2023-03-08

NCR, LLC v. Coriat

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART** **34M**

Justice

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NCR, LLC, OSI, LLC

Plaintiff,

- v -

ALEJANDRO CORIAT, HOUSING CONSERVATION COORDINATORS, INC.,

Defendant.

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INDEX NO. 157967/2018

MOTION DATE 11/15/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 60, 61, 63, 64, 65, 66, 67, 68, 69

were read on this motion to/for DISMISS.

In 2018, plaintiffs NCR, LLC and OSI, LLC, as the respective owners of the apartment buildings located at 428 West 47th Street, New York, NY and 454 West 47th Street, New York, NY, commenced this action against defendants Alejandro Coriat and Housing Conservation Coordinators, Inc. (hereinafter "HCC"), alleging causes of action for tortious interference with a business relationship, injurious falsehood, trespass against personal property, and defamation and libel. Plaintiffs allege that Coriat and HCC attempted to form a tenant organization through the publication of false and defamatory material that it then distributed to tenants in plaintiffs' buildings. In this motion sequence (002), defendants move for summary judgment pursuant to CPLR 3212 as to each cause of action. Defendants oppose the motion. For the following reasons, defendants' motion is granted in its entirety.

BACKGROUND

As a non-profit organization that provides legal services and representation to low-income tenants, HCC employs staff attorneys to "organize tenants" and establish tenant associations in apartment buildings in New York City. As part of this effort, HCC attorneys and organizers are assigned particular apartment buildings in which they are responsible for raising awareness of the services it provides. This often requires HCC employees to visit their assigned buildings, especially those in which tenants are experiencing problems and are actively engaged in disputes with the apartment building's owner.

In 2017 and 2018, Coriat worked for HCC in this capacity. (NYSCEF doc. no. 51, Coriat EBT.) According to his testimony, a tenant from 428 West 47th Street—Liyah Eliyahu—and a tenant from 454 West 47th Street—Bibi Musafiri—approached HCC and described a history or pattern of rent overcharges and harassment by the apartment owner and/or manager. (*Id.* at 53.) In March 2018, HCC and Coriat received other complaints and allegations regarding

construction work being performed at strange times and without proper NYC building permits. (*Id.* at 89.) HCC assigned Coriat to meet with tenants, hand out fliers, and organize an associational meeting for tenants in plaintiffs' two apartment buildings. Around this time, Coriat began knocking on tenant doors. He testified that Musafiri allowed him entrance in 454 West 47th and showed him the conditions of the building. (*Id.* at 71.) While on the premise Coriat knocked on doors of various other tenants. (*Id.*) Where Coriat did not know a specific tenant, Coriat waited outside the buildings and handed out copies of a flyer that he authored for the tenant association general meeting to take place at HCC's office building.

In plaintiffs' complaint and opposition papers, the following statements in the flyer were false and published with malice:

> "Issues to Address:
> - Unpermitted, chaotic and hazardous construction and renovation projects
> - What's happening with the apartments the landlord used to rent as illegal hotels?
> - Fraudulent rent overcharges, unlawful de-regulation of stabilized apartments
> - Harassment, threats, and insulting condescension
> - Lack of repairs, neglect
>
> ...
>
> Why is your Landlord so Awful?
> - Because he has to be. He [sic] got a massive mortgage on his building, which he can only payback by raising your rents or harassing you out of your apartment.
> - Because he wants to be. He has no real empathy for you, and will only help you half-way so long as you stop reporting violations or drop legal actions.
> - Because he can be. There's nothing stopping him (except for six tenants on rent-strike beating him up in court for fraud and harassment), so he pretty much can do whatever he wants and make up lies and excuses to city agencies." (NYSCEF doc. no 57, flyer.)

Based on the foregoing statements, plaintiff alleges that it lost rental income believed to be in the amount of $500,000 and reputational damage in the amount of $1,000,000.

DISCUSSION

CPLR 3212 Standard

Summary judgment is appropriate where "the proponent makes a 'prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of material issues of fact' and the opponent fails to rebut that showing." *Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v prospect Hosp.*, 68 NY2d 320, 324; see also CPLR 3212 [b].) Once the proponent has made a prima facie showing, the burden shifts to the opposing party to demonstrate, through admissible evidence, factual issues requiring a trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Since summary

judgment is an extreme remedy, the Court must draw all reasonable inferences in favor of the non-moving party. (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012].) Where there is doubt as to the existence of material facts or where different conclusions can reasonably be drawn from the evidence, summary judgment should be denied. (*Santos v Temco Serv. Indus.*, 295 AD2d 218, 218-219 [1st Dept 2002].)

Tortious Interference and Injurious Falsehood Claims

A cause of action for tortious interference with a business relationship requires a plaintiff to demonstrate (1) the existence of a valid contract between plaintiff and a third party; (2) defendant's knowledge of that contract; (3) defendant's intentional procurement of a breach; and (4) damages. (*Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 294, 299 [1st Dept 1999].) Further, a plaintiff must demonstrate that the "procurement of a breach" was accomplished by "wrongful means" or that defendant acted for the sole purpose of harming the plaintiff. (*Id.*)

For this motion, defendants contend that plaintiffs cannot show either (1) that a breach was procured through "wrongful means" or (2) that defendants' sole purpose was to harm them. In defendants' view, the purpose in organizing tenant meetings was aligned with their mission strategy to provide low-income tenants with information as to their legal rights in disputes with their landlord—not, as plaintiffs might argue, to solely injure the landlord's business relationships. (NYSCEF doc. no. 42 at 8) As to the definition of "wrongful," defendants contend that the flyer, even should the Court accept that certain statements therein contain falsehoods, does not establish a claim for tortious interference with business dealing. (NYSCEF doc. no. 69 at 4.) In opposition, plaintiffs cite *Carvel v Noonan* (3 NY3d 182 [2004]) for the proposition that using "misrepresentations" in convincing a third-party to breach constitutes "wrongful means," and therefore, because the flyer contains factual inaccuracies in certain respects, defendants are not entitled to summary judgment.

After reviewing the parties' submissions, the Court finds that defendants, as movants, have not met their burden and demonstrated as a matter of law that the complained-of conduct was lawful, i.e., not "wrongful." However, whether the alleged conduct is considered "wrongful" or not is ultimately immaterial because, as defendants argue, it is abundantly clear that plaintiffs have failed to provide any evidence of damages or to connect said damages to defendants' conduct.[1] Nowhere, even in the complaint, is there any assertion as to a specific contract or a set of contracts that defendants interfered with and what harm came to plaintiffs therefrom. A review of the evidence reveals that plaintiffs' alleged injury is entirely speculative. (*See Kimso Apts., LLC v Rivera*, 180 AD3d 1033, 1035 [2d Dept 2020], citing *Burrowes v Combs*, 25 AD3d 370, 372-373 [1st Dept 2006] ["To avoid dismissal of a tortious interference with contract claim a plaintiff must support his claim with more than mere speculation"].)

"Defendant Coriat has instructed prospective tenants to establish tenancy…and once these individuals have established tenancy, Coriat advises them to then bring a law suit against Plaintiffs for overcharges;" "Defendant Coriat misinformed tenants that Plaintiffs are engaged in mortgage fraud…to this effect Defendant has instructed tenants to deny access to the Plaintiffs

[1] Although defendants do not argue as such, the problem with the plaintiffs' pleadings that defendants refer to here could also be considered a failure to demonstrate that a third-party breached a contract with plaintiffs.

due to lack of permits…in [an] effort to delay completion of the work;" "Defendant has made it his mission to encourage other tenants to waste these courts resources and engage in frivolous litigation against plaintiffs"—these are the most direct allegations of tortious interference with a contractual relationship, but on this motion sequence, plaintiffs have not identified a single instance of a tenant bringing litigation on Coriat's or HCC's advice. Nor have they cited a single instance in which tenants in these buildings were instructed to withhold rent that they were not already withholding.

Plaintiffs have not provided an affirmation from a tenant, or indeed, one of its own officers, as to a contract that was breached as a result of defendants' organizing activities. The only affidavit that plaintiffs submit in support of its position is one by Talma Grafi, as the plaintiffs' property manager, but even she has not identified a contract which a tenant breached through HCC and Coriat's organizing campaign. (*See* NYSCEF doc. no 63, Grafi affidavit.) In short, the evidence before the Court reveals that no contractual right has been interfered with and thus, plaintiffs have suffered no contractual damages stemming from defendants' conduct. (*See Burrowes*, 25 AD3d at 372 ["To avoid dismissal of a tortious interference with a contract claim a plaintiff must support his claim with more than mere speculation"].) Plaintiffs' assertion that their loss of rental income and the additional costs that it has had to expend with city agencies "will be proven at trial" is entirely conclusory and does not preclude summary judgment on this cause of action. (*See* NYSCEF doc. no. 64 at ¶11.)

Defendants have demonstrated entitlement to summary judgment on plaintiffs' injurious falsehood cause of action for the same reason. A cause of action for injurious falsehood lies where one publishes false and disparaging statements about another's property under circumstances which would lead a reasonable person to anticipate that damage might flow therefrom (*Cunningham v Hagedorn*, 72 AD2d 702, 704 [1st Dept 1979].) Critically, the cause of action requires the plaintiff to prove special damages with particularity. (*Rall v Hellerman*, 284 AD2d 113, 114 [1st Dept 2001]; *Franklin v Daily Holdings, Inc*, 135 AD3d 87, 93 [1st Dept 2015].) "Special damages consist of the loss of something having economic or pecuniary value, which must flow directly from the injury to reputation caused by the defamation and not from the effects of defamation." (*Franklin*, 135 AD3d at 93, citing *Agnant v Shakur*, 30 F Supp 2d 420, 426 [SDNY 1998].) As the Court explained above, plaintiffs have not pled with particularity, let alone provided evidence of, special damages it incurred directly from plaintiffs' alleged defamation. (*See BCRE 230 Riverside LLC v Fuchs*, 59 AD3d 282, 283-284 [1st Dept 2009] ["Defendant's allegation of special damages, a necessary element… is wholly inadequate because it fails to allege specific injury to legally protected property interests"].) Again, plaintiffs' contention to the contrary—that damages are a triable issue—is unavailing. Accordingly, defendants have shown entitlement to summary judgment on both plaintiffs' causes of action for tortious interference and injurious falsehoods.

Trespass to Property Claim

In support of their motion on this claim, defendants submitted the deposition testimony of Coriat. He testified that he received access to 454 West 47th Street from Musafiri, a tenant in the apartment complex, who invited him into the building and her apartment. (NYSCEF doc. no. 51 at 71.) He further testified that, in circumstances where he did not know particular individuals

living in the apartment, he would stand outside canvassing and passing flyers to tenants who were entering, whom he would then ask permission to access the building and to knock on doors. (*Id.* at 72-73.) Defendants contend that, because this evidence is unrefuted, Coriat's testimony establishes defendants were granted permission to enter the apartment buildings, that Coriat's presence on premises was lawful, and therefore, they are entitled to summary judgment. (*See Long Island Gynecological Servs., P.C. v Murphy*, 298 AD2d 504, 504 [2d Dept 2002] [Liability for civil trespass lies only where the defendant, without justification or permission, either intentionally entered upon another's property, or if entry was permitted, refused to leave after permission was withdrawn]; *Berenger v 261 W, LLC*, 93 AD3d 175, 181 [1st Dept 2012].) The Court agrees.

In opposition, plaintiffs cast doubt on the authenticity of defendants' testimony without actually providing any of its own evidence. (*See* NYSCEF doc. no. 64 at ¶16 ["The instant motion does not even allege who let Coriat into the building. In fact, there is a statement that permission was denied. And, then someone allegedly let him in. Who? How? We just do not know?"].) However, the one statement that plaintiffs refer to where "permission was denied" was taken from Coriat's own testimony—not from evidence submitted by plaintiffs—and critically it does not undermine the part of his testimony describing how he received permission from other tenants. That defendants have not precisely identified who let Coriat into the building does not create an issue of fact as to whether defendants were lawfully on the premises, especially where plaintiffs have provided no evidence of their own. Lastly, plaintiffs argue there are issues of fact since Coriat did not submit an affidavit in support of the motion and as such "there is no claim regarding how he entered the building and under what permission." (*Id.* at ¶15; NYSCEF doc. no 63 at ¶9.) But such an affidavit is not required where a party has provided sworn testimony in support of its motion.

Defamation, Libel, and Slander Claims

In limited circumstance, where the social benefit in encouraging free speech or the discharge of government responsibilities outweighs the individuals underlying right to a good reputation, Court of Appeals has found that "certain communications, although defamatory, cannot serve as the basis for the imposition of liability in a defamation action." (*Toker v Pollak*, 44 NY2d 211, 218-219 [1978]; *Stega v New York Downtown Hosp.*, 31 NY3d 661, 669 [2018].) Such communications may be entitled to different levels of protection based upon who the speaker is and the public policy behind protecting such speakers from civil liability. These protections are categorized as either absolute privileges or qualified privileges. Whereas absolute privilege protects individuals participating in "public functions"—such as judicial, legislative, or executive proceedings—qualified privilege applies where the communication is made "in the discharge of some pubic or private duty, legal or moral, or in the conduct of his own affairs, in a matter where his interest is concerned." (*Id.*) Because the societal interest in protecting this latter type of communication is viewed as less important than those interests protected by absolute immunity, the communicant asserting a qualified privilege still must have expressed themselves "in a reasonable manner and for a proper purpose" and may lose such protections against liability for failing to do so. (*Id.*) As the Court of Appeals wrote in *Liberman v Goldstein*, "the shield provided by a qualified privilege may be dissolved if [the] plaintiff can demonstrate that defendant spoke with 'malice.'" (80 NY2d 429, 437-438 [1992].) As these words demonstrate,

once a defendant has demonstrated entitlement to a qualified privilege, the burden shifts to the plaintiff to establish "malice" or raise a triable issue (*Id.*; *Stega*, 31 NY3d at 669)

Here, since plaintiffs concede that defendants are entitled to a qualified privilege and, thus, shielded from liability for any alleged defamatory material it published non-maliciously,[2] the Court must only address whether plaintiffs have met their burden and raised issues of triable fact on the issue of malice. The Court finds that they have not. Under the Supreme Court's *New York Times v Sullivan* (376 US 254 [1964]) malice standard, a plaintiff must demonstrate that the defendant had knowledge that the statements were false or recklessly disregarded their falsity. (*See also Liberman v*, 80 NY2d at 437-438.) The Supreme Court later clarified, in terms of what it means to display a "reckless disregard" for a statement's truthfulness, that "only those false statements made with a high degree of awareness of their probable falsity demanded by *New York Times* [*v Sullivan*] may be the subject of either civil or criminal sanctions" (*id.*, citing *Garrison v Louisiana*, 379 US 64, 74 [1964]) and that "there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of [the] publication." (*St. Amant v Thomas*, 390 US 727, 731 [1968].) In *Liberman*, the Court noted that either this constitutional standard of malice or the common-law standard—meaning the defendant's spite or ill will toward the plaintiff (*see Loughry v Lincoln First Bank*, 67 NY2d 369, 376 [1986])—will defeat a qualified privilege.

