Hakim v James
2018 NY Slip Op 30839(U)
May 3, 2018
Supreme Court, New York County
Docket Number: 160687/16
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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KAMRAN HAKIM, 1205-1215 FIRST AVENUE ASSOCIATES LLC, and ELLIANA 27 E 92nd LLC

Plaintiff,

–against–

LETITIA JAMES IN HER OFFICIAL CAPACITY AS THE PUBLIC ADVOCATE, THE OFFICE OF THE PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, and THE CITY OF NEW YORK,

Defendants.

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Index No. 160687/16
Motion Seq. Nos. 002 and 003

DECISION AND ORDER

CAROL R. EDMEAD, J.S.C.:

In this action relating to a list published by the City of New York's Public Advocate compiling the owners of multiple dwelling buildings with the most citations issued against them, defendant the City of New York (the City) moves, pursuant to CPLR 3211 (a) (7), to dismiss the complaint as against it (motion seq. No. 002). Additionally, the Public Advocate, Letitia James (James or the Public Advocate), who was sued here in her official capacity, also moves to dismiss the complaint as against her (motion seq. No. 003). The motions are consolidated for disposition.

BACKGROUND

The Public Advocate publishes an annual list on the City's official website, NYC.gov, entitled "100 Worst Landlords in New York City" (the Watchlist).[1] The Watchlist describes itself as:

> "...an informational-sharing tool intended to allow residents, advocates, public officials, and other concerned individuals to identify which property owners consistently flout the City's laws intended to protect the rights and safety of tenants."

[1] *See* http://advocate.nyc.gov/landlord-watchlist/worst-landlords and http://landlordwatchlist.com.

("About the Watchlist," https://advocate.nyc.gov/landlord-watchlist/criteria).

Landlords, according to the City, are ranked according to the number of violations issued to their buildings by the Department of Housing Preservation and Development (HPD) and the Department of Buildings (DOB), as well as information from the City's Department of Finance (DOF) which "identifies buildings for which unpaid municipal debt was sold through the City's annual tax lien sale in either 2016 or 2017" (*id.*). In a section entitled, "Identifying the 'Worst' Landlords," the website states:

> "To qualify for inclusion on the Watchlist, a landlord must own one or more buildings that meet the Watchlist selection criteria, which is a minimum threshold of the number of open violations per unit. Individual buildings that meet the selection criteria are grouped according to the name of the 'head officer' or 'individual owner' of that building, as registered with HPD, and the name of the head officer' or 'individual owner' of that building, as registered with HPD, and the name of the head officer or individual owner is considered that building's landlord. Landlords are then ranked according to the total number of open violations at all of their buildings that met the building selection criteria. The 100 landlords with the most open HPD violations for the twelve months between 2016 and October 2017 are considered the '100 Worst Landlords in New York City'"
>
> (*Id.*).

The website has a "methodology" section that offers a more detailed explanation of how landlords are selected for the Watchlist.[2] The website also has a "Legal Disclaimer" that provides: "Data for the Public Advocate's Worst Landlord Watchlist is obtained from open data sources from (HPD) and (DOB), as well as (DOF). These agencies are solely responsible for its accuracy."

Plaintiffs are a landlord who appeared on the list, Kamran Hakim (Hakim), and two limited liability companies controlled by Hakim, 1205-1215 First Avenue Associates LLC (First Avenue), and Elliana 27 E 92nd LLC (Elliana). Plaintiffs sent a letter to James's office dated

[2] *See* https://advocate.nyc.gov/methodology.

July 5, 2016. The letter argued that Hakim should not have been placed on the 2015 list because two of the buildings included in the calculations, while listed as multiple dwellings, were actually vacant. The letter asked that plaintiffs be removed from the Watchlist and that a retraction be issued. Following the letter, plaintiffs' lawyers had a meeting with the Public Advocate. However, the meeting did not resolve the dispute and Hakim once again appeared on the 2016 list.

Plaintiffs initiated this action by filing a summons with notice on December 20, 2016. Plaintiffs subsequently filed a complaint and an amended complaint. The amended complaint, filed on January 31, 2018, alleges that James's actions were *ultra vires*, as her actions exceeded the powers conferred to the Public Advocate by the City Charter. Plaintiffs bring five causes of action: (1) for an injunction preventing defendants from publishing the Watchlist, placing plaintiffs on future Watchlists, and requiring defendants to remove plaintiffs from prior lists or taking reasonable steps to cease publications of those lists; (2) for $15,000,000 in actual and punitive damages for libel; (3) for 15,000,000 in actual and punitive damages for *prima facie* tort; (4) for 15,000,000 in actual and punitive damages for deprivation of due process; (5) for an order of mandamus, requiring defendants to remove plaintiffs from all iterations of the Watchlist, and preventing them from identifying plaintiffs as one of the City's "worst landlords." [3]

By a decision dated March 13, 2017 (March 2017 decision), this court denied plaintiffs' application for a preliminary injunction enjoining defendants from publishing its list of "100 Worst Landlords in York City." The court found that plaintiffs substantive claims did not have likelihood of success (March 2017 decision at 10-17). Both the City and James now move to dismiss the complaint, under CPLR 3211 (a) (7), for failure to state a cause of action.

[3] Plaintiffs also seek incidental damages on their mandamus cause of action.

DISCUSSION

In determining a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), the Court's role is deciding "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 a motion for dismissal will fail" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 968 NYS2d 459 [1st Dept 2013]). On a motion to dismiss made pursuant to CPLR § 3211, 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 into any cognizable legal theory" (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, *supra; Nonnon v City of New York*, 9 NY3d 825 [2007]). However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not" presumed to be true or accorded every favorable inference (*David v Hack,* 97 AD3d 437, 948 NYS2d 583 [1st Dept 2012]), and, in such circumstances, the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]).

Libel

Defamation and libel involve "the making of a false statement which 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 intercourse in society" (*Foster v Churchill*, 87 NY2d 744, 751 [1996] [internal quotation marks and citation omitted]). "The elements are a false statement, published without privileged or authorization to a third party,

constituting fault as judged by, at minimum, a negligence standard, and it must either cause special harm or constitute defamation *per se*" (*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]). As falsity is a necessary element in a libel claim, "it follows that only statements alleging facts can properly be the subject of a defamation action" (*600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d 130, 139 [1992]). Conversely, libel claims may not be based on "assertions of opinion" (*Sandals Resorts Intl. Ltd. v Google, Inc.*, 86 AD3d 32, 38 [1st Dept 2011]).

Context, of course, is critical in defamation cases. For example, New York affords an immunity against liability in defamation for expressions uttered or written pursuant to "official participation in the processes of government" (*Park Knoll Assoc. v Schmidt*, 59 NY2d 205, 209 [1983]). Courts refer to this immunity as an "[a]bsolute privilege" (*id.*). The Court of Appeals noted that this privilege arises out of a kind of interest-balancing: "the perceived social benefit in encouraging free speech or the discharge of governmental responsibility sometimes outweighs the individual's underlying right to a good reputation" (*id.* at 208). Thus, "the individual's right may have to yield to a privilege granted the speaker barring recovery of damages for ... defamatory statements" (*id.*). In discussing this immunity in the context of judicial proceedings, the Court of Appeals, stressing the importance of context, noted that "[t]he immunity does not attach solely because the speaker is a Judge, attorney, party or a witness, but because the statements are, in the words of Lord Mansfield, 'spoken in office'" (*id.* at 209 [internal citation omitted]).

The City and James argue that they have not published any false statements about defendants and that, even if they had, they are entitled to absolute immunity. As to the first issue, the City argues that the statement that the plaintiffs are among the "100 Worst Landlords" in the five boroughs is a non-actionable expression of opinion, rather than an assertion of fact.

The Court of Appeals has acknowledged that "[d]istinguishing between assertions of fact and nonactionable expressions of opinion has often proved a difficult task" (*Brian v Richardson*, 87 NY2d 46, 51 [1995]). In finding a path between the two, the Court of Appeals has been guided by the principle that the state's constitution offers broader speech protections than the United States Constitution (*see Immuno AG. v Moor-Jankowski*, 77 NY2d 235, 248-249 [1991]). Accordingly, "the standard in this state for distinguishing protected expressions of opinion from actionable assertions of fact" (*Sandals Resorts*, 86 AD3d at 40) is:

> "A pure opinion is a statement of opinion which is accompanied by a recitation of the facts upon which it is based. An opinion not accompanied by such a factual recitation, may, nevertheless, be pure opinion if it does not imply that it is based upon undisclosed facts. When, however, the statement of opinion implies that is based upon facts which justify the opinion but are unknown to those reading or hearing it, it is a mixed opinion and is actionable. The actionable element of a mixed opinion is not the false opinion itself—it is the implication that the speaker knows certain facts, unknown to his audience, which supports his opinion and are detrimental to the person about whom he is speaking"

(*id.*, *quoting Steinhilber v Alphonse*, 68 NY2d 283, 289-290 [1986] [internal quotation marks and citation omitted]).

Here, the assertion that plaintiffs are among the "100 Worst Landlords" in the City is clearly the first category: "a statement of opinion which is accompanied by a recitation of facts upon which is based." Thus, it is pure opinion and not actionable.

Plaintiffs, in opposition, quibble with the methodology used by the City to produce its ultimate conclusion of inclusion. "[T]here is," plaintiffs argue in opposition, "simply no connection between the number of violations on a building (including those violations placed on two vacant buildings) and labeling the building's landlord the 'worst'" (Memo of Law in Opp to the City at 5). This argument – that defendants took accurate factual data, and applied it in a way

that produced an incorrect opinion – simply does not bring the Watchlist within the ambit of actionable libel.

Thus, as there is no false factual statement, the court does not reach the question of whether defendants are entitled to an absolute privilege for words "spoken in office." As the statements in question here are pure opinion under New York law, plaintiffs' cause of action for libel must be dismissed.

***Prima Facie* Tort**

A cause of action for *prima facie* tort requires a showing of: "(1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful (*Freihofer v Hearst Corp.*, 65 NY2d 135, 142-143 [1985]). With respect to the third requirement, that the defendant acted without excuse of justification, courts have held that plaintiffs must show that defendants acted "solely out of disinterested malevolence" (*Bainton v Baran*, 287 AD2d 317, 318 [1st Dept 2001] [holding that the admission that plaintiff acted, at least partly, in self-interest was "fatal to this cause of action]).

The City and James each argue that plaintiffs' claim for *prima facie* tort must be dismissed as plaintiffs cannot show that malevolence was the sole purpose of publishing the list. Defendants argue that the true and plain purpose of the list is to provide information that will be of value to the public. In opposition, plaintiffs argue that, as James stated in an interview that she intended to "shame" landlords on the Watchlist, there is "some level of malevolence directed towards landlords" (Memo of law in Opp to James at 7 [emphasis in original]).

Some malevolence, mixed with other motives, is simply not enough to sustain a cause of action for *prima facie* tort. Here, the City and James plainly intended to shame the landlords on

the list into improving the conditions of their buildings and thus providing a benefit to the public. Accordingly, as plaintiffs can only allege malevolence mixed with other motives, their cause of action for *prima facie* tort must be dismissed. Moreover, James argues that plaintiffs fail to allege special damages, the second requirement. Plaintiffs do not respond to this argument in opposition. The lack of special damages provides an alternative basis for dismissing this cause of action.

Due Process

Plaintiffs fourth cause of action, styled as "deprivation of due process," claims that subsection 24 (l) of the City Charter outlines the process owed to them (*see* amended complaint, ¶¶ 311-312). The subsection provides:

> "Before making public any portion of any draft, preliminary or final report relating to the operations or activities of a city officer or agency, the Public Advocate shall send a copy of the draft report to any such officer, and to the head of any agency, discussed in such report and provide the officer and agency, in writing, with a reasonable deadline for their review and response. The Public Advocate shall include in any report, or portion thereof, which is made public a copy of all such officer and agency responses."

Defendants argue that this provision does not grant any process rights to plaintiffs, but instead to city officers or agencies about whom the Public Advocate issues a report. While the amended complaint states that "[t]he due process that should be afforded to those on the Watchlist … is outlined in the City Charter," plaintiffs, in opposition, shuffle off reliance on the City Charter, stating that they are not basing their due process claim on it. Instead, plaintiffs contend that the claim is based on the Due process clause of the New York Constitution as well as the Due Process clause of the federal constitution.

The bar for stating such a cause of action is high:

> "[D]efamation alone, even by a government entity, does not constitute a deprivation of a liberty interest protected by the Due Process Clause. Some

> 'stigma plus' must be shown before mere defamation will rise to the level of a constitutional deprivation .... [I]n the context of defamation involving a government employee, defamation ... is not a deprivation of a liberty interest unless it occurs in the course of dismissal or refusal to rehire the individual as a government employee or during the termination or alteration of some other legal right or status"

(*Matter of Casale v Metropolitan Transp. Auth*, 47 AD3d 519, 520 [1st Dept 2008] [internal quotation marks and citation omitted];.*see also Knox v New York City Dept of Educ.*, 85 AD3D 439 [1st Dept 2011] [holding, in an Article 78 proceeding, that petitioner was entitled to a name-clearing hearing to dispute claims that could "significantly impair her ability to gain employment" in her chosen field, *e.g.*, that she had falsely reported days worked]).

In *Swinton v Safir*, the Court of Appeals held that the petitioner established "stigma-plus" by showing that the allegedly defamatory expressions led to his loss of employment (93 NY2d 758, 764 [1999]). *Swinton*, like *Knox,* involved a petitioner seeking not monetary damages, but name-clearing hearing, "[t]he sole purpose" of which "is to afford the employee an opportunity to prove that the stigmatizing material in [a] personnel file is false" (*id.* at 763 n 1).

Plaintiffs argue that they show stigma-plus, especially since they offered defendants proof that some of the tickets issued to them were issued in reference to vacant buildings. This is not stigma-plus. In *Swinton* and *Knox*, the stigma-plus finding hinged on the allegedly defamatory material threatened to "foreclose future job opportunities" for the petitioners. There is no such threat here. Plaintiffs do not argue that the Watchlist has somehow prevented Hakim from finding employment. The other plaintiffs are business entities and there is no allegation that their existence is threatened by inclusion on the Watchlist.

