

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: HONORABLE KENNETH A. DAVIS  
Justice

TRIAL/IAS, PART 5  
NASSAU COUNTY

JOSEPH MOHEN,

Plaintiff,

SUBMISSION DATE: 8/3/07  
INDEX NO.: 2569/05

-against-

VALERY STEPANOV, LUDMILA STEPANOV  
and ANNA MOHEN,

Defendants.

MOTION SEQ. # 11

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	X
Answering Affidavits.....	X
Replying Affidavits.....	X

Motion by defendant Anna Mohen for summary judgment dismissing all causes of action against her is granted as to the first, fourth, fifth, and sixth causes of action, and denied as to the second and third causes of action. Defendant Anna Mohen's additional request for summary judgment on her counterclaims and an order directing an inquest is summarily denied. This defendant's further request for sanctions and attorneys' fees pursuant to 22 NYCRR 130-1 is also denied.

Plaintiff Joseph Mohen and defendant Anna Stepanov met through a Russian introduction/dating agency in Russia in 2001. Defendants Valery and Ludmila Stepanov are Anna's parents.

Joseph and Anna were married on February 14, 2002, in the United States. The marital residence was in Garden City, New York.

The parties' son, Matthew Mohen, was born on June 7, 2003. Plaintiff commenced divorce proceedings on August 11, 2004. A Decision after Trial regarding child custody, child support and maintenance was rendered by the Honorable Elaine Jackson Stack on July 10, 2007.

This action was commenced on February 18, 2005. In his amended complaint Joseph alleges the following six causes of action: libel based upon alleged false statements in a letter mailed to neighbors on Cedar Place in Garden city; defamation based upon alleged false statements in an e-mail to the editor of gcnews.com; defamation based on a writing posted on the internet on September 22, 2004; defamation based on alleged false statements in a Police Report dated January 25, 2005; malicious prosecution; and slander in connection with statements made to the Garden City Police Department on January 20, 2005. The Court will not quote the alleged defamatory communications, which are annexed as exhibits to the amended complaint.

In essence, plaintiff alleges that Anna and her parents schemed to arrange Anna's marriage to an American for the purpose of obtaining permanent residence status in the United States and ultimately a financial windfall in the form of a divorce settlement. As noted above pursuant to a Decision after Trial dated July 10, 2007, the parties are divorced and defendant was awarded maintenance in the sum of \$42,000 per year for five years. Plaintiff is further required to pay child support to defendant in

the sum of \$29,720 per year.

In her answer defendant Anna Mohen alleges an affirmative defense of truth as an absolute defense against all of plaintiff's claims, a cross-claim against her parents for indemnification, and counterclaims against plaintiff for assault and battery on September 2-3, 2003, January 18, 2005, January 19, 2005, and throughout the course of the marriage generally. On this motion Anna seeks summary judgment dismissing all of plaintiff's causes of action. While she correctly insists that truth is a complete defense [*Cahill v County of Nassau*, 17 AD3d 497 (2<sup>nd</sup> Dept. 2005); *Yan v Potter*, 2 AD3d 842 (2<sup>nd</sup> Dept. 2003)], a determination of the truth of allegedly defamatory communications depends on the credibility of all concerned, which can only be resolved by the trier of fact [*Misek-Falkoff v Keller*, 153 AD2d 841 (2<sup>nd</sup> Dept. 1989)]. Anna further argues that plaintiff has not and cannot prove publication by her of any allegedly defamatory statements, and further that plaintiff cannot prove that malice was her sole motivation for the purposes of the malicious prosecution claim.

At the outset the Court must address plaintiff's accusation that this motion is untimely. The note of issue was filed on February 23, 2007, and all summary judgment motions were required to be made within 90 days from the filing of the note of issue. However, where one party mails the note of issue to the opposing party, such mailing extends the deadline for the period within which a motion for summary judgment must be made by an additional

five days [*Luciano v Apple Maintenance & Services, Inc.*, 289 AD2d 90 (1<sup>st</sup> Dept. 2001); *Szabo v XYZ, Two Way Radio Taxi Assn, Inc.*, 267 AD2d 134 (1<sup>st</sup> Dept. 1999)]. Consequently defendant Anna Mohen's service of the instant motion papers on May 25, 2007, was timely.

Summary judgment is a drastic remedy which will be granted only when it is clear that there are no triable issues of fact [*Andre v Pomeroy*, 35 NY2d 361, 364 (1974)]. On a motion for summary judgment the court should refrain from making credibility determinations [*Capelin Assoc. Inc. v Globe Mfg Corp.*, 34 NY2d 338 (1974)].

A writing is libelous *per se* if it tends to expose the plaintiff to public contempt, ridicule, aversion, or disgrace, or induce an evil opinion in the minds of right-thinking persons and to deprive him of their friendly intercourse in society [*Rinaldi v Holt, Rinehart & Winston, Inc.*, 42 NY2d 369, 379, cert den 434 US 969 (1977)]. Viewing the allegations of the amended complaint in the light most favorable to the plaintiff as the opponent of summary judgment, the Court concludes that the detailed three-page e-mail to gcnews.com, the internet posting, and the statements to the police, may be reasonably susceptible of a defamatory connotation [*Silsdorf v Levine*, 59 NY2d 8, 12-13, cert den 464 US 831(1983)]. Under these circumstances, triable issues of fact are presented as to whether the communications on which the second, third, fourth and sixth causes of action are based, rise to the level of the aforementioned definition of libel *per se*, and must be

tested against the understanding of the average person or the reading public [see *November v Time Inc.*, 13 NY2d 175, 179 (1963); *Mencher v Chesley*, 297 NY 94, 100(1947); *Smith v Long Island Youth Guidance, Inc*, 181 AD2d 820, 821(1992)].

The allegations in the first cause of action based upon the undated letter to neighbors (Exhibit A to the amended complaint) simply do not suffice. Where a couple is in the midst of divorce, and the allegation is that one spouse does not give the other money, such a claim without more, would not result in exposing the spouse to contempt, ridicule, aversion or disgrace. Having a young child wander into the street is a safety issue, but does rise to the level of defamation. Based on all of the circumstances of this case, defendant is entitled to summary judgment dismissing the first cause of action for libel based on the letter to neighbors.

Defendant further challenges the validity of the second and third causes of action based upon the requirement of publication. "Publication," for the purposes of a libel claim, "is a term of art" [*Ostrowe v Lee*, 256 NY 36, 38 (1931)]. 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 [*Fedrizzi v Washingtonville Central School District*, 204 AD2d 267 (2<sup>nd</sup> Dept.1994)]. Publication to a third person is a necessary element of a libel claim [*Wolosin v Campo*, 256 AD2d 332 (2<sup>nd</sup> Dept. 1998); *Fedrizzi*].

Most of the cases involving assistance in publication of letters which are the subject of libel actions involve some question of privilege not presented here [see *Garson v Hendlin*, 141 AD2d 55 (2<sup>nd</sup> Dept. 1988), app den 74 NY2d 603 (1989); see also *Park Knoll Associates v Schmidt*, 59 NY2d 205 (1983)].

With respect to the detailed e-mail to the editor of gcnews.com (Exhibit B to the amended complaint) on which the second cause of action is based, it is true that the names at the end of the letter are those of defendants Valery and Ludmila Stepanov, and the e-mail address set forth at the top of this communication is that of Anna's brother, Oleg Kartograf, in St. Petersburg, Russia. Nevertheless, given the tumultuous relationship between Joseph and Anna, the bitterness of the divorce proceeding, and the specific detail of the e-mail, the Court finds that a question of fact is presented as to Anna's role with respect to publication of this e-mail letter [see *James v DeGrandis*, 138 F.Supp.2d 402 (WDNY 2001)].

The posting on the internet is allegedly signed by "anna mohen" from "garden city ny" and only refers to plaintiff as "my husband." A libel cause of action may be maintained by a person not actually named in the allegedly libelous text where a jury might reasonably infer that the alleged libel concerned the plaintiff [*Smith v Long Island Youth Guidance, Inc.* at 821]. Although plaintiff denies all knowledge of this internet posting, Anna's credibility regarding the publication of this internet posting may not be determined on this motion for summary judgment. Because the

posting may be read as charging plaintiff with kidnaping, dishonesty and emotional abuse, it is susceptible of a defamatory connotation, and therefore must be submitted to the trier of fact.

The fourth cause of action alleges a claim for libel in connection with the "supporting deposition" dated January 20, 2005, which was given to the police, and the sixth cause of action alleges a claim for slander arising out of verbal statements given to police on the same day. It is not slanderous *per se* to claim that someone committed harassment [*Lieberman v Gelstein*, 80 NY2d 429, 436 (1992)], and this is the substance of the January 20<sup>th</sup> "supporting deposition." Furthermore communications with the police are protected by a qualified privilege [*Levy v Grandone*, 14 AD3d 660, 293-294 (2<sup>nd</sup> Dept. 2005); see *Garson* at 60-63], thereby requiring a showing of malice. Where, as here, the only evidence of malice is the plaintiff's conclusory allegations to that effect [*Conciatori v Longworth*, 259 AD2d 459 (2<sup>nd</sup> Dept. 1999)], the plaintiff has failed to raise a triable issue of fact that these communications were motivated solely by malice [see *Levy* at 294]. Consequently defendant's motion for summary judgment dismissing the fourth and sixth causes of action must be granted.

The fifth cause of action alleges a claim for malicious prosecution. Plaintiff here alleges that defendant furnished false information to the police, resulting in plaintiff's arrest and prosecution for violation of an order of protection. However, defendant later withdrew her complaint in Family Court.

Where a civilian complainant merely seeks police assistance or furnishes information to law enforcement authorities who are then free to exercise their own judgment as to whether an arrest should be made and criminal charges filed, there can be no claim against the civilian for malicious prosecution [Levy at 293]. Only where the civilian takes such an active part in procuring the arrest with undue zeal that the police officer is "not acting of his own volition," can such a claim be made [Mesiti v Wegman, 307 AD2d 339,340(2<sup>nd</sup> Dept. 2003)]. No such showing of an active role by defendant in procuring the arrest has been made by plaintiff here. For this reason, defendant's motion for summary judgment dismissing the fifth cause of action must also be granted.

As plaintiff notes, defendant fails to address her counterclaims in her moving papers, and for this reason summary judgment on these counterclaims is summarily denied.

Defendant has further failed to establish any basis on this record for her request for sanctions pursuant to 22 NYCRR 130-1, which request is also denied.

This decision constitutes the order and judgment of the Court.

OCT 10 2007  
Dated: \_\_\_\_\_  
\_\_\_\_\_  
KENNETH A. DAVIS

**ENTERED**

OCT 12 2007  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE