To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

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CAROL ROBSON

Plaintiff,

-against-

Index No. 57857/2011
DECISION & ORDER
Motion Sequence # 1

LAUREEN SUTTON, SCARBOROUGH MANOR OWNER'S CORP.

Defendants.

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The following papers were received and considered in connection with the above-captioned matter:

PAPERS	**NUMBERED**
Notice of Motion/Affirmation/Affidavit/Exhibit A -H	1-10
Memorandum of Law in Support	11
Affidavit/Affirmation in Opposition/Exhibit A-H	12-20
Reply Affirmation	21

Defendants move for an order pursuant to CPPLR 3211(a)(7) dismissing the plaintiff's complaint for failure to state a cause of action; and pursuant to CPLR 3212 granting the defendant summary judgment on the ground that there are no triable issues of fact.

Plaintiff, Carol Robinson claims that the defendant, Laureen Sutton, while employed by the defendant Scarborough Manor Owner's Corp. made defamatory statements against her. Plaintiff purchased a two-bedroom cooperative apartment within

Scarborough Manor in 1982. Laureen Sutton was the property manager for Scarborough Manor. On May 5, 2011, a Decision was entered in the Village of Ossining Justice Court holding that the plaintiff failed to maintain her unit at Scarborough Manor in accordance with the provisions of the Proprietary Lease and House Rules. Plaintiff was found to have failed to cure defaults contained in the May 13, 2010 Notice to Cure and the May 20, 2010 Notice to Cure. Plaintiff was subsequently evicted pursuant to an Order of the court on or about August 23, 2011.

Plaintiff claims that Sutton made four (4) defamatory statements about her. The first alleged statement was "Ms. Robson is a violent person, I am afraid of her and she physically pushed me" – Laureen Sutton. This statement was allegedly made to Carlos Castro, a member of the Board of Directors for Scarborough Manor. The second statement alleged made by Sutton was "Ms. Robson had feces and urine all over her apartment". This statement was allegedly made by Sutton to the marshal that was carrying out Plaintiff's eviction. The third statement alleged made by Sutton was "Ms. Robson's mother was dead in the apartment for ten (10) days". Plaintiff testified at her deposition that she did not know when this statement was made or to whom Sutton made the statement. The final statement alleged made by Sutton was "Ms. Robson goes floor to floor to pick up newspapers". Plaintiff testified that Sutton made this statement to a Ms. Kenney, who lived on the 6th floor of Building 2, during a social gathering for one of the residents on the day that the plaintiff was evicted.

Robson commenced this action by service of a summons and verified complaint on or about August 31, 201, alleging that she sustained damages due to defamatory statements allegedly made by Sutton. Sutton and Scarborough Manor served a verified

answer on or about April 5, 2012 and an amended verified answer on or about April 27, 2012. Plaintiff served bill of particulars and a note of issue was filed on or about September 15, 2015. Depositions of the parties were also conducted. Sutton now moves to dismiss pursuant to CPLR 3211(a)(7) and for summary judgment pursuant to CPLR 3212.

On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the complaint a liberal construction (see CPLR 3026), "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" *Leon v. Martinez*, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511; *Nonnon v. City of New York*, 9 N.Y.3d 825, 827, 842 N.Y.S.2d 756, 874 N.E.2d 720; *Knutt v. Metro Intl., S.A.*, 91 A.D.3d 915, 915, 938 N.Y.S.2d 134.

To properly state a cause of action alleging defamation, a plaintiff must allege that, without privilege or authorization, and with fault as judged, at minimum, by a negligence standard, the defendant published to a third party a false statement, *Liberman v. Gelstein*, 80 N.Y.2d 429, 435, 590 N.Y.S.2d 857, 605 N.E.2d 344; *Baker v. Inamdar*, 99 A.D.3d 742, 744, 952 N.Y.S.2d 208; *Salvatore v. Kumar*, 45 A.D.3d at 563, 845 N.Y.S.2d 384). Additionally, unless the defamatory statement fits within one of the four "per se" exceptions, *Liberman v. Gelstein*, 80 N.Y.2d at 435, 590 N.Y.S.2d 857, 605 N.E.2d 344), a plaintiff must allege that he or she suffered "special damages"—"the loss of something having economic or pecuniary value" (id. at 434–435, 590 N.Y.S.2d 857, 605 N.E.2d 344; *Epifani v. Johnson*, 65 A.D.3d 224, 233, 882 N.Y.S.2d 234. Where an

allegedly false statement is defamatory per se, the law presumes that damages will result, so the plaintiff need not allege or prove them, *Liberman v. Gelstein*, 80 N.Y.2d at 435, 590 N.Y.S.2d 857, 605 N.E.2d 344.

The four established exceptions of defamation per se consist of statements (i) charging the plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that the plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman, *Moore v. Francis*, 121 N.Y. 199, 203, 23 N.E. 1127; *Privitera v. Town of Phelps*, 79 A.D.2d 1, 3, 435 N.Y.S.2d 402 . Here, none of the statements constitute defamation per se, as none of the statements injures the plaintiff in her profession, since plaintiff testified that she has not worked since 2001. Furthermore, none of the statements accuses the plaintiff of having a loathsome disease or of being unchased.

The alleged statement that "Ms Robson is a violent person, I am afraid of her and she physically pushed me" constitutes at most harassment which is a violation and not a crime under New York Criminal Statute. Harassment is a relatively minor offense in the New York Penal Law—not even a misdemeanor—and thus the harm to the reputation of a person falsely accused of committing harassment would be correspondingly insubstantial, *Liberman v. Gelstein,* 80 N.Y.2d 429, 605 N.E.2d 344, 590 N.Y.S.2d 857. Harassment, therefore, not being a serious crime would not constitute slander per se.

Finally, CPLR 3016(a) requires that in a defamation action, "the particular words complained of ... be set forth in the complaint." The complaint also must allege the time, place and manner of the false statement and to specify to whom it was made, *Arsenault v. Forquer*, 197 A.D.2d 554, 602 N.Y.S.2d 653; *Vardi v. Mutual Life Insurance Co. of*

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New York, 136 A.D.2d 453, 523 N.Y.S.2d 95. Plaintiff stated in paragraph 3 of her complaint that between April 1, 2010 and August 26, 2011 these statement were made in the presence of several other persons. However, the plaintiff admitted in her bill of particulars that she does not have an exact time, place or date that these statements were made. Plaintiff does state the specific words alleged to have been spoken by Sutton, but fails to state the time, place and manner of the false statement.

A claim alleging slander is not sustainable if special damages are not pleaded unless it falls within one of four exceptions that establish slander per se', *Liberman v. Gelstein*, 80 N.Y.2d 429, 435, 590 N.Y.S.2d 857, 605 N.E.2d 344. The Court has already determined that the plaintiff's statements do not fall within slander per se and therefore, the plaintiff must prove special damages. General allegations of injury to reputation are insufficient to establish special damages, *Cammarata v. Cammarata,* 61 A.D.3d 912, 787 N.Y.S.2d 163 (2d Dept. 2009). Moreover, injury to reputation and subjection to scorn and hatred are insufficient to support slander claims, *Ggalasso v. Saltzman,* 42 A.D.3d 310, 839 N.Y.S.2d 731, 36 Media L. Rep. 1894, 2007 N.Y. Slip Op. 05830 (1st Dept. 2007). A viable slander claim requires allegations of special damages, i.e., economic or pecuniary loss *Liberman v. Gelstein, Supra* 80 N.Y.2d 429, 434–435.

Here, the plaintiff alleges in paragraph 5 of her complaint that she has been "injured in her good name and reputation as a person and individual and has suffered great pain and mental anguish and has been held up to ridicule and contempt by her friends, acquaintances and the public. This is insufficient to support a claim of economic or pecuniary loss." Therefore, since none of the statements allegedly made by Sutton

constituted defamation per se, and the plaintiff failed to establish special damages, then the plaintiff has failed to state a cause of action.

After accepting the facts as alleged in the plaintiff's complaint as true, according the plaintiff the benefit of every possible favorable inference, it is the finding of the Court that the facts as alleged do not fit within any cognizable legal theory. Plaintiff has therefore, failed to plead a cause of action for defamation and her complaint should be dismissed pursuant to CPLR 3211(a)(7).

As to Sutton's motion for summary judgment, to obtain summary judgment it is necessary that the movant establish her cause of action or defense "sufficiently to warrant the court as a matter of law in directing judgment" in her favor, CPLR 3212, subd. (b)), and she must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must "show facts sufficient to require a trial of any issue of fact", CPLR 3212, subd. (b). Normally if the opponent is to succeed in defeating a summary judgment motion she, too, must make her showing by producing evidentiary proof in admissible form. When challenged on a motion for summary judgment, a plaintiff may not rely solely on hearsay or conclusory allegations that the slanderous statement was made, *Schwartz v. Society of the New York Hospital*, 232 A.D.2d 212, 213, 647 N.Y.S.2d 776; Barber v. Daly, 185 A.D.2d 567, 568, 586 N.Y.S.2d 398; Green v. Irwin, 28 A.D.2d 971, 283 N.Y.S.2d 455), but must lay bear their proof in non-hearsay form, *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

As stated above, the plaintiff has failed to state a cause of action for defamation, by tendering non-hearsay evidence to support the utterances, by failing to allege and

prove when, where and by whom the utterances were made and by establishing special damages. The burden now shifts to the plaintiff to show triable issues of fact.

Plaintiff testified at her deposition at page 49 that Ms. Kenny told her that Sutton stated that she goes from floor to floor to pick up new paper. She also testified at her deposition at page 44, that an unnamed City Marshal told her that Sutton stated that she had feces and urine all over her apartment. She further testified at page 53, that Sutton stated that her mother died in the apartment for 10 days but she didn't hear Sutton make the statement nor remember when the statement was made or to whom it was made. Lastly, the plaintiff testified at page 37, that she never heard Sutton say that she is a violent person. She stated that Mr. Cotto, her attorney, told her that Sutton made the statement to Mr. Castro. From her testimony, it is unclear if these statements were in fact made and if they were made, when, where and to whom this statement was allegedly made.

Assertion by subject of allegedly defamatory statements that he had been told by third party that statements were made to third party by defendants was mere hearsay and was insufficient to establish publication of statements, as would allow recovery in defamation action, *Scaccia v. Dolch* 231 A.D.2d 885, 647 N.Y.S.2d 883 (4th Dept. 1996). These were all hearsay statements and to defeat Sutton's motion for summary judgment the plaintiff needs non-hearsay allegations. Furthermore, the plaintiff offered no sworn statement from the individuals who allegedly heard the statement.

Plaintiff has, therefore, failed to raise triable issues of fact utilizing non-hearsay statements sufficient to defeat the defendants' motion for summary judgment.

Accordingly, it is

ORDERED that the defendants' motion is GRANTED; and it is further

ORDERED that the action is dismissed.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
March 29, 2016

Sam D. Walker

HON. SAM D. WALKER, J.S.C.