

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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_____AD3d_____

Argued - June 22, 2023

COLLEEN D. DUFFY, J.P.
LARA J. GENOVESI
DEBORAH A. DOWLING
JANICE A. TAYLOR, JJ.

2021-08462

DECISION & ORDER

Robert Jesberger, appellant, v CVS Health Solutions,
LLC, et al., respondents.

(Index No. 604027/21)

Barket Epstein Kearon Aldea & LoTurco, LLP, Garden City, NY (Alexander Klein of counsel), for appellant.

Cullen & Dykman, LLP, Garden City, NY (Nicholas M. Cardascia of counsel), for respondents.

In an action, inter alia, to recover damages for defamation, the plaintiff appeals from an order of the Supreme Court, Nassau County (Denise L. Sher, J.), entered November 8, 2021. The order, insofar as appealed from, granted that branch of the defendants' motion which was pursuant to CPLR 3211(a) to dismiss the cause of action alleging defamation.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, and that branch of the defendants' motion which was pursuant to CPLR 3211(a) to dismiss the cause of action alleging defamation is denied.

In April 2021, the plaintiff commenced this action against CVS Health Solutions, LLC, and its subsidiaries and affiliated corporation, CVS Albany, LLC, doing business as CVS Pharmacy, and Paula Martin (hereinafter collectively the defendants), inter alia, asserting a cause of action to recover damages for defamation and defamation per se. The plaintiff alleged, among other things, that in November 2020, he was a customer at a CVS store in Jericho, where the defendant Martin was employed as a pharmacist. The plaintiff further alleged that, on December 3, 2020, Martin informed his physician, inter alia, that the plaintiff was banned from the pharmacy for stealing newspapers on multiple occasions and that she had reported the plaintiff to the police. The

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defendants moved to dismiss the complaint pursuant to CPLR 3211 (a)(1) and (7). By order entered November 8, 2021, the Supreme Court, among other things, granted that branch of the defendants' motion which was to dismiss the cause of action alleging defamation. The plaintiff appeals.

“On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must liberally construe the complaint, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Floral Park Ophthalmology, P.C. v Ruskin Moscou Faltischek, LLP*, 216 AD3d 1136, 1136, quoting *Katsoris v Bodnar & Milone, LLP*, 186 AD3d 1504, 1505; see *Matter of 22-50 Jackson Ave. Assoc., L.P. v County of Suffolk*, 216 AD3d 939). “Thus, on a motion to dismiss pursuant to CPLR 3211(a)(7) we consider only ‘whether any reading of the complaint supports the defamation claim’” (*Trump Vil. Section 4, Inc. v Bezvoleva*, 161 AD3d 916, 917, quoting *Davis v Boenheim*, 24 NY3d 262, 272). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus” (*Trump Vil. Section 4, Inc. v Bezvoleva*, 161 AD3d at 917 [internal quotation marks omitted]).

The elements of a cause of action to recover damages “for defamation are (a) a false statement that tends to expose a person to public contempt, hatred, ridicule, aversion, or disgrace, (b) published without privilege or authorization to a third party, (c) amounting to fault as judged by, at a minimum, a negligence standard, and (d) either causing special harm or constituting defamation per se” (*Greenberg v Spitzer*, 155 AD3d 27, 41). CPLR 3016(a) requires, “[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint.” The complaint “must also allege the time when, place where, and manner in which the false statement was made, and specify to whom it was made” (*Epifani v Johnson*, 65 AD3d 224, 233; see *Offor v Mercy Med. Ctr.*, 171 AD3d 502, 503).

Here, the complaint alleged that the statement that the plaintiff was banned from the pharmacy in question for stealing was made on December 3, 2020. The complaint also set forth the statement allegedly made and to whom the statement was made (see *Epifani v Johnson*, 65 AD3d at 234). Contrary to the defendants' contention, “the words need not be set in quotation marks” to state a cause of action to recover damages for defamation (*Moreira-Brown v City of New York*, 71 AD3d 530, 530). Moreover, the allegation that the plaintiff “was stealing” “constitutes an allegation of a ‘serious crime’ so as to qualify as slander per se” (*Epifani v Johnson*, 65 AD3d at 234).

“A motion pursuant to CPLR 3211(a)(1) to dismiss the complaint on the ground that the action is barred by documentary evidence may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law” (*Buchanan v Law Offs. of Sheldon E. Green, P.C.*, 215 AD3d 790, 791, quoting *Mawere v Landu*, 130 AD3d 986, 987; see *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326). Here, the affidavits and the video evidence submitted by the defendants are not documentary evidence (see *Davis v Henry*, 212 AD3d 597, 597).

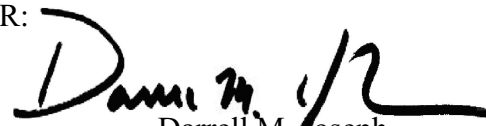
Additionally, “[w]hile a court is ‘permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211(a)(7),’ where the motion is not converted to one for summary judgment, ‘the criterion is whether the [plaintiff] has a cause

of action, not whether he has stated one, and . . . unless it can be said that no significant dispute exists regarding it . . . dismissal should not eventuate” (*Anzora v 81 Saxon Ave. Corp.*, 146 AD3d 848, 849, quoting *Sokol v Leader*, 74 AD3d 1180, 1181, and *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [citation omitted]). Here, the defendants’ evidentiary submissions in support of their motion did not conclusively establish that the plaintiff has no cause of action to recover damages for defamation and, viewing the record as a whole, raised questions of fact and credibility that cannot be resolved at this stage of the litigation (*see Joseph v Fensterman*, 204 AD3d 766, 768; *Matter of Gerard P. v Paula P.*, 186 AD3d 934, 938-939).

The defendants’ remaining contention is without merit.

DUFFY, J.P., GENOVESI, DOWLING and TAYLOR, JJ., concur.

ENTER:

A handwritten signature in black ink, appearing to read "Darrell M. Joseph". The signature is stylized with a large initial "D" and a long horizontal stroke at the end.

Darrell M. Joseph
Acting Clerk of the Court