

SHORT FORM ORDER



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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

JEROLD PROBST,

TRIAL/IAS PART 15

INDEX NO. 7841/04

Plaintiff(s),

MOTION SEQUENCE
NO. 1

- against -

YAAKOV BENDER,

MOTION SUBMISSION
DATE: August 6, 2004

Defendant(s).

The following papers read on this motion:

Notice of Motion	X
Affirmation in Opposition	X
Reply Affirmation	X

Upon the foregoing papers, the motion by the defendant for an Order pursuant to CPLR §3211(a)(7) dismissing the complaint, is determined as hereinafter provided:

In examining an application pursuant to CPLR §3211(a)(7), the Court in *Weiss v Cuddy & Feder*, 200 AD2d 665, 606 NYS2d 766 (Second Dept., 1994) stated:

"In determining whether a complaint is sufficient to withstand a motion pursuant to CPLR 3211(a)(7) "the sole criterion is 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" (*Guggenheimer v Ginzberg*, 43 NY2d 268, 275)."

Weiss v Cuddy & Feder, supra at 666-667

Amongst other things, the Complaint sets forth in the First Cause of Action:

"FIRST CAUSE OF ACTION

4. Heretofore, the Yeshiva and Mesivta hired contractors and subcontractors to construct a high school located in Far Rockaway, New York.

5. Heretofore, within one year prior to the commencement of this action, and prior to February 2004, Bender, in the presence of Ronald Lowinger and also in the presence of other persons whose names are unknown to plaintiff, at this time, willfully and maliciously spoke the following words concerning plaintiff: that plaintiff had "taken kickbacks" from contractors and subcontractors that "he hired" for the construction of the Mesivta school, that plaintiff had "overcharged" the Yeshiva and Mesivta that plaintiff had "milked" the Yeshiva and Mesivta in connection with the construction of the High School, that plaintiff "was a thief", that plaintiff has "committed fraud" and "stole" from the Yeshiva and Mesivta.

6. The words so spoken of plaintiff were false and defamatory and so known to be so by defendant and, in speaking them, defendant acted with actual malice against plaintiff and/or in reckless disregard of whether or not such statements were false, and willfully, maliciously and deliberately intended to injure and defame plaintiff, personally and professionally, and to subject him to public scorn, contempt and ridicule.

7. As a result of defendants' false and defamatory words, plaintiff's good name and reputation have been greatly injured, and plaintiff's reputation in the community has been and irrevocable damaged.

8. By reason of the foregoing, plaintiff is entitled to damages in an amount to be determined at trial, but exceeding the sum of Five Million (\$5,000,000) Dollars."

As to the allegations set forth in the First Cause of Action, the defendant contends that any comment made by the defendant to Ronald Lowinger is protected by the common interest privilege as both are members of the board of trustees of Darchie Torah. In examining this privilege, the Court in **Bogoni v Simpson**, 306 AD2d 125, 760 NYS2d 497 (First Dept., 2003) stated:

"Because it was on a subject of common concern and interest, her notice is entitled to a qualified privilege (see, *Foster v Churchill*, at 752, 642 NYS2d 583, 665 NE2d 153, citing *Liberman v Gelstein*, 80 NY2d 429, 590 NYS2d 857, 605 NE2d 344). While the defense of qualified privilege may be defeated by a showing tending to demonstrate that the defendant spoke with malice (see, *Foster v Churchill*, at 752, 642 NYS2d 583, 665 NE2d 153), plaintiff offered no evidence here regarding Ms. Simpson's motivation, aside from the notice itself. The words of the notice alone are insufficient to satisfy plaintiff's burden of making a prima facie showing that they were made with spite or ill will, a high degree of awareness of their probable falsity, or with a reckless disregard for the truth (see *Liberman v Gelstein*, 80 NY2d 429, 439, 590 NYS2d 857, 605 NE2d 344; *Russ v State Emples, Fed. Credit Union*, 298 AD2d 791, 793, 750 NYS2d 658; *Roberts v Philip Morris Mgmt. Corp.*, 288 AD2d 166, 167, 733 NYS2d 190; *Levy b Educational Records Bur.*, 269 AD2d 277, 278, 703 NYS2d 129, *lv. dismissed* 95f NY2d 790, 711 NYS2d 157, 733 NE2d 229)."

Bogoni v Simpson, supra at 126

The plaintiff's affirmation submitted in opposition to the requested relief is the Reply Affirmation submitted by the plaintiff to certain motion practice in a companion case captioned "**Probst v Yeshiva Darchie Torah and Mesivta Chaim Shlomo**" Index #5869/04. The Court observes that the plaintiff in said affirmation alludes to certain statements made in an affidavit in the context of litigation. The Court notes that statements made in the context of a judicial proceeding have an absolute privilege (see, **Allan and Allan Arts Ltd. v Rosenblum**, 201 AD2d 136, 615 NYS2d 410 (Second Dept., 1994)). The Court further notes that although the plaintiff through counsel contends that the alleged statements were made outside of the litigation process, there is no submission in admissible form that substantiates this contention and the plaintiff's Reply Affirmation only alludes to statements in a litigation context. In the absence of such a submission, the plaintiff has not made a showing to void the qualified common interest privilege (see, **Bogoni v Simpson**, supra). Plaintiff, similarly has not made a showing of any knowledge of whom the unknown parties are as set forth in the First Cause of Action. Discovery in this circumstance would be insufficient to defeat the requested relief (see, **A. Brod, Inc. v Worldwide Dreams, LLC**, 2004 WL 1563352). In the absence of same and based upon the privilege of common interest, the Complaint does not state a cause of action cognizable at law (see, **Weiss v Cuddy & Feder**, supra).

Based upon the foregoing, the defendant's application for an Order pursuant to CPLR §3211(a)(7) dismissing the complaint, is granted.

SO ORDERED.

DATED: 10/13/2004

..... Kay S. Melson
J.S.C.

ENTERED
OCT 18 2004
NASSAU COUNTY
COUNTY CLERK'S OFFICE