| **Savitt v Cantor** |
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| 2019 NY Slip Op 33380(U) |
| November 13, 2019 |
| Supreme Court, New York County |
| Docket Number: 653476/2018 |
| Judge: Andrew Borrok |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 53EFM

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EPHRAIM SAVITT, LEAH SAVITT,

Plaintiff,

- v -

MARK CANTOR, SUSAN SCHERNWETTER, ALEX HARRINGTON, KRISTEN GALUSHA-WILD, 165 WEST END AVENUE OWNERS CORP.

Defendant.

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**INDEX NO.** 653476/2018

**MOTION DATE** 11/07/2019

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57

were read on this motion to/for DISMISSAL.

This is a case about a New York City Co-op – *i.e.*, 165 West End Avenue Corporation (the **Co-op)** – involving the adoption of a new bylaw on March 1, 2018 (the **New Bylaw**) by the Board of Directors (the **Board**), the subsequent Co-op Board election, a speech (the **Speech**) given at a shareholder's meeting, and a June 3rd, 2018 email (the **June 3rd Email**) and June 6th, 2018 email (the **June 6th Email**; the June 3rd Email, together with the June 6th Email, collectively, the **Shareholder Emails**), both sent to the shareholders of the Co-op.

Leah Savitt, one of the plaintiffs in this case, complains that the New Bylaw was adopted to preclude her from running for re-election to the Board and that the Speech and the Shareholder Emails defamed her. Ephraim Savitt, the other named plaintiff and Ms. Savitt's husband, is another shareholder of the Co-op and a former President of the Co-op Board. Together, they

have brought this lawsuit derivatively claiming breach of fiduciary duty (the **First Cause of Action**). Individually, Ms. Savitt has brought this action directly against Mark Cantor, the President of the Co-op, alleging defamation in connection with the Speech (the **Second Cause of Action**), and Mr. Cantor, Susan Schernwetter, Alex Harrington, and Kristen Galusha-Wild (collectively, the **Defendants**), each of whom is a member of the Board, alleging defamation with respect to the June 3rd Email (the **Third Cause of Action**) and also with respect to the June 6th Email (the **Fourth Cause of Action**). The Defendants have moved to dismiss the complaint, arguing that the First Cause of Action must be dismissed as untimely and is otherwise without merit, and the Second Cause of Action, the Third Cause of Action, and the Fourth Cause of Action must be dismissed for failure to state a cause of action. For the reasons set forth below, the First Cause of Action and the Second Cause of Action are dismissed.

**THE RELEVANT FACTS AND CIRCUMSTANCES**

Beginning in June 2017, the Co-op Board began investigating a lobby renovation plan (Complaint, ¶ 40). Ms. Savitt, who was on the Board, opposed the plan because the prior renovation of the lobby, which had taken place when her husband was President of the Board, had occurred only 12 years ago and, in Ms. Savitt's opinion, there were more pressing projects, including renovations to the elevators which, according to an engineering consulting report, had 1-3 years left of functioning acceptably (*id.*, ¶¶ 40-47). It is undisputed that although the Co-op Board did some investigatory work regarding a potential lobby renovation, the Board did not move forward with any lobby renovation plan.

According to Ms. Savitt, the incidents that give rise to the instant lawsuit stem from her intention to run against Mr. Cantor for President of the Co-op Board. Ms. Savitt indicates that she sent emails to the shareholders indicating that the Co-op's finances were being mismanaged by the Defendants because, among other things, the Co-op had failed to pay its monthly maintenance fees to the Lincoln Towers Community Association (**LCTA**), leaving the Co-op with $237,900 in arrears (*id.*, ¶ 64). In response, the Defendants sent an email to shareholders explaining that the delinquency was the result of the LCTA's failure to send invoices to the Co-op's new management company, which was previously unaware of the maintenance obligation, and that the obligation had been paid without interest or penalty to the Co-op (*id.*, ¶ 74). For the avoidance of doubt, Ms. Savitt does not allege any monetary damages to the Co-op. At oral argument, Ms. Savitt indicates that the payables on the Co-op's books were higher than they normally would be but did not dispute that the cash balance or other assets were equally high to offset the pending payable which the Co-op paid without interest or penalty.

Subsequently, the Board enacted the New Bylaw at the March 1, 2018 meeting, which amended the bylaws of the Co-op by changing the "Code of Conduct and Ethics for Members of the Board of Directors of 165 West End Avenue Owners Corp" (the **Code of Ethics**) by amending paragraph (h). The Co-op bylaws as amended by the New Bylaw provides as follows:

> The By-laws provide that no person shall be qualified to be a member of the Board if such person
>
> a. Is a real estate broker or salesperson and does not agree in writing to refrain from engaging in selling apartment[s] in the building or participating in such sales, either directly or indirectly, as a listing broker, co-broker or otherwise as an economic participant in such sales; or

b. Is an attorney and does not agree in writing to refrain from representing shareholders of the Corporation in matters arising between the Corporation and such shareholders; or

c. Is a principal or owner of, or has a financial interest in, any company supplying goods or services to buildings and does not agree in writing that such company shall not be involved in any business with the Corporation; or

d. Receives any economic benefit of any nature, including any remuneration, gift or other consideration, from any person, firm or entity (or employee thereof) dealing with the Corporation, as a result of, or in any way associated with, transactions involving the Corporation, unless such economic benefit shall have been specifically disclosed to, and approved by a two-thirds vote of disinterested directors prior to receipt thereof.

e. Has entered into a contract of sale with respect to the apartment in the only building owned or occupied by that director.

f. Does not agree prior to election to be bound by the Code of Ethics adopted by the Board of Directors of the Corporation.

g. Is, as of the date of the election of directors, in default with respect to any obligation to the Corporation under the shareholder's proprietary lease, provided that the shareholder has received notice of such default and the period for cure has expired.

The violation by any director of any of the foregoing provisions without the express written consent of a majority of the disinterested directors, or failure to comply with the Code of Ethics of the Board of Directors, shall be grounds for removal of such director for legal cause by majority vote of the Board or shareholders.

h. Has been in arrears, as shown on the books and records of the Corporation, with respect to any financial obligations to the Corporation under the shareholder's proprietary lease for four months in any twelve month period, if in each of those four months the past due amount is equal to or greater than the shareholder's monthly maintenance and fees on the shareholder's apartment(s) and/or parking space(s), unless the shareholder had reasonably and in good faith contested the amount of such arrearage, including, for example, contested issues relating to New York City Real Estate Tax rebate programs.

Such disqualification to serve as a director shall be for a period of ten years from the date the last such arrearage remained on the books of the Corporation. This provision shall be applicable to non-shareholders who reside in an apartment whose

> owner has been in arrears in the manner described in this subsection (NYSCEF Doc. No. 14).

The Defendants announced the passage of the New Bylaw in a March 9th, 2018 letter to shareholders (*id.*, ¶ 91). The plaintiffs assert that the New Bylaw amendment was passed without proper notice to shareholders and for the purpose of excluding Ms. Savitt from serving on the Board based on prior arrearages, even though she had paid any prior arrearages in full and claims she never defaulted on any financial obligations to the Co-op (*id.*, ¶ 92).

Mr. Cantor circulated the 2018 annual shareholders election packet to the Co-op's shareholders on May 8, 2018 (*id.*, ¶ 96). The packet included the biographies of six candidates—Ms. Savitt's biography was not among them (*id.*). In his May 8, 2018 cover letter, Mr. Cantor indicated that Ms. Savitt's term was expiring and her seat was up for election and included a description of the New Bylaw (*id.*, ¶¶ 97, 99). Ms. Savitt sent emails, dated May 22 and May 29, 2018, to the Board, the Co-op's attorney, and the Co-op's managing agent, demanding that the New Bylaw be reversed, that she be permitted to run as a candidate, and that the elections be adjourned until after her name and biography were included in an amended shareholders election packet (*id.*, ¶ 135).

At the "meet the candidates" shareholders meeting on May 22, 2018, Mr. Cantor gave a Speech to shareholders in which he said:

> Before I explain the ground rules for the discussion tonight, I would like to tell you about this Code of Ethics which all our candidates have signed, because it has been a point of discussion among shareholders this year. Here is the context:

The role of the board is multifaceted. A few examples: the board's job is to manage our money. The board's job is to help select and manage the vendors and service providers who support us. The board's job is to review the financial background of new shareholders, to ensure that new shareholders have the wherewithal to live in our building. The board's job is to manage the Co-op's checkbook.

