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SHORT FORM ORDER

INDEX No. 31111/2011
CAL No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 12-5-12
SUBMIT DATE 7-19-18
Mot. Seq. # 04 - MD
X-Mot. Seq. # 05 - MG
Mot. Seq. # 06 - MG
X-Mot. Seq. # 07 - MD

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MICHAEL GUERIN,

Plaintiff,

- against -

DEBOIS SMITH, DOROTHY BORDEN, NICOLE CUMMINGS, ANTHONY GUARDINO and FARRELL FRITZ, P.C.,

Defendants.

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Upon the following papers numbered 1 to 59 read on these motions for summary judgment, to dismiss and to amend ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16 (#04) & 47 - 51 (#06) ; Notice of Cross Motion and supporting papers 23 - 28 (#05) & 52 - 55 (#07) ; Answering Affidavits and supporting papers 17 - 21 & 21 - 22 (#04) & 29 - 30 & 31 - 38 (#05) & 56 - 57 & 58 - 59 (#07) ; Replying Affidavits and supporting papers 39 - 46 (#05) ; ~~Other ;~~ ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

The plaintiff moves for an order pursuant to CPLR 3212 granting summary judgment against defendants Anthony Guardino, Farrell Fritz, P.C., and Debois Smith. Defendants Guardino and Farrell Fritz cross move for an order granting summary judgment and dismissing the complaint. The plaintiff separately moves for an order directing that the action be discontinued as against defendant Dubois Smith, who died during the pendency of this action. Defendants Guardino and Farrell Fritz cross move for an order granting leave to file an Amended Answer and Cross Claims.

Defendants Dubois Smith and Dorothy Borden are the owners of a parcel of land located at 8 Northfield Lane, Nissequogue, New York. Defendant Nicole Cummings is the tenant on this property. The property consists of over five acres of land and a number of buildings. On June 16, 2010, defendants Smith and Borden applied to the Planning Board of the Village of Nissequogue to subdivide this premises into two lots. Defendant Farrell Fritz, P.C. was hired by defendants Smith and Borden to

represent them with respect to the subdivision application. Defendants were subsequently notified that they would first need certain variances from zoning laws before any subdivision could occur. An application was thereafter made by defendants Smith and Borden to the Board of Appeals of the Village of Nissequogue and on March 21, 2011, a public hearing was held on their application. By a decision dated April 4, 2011, the Board granted defendants' application for subdivision approval.

On May 3, 2011, plaintiff, the owner of an adjoining parcel of property, commenced an Article 78 proceeding against the individuals constituting the Board of Appeals seeking to set aside the Board's determination to grant subdivision approval upon the grounds that their decision was arbitrary, capricious, illegal and not supported by any evidence in the record. According to the papers before the Court, plaintiff was successful in his Article 78 proceeding and the determination of the Board of Appeals approving the subdivision was set aside. Defendants Smith and Borden thereafter filed another request for subdivision approval with the Village Planning Department. On October 5, 2011, counsel for plaintiff received a letter from defendant Anthony Guardino, an attorney in the office of defendant Farrell Fritz, P.C. in which Guardino advised counsel that defendants Smith and Borden had been made aware that their tenant on the property that they were seeking to subdivide, defendant Nicole Cummings, had filed a complaint with the Nissequogue Police Department, regarding plaintiff's videotaping of defendant Cummings' activities while she was on the leased property. In that letter, counsel was advised that Cummings observed that the video camera was directed at her bathroom window while she was showering. In his letter, defendant Guardino cautioned that defendant Cummings had a reasonable expectation of privacy in certain areas, such as her bathroom, and that videotaping her in that room constituted an illegal trespass. Guardino further advised counsel for plaintiff that videotaping for voyeuristic or other improper purposes was a Class D felony under New York law. Guardino asked, in the interest of common courtesy and decency, to stop the videotaping.

In response to this letter, plaintiff commenced the within action, on October 24, 2011, seeking recovery for defamation, based upon the allegation that plaintiff engaged in criminal activity by videotaping defendant Cummings. Plaintiff contends in his complaint that defendants' intent was to defame him before members of the Nissequogue Planning Board in order to discredit plaintiff's opposition to the application to subdivide the property of defendants Smith and Borden. Thereafter defendant Dubois Smith died and the action was stayed.

Motion to Discontinue as against Dubois Smith

The Court, in its discretion, has the authority to grant or deny an application to discontinue an action made pursuant to CPLR 3217 (b) (***Tucker v Tucker***, 55 NY2d 378, 449 NYS2d 683 [1982]). In the absence of special circumstances, such as prejudice to the substantial rights of other parties to the action, a motion for a voluntary discontinuance should be granted (*see* ***Burnham Serv. Corp. v National Council on Compensation Ins.***, 288 AD2d 31, 32, 732 NYS2d 223 [1st Dept 2001]; ***Citibank v Nagrotsky***, 239 AD2d 456, 457, 658 NYS2d 966 [2d Dept 1997]; ***County of Westchester v Welton Becket Assocs.***, 102 AD2d 34, 478 NYS2d 305 [1984], *affd* 66 NY2d 642, 495 NYS2d 364).

The Court has reviewed the motion and opposition filed by the defendants. The defendants have failed to demonstrate how a 'substantial right" will be prejudiced by the discontinuance as against Dubois

Smith. Therefore, the motion to discontinue the claims of the plaintiff as against defendant Dubois Smith is granted and the mandatory stay is lifted.