As discussed above, plaintiffs do not state a cause of action for defamation alone. Even if they had cleared this first hurdle, they fail to allege facts amounting to stigma-plus. Accordingly, as plaintiffs do not state a cause of action for deprivation of a liberty interest under the Due

Process clause of either the United States or the New York Constitution, the fourth cause of action for deprivation of due process must be dismissed.

Mandamus

The fifth cause of action seeks mandamus against defendants, requiring them to: (1) remove plaintiffs from the current Watchlist; (2) remove plaintiffs the 2016 Watchlist; and (3) prohibit defendants from identifying and labelling plaintiffs as being among the "worst landlords" in the City. While mandamus is typically a relief sought through an Article 78 proceeding, rather than a plenary proceeding such as this one, plaintiffs describe their action as a "hybrid." In any event, mandamus is not appropriate in these circumstances.

"It is hornbook law that a mandamus to compel may not force the performance of a discretionary act, but rather only purely ministerial acts to which a clear legal right exists" (*Matter of Anonymous v Commissioner of Health*, 21 AD3d 841 [1st Dept 2005]). Pursuant to CPLR 7803 (1), a petitioner "must have a clear legal right to the relief demanded and there must be a corresponding nondiscretionary duty on the part of the administrative agency to grant that relief" (*Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 757 [1991]).

These requirements put plaintiffs in the unenviable position of having to show that defendants have a nondiscretionary duty not to publish the Watchlist, while plaintiffs themselves have a clear legal right not to appear on such lists. No such corresponding duty and right exist.

Plaintiffs argue that the City Charter, by not specifically enumerating the right to create the Watchlist, places a duty on defendants not to do so. This is not the case. As discussed in the March 2017 decision, the publishing of the Watchlist, while not an enumerated duty of the Public Advocate, is within the discretionary ambit of the office (*see* the March 2017 decision at

15). That is, under section 1061 of the City Charter, the Public Advocate is tasked with chairing Commission on public information and communication, whose duty it is to educate the public about the availability and usefulness of information maintained by City agencies. As the Watchlist aims to synthesize information compiled by various City agencies and put it in a form that is useful to the public, compiling the list is not beyond the scope of the powers and duties granted to Public Advocate under the City Charter. Thus, as plaintiffs cannot show a clear corresponding duty and right, as required by *Matter of Scherbyn*, the fifth cause of action for mandamus must be denied.

Plaintiffs contend that the First Department's recent decision in *Matter of James v City of New York* supports a different result (154 AD3d 424 [1st Dept 2017]). *James*, however, supports dismissal of the application for mandamus, as it reiterates that mandamus is an "extraordinary remedy" not available for the discretionary acts of governmental agencies (*id.* at 425). In *James*, the Public Advocate brought an Article 78 proceeding seeking mandamus against the Department of Education (DOE) and its chancellor, requiring them to provide air conditioning on buses used to bring disabled children to the City's District 75 schools (*James v City of New York*, 53 Misc3d 821, 822 [NY Sup Ct, Schlesinger, J. 2016]). The First Department found that the Public Advocate did not have a clear right under the City Charter to compel the DOE to provide air conditioning on school buses, and accordingly held that the Public Advocate had no standing to seek mandamus against the DOE and its chancellor (*id.* at 424-425). This does not support the proposition that the Public Advocate did not have the discretionary power to compile and publish the Watchlist.

Injunctive Relief

In the first cause of action for injunctive relief, plaintiffs seek, essentially, the same relief they seek in the fifth cause of action for mandamus. The cause of action is equally defective under a different name.

An application for an injunction must fail when it is not supported by substantive cause of action:

> "injunctive relief is simply not available when the plaintiff does not have any remaining substantive cause of action against those defendants. An injunction is a remedy, a form of relief that may be granted against a defendant when its proponent establishes the merits of its substantive cause of action against that defendant. Although it is permissible to plead a cause of action for a permanent injunction, . . . permanent injunctive relief is, at its core, a remedy that is dependent on the merits of the substantive claims asserted"

(*Weinreb v 37 Apts. Corp.*, 97 AD3d 54, 58-59 [1st Dept 2012]).

Here, as the court is dismissing plaintiffs' substantive causes of action, the cause of action for an injunction must, as a corollary, also be dismissed.

CONCLUSION

Accordingly, it is

ORDERED that the motions of defendants the City of New York (motion seq. No. 002) and Letitia James (motion seq. No. 003) to dismiss the complaint are granted; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and is it further

ORDERED that counsel for defendant the City of New York shall serve a copy of this order along with notice of entry within 10 days of entry.

Dated: May 3, 2018

ENTER:

Hon. Carol Robinson Edmead, JSC