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| Jacobowitz v Gutnick |
| 2021 NY Slip Op 31026(U) |
| April 1, 2021 |
| Supreme Court, Kings County |
| Docket Number: 511754/2020 |
| Judge: Peter P. Sweeney |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73

Index No.: 511754/2020
Motion Date: 11-2-20
Mot. Seq. No.: 1

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MARK JACOBOWITZ, YERACHMEAL JACOBSON,
BLUEJAY MANAGEMENT, LLC, BLUEJAY
CAPITAL, LLC, 1704 OCEAN AVENUE LLC,

Plaintiffs,

-against-

DECISION/ORDER

MEYER GUTNICK, BEDFORD REALITY
MANAGEMENT, LLC

Defendants.

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The following papers numbered 1 to 3 were read on this motion:

| Papers: | Numbered: |
|---|------------------|
| Notice of Motion/Order to Show Cause | |
| Affidavits/Affirmations/Exhibits/Memo of Law..... | 1 |
| Answering Affirmations/Affidavits/Exhibits/Memo of Law..... | 2 |
| Reply Affirmations/Affidavits/Exhibits/Memo of Law..... | 3 |
| Other..... | |

Upon the foregoing papers, the motion is decided as follows:

Defendants Meyer Gutnick (“Mr. Gutnick”) and Bedford Realty Management LLC (“Bedford”) move for an order dismissing plaintiffs’ first amended complaint in its entirety pursuant to CPLR § 3211(a)(7) for failure to state a cause of action and for an award of sanctions and such other and further relief as may be just and proper.

Background:

The plaintiffs and the defendants were business partners in certain limited liability companies that owned commercial real estate. The defendant, Meyer Gutnick, the principle of Bedford insisted upon obtaining certain financial information from the plaintiffs concerning real property in which Bedford had an interest. Mr. Gutnick maintains that he was entitled to the information pursuant to the companies operating agreement which provides:

Section 9.2. The Managers shall cause to be performed, all general and administrative services on behalf of the Company and in pursuance thereof shall cause to be maintained complete and

accurate books of the Company at the Company's principal office or at another location selected by the Managers of which the Members are notified, showing the interests of the Members, all receipts and expenditures, assets and liabilities, profits and losses, and all other records necessary for recording the Company's business and affairs, including the maintenance of the Capital Accounts of each Member. The books of the Company shall be open to inspection and examination by each Member and by the representatives of a Member designated in writing by such Member at all reasonable times upon reasonable notice for all proper purposes. The Company shall pay all expenses occurred in connection with preparation and delivery of the information and materials set forth in this Section 9.2.

Plaintiffs Mark Jacobowitz (“Jacobowitz”) and Yerachmeal Jacobson (“Jacobson”) were the managers of the company. Mr. Gutnick maintains that the plaintiffs were not forthcoming with the information he felt he was entitled to and repeatedly requested the information from the plaintiffs. At one point, Mr. Gutnick went to a Beth den seeking a ruling from a rabbinical court that the plaintiffs were required to provide him with the information. The plaintiffs did not appear before the Beth den.

Mr. Gutnick communicated with several third-parties advising them that the plaintiffs were “not being transparent”, that he had not been provided with the information and that the plaintiffs had breached the operating agreement. The plaintiffs claim that these statements were false and defamatory. In the amended complaint, the plaintiffs alleged several causes of action sounding in defamation based on these statements.

Plaintiffs also asserted a cause of action for declaratory relief. They allege that plaintiffs Jacobson and Jacobowitz are the managing members of plaintiff 1704 Ocean Avenue, LLC (“1704 Ocean”) and that Bedford is also a member. Plaintiffs alleges that the operating agreement for 1704 Ocean states, in relevant part, as follows:

Section 8.5. Removal of Member. In the event that any member of the Company or, for any member which is an Entity, then in the event that any manager, officer, director, trustee, member, shareholder or beneficiary of such member...(iii) engages in or performs any act or omission which, in the reasonable judgment of the Managers, is in bad faith and is detrimental to the interests of the Company, its Members or its Managers, then the Managers shall have the right to remove and expel such Member (the

"Removed Member") from the Company. With[in] 7 of notice of such removal, the Company shall pay to the Removed Member the full balance of his capital account less...(ii) any amount which the Managers, in their good faith judgment, believe is owed to the Company by such Removed Member, include[ing] to compensate the Company for damages sustained by reason of the conduct described in Subsections (i) through (iii) of this Section 8.5.