Motion to for Summary Judgment by Guardino & Farrell Fritz

CPLR §3212(b) states that a motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (***Olan v. Farrell Lines, Inc.***, 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985); ***Spearman v. Times Square Stores Corp.***, 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller, ***New York Civil Practice*** Sec. 3212.09)).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" CPLR3212 [b]; ***Gilbert Frank Corp. v Federal Insurance Co.,*** 70 NY2d 966, 525 NYS2d 793, 520 NE2d 512 [1988]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). Furthermore, the evidence submitted in connection with a motion for summary judgment should be viewed in the light most favorable to the party opposing the motion (***Robinson v Strong Memorial Hospital,*** 98 AD2d 976, 470 NYS2d 239 [4th Dept 1983]).

On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue (*see* ***S.J. Capelin Associates v Globe Mfg. Corp.,*** 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [1974]). However, the court must also determine whether the factual issues presented are genuine or unsubstantiated (***Prunty v Keltie's Bum Steer,*** 163 AD2d 595, 559 NYS2d 354 [2d Dept 1990]). If the issue claimed to exist is not genuine but is feigned and there is nothing to be tried, then summary judgment should be granted (***Prunty v Keltie's Bum Steer,*** *supra*, citing ***Glick & Dolleck v Tri-Pac Export Corp.,*** 22 NY2d 439, 293 NYS2d 93, 239 NE2d 725 [1968]; ***Columbus Trust Co. v Campolo,*** 110 AD2d 616, 487 NYS2d 105 [2d Dept 1985], *affd*, 66 NY2d 701, 496 NYS2d 425, 487 NE2d 282).

The Court in ***Fedrizzi v Washingtonville Cent. Sch. Dist.***, 204 AD2d 267, 268 [2nd Dept 1994], held that

> A necessary element to the success of a libel or slander cause of action is publication of the offending statements to a third person (see, e.g., ***Church of***

> ***Scientology***, 354 F. Supp 800, 803; ***McGill v Parker***, 179 AD2d 98, 106, 582 N.Y.S.2d 91). Words are "published" within the meaning of the law of libel when they are in writing and are read by someone other than the person libeled and the person making the charges. Similarly, to constitute actionable slander, the slanderous words must have been spoken in the presence and hearing of some person other than the one slandered, who is not entitled to hear the defamatory matter (see, ***Fulton v Ingalls***, 165 App Div 323, 151 N.Y.S. 130, affd 214 NY 665, 108 N.E. 1094; 44 NY Jur 2d, Defamation and Privacy § 46, at 10-11). Absent some communication to a third person, no damage, either actual or presumed, can result (see, ***Youmans v Smith***, 153 NY 214, 47 N.E. 265).

In ***Toker v Pollak***, 44 NY2d 211, 219 [1978], the Court held that

> communications protected by a qualified privilege do not provide the communicant with an immunity against the imposition of liability in a defamation action. A qualified privilege does, however, negate any presumption of implied malice flowing from a defamatory statement, and places the burden of proof on this issue upon the plaintiff. (***Lovell Co. v Houghton***, 116 NY 520, 525; ***Doyle v Clauss***, 190 App Div 838, 842.) A communication is said to be qualifiedly privileged where it "is fairly made by a person in the discharge of some public or private duty, legal or moral, or in the conduct of his own affairs, in a matter where his interest is concerned." (***Lovell Co. v Houghton***, 116 NY, at p 526, supra.) The interest championed by the communicant, viewed as constituting a somewhat lesser degree of importance than those interests vindicated in communications afforded absolute immunity, must be expressed "in a reasonable manner and for a proper purpose." (Prosser, Torts [4th ed], § 115, p 786.)

In ***Simons v Katz***, 257 AD2d 402, 403 [1st Dept 1999], the Court held that

> as defendant made the statement in furtherance of her representation of her client and therefore enjoyed a qualified privilege (see, ***Toker v Pollak***, 44 NY2d 211, 219), and plaintiff failed to raise an issue of fact as to malice (see, ***Liberman v Gelstein***, 80 NY2d 429, 437-439), summary judgment dismissing the complaint was properly granted.

The letter in question was written in furtherance of defendants Guardino and Farrell Fritz's representation of defendant Smith and Borden and therefore is subject to a qualified privilege and not libel per se. Defendants Guardino and Farrell Fritz have shown that the letter was written subsequent to a police report being made by the tenants on the property owned by Smith and Borden and was not done with a malicious intent. In addition the letter does not allege that the plaintiff was videotaping for voyeuristic purposes and committing a "Class D felony" bur rather indicates that "videotaping for voyeuristic or other improper purposes is a Class D felony under New York law."

The Court concludes that the moving defendants have submitted documentary evidence establishing their prima facie showing of entitlement to judgment as a matter of law. In opposition to this prima facie showing and viewing the evidence in the light most favorable to the plaintiff, he has failed to meet his burden of raising a triable issue of fact as to the defendants' malicious intent. Therefore the action is dismissed.

The remaining motions are denied as moot.

The foregoing constitutes the decision and Order of the Court.

Dated: September 10, 2018

HON. JOSEPH A. SANTORELLI
J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION