

Gottlieb v Colonel

2016 NY Slip Op 33085(U)

December 14, 2016

Supreme Court, Dutchess County

Docket Number: 50650/16

Judge: Maria G. Rosa

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
DUTCHESS COUNTY

Present:

Hon. MARIA G. ROSA

Justice.

KENNETH GOTTLIEB,

Plaintiff,

-against-

CHRISTINE A. COLONEL and MCGRATH
MANAGEMENT SERVICES, INC.,

Defendants.
_____x

DECISION AND ORDER

Index No: 50650/16

The following papers were read and considered on plaintiff's motion to dismiss.

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EXHIBITS A&B
MEMORANDUM OF LAW IN SUPPORT

AFFIRMATION IN OPPOSITION
SUPPLEMENTAL AFFIRMATION IN OPPOSITION
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AFFIRMATION IN REPLY
EXHIBIT A
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EXHIBITS A-E
MEMORANDUM OF LAW IN REPLY
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EXHIBIT A
SUPPLEMENTAL AFFIDAVIT
SUPPLEMENTAL MEMORANDUM OF LAW IN REPLY

This is a defamation action in which plaintiff seeks damages based on a written statement defendant Christine Colonel provided to a prosecutor stating that she saw the plaintiff walking a dog in the common area of a condominium complex without a muzzle. Defendants moved to dismiss pursuant to CPLR §3211 and for sanctions. The court noticed the parties that it intended to treat the motion as one for summary judgment pursuant to CPLR §3211(c). The parties made supplemental submissions and the motion is ripe for review.

The factual background of the action is not in dispute. The plaintiff is the owner of a condominium located in the Fishkill Woods Condominium Development. Defendant McGrath Management Services, Inc. is the managing agent of the complex and defendant Christine Colonel is the property manager responsible for overseeing its daily management. In 2014 plaintiff was charged with violations of Fishkill Town Code Section 58.7 and NYS Agricultural and Markets Law §123 stemming from an incident involving his two dogs Kieko and Omi. In an amended order dated August 8, 2014 the criminal action was adjourned in contemplation of dismissal subject to plaintiff keeping the dogs adequately restrained and muzzled while outside his residence, the payment of restitution for unreimbursed co-payments and obtaining American Kennel Club evaluations of the dogs. Less than one year later, plaintiff's dog attacked another homeowner in the condominium community resulting in multiple puncture wounds and scrapes requiring medical attention. Plaintiff was again charged with violating the Town of Fishkill Code and New York Agricultural and Markets Law. An amended order dated July 19, 2015 adjourned that action in contemplation of dismissal for a six month period and imposed a variety of conditions, including that all restrictions set forth in the August 8, 2014 order would apply for the remainder of plaintiff's dog Omi's life.

Defendant Colonel has submitted an affidavit stating that on August 13, 2015, she was performing a site inspection of the condominium complex when she saw plaintiff's wife walking one of plaintiff's two dogs across a common area without a muzzle. She subsequently observed plaintiff walking his other dog in the common area without a muzzle. She immediately contacted the Town of Fishkill Animal Control officer who instructed her to contact the town prosecutor. Colonel called the town prosecutor who told her to give to him a notarized written statement detailing her observations. Defendant forwarded a statement the next day recounting her observations of seeing both the plaintiff's wife and the plaintiff walking their dogs without muzzles. In this action, plaintiff alleges that Colonel's written statement to the town prosecutor was defamatory. He seeks 2 million dollars in compensatory damages and 6 million dollars in punitive damages.

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. Salvatore v. Kumar, 45 AD3d 560, 563 (2nd Dept. 2007). Statements made by "witnesses in the course of a judicial or quasi-judicial proceeding as absolutely privileged, notwithstanding the motive with which they are made, so long as they are material and pertinent to the issue to be resolved in the proceeding." Rufeh v. Schwartz, 50 AD3d 1002 (2nd Dept. 2008). Defendant Colonel's notarized statement submitted at the request of the town prosecutor in connection with the criminal proceeding pending against the plaintiff was privileged. The statement was both material and pertinent to whether plaintiff had

engaged in conduct that violated a condition of the pending action that had been adjourned in contemplation of dismissal. Plaintiff's affidavit submitted in opposition to the defendant's motion fails to raise a material issue of fact as to this privilege. His assertion that Colonel published the statement to other individuals other than the town prosecutor is entirely speculative. The court further rejects his claim that defamatory intent can be inferred because she did not specifically say in the statement that she observed his dogs Omi and Kieko. Such an omission does not as a matter of law give rise to an inference of malice. Her statement was privileged notwithstanding the motive and plaintiff does not deny that he or his wife were walking those two dogs in the vicinity of the condominium complex on August 13, 2015. The court further rejects plaintiff's claim that the criminal action was closed at the time Colonel made the written statement. A criminal action adjourned in contemplation of dismissal is not over. It is an adjournment of the action "with a view to ultimate dismissal of the accusatory instruments . . ." CPL §170.55. The action only matures to a dismissal if the case is not restored to the calendar upon application made within six months. *Id.* See Hollender v. Trump Village Coop., 58 NY2d 420 (1983).

Based upon the foregoing, it is hereby

ORDERED that defendants' motion for summary judgment dismissing the complaint is granted.

This court has the discretion to impose financial sanctions upon any party or attorney who engages in frivolous action. 22 NYCRR §130-1.1. Conduct is considered frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false. *Id.* In determining whether conduct is frivolous, the court must consider the circumstances under which the conduct took place.

The court is deeply troubled by plaintiff's filing of a defamation action based upon defendant Colonel's reporting to a town prosecutor her observations of conduct that she ostensibly believed was a clear violation of a court order in an open criminal proceeding. Colonel's affidavit establishes that she was well aware of the history of dog attacks and incidents with plaintiff's dogs and had knowledge of the criminal court proceedings against him for such conduct. In light of this history, her providing information about an alleged violation of the terms of the Justice Court order was clearly privileged. The filing of a defamation action on such facts was completely without merit in law. The record also contains evidence that plaintiff filed a similar defamation action that was dismissed by this court (Sproat, J.) pursuant to CPLR 3211. In light of that proceeding and the filing of this baseless action, it is reasonable to conclude that the plaintiff has undertaken to harass and/or deter defendants or any other individuals in the condominium complex from reporting future violations of the Justice Court order. Having considered the contentions of the parties and plaintiff having been awarded a reasonable opportunity to be heard, based on the foregoing it is hereby

ORDERED that defendants motion for sanctions pursuant to 22 NYCRR §130-1.1. is

granted. Plaintiff shall pay defendants' reasonable attorney's fees incurred in defending the action and costs per CPLR Article 81. Defendants shall submit on notice an affirmation of such fees on or before January 13, 2017. Plaintiff's counsel shall pay \$500 in sanctions to the Lawyers' Fund for Client Protection per 22 NYCRR §130-1.3 on or before January 13, 2017. Proof of payment shall be sent directly to chambers on or before January 20, 2017.

This constitutes the decision and order of this court.

Dated: December 14, 2016
Poughkeepsie, New York

ENTER:



MARIA G. ROSA, J.S.C.

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Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.