Applying the above principles, the Court finds that there are no triable issues under either standard of malice. First, under the constitutional standard, plaintiffs have not provided evidence of defendants' "high degree of awareness" that the statements contained in the flyer were probably false. Plaintiffs claim that the statements "what's happening with the apartments the landlord used to rent as illegal hotels," "except for six tenants on rent-strike beating him up in court for fraud and harassment," and "he's got a massive mortgage, which he can only pay back by raising your rents" are all false (NYSCEF doc. no. 63 at ¶¶ 17, 26, and 27.) but they provide no indication that defendants made these statements with a reckless disregard for their truth or that they entertained serious doubts as to their truth. The first two statements, as Coriat testified to, were based on his and HCC's interviews with tenants who were withholding rent or otherwise made complaints about the conditions of the building. (NYSCEF doc. no. 51 at 114.) As to the "massive mortgage" statement, Coriat describes that he based this statement on his and HCC's interpretation of market "dynamics" that they were seeing at the time.[3] (NYSCEF doc. no. 51 at 109.) Again, there is a critical difference, as the *Liberman* Court noted, between not knowing whether something is true and being highly aware that it is probably false. Because only the

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[2] Plaintiffs' memorandum of law does not advance an argument as to whether defendants are entitled to such a privilege. They suggest a reason why the Court should not apply a qualified privilege to defendants' organizing activities. Rather, they assert only that "even assuming this privilege, it is conceded that it is vitiated should 'malice' be proven." (NYSCEF doc. no. 64 at ¶¶17-18.)

[3] The Court has its doubt as to whether the section in the flyer entitled "Why is your Landlord so Awful?", including the three answers, are even defamatory. Whether statements are assertions of fact (and therefore actionable), as opposed to constitutionally protected assertions of opinion, courts look to the context in which the statements are published and whether the context suggests to the reader the statements were intended one way or the other. (*See Themed Rests., Inc. v Zagat v Survey, LLC*, 21 AD3d 826, 826 [1st Dept 2005].) Though defendants do not argue this point, and therefore the Court does not decide it, the context in which the reasonable reader views the "Why is Your Landlord so Awful?" section suggests that the statements therein are purely opinions—that plaintiffs are making broad, generalized arguments about landlords as a class as opposed to specific statements of fact about this particular landlord.

latter constitutes "reckless disregard" and the evidence does not establish issues of fact as to the defendants' awareness, plaintiffs have not demonstrated the constitutional definition of malice.[4]

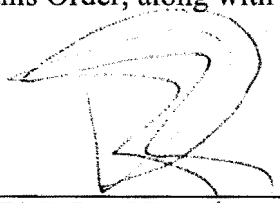
As to the common-law definition of malice—that defendant conducted itself out of spite or ill will—there is also no issues of fact: as described *supra*, defendants published the flyer to promote its services and provide low-income tenants with information regarding their legal rights. A triable issue is only raised if a jury could reasonably conclude that "[common-law] malice was the one and only cause for the publication." (*Liberman*, 80 NY2d at 439, citing *Stukuls v State of New York*, 42 NY2d 272, 281-282 [1977].) Because plaintiffs have not raised issues of fact as to either type of malice, defendants are entitled to summary judgment on this claim.

Accordingly, for the foregoing reasons, it is hereby

ORDERED AND ADJUDGED that defendants Alejandro Coriat and Housing Conservation Coordinators, Inc.'s motion for summary judgment pursuant to CPLR 3212is granted as to plaintiffs' causes of action for tortious interference with a contract, injurious falsehood, trespass to property, and defamation, libel, and slander; as such, the complaint is dismissed in its entirety; and it is further

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

ORDERED that counsel for defendants shall serve a copy of this Order, along with notice of entry, on all parties within ten (10) days of entry.



3/8/2023
DATE

DAKOTA D. RAMSEUR, J.S.C.

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

[4] The Court is particularly limited in finding malice when plaintiffs' affidavit in opposition merely asserts that "just looking at the four corners of the Flyer, 'malice' is established." (NYSCEF doc. no. 64 at ¶18.)