Plaintiffs contend that it was the “reasonable judgment of 1704 Ocean's managers, Jacobowitz and Jacobson, that Gutnick's acts as alleged in the amended complaint were in bad faith and detrimental to the interests of 1704 Ocean. Plaintiffs further alleged that in accordance with 1704 Ocean's operating agreement, by letter dated June 23, 2020, Jacobowitz and Jacobson gave notice to Gutnick and Bedford removing and expelling Bedford as member due to Gutnick's acts. Plaintiffs claim that the amount owed to 1704 Ocean by Gutnick/Bedford to compensate 1704 Ocean for the damages sustained by reason of the conduct complained of herein exceeds the amount in Bedford's capital account, which is apparently in excess of one million dollars. In the amended complaint, plaintiffs 1704 Ocean, Jacobowitz and Jacobson seek a declaratory judgment that the damages sustained as a result of Gutnick's “defamation” exceed the balance of Bedford's capital account and that Plaintiff 1704 Ocean is entitled to withhold the balance of the account.

Discussion:

A. The Causes of Action Alleging Defamation:

Defendants claim the alleged defamatory statements constitute nonactionable opinion. The Court agrees. A cause of action predicated on alleged defamatory statements is subject to dismissal if the statements constitute nonactionable opinion (*see Gottlieb v. Wynne*, 159 A.D.3d 799, 800, 74 N.Y.S.3d 46; *Arvanitakis v. Lester*, 145 A.D.3d 650, 652, 44 N.Y.S.3d 71). The factors to be considered when distinguishing between assertions of fact and nonactionable expressions of opinion are: “(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to ‘signal ... readers or listeners that what is being read or heard is likely to be opinion, not fact’ ” (*Gross v. New York Times Co.*, 82 N.Y.2d 146, 153, 603 N.Y.S.2d 813, 623 N.E.2d 1163, quoting *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 292, 508 N.Y.S.2d 901, 501 N.E.2d 550; *see Brian v. Richardson*, 87

N.Y.2d 46, 51, 637 N.Y.S.2d 347, 660 N.E.2d 1126). “Distinguishing between fact and opinion is a question of law for the courts, to be decided based on ‘what the average person hearing or reading the communication would take it to mean,’ ” taking into account the overall context in which the assertions were made (*Davis v. Boehm*, 24 N.Y.3d 262, 269, 998 N.Y.S.2d 131, 22 N.E.3d 999, quoting *Steinhilber v. Alphonse*, 68 N.Y.2d at 290, 508 N.Y.S.2d 901, 501 N.E.2d 550; see *Brian v. Richardson*, 87 N.Y.2d at 51, 637 N.Y.S.2d 347, 660 N.E.2d 1126). In making this determination, “the courts must consider the content of the communication as a whole, as well as its tone and apparent purpose” (*Brian v. Richardson*, 87 N.Y.2d at 51, 637 N.Y.S.2d 347, 660 N.E.2d 1126). In *Phillips v. Carter*, 58 A.D.3d 528, 872 N.Y.S.2d 22, a somewhat analogous case, the complaint alleged that the defendant falsely told a third party that the plaintiff had breached his contract and “could not be trusted as a contract partner.” The Court held that the complaint filed to state a claim for defamation because the alleged defamatory statements were either true or constituted unactionable opinion (58 A.D.3d 528, 872 N.Y.S.2d at 23; see also, *Manfredonia v. Weiss*, 37 A.D.3d 286, 829 N.Y.S.2d 508 [2007]; *Silverman v. Clark*, 35 A.D.3d 1, 12–13, 822 N.Y.S.2d 9).