About a decade ago, I proposed that our building adopt a Code of Ethics for Board Members. This particular [C]ode of [E]thics was developed for the New York City Council of [Co-ops] and Condos to reduce the risks that co-ops faced from their own board members. This code has been presented for many years to managing agents and members and officers of New York [C]ity [Co-op] boards. The Code of Ethics was the basis of a class that was accredited as continuing legal education for attorneys and approved by the various bar associations that regulate continuing legal education.

I proposed that we adopt this Code of Ethics because, I think we are all better off living in a clean building, with a clean board, with clean elections. This code of ethics protects all shareholders, and it specified several things:

1. Board members cannot vote on matters in which they have financial interests[.]

2. Almost all third-party contracts must be bid out to at least three bidders - Insisting on multiple bids lowers prices, reducing the likelihood of us getting hoodwinked.

3. The Code instituted strictures related to the handling of confidential information and communication with vendors.

4. It set up qualifications for board members - it essentially excludes people who are currently doing business with the coop to eliminate conflicts of interest.

5. And here is a relevant point: It excluded from board membership those who are in default on a financial obligation to the building **at the moment** they join the board. REPEAT

But this rule had a loophole. A shareholder could be financially delinquent as often as they like BEFORE becoming a board member, they could be financially delinquent as often as they like WHILE SERVING ON THE BOARD, as long as they were not delinquent, at the moment when they joined the board. This year, the board decided that this loophole should be closed. The board believes that closing this loophole PROTECTS ALL Shareholders.

So here is the change: Now, if someone is regularly delinquent with their payments, before they are on the board - if someone is regularly delinquent with their payments, while they are on the board - they can't serve as a board member going forward.

> The board made this change because we want a clean building, with a clean board, with clean elections. It is all very straight forward. All of the candidates that you will hear from tonight have signed the updated code of ethics (NYSCEF Doc. No. 22 [emphasis in original]).

In other words, Mr. Cantor explained to the shareholders the purpose for the adoption of the Code of Ethics and the New Bylaw. It is undisputed that Mr. Cantor's Speech did not refer in any manner to Ms. Savitt. Ms. Savitt, however, asserts that the implication of Mr. Cantor's statement was that Ms. Savitt was "unclean" and did not follow the highest ethical standards personally, and "by extended implication," professionally as a financial advisor and accountant (*id.*).

The Defendants, along with two additional non-defendant Board members, sent the June 3rd Email to the shareholders with the subject "Information About the Annual Election and Building Management." The June 3rd Email stated that "[w]e have consistently heard from residents that the most important attribute of a Board member is fiscal responsibility." The June 3rd Email further stated that:

> This year we adopted one enhanced rule that closed a loophole, ensuring the best possible governance for the building. The loophole allowed a shareholder to serve on the Board even if he or she had long-standing maintenance payment delinquencies before becoming a Board Member – or while serving on the Board – as long as that shareholder was current at the time when he or she joined the Board. The enhanced rule closed this loophole, requiring a Board Member to have a good financial record with respect to paying maintenance, even while serving on the Board (*id.*, ¶ 109).

The plaintiffs assert that the June 3rd Email specifically set forth five defamatory statements:

(i) ***"[i]t has against come to our attention that a letter filled with falsehoods and fabricated accusations regarding building management and the***

***annual election has been circulated to many shareholders by Leah Savitt***";

(ii) "[t]here is no truth to the claim that our recent by-law change was illegally enacted";

(iii) that Ms. Savitt was engaging in "***fear mongering, spreading falsehoods regarding elevator safety, budget intentions, and lobby renovation plans***";

(iv) that Ms. Savitt used "***abusive, invective-filled language, personal intimidation, and bullying tactics***"; and

(v) that she made "threats of frivolous legal action" (*id.*, ¶¶ 113-24 [emphasis added).

The plaintiffs further assert that the Defendants made the following defamatory statements in the June 6th Email to the shareholders:

(i) "*[t]he residential Co-op Board members,* ***with the exception of one person,*** *believe it is important to present you with the truth*";

(ii) "[t]o write that 165 West End 'defaulted on its payments' is false. Why is it being repeated? This falsehood seems intended to wrongly denigrate and delegitimize the Board and management in advance of our board elections";

(iii) "[r]egarding our elections, ***please be assured that ALL candidates who agreed to and signed our required Code of Ethics for Board Members were included on the ballot***. The Code of Ethics define our basic ground rules for Board members, protecting all shareholders" (*id.*, ¶¶ 127, 129, 131 [emphasis added]).

On June 8th, 2018, plaintiff Ephraim Savitt, on behalf of the shareholders of the Co-op, emailed a Demand Letter to Board and the Defendants individually, demanding that the election be canceled and adjourned (*id.*, ¶¶ 137, 138). Notwithstanding the Demand Letter, the election proceeded at the June 11, 2018 annual shareholders meeting (*id.*, ¶ 140).

**DISCUSSION**

A party may move for judgment dismissing one or more causes of action on the ground that the pleadings fail to state a cause of action for which relief may be granted (CPLR § 3211 [a] [7]). On a motion to dismiss pursuant to CPLR § 3211 (a) (7), the court must afford the pleadings a

liberal construction and accept the facts alleged in the complaint as true, according the plaintiff the benefit of every favorable inference (*Morone v Morone*, 50 NY2d 481, 484 [1980]). The court's inquiry on a motion to dismiss is whether the facts alleged fit within any cognizable legal theory (*id.*). Bare legal conclusions are not accorded favorable inferences, however, and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999]). A party may also move to dismiss based on documentary evidence pursuant to CPLR § 3211 (a) (1). A motion to dismiss pursuant to CPLR § 3211 (a) (1) will be granted only where the documentary evidence conclusively establishes a defense to the plaintiff's claims as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]). In addition, pursuant to CPLR § 3211 (a) (3), dismissal may be sought based on a plaintiff's lack of standing to the bring the suit.

**Direct and Derivative Claims**

As an initial matter, the Defendants argue that the complaint must be dismissed because it includes both direct and derivative claims. The argument fails. A complaint may assert both direct and derivative claims so long as the plaintiff does not commingle direct and derivative claims within each cause of action (*Baliotti v Walkes*, 134 AD2d 554, 555 [2d Dept 1987]; *Brescia v Silberman*, 2009 NY Mic. Lexis 4681, *5 [Sup. Ct. NY County 2009]). Here, the First Cause of Action for breach of fiduciary duty is a derivative claim brought on behalf of shareholders of the Co-op. The Second Cause of Action, the Third Cause of Action and the Fourth Cause of Action are direct claims brought by Ms. Savitt for defamation. No cause of action combines both direct and derivative claims. Accordingly, dismissal based on commingling direct and derivative claims is denied.

**Breach of Fiduciary Duty (the First Cause of Action)**

The plaintiffs argue that the Defendants breached their fiduciary duties based on their conduct relating to (1) the lobby reconstruction plan, which the plaintiffs allege was costly and unnecessary, (2) their inattention to the costly and necessary elevator repairs, (3) their improper handling of the Co-op's finances, resulting in arrearages in monthly maintenance payments of $237,900, and (4) promulgating an improper by-law amendment (i.e., the New Bylaw), which had the effect of excluding Ms. Savitt from running for re-election for her seat on the Co-op's board of directors. The plaintiffs seek $2 million in compensatory damages and $2 million in punitive damages for the Co-op, and declaratory relief directing the removal of the Defendants from the Co-op Board of Directors and declaring that the New Bylaw is null and void. In their moving papers, the Defendants argue that dismissal is required because the plaintiffs have failed to adequately plead breach of fiduciary duty. The court agrees.

To prevail on a claim for breach of fiduciary duty against residential cooperative board members, the complaint must allege (i) the existence of a fiduciary relationship, (ii) misconduct by the individual board members, and (iii) damages caused by the defendants' misconduct (*Loch Sheldrake Beach and Tennis Inc. v Akulich*, 141 AD3d 809, 811 [3d Dept 2016], citing *Parekh v Cain*, 96 AD3d 812, 816 [2012]). In addition, "it is well-settled that a breach of fiduciary duty claim does not lie against individual cooperative board members where there is no allegation of 'individual wrongdoing by the members . . . separate and apart from their collective actions taken on behalf of the' cooperative" (*Hersh v One Fifth Avenue Apartment Corp.*, 163 AD3d 500, 500 [1st Dept 2018], quoting *20 Pine St. Homeowners Assn. v 20 Pine St. LLC*, 109 AD3d 733, 735-736 [1st Dept 2013]).

First, it is undisputed that although the Board considered renovating the lobby, the Board ultimately decided not to move forward with this project. Inasmuch as the Board did no more than explore a lobby renovation, it can not form a basis for any breach of fiduciary duty. Second, according to the engineering report, the elevators had between 1-3 years of acceptable functionality. The time has not yet passed and there is no report or other evidence offered in opposition to the motion which suggests that the elevators required immediate attention and such attention was not given due consideration by the Board. Furthermore, as counsel to the Defendants clarified at oral argument, the Co-op has entered into an agreement to modernize the elevators within the time period that the engineering report calls for. Therefore, the complaint fails to plead any damages relating to the elevator modernization plan and the breach of fiduciary claim is dismissed on this basis.

Third, the claim of breach of fiduciary duty arising out of the management company's failure to timely pay the LCTA dues fails because the complaint does not plead any actual damages incurred by the Co-op. The closest that the plaintiffs come to alleging that any damages resulted is their statement that the Defendants' alleged financial mismanagement in failing to timely pay the Co-op's monthly Association fees "resulted in doubling the building's accounts payable for 2007 from previous years, thereby creating ***a real danger*** to the ***perceived*** financial health of the Co-op" (Pl's Mem. in Opp. at 21 [emphasis added]). This allegation falls short, however, because it raises only the speculative possibility of future harm rather than any actual harm, because the plaintiffs concede that all outstanding fees were promptly paid when the arrearages were discovered and the Co-op did not incur any interest, late penalties, or fees, and because counsel conceded at oral argument that the Co-op books reflected corresponding increased assets

as a result of the increased payable – *i.e.*, that there was no chance of even perceived danger to the financial health of the Co-op.

And, finally, the challenge to the adoption of the New Bylaw fails because (a) it must have been brought pursuant to Article 78 as a special proceeding and not a plenary action, and (b) in any event, is untimely pursuant to CPLR § 217 as this action was not commenced within four months of adoption of the New Bylaw (CPLR § 217 [1]; *Musey v 425 East 86 Apartments Corp.*, 154 AD3d 401, 403 [1st Dept 2017]; *accord Katz v Third Colony Corp.*, 101 AD3d 652, 653 [1st Dept 2012] [affirming dismissal of shareholders' claims against co-op board alleging *ultra vires* bylaw amendments because such claims must be brought under Article 78 within four months]). As the New Bylaw was passed on March 1, 2018 (Complaint, ¶ 80), the last day to timely commence an Article 78 proceeding (which this is not) was July 1, 2018, and this cause of action was not commenced until after such date (July 11, 2018). Therefore, the First Cause of Action is dismissed.

**Defamation**

"Defamation is 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 friendly intercourse in society" (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014]). The elements of a cause of action for defamation are:

> (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special

> harm or the existence of special harm created by the publication (Restatement [Second] of Torts § 558).

Defamation "can take one of two forms—slander and libel" (*Ava v NYP Holdings, Inc.*, 64 AD3d 407, 411 [1st Dept 2009]). As a rule, "slander is defamatory matter addressed to the ear while libel is defamatory matter addressed to the eye (*id.* at 411-12).

Special damages are a necessary element of a defamation claim unless the alleged defamation falls within one of the categories of statements that constitute defamation *per se*: "(1) statements charging the plaintiff with a serious crime; (2) statements that tend to injure the plaintiff in her trade, business or profession; (3) statements that impute to the plaintiff a 'loathsome disease'; and (4) statements that impute unchastity to a woman" (*Nolan v State*, 158 AD3d 186, 195 [1st Dept 2018]). As the Court of Appeals has explained, "[w]hether particular words are defamatory presents a legal question to be resolved by the court in the first instance" (*Aronson v Wiersma*, 65 NY2d 592, 593 [1985]).

**Slander Per Se (Second Cause of Action)**

The plaintiffs argue that Mr. Cantor's statement in his Speech at the shareholders meeting on May 22, 2018, that "what this building needs is a clean board with candidates who follow the highest ethical standards" defamed Ms. Savitt because it implied that she was excluded as a Board candidate because she is "unclean" personally and professionally and unethical in her financial responsibilities (Complaint, ¶¶ 170-82). And because, in the plaintiffs' view, the statement was intended to harm Ms. Savitt's professional reputation as a financial planner and undermine her ability to generate new business, the plaintiffs argue that Mr. Cantor's statement constitutes slander *per se* (*id.*, ¶¶ 178-79). This argument however fails.

First, Mr. Cantor's statement has no defamatory import on its face. The statement does not mention Ms. Savitt by name, and the Complaint does not sufficiently allege that it would have been understood by the shareholders present at the meeting as relating to Ms. Savitt – i.e., as opposed to all members of the Co-op seeking to run for office. Therefore, the Complaint fails to plead that Mr. Cantor made a defamatory statement concerning Ms. Savitt, which is an essential element of a slander cause of action.

In addition, the Complaint does not plead special damages and there is no plausible interpretation of this statement in which it would tend to injure Ms. Savitt in her profession as a financial planner. Simply put, the statement has nothing to do with Ms. Savitt's business and the Complaint sets forth only a vague and conclusory allegation that the statement was intended to harm Ms. Savitt's ability to generate new business. Accordingly, the Complaint fails to plead the element of special damages required for a cause of action for slander and fails to adequately allege that the statement falls within any of the defamation *per se* exceptions (*Nolan*, 158 AD3d at 195).

The court notes that cherry-picking this single statement in the Speech does not put the Speech in its full and proper context. The Speech simply explains the purpose of the Code of Ethics and the New Bylaw, which was designed to "protect all shareholders" by ensuring that shareholders who wish to run for the Board have not been delinquent in their financial obligations for a significant period of time. Even if pretextual, the Speech in its full context does not "expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of" Ms. Savitt (*Stepanov*, 120 AD3d at 34), nor could it be read as causing injury to her trade, business,

or profession (*Liberman*, 80 NY2d at 435). Under the plaintiffs' interpretation, a Co-op board could never adopt a bylaw amendment and then explain its reasons for doing so to the shareholders without running the risk of defaming anyone impacted by the amendment. Therefore, the Second Cause of Action is dismissed.

**Libel Per Se – June 3rd Email (Third Cause of Action)**

The Defendants argue that dismissal is required because the statements in the June 3rd Email do not constitute libel *per se*. More specifically, the Defendants argue that none of the statements are directed to Ms. Savitt's profession, and the complaint does not plead special damages, which is a necessary element of the claim. In their opposition papers, the plaintiffs argue that the statements in the June 3rd Email constitute libel *per se* because the they involve Ms. Savitt's professional reputation as a financial planner, and therefore special damages need not be pleaded. In addition, the plaintiffs argue that their demand for $1 million in damages is sufficient to satisfy the pleading requirement of special damages at this stage in the proceedings.

The plaintiffs allege that the following statements from the June 3rd Email constitute libel *per se*: (1) "It has against come to our attention that a letter filled with falsehoods and fabricated accusations regarding building management and the annual election has been circulated to many shareholders by Leah Savitt"; (2) "[t]here is no truth to the claim that our recent by-law change was illegally enacted"; (3) that Ms. Savitt was engaging in "fear mongering, spreading falsehoods regarding elevator safety, budget intentions, and lobby renovation plans"; (4) that Ms. Savitt used "abusive, invective-filled language, personal intimidation, and bullying tactics"; (5) that Ms. Savitt made "threats of frivolous legal action" (Complaint, ¶¶ 113-24).

Statements 1 and 2 do not constitute libel *per se* as they do not relate to Ms. Savitt's business in any way, nor do they fall into any of the other defamation *per se* categories. In addition, these statements are protected by the qualified privilege to reply in kind to a defamatory attack (*Shenkman v O'Malley*, 2 AD2d 567, 574 [1st Dept 1956]). These statements are both pertinent to and proportionate with Ms. Savitt's letters and emails to shareholders (*id.*, at 574-76). The mere denial of the accusations made by Ms. Savitt against the Board in a measured reply cannot be the basis for a claim of defamation.

Statements 3-5, however, are different from the first two statements in that they go beyond merely replying to Ms. Savitt's accusations. These statements are gratuitous and disproportionate and taken as true for the purposes of this motion have the potential to "expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion" of her by accusing her of lying and engaging in outrageous behavior (*Stepanov*, 120 AD3d at 34). Nevertheless, none of these statements involve Ms. Savitt's profession as a financial planner, nor do they fall within any of the other defamation *per se* categories. Accordingly, the cause of action cannot be sustained absent allegations of special damages.

