY2d 759 [1992], *cert denied* 508 US 910 [1993]).

Three factors must be considered in determining whether a reasonable reader would consider the statement connotes fact or non-actionable opinion, to wit: """(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal . . . readers or listeners that what is being

read or heard is likely to be opinion, not fact''''' (*Davis*, 24 NY3d at 270, quoting *Mann*, 10 NY3d at 276, quoting *Brian v Richardson*, 87 NY2d 46, 51 [1995]). The third factor "requires that the court consider the content of the communication as a whole, its tone and apparent purpose" (*Davis*, 24 NY3d at 270; *see also Brian*, 87 NY2d at 51).

With respect to the first factor, defendants used specific, easily understood language to communicate that, among other things, Oberman and Trump Village filed frivolous cases against shareholders for opposing his views, that Trump Village's elections have not been held fairly, that Oberman manipulated the elections and the election results were fabricated, and that Oberman is spending corporate monies for his own personal purposes. Consideration of the second factor similarly weighs in favor of treating the alleged defamatory statements as factual because they are capable of being proven true or false. The language used in the alleged defamatory statements cannot be characterized as mere "rhetorical hyperbole" (*see Davis*, 24 NY3d at 271).

In considering the context in which the statements were made, the court notes that a reasonable reader may be less likely to read statements as facts if they are made on the internet (*see Sandals Resorts Intl. Ltd. v Google, Inc.*, 86 AD3d 32, 42 [1st Dept 2011]). Nevertheless, internet postings are not exempt from being libelous where they do not constitute opinion, particularly where, as here, they imply that they are based upon undisclosed facts. Furthermore, the alleged defamatory statements were made on a website which purports to represent and be knowledgeable about the Trump Village community.

Thus, based upon this context, the court does not find that the alleged defamatory statements constitute non-actionable opinion.

Defendants also argue that the alleged statements are not defamatory. The court rejects this argument. The alleged defamatory statements are "reasonably susceptible of a connotation which could tend '"to expose . . . plaintiff[s] to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of [them] in the minds of right-thinking persons, and to deprive [them] of their friendly intercourse in society"'" (*Mohen v Stepanov*, 59 AD3d 502, 504 [2d Dept 2009], quoting *Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 379 [1977], *rearg denied* 42 NY2d 1015 [1977], *cert denied* 434 U.S. 969 [1977], quoting *Sydney v MacFadden Newspaper Publ. Corp.*, 242 NY 208, 211-212 [1926]). In addition, contrary to defendants' contentions, plaintiffs have alleged special damages or that the statements are defamatory per se.

Defendants further argue that plaintiffs have not pleaded the challenged statements with the requisite particularity pursuant to CPLR 3016 (a), which provides that "[i]n an action for libel . . . the particular words complained of shall be set forth in the complaint." This argument is without merit. Plaintiffs have set forth the entire statements which they allege to be defamatory (*see Accadia Site Contr., Inc. v Skurka*, 129 AD3d 1453, 1454 [4th Dept 2015]). Contrary to defendants' assertions, they have not paraphrased these statements, but have quoted them. Plaintiffs have also set forth the dates of the majority of the statements, and have stated the manner of the publication of the statements, i.e., on the

website, and that defendants published these statements. To the extent that defendants contend that plaintiffs have not been able to identify the defendants who posted anonymous statements or the dates of certain statements, this information is exclusively in defendants' knowledge and plaintiffs cannot be penalized, at this pleading stage of the action and prior to discovery, based upon their lack of this information.

Defendants' argument that the statements were not "of and concerning" plaintiffs is devoid of merit. The statements refer specifically to Oberman and Trump Village, as set forth above.

Defendants further argue that plaintiffs' complaint should be dismissed because the Federal Communications Decency Act (42 USC § 230) protects website owners and operators from liability for statements made by third parties. Under the Federal Communications Decency Act, a defendant is "immune from state law liability if (1) it is a 'provider or user of an interactive computer service'; (2) the complaint seeks to hold the defendant liable as a 'publisher or speaker'; and (3) the action is based on 'information provided by another information content provider'" (*Shiamili v Real Estate Group of N.Y., Inc.*, 17 NY3d 281, 286-287 [2011], quoting 47 USC § 230 [c] [1]; *see also Braverman v Yelp, Inc.*, 2014 NY Slip Op 30444[U], *2 [Sup Ct, NY County 2014], *affd* 128 AD3d 568 [1st Dept 2015]). Plaintiffs' complaint, however, alleges that defendants wrote and created the content of the alleged defamatory statements, and was not merely the intermediary for them. Thus, construing the allegations of plaintiffs' complaint as true, as the court must, on

a motion to dismiss, the complaint may not be dismissed on this basis. Consequently, plaintiffs' motion to dismiss must be denied.

Defendants' Motions to Quash

Defendants served a subpoena on Google, dated October 9, 2014 (the October 9, 2014 subpoena), seeking "[a]ny and all subscriber records regarding the identification and information sufficient to identify the user data and account holder of" the e-mail address tv4united@gmail.com (the e-mail address), including but not limited to "the real names, screen names, status of account, date account opened and closed, registration information, Internet Protocol (IP) Addresses, Media Access Control (MAC), telephone numbers, e-mail addresses and internet connection logs." The October 9, 2014 subpoena also sought "[d]etailed sign in and sign off logs showing the last 50 times the user signed into the account associated with the [e-]mail address . . . with date and IP addresses."

The October 9, 2014 subpoena was not served on defendants. Defendants claim that, at that time, plaintiffs had not yet served them with a copy of the complaint, which is dated October 9, 2014, and which was also e-filed on October 9, 2014. Defendants assert that they learned about the October 9, 2014 subpoena and the present action when Bezvoleva received an e-mail from Google on October 29, 2014, wherein Google notified her that it was giving her until November 17, 2014 to provide it with a file-stamped motion to quash or other formal objection, absent which it would produce the documents requested by the subpoena. The October 9, 2014 subpoena did not inform Google, on its face, or in any notice

accompanying it, the reasons such disclosure was sought or required from it, and it did not annex a copy of the complaint. On November 17, 2014, defendants, through their counsel, filed a notice of motion to quash the October 9, 2014 subpoena, pursuant to CPLR 2304, contending that plaintiffs failed to serve a copy of it on them, pursuant to CPLR 3120 (3) and 2303 (a), that it was facially defective because it failed to indicate the circumstances or reasons the information sought was required, and that it was imprecise and overbroad.

Prior to the return date of that motion to quash, plaintiffs amended the October 9, 2014 subpoena in an effort to cure the defects claimed by defendants. Specifically, they annexed a copy of the complaint to the subpoena, and added a notice informing Google that: "Your testimony and documents are required because you have special knowledge regarding pertinent facts which are in issue in this matter, including, but not limited to, your knowledge of facts and control of documents and/or electronically stored information relating to the identity of the owner(s) of the subject website tv4united@gmail.com and/or the defendants Josef Stalin, Aborigen and John Doe defendants (see accompanying complaint)."

Plaintiffs served this subpoena, as amended, dated November 18, 2014 (the November 18, 2014 subpoena), which sought the same production of documents as the October 9, 2014 subpoena, on Google. On December 22, 2014, defendants moved to quash the November 18, 2014 subpoena.

Defendants, in seeking to quash the November 18, 2014 subpoena, now contend that it must be quashed because plaintiffs failed to serve a copy of this subpoena on their counsel

as required by CPLR 2303 (a) and 2103 (b). CPLR 2303 (a) provides that "[a] copy of any subpoena duces tecum served in a pending civil judicial proceeding shall also be served, in the manner set forth in [CPLR 2103], on each party who has appeared in the civil judicial proceeding so that it is received by such parties promptly after service on the witness and before the production of books, papers or other things." CPLR 2103 (b) provides that "[e]xcept where otherwise prescribed by law or order of court, papers to be served upon a party in a pending action shall be served upon the party's attorney."

The court notes, however, that defendants' counsel first filed a notice of appearance on February 17, 2015 (*see* CPLR 320). Pursuant to CPLR 2103 (c), where a party has not appeared by an attorney, service of a non-party subpoena may be made upon the party by mailing it to the party. Here, there is no dispute that the November 18, 2014 subpoena was served upon defendants themselves. Bezvoleva, in an affidavit, states that she learned of the existence of the November 18, 2014 subpoena on December 8, 2014 when she received a copy of it in the mail, and that she promptly forwarded a copy of it to her attorneys. Yeselson, in an affidavit, also states that she received a copy of the November 18, 2014 subpoena by mail on December 8, 2014.

Moreover, plaintiffs e-filed the November 18, 2014 subpoena as exhibit B to their affidavit in opposition to defendants' motion to quash the October 9, 2014 subpoena (document #18). Thus, the November 18, 2014 subpoena was served and filed electronically

by its e-filing on December 2, 2014, prior to defendants' motion to quash the subpoena on the basis of a lack of service on their counsel.

Furthermore, the purpose of service of the non-party subpoena upon a party and his or her attorney, pursuant to CPLR 2303 (a) and 2103 (b), and pursuant to CPLR 3120 (3), which similarly requires that "[t]he party issuing a subpoena duces tecum . . . shall at the same time serve a copy of the subpoena upon all other parties," is to allow a party to move for a protective order, pursuant to CPLR 3103 (a), or to move to quash the subpoena, pursuant to CPLR 2304, in advance of the actual production of the subpoenaed documents by the non-party. Here, defendants were afforded the opportunity to move to quash the November 18, 2014 subpoena in advance of any production of documents by Google, and defendants made this second motion to quash. Thus, this technical objection regarding a lack of service upon defendants' counsel fails to provide a basis for quashing the November 18, 2014 subpoena.

Defendants further contend, however, that the subpoena is facially defective because the subpoena fails to indicate "the circumstances or reasons such disclosure is sought or required" as mandated by CPLR 3101 (a) (4). "[T]he CPLR 3101 (a) (4) notice requirement applicable to subpoenas duces tecum issued pursuant to CPLR 3111 is equally applicable to nonparty subpoenas issued pursuant to CPLR 3120" (*Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104, 111 [1st Dept 2006]). CPLR 3101 (a) (4) requires that the requisite notice be included on the face of the subpoena or in a notice accompanying it, and a

subpoena is facially defective where it neither contains nor is accompanied by a notice stating the "circumstances or reasons such disclosure is . . . required" (CPLR 3101 [a] [4]; *see also Matter of American Express Prop. Cas. Co. v Vinci*, 63 AD3d 1055, 1056 [2d Dept 2009]).

In *Matter of Kapon v Koch* (23 NY3d 32 [2014]), the Court of Appeals clarified the standard to be applied on a motion to quash a non-party subpoena pursuant to CPLR 2304. It held that CPLR 3101 (a) (4) "imposes no requirement that the subpoenaing party demonstrate that it cannot obtain the requested disclosure from any other source," but, rather, "so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty" (*Id.* at 38).

"'An application to quash a subpoena should be granted [o]nly where the futility of the process to uncover anything legitimate is inevitable or obvious . . . or where the information sought is utterly irrelevant to any proper inquiry'" (*id.*, quoting *Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327, 331-332 [1988] [internal quotation marks omitted]). "It is the one moving to vacate the subpoena who has the burden of establishing that the subpoena should be vacated under such circumstances" (*Matter of Kapon*, 23 NY3d at 39; *see also Ledonne v Orsid Realty Corp.*, 83 AD3d 598, 599 [1st Dept 2011]; *Matter of Dairymen's League Coop. Assn., Inc. v Murtagh*, 274 App Div 591, 595-596 [1948], *affd* 299 NY 634 [1949]).

The Court of Appeals, *in Matter of Kapon* (23 NY3d at 39), further noted that while the one seeking to quash the subpoena "bears the initial burden of proof on a motion to

quash," the notice requirement of CPLR 3101 (a) (4) "nonetheless obligates the subpoenaing party to state, either on the face of the subpoena or in a notice accompanying it, 'the circumstances or reasons such disclosure is sought or required,''" and that "[t]he subpoenaing party must include that information in the notice in the first instance . . . lest it be subject to a challenge for facial insufficiency." It further observed that "the subpoenaing party's notice obligation was never intended by the legislature to shift the burden of proof on a motion to quash from a nonparty to the subpoenaing party, but, rather, was meant to apprise a stranger to the litigation the 'circumstances or reasons' why the requested disclosure was sought or required" (*id.*).

Here, plaintiffs met this initial burden since the November 18, 2014 subpoena served gave Google, as well as defendants, sufficient information to challenge the subpoena on a motion to quash. Since plaintiffs met this minimal obligation, the burden shifted to defendants to establish that they were entitled to prevail on the motion to quash.

As noted above, this burden requires a showing that the documents sought are irrelevant to the prosecution of the action (*see Matter of Kapon*, 24 NY3d at 38-39; *Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327, 331-332 [1988]). Here, with respect to the relevancy of the documents sought, plaintiffs assert that the information sought by the subpoena is material and necessary in order for them to learn the true identities of the owners and authors of the website. They point out that no comments are attributed to a particular author, and assert that the only identifying information on the website that would lead a

reasonable person to find the anonymous author is a line on the webpage which states "Contact Us," and lists the e-mail address.

However, while not expressly admitting that they are the "owners" of the website, defendants acknowledge that the administrators of the website are posted in the "Biographies" section of the website, and they admit that they are two of the administrators, and that the other two administrators are "Eugene" and "Galina." They claim that plaintiffs are already aware of the identities of Eugene and Galina because they are currently suing plaintiffs in a separate action alleging discrimination against Eugene. Defendants further assert that the information sought cannot identify potential defendants because the comments, such as the ones at issue in this case, are not posted to the website through the e-mail address, but through the "Disqus" application. Notably, the notice provided in the subpoena to Google as to why the documents are required states that it is seeking the identities of the owners of the website, but does not mention the e-mail address or why it needs the documents requested regarding the e-mail address. Thus, while plaintiffs are entitled to obtain relevant information with respect to the posting of the alleged defamatory statements on the website, defendants have shown that the information sought by plaintiffs, as presently requested in the November 18, 2014 subpoena, is irrelevant (*see* CPLR 3101).

Moreover, as contended by defendants, the subpoena is overbroad with respect to the documents sought regarding the e-mail address, and plaintiffs, in their opposition papers, have not adequately explained the relevancy of the documents sought in relation to obtaining

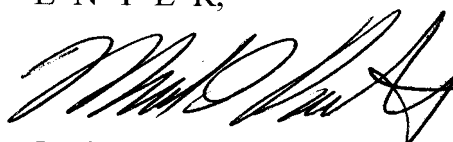
the identities of the owners of the website. It is also noted that while plaintiffs state that defendants have refused to sign a stipulation admitting that they are the owners of the website, they may serve a notice to admit, pursuant to CPLR 3123 (a) (since the identity of the owners is an easily provable fact), or interrogatories, pursuant to CPLR 3132, upon defendants in an effort to secure this admission. Thus, the November 18, 2014 subpoena (and the earlier October 9, 2014 subpoena which was amended by the November 18, 2014 subpoena) must be quashed.

CONCLUSION

Accordingly, defendants' motion to dismiss plaintiffs' complaint as against them is denied in its entirety. Defendants' motions to quash the subpoenas served on Google are granted.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. MARK I PARTNOW
SUPREME COURT JUSTICE

FILED
AUG 13 2015
KINGS COUNTY CLERK'S OFFICE