Ford v North Hills Country Club, Inc.
2015 NY Slip Op 32752(U)
November 30, 2015
Supreme Court, Nassau County
Docket Number: 600757-15
Judge: Jerome C. Murphy
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SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEROME C. MURPHY,
Justice.

EDWARD J. FORD,

Plaintiff,

- against -

NORTH HILLS COUNTRY CLUB, INC.,

Defendant.

TRIAL/IAS PART 22
Index No.: 600757-15
Motion Date: 9/11/15
Sequence No.: 001

DECISION AND ORDER

MG
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The following papers were read on this motion:

Motion to Dismiss Complaint with Exhibits..... 1
Memorandum of Law in Support of Motion..... 2
Affirmation in Opposition and Exhibits..... 3
Reply Affirmation..... 4

PRELIMINARY STATEMENT

Defendant moves for dismissal of the Complaint pursuant to CPLR § 3211(a)(1) on the ground that the defense is based on documentary evidence; and pursuant to CPLR §§ 3016(a) and 3211(a)(7) on the grounds that the Complaint fails to state a cause of action upon which relief may be granted and that plaintiff has failed to plead his claims with sufficient particularity.

BACKGROUND

Plaintiff commenced this action seeking compensatory and punitive damages for alleged defamation per se by defendant against plaintiff. The Complaint alleges that plaintiff has been a member of North Hills Country Club since 1958. Plaintiff Edward J. Ford ("Ford") alleges that on August 6, 2014, while socializing in the clubhouse, he felt discomfort in his chest, and asked members present if anyone had aspirin. A fellow member, John DeVivo, said he knew where to locate aspirin, and retrieved aspirin for Ford.

Two days later, on August 8, 2014, Ford alleges that the General Manager, published an e-mail on behalf of the Board of Governors, and forwarded it to numerous members and former

members of the club, accusing Ford of vandalizing property (Exh. "B" to Motion), stating specifically as follows:

> On Wednesday, August 6, 2014 at approximately 9:20 PM you were observed vandalizing the Locker Room Attendants Room in the Men's Locker Room. This behavior is not acceptable, and as such, in accordance with our By-Laws, Article IV, Section 8, you will be required to appear before the Board of Governors on Wednesday, August 20, 2014 at 5:00 PM. At that meeting, you will have the opportunity to speak on your own behalf. Whether or not you choose to attend, the Board of Governors will determine what disciplinary action to take.
>
> In the interim, and under the same provision of the By-Laws, the Executive Committee of the Board of Governors has elected to impose an immediate suspension commencing Sunday, August 10, 2014. During your suspension, you will not be permitted to use the Club in any capacity, including your presence at the Club facility, until the Board of Governors hearing.

Ford alleges that the foregoing statement about him is false; was knowingly made in bad faith; was published without authorization or privilege; was intended to impute plaintiff's unfitness to engage in his professional activities as a legal videographer; was intended to malign plaintiff's personal and professional reputation as a professional legal videographer; was intended to expose plaintiff to public contempt, ridicule, aversion, disgrace and/or to induce an evil opinion of Plaintiff in the minds of right-thinking persons and deprive plaintiff of his friendly intercourse in society; intended to harm plaintiff's business as it related to his legal videography; and publicly accused plaintiff of criminal activity.

Plaintiff alleges three causes of action: defamation under the common law of New York; defamation per se; and intentional interference with business relations.

Defendant moves to dismiss the complaint on the ground that the attachment to the email in question is directed to Mr. DeVivo, and does not accuse plaintiff of vandalizing the Attendant's Room. The e-mail itself, to which the letter was attached, reads as follows: "Gentlemen, attached is the letter to be sent to Mr. DeVivo and Mr. Ford. Please review and comment. Time is of the essence, as this letter must be sent immediately. Thank you, Michael Bomengo."

Defendant also contends that the complaint fails to properly plead any of the required elements to set forth a claim in defamation, defamation per se, or intentional interference with

business relations. Plaintiff, they contend, has failed to allege special damages, failed to assert facts accusing him of committing a serious crime, or tending to injure him in his trade, business or profession. As to the third cause of action, plaintiff has allegedly failed to state a valid claim for intentional interference with contractual relationships, in that he has failed to identify any third-party with whom he had a business relationship which was damaged by defendant's conduct.

Plaintiff submits an Affirmation, as opposed to an Affidavit, in opposition to the Motion. CPLR § 2106(a) authorizes an attorney, who is not a party to an action, to submit a subscribed and affirmed document in lieu of and with the same force and effect as an affidavit. Mr. Ford is the plaintiff in the action, and the Affirmation in lieu of an Affidavit is therefore not authorized.

Nevertheless, in his opposition, plaintiff asserts by Affidavit (although labeled Affirmation) that the attached letter to the e-mail in question was also addressed to and sent to him, including the same language as the letter to Mr. DiVivo, and that he was immediately suspended from membership in North Hills Country Club. He does not provide a copy of this letter. He also submits an affidavit from Scott Raffa, a member of the club, who received the subject e-mail, which he, and other members of the club, interpreted as meaning that both Mr. DiVivo and Mr. Ford were accused of vandalizing the locker room.

Plaintiff also asserts that the email and attachment accuse him of vandalism, which constitutes a felony if the damage exceeds $250.00, citing Penal Law § 145, and therefore constitutes libel per se. As a consequence, he claims that he is not required to allege special damages. Nevertheless, plaintiff annexes to his Affirmation a copy of a Supplemental Summons and Amended Complaint, in which he specifies special damages. Plaintiff also agreed to discontinue the Third Cause of Action for interference with business relations.

Defendant replies to plaintiff's opposition, in which they reiterate that the document upon which plaintiff relies does not accuse him, as opposed to Mr. DiVivo, of vandalizing the locker room. They also contend that plaintiff has failed to alleged special damages, failed to explain how this e-mail harmed him in his business or profession, and failed to state a cause of action for interference with a business relationship.

DISCUSSION

CPLR § 3211 (a)(1) provides as follows:

> (a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against

him on the ground that:

1. a defense is founded upon documentary evidence.

In order to succeed in a claim based upon documentary evidence, " . . . the defendant must establish that the documentary evidence which form the basis of the defense be such that it resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim" (*Symbol Technologies, Inc. v. Deloitte & Touche, LLP,* 69 A.D.3d 191, 194 [2d Dept. 2009]); (*DiGiacomo v. Levine,* 2010 WL 3583424 (N.Y.A.D. 2d Dept.]).

While plaintiff has attached only the letter addressed to DiVivo, this does not resolve all factual questions as a matter of law. Plaintiff asserts that a letter containing the identical language was addressed and mailed to him, and the cover e-mail made it clear that the letter was to be mailed to both plaintiff and Mr. DiVivo. The name of plaintiff does not appear as a recipient of a courtesy copy of the letter addressed to DiVivo, and plaintiff has submitted an affidavit that he received the letter addressed to him, and was suspended for the period August 10, 2014 through September 30, 2014, as a result of the action referred to in the letter.

Defendant's motion to dismiss the complaint based upon a defense based on documentary evidence is denied.

Defendant also moves to dismiss the complaint for failure of plaintiff to comply with the particularity requirement of CPLR § 3016(a). That statute requires particularity in specific actions and provides in pertinent part as follows: "(a) Libel or slander. In an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally." Defendant attaches a copy of the Complaint as Exh. "A" to the motion. In ¶ 11, plaintiff quotes verbatim from the letter addressed to Mr. DiVivo, but stated in the e-mail cover to be sent to both DiVivo and Ford.

Plaintiff alleges that the e-mail with attached letter was sent to "numerous members and former members of the country club", and submits an affidavit from Scott Raffa, a member of the club, who states that he was a recipient of the letter, and that he understood it to mean that both DiVivo and Ford were being accused of vandalizing the locker room. Plaintiff has met the particularity requirement of CPLR § 3016(a), and has adequately identified the persons to whom the e-mail was sent.

The motion to dismiss based upon the failure of plaintiff to set forth with particularity the language complained of as constituting libel is denied.

Defendant also contends that plaintiff has failed to assert special damages, and opposes his application to amend the Complaint to do so. " The elements of a cause of action [to recover damages] 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. " (*Martino v. HV News, LLC,* 114 A.D.3d 913, 913-914 [2d Dept. 2014). A defamatory statement is libelous per se if it " ' 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.' " (*Matovic v. Times Beacon Record Newspapers,* 46 A.D.3d 636 [2d Dept. 2007], quoting from *Rinaldi v. Holt, Rinehart & Winston,* 42 N.Y.2d 369, 379 [1977]).

Slander as a rule is not actionable unless the plaintiff suffers special damage. Special damages contemplate " ' the loss of something having economic or pecuniary value.' " (*Liberman v. Gelstein,* 80 N.Y.2d 429, 434—435 [1992], quoting Restatement Second of Torts § 575). In the absence of special damages, slander claims are not sustainable unless they fall within one of four exceptions to the rule. These exceptions, constituting "slander per se", consist of statements (i) charging plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman (*Id.* at 435).

Plaintiff claims that the statement was slanderous per se, in that it charged him with criminal conduct. Not every imputation of criminal conduct, however, is slanderous per se. (*Id.*). As the Court in *Liberman* therefore noted, with the extension of criminal punishment to many minor offenses, it became necessary to differentiate between serious and relatively minor offenses, and only statements regarding the former are actionable without proof of damages. The Court points to the list of crimes contained in Comment g to § 571 of the Restatement, which delineates the types of crimes actionable as per se slander, as including murder, burglary, larceny, arson, rape, and kidnapping (*Id.*)

It is unclear what is meant by the term "vandalizing". It does not appear as a crime in the Penal Law. Penal Law §§ 145.00 et seq. sets fourth four degrees of criminal mischief. Criminal mischief in the Fourth Degree (§145.00), a Class A misdemeanor, involves intentional damage to the property of another. Criminal Mischief in the Third Degree (§145.05), a Class E felony, deals with intentional damage to the property of another in an amount exceeding $250.00, as well

as intentional damage to a motor vehicle. Criminal Mischief in the Second Degree (§ 145.10) deals with damage in excess of $1,500.00, and is a Class D Felony. Criminal Mischief in the First Degree (§145.12), is a Class B Felony involving damage to property by use of explosives.

The Merriam-Webster definition of "vandalize" is "to deliberately destroy or damage (property)." The Court is unwilling to presume that the term as contained in the e-mail necessarily imported damage in excess of $250.00, which would constitute an E felony. Even if the damage was in excess of $250.00, the Court would be hard-pressed to regard this as a "serious crime", in the category of those denominated in the Comment to the Restatement. The Court therefore concludes that the assertion as to "vandalizing" does not import a serious crime, is not slander per se, and is not actionable in the absence of special damages.

Without cross-moving for leave to amend the Complaint in accordance with CPLR § 3025, plaintiff appends a Supplemental Summons and Amended Complaint, in which he itemizes costs attendant to his membership in the country club for the period from August 8, 2014 through September 30, 2015, the period of his suspension, as constituting "special damages." These dues and fees were not caused by any action on the part of defendant. Rather, they are simply concomitant with his obligations as a member of the club. While he was precluded from utilizing the facilities of the club during the term of his suspension, he nevertheless remained a member, and was required to make the alleged payments.

More importantly, however, and seemingly not raised by either side, is the issue of qualified privilege. "A qualified privilege attaches to a communication made by a person with a legitimate interest in making or a duty to make the communication, and the communication is sent to a person with a corresponding interest or duty, even though, without the privilege, the communication would be defamatory." (14 N.Y.Prac., New York Law of Torts § 1:51; *Presler v. Domestic & Foreign Missionary Socy. Of the Prot. Episcopal Church in the United States of Am.*, 113 A.D.3d 409 [1st Dept. 2014]).

The subject communication in this case was generated by the General Manager of the North Hills Country Club, Michael Bomengo, and directed, apparently, to members of the Board of Governors, seeking their approval to forward the letters to Messrs. Ford and DiVivo. While the nature and extent of the vandalism is not set forth in the communication, it is clear that Mr. Bomengo had a duty to advise members of the governing board of the happening of the event, and make arrangements for a meeting in compliance with the By-Laws of the Club. As such, he

had a legitimate interest and a duty to make the communication to persons with a corresponding interest or duty, whether or not the language would otherwise be defamatory.

Defendant's motion to dismiss the Complaint is granted on the grounds that the communication was qualifiedly privileged.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
November 30, 2015

ENTER:

Jerome C Murphy

JEROME C. MURPHY
J.S.C.

ENTERED

DEC 02 2015

NASSAU COUNTY
COUNTY CLERK'S OFFICE