Applying the above principles, the Court finds that the alleged defamatory statements constituted unactionable opinion. All of the statements made by Mr. Gutnick that the plaintiffs claim are defamatory concern Mr. Gutnick’s claim that the plaintiffs were not providing him with the financial information he requested and felt that he was entitled to under the relevant operating agreement. As in *Phillips*, the gist of defendant’s statements is that the plaintiffs breached a contract, i.e., the operating agreement. As the *Phillips* Court held, such statements are either true or nonactionable opinion. According, the causes of action alleged in the complaint alleging defamation are dismissed for failure to state a cause of action.

B. The Declaratory Judgment Action:

“ ‘A motion to dismiss a declaratory judgment action prior to the service of an answer presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration’ ” (*Matter of Tilcon N.Y., Inc. v. Town of Poughkeepsie*, 87 A.D.3d 1148, 1150, 930 N.Y.S.2d 34, quoting *Staver Co. v. Skrobisch*, 144 A.D.2d 449, 450, 533 N.Y.S.2d 967). “Thus, ‘where a cause of action is sufficient to invoke the court’s power to render a declaratory judgment ... as to the rights and other legal relations of the parties to a justiciable controversy, a motion to dismiss

that cause of action should be denied' ” (*DiGiorgio v. 1109–1113 Manhattan Ave. Partners, LLC*, 102 A.D.3d 725, 728, 958 N.Y.S.2d 417, quoting *Matter of Tilcon N.Y., Inc. v. Town of Poughkeepsie*, 87 A.D.3d at 1150, 930 N.Y.S.2d 34). Here, since the cause of action for declaratory relief is sufficient to invoke the court’s power to render a declaratory judgment as to the rights and other legal relations of the parties, that branch of defendants’ motion to dismiss the declaratory judgment cause of action is **DENIED**.

While it is true that “the merits of a properly pleaded cause of action for a declaratory judgment upon a motion to dismiss for failure to state a cause of action may be granted where ‘no questions of fact are presented [by the controversy]’ ” (*Matter of Tilcon N.Y., Inc. v. Town of Poughkeepsie*, 87 A.D.3d at 1150, 930 N.Y.S.2d 34, quoting *Hoffman v. City of Syracuse*, 2 N.Y.2d 484, 487, 161 N.Y.S.2d 111, 141 N.E.2d 605), at this stage of the litigation the Court is not inclined to make such a determination. One of the pivotal issues with respect to the cause of action for a declaratory judgment is whether Mr. Gutnick “engage[d] in or perform[ed] any act or omission which, in the reasonable judgment of the Managers, [was] in bad faith and ... detrimental to the interests of the Company, its Members or its Managers.” Contrary to defendants’ contention, simply because the plaintiffs did not allege a viable cause of action for defamation is not determinative even though the plaintiffs claim stated in paragraph 59 that they are entitled to “a declaratory judgment that the damages sustained as a result of Gutnick's defamation exceeds the balance of Bedford's capital account...”.

“On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the complaint must be construed liberally, the factual allegations must be deemed to be true, and the nonmoving party must be given the benefit of all favorable inferences” (*Christ the Rock World Restoration Church Intl., Inc. v. Evangelical Christian Credit Union*, 153 A.D.3d 1226, 1229, 62 N.Y.S.3d 396; see *Leon v. Martinez*, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511). Thus, one of the critical issue in the declaratory judgment action is whether the statements made by Mr. Gutnick to the third-parties, in the reasonable judgment of the Managers, were made in bad faith and detrimental to the interests of the Company, its Members or its Managers. The fact the statements were not defamatory under the law is not determinative.

Accordingly, it is hereby

ORDRED that defendants’ motion is **GRANTED** solely to the extent that all causes of action alleged in the amended complaint are dismissed except the cause of action for a

declaratory judgment (Count VII). The plaintiff is directed to serve a second amended complaint deleting all causes of action other than the cause of action for a declaratory judgment within 20 days of service of this order and the defendants shall interpose an answer to the second amended complaint within the time provided in the CPLR.

This constitutes the decision and order of the Court.

Dated: April 1, 2021



PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020