To the extent that the plaintiffs argue that they have satisfied the pleading requirement by alleging that they have sustained $1 million in damages as a result of the Defendants' allegedly defamatory statements, this argument is without merit. Special damages consist of "the loss of something having economic or pecuniary value" (Restatement [Second] of Torts § 575, comment b) and "it is settled law that they must be fully and accurately identified 'with sufficient

particularity to identify actual losses'" (*Matherson v Marchello*, 100 AD2d 233, 235 [2d Dept 1984], quoting *Lincoln First Bank of Rochester v Siegel*, 60 AD2d 270, 280 [4th Dept 1977]). As the First Department has held, "general allegations of damages do not meet the requisite standard for pleading special damages" (*Bowes v Magna Concepts, Inc.*, 166 AD2d 347, 349 [1st Dept 1990]). Here, the complaint sets forth only a conclusory and general allegation that the plaintiffs have sustained $1 million in damages. This is insufficient as a matter of law. Because the complaint fails to adequately plead special damages, the Third Cause of Action is dismissed.

**Libel Per Se – June 6th Email (Fourth Cause of Action)**

Again, the Defendants argue that the Fourth Cause of Action should be dismissed because the Complaint does not plead special damages and the statements do not constitute libel *per se*. In their opposition papers, the plaintiffs argue that, considered in their proper context, the statements relate to Ms. Savitt's professional reputation and therefore damages are presumed, and that, in any event, the allegation that the plaintiffs have sustained $1 million in damages is sufficient to satisfy the pleading requirement of special damages.

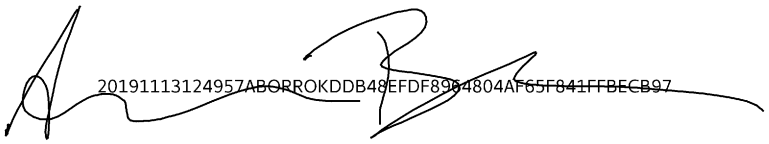
Specifically, the plaintiffs argue that the following statements in the June 6th Email constitute libel *per se*: (1) "[t]he residential Co-op Board members, with the exception of one person, believe it is important to present you with the truth"; (2) "[t]o write that 165 West End 'defaulted on its payments' is false. Why is it being repeated? This falsehood seems intended to wrongly denigrate and delegitimize the Board and management in advance of our board elections"; and (3) "[r]egarding our elections, please be assured that ALL candidates who agreed to and signed our required Code of Ethics for Board Members were included on the ballot. The Code of Ethics

define our basic ground rules for Board members, protecting all shareholders" (Complaint, ¶¶ 127, 129, 131).

With respect to the first statement, it goes beyond merely replying to Ms. Savitt's accusations and taken as true for the purposes of this motion in sum accuses her of having been dishonest. Although the statement does not mention Ms. Savitt by name, taken in context and assumed as true, the implication could be that she is the sole Board member who does not believe it is important to tell the truth to the shareholders. The second and third statements are not actionable because they have no discernable defamatory meaning and are merely defenses made in reply to the accusations leveled by Ms. Savitt. In addition, these statements fall far short of statements that would "expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion" of her in the minds of the shareholders (*Stepanov*, 120 AD3d at 34). However, most significantly, none of the statements in the June 6th Email pertain to Ms. Savitt's profession in any way. Therefore, they do not rise to the level of libel *per se* and because the complaint does not plead special damages, the Fourth Cause of Action is dismissed (*Liberman*, 80 NY2d at 435).

Accordingly, it is

ORDERED that the Defendants' motion to dismiss is granted in its entirety and the First Cause of Action is dismissed with prejudice and the Second, Third, and Fourth Causes of Action are dismissed without prejudice.




11/13/2019
DATE

ANDREW BORROK, J.S.C.

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|---|---|---|---|---|---|---|---|
| CHECK ONE: | X | CASE DISPOSED | | | NON-FINAL DISPOSITION | | |
| | X | GRANTED | ☐ | DENIED | GRANTED IN PART | ☐ | OTHER |
| APPLICATION: | ☐ | SETTLE ORDER | | | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | ☐ | INCLUDES TRANSFER/REASSIGN | | | FIDUCIARY APPOINTMENT | ☐ | REFERENCE |