

166 A.D.3d 726
Supreme Court, Appellate Division,
Second Department, New York.

Yeheskel ELIAS, et al., appellants,
v.
Jeanne MASSIMILLO, etc., respondent.

2016–04754
|
(Index No. 10701/14)
|
Argued—May 31, 2018
|
November 14, 2018

Attorneys and Law Firms

Randy Scott Zelin, P.C., New York, NY, for appellants.

Mark E. Goidell, Garden City, NY, for respondent.

REINALDO E. RIVERA, J.P., ROBERT J. MILLER,
BETSY BARROS, FRANCESCA E. CONNOLLY, JJ.

DECISION & ORDER

*726 In an action, inter alia, to recover damages for defamation, the plaintiffs appeal from an order of the Supreme Court, Nassau County (George R. Peck, J.) dated March 21, 2016. The order, insofar as appealed from, granted that branch of the defendant's motion which was pursuant to CPLR 3211(a)(7) to dismiss the cause of action alleging defamation.

ORDERED that the order is affirmed insofar as appealed from, with costs.

The plaintiffs allege that the defendant sent a defamatory email in 2014 to the plaintiffs' adult children. The defendant is the sister of the plaintiff Janet Elias. The plaintiff Yeheskel Elias is the husband of Janet Elias.

“A defamatory statement of fact is in contrast to ‘pure opinion’ which under our laws is not actionable because [e]xpressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation” (*Davis*

v. Boeheim, 24 N.Y.3d 262, 269, 998 N.Y.S.2d 131, 22 N.E.3d 999, quoting *Mann v. Abel*, 10 N.Y.3d 271, 276, 856 N.Y.S.2d 31, 885 N.E.2d 884). Although the subject email communicated the defendant's opinion of the character of the plaintiff Janet Elias, the email also set forth disputed allegations of fact that had a precise meaning which were readily understood and which were capable of being proven true or false, and in context, the email could be reasonably understood to proffer assertions of fact (*see Davis v. Boeheim*, 24 N.Y.3d at 271–272, 998 N.Y.S.2d 131, 22 N.E.3d 999; *Baker v. Galusha*, 114 A.D.3d 1124, 1125, 981 N.Y.S.2d 198; *see also Hull v. Town of Prattsville*, 145 A.D.3d 1385, 1387–1388, 44 N.Y.S.3d 253). Thus, the *727 subject email communication contained potentially actionable statements of fact.

However, a plaintiff in a defamation action must allege that he or she suffered special damages—the loss of something having economic or pecuniary value (*see **776 El Jamal v. Weil*, 116 A.D.3d 732, 733–734, 986 N.Y.S.2d 146), unless the challenged statement is defamatory per se (*see Liberman v. Gelstein*, 80 N.Y.2d 429, 435, 590 N.Y.S.2d 857, 605 N.E.2d 344; *Gottlieb v. Wynne*, 159 A.D.3d 799, 800, 74 N.Y.S.3d 46; *Spring v. County of Monroe*, 151 A.D.3d 1694, 1696–1697, 57 N.Y.S.3d 799). Here, the complaint did not allege special damages. Further, the subject email did not charge the plaintiffs with any serious crime (*see Liberman v. Gelstein*, 80 N.Y.2d at 435, 590 N.Y.S.2d 857, 605 N.E.2d 344), and it did not charge the plaintiff with having any “loathsome disease” (*Golub v. Enquirer/Star Group*, 89 N.Y.2d 1074, 1077, 659 N.Y.S.2d 836, 681 N.E.2d 1282). Although one statement in the email referred to alleged professional misconduct by the plaintiff Janet Elias, a teacher, under these circumstances that allegation of a single instance of professional misconduct is not actionable (*see Cook v. Relin*, 280 A.D.2d 897, 898–899, 721 N.Y.S.2d 885; *Larson v. Albany Med. Ctr.*, 252 A.D.2d 936, 939, 676 N.Y.S.2d 293; *Ram v. Moritt*, 205 A.D.2d 516, 612 N.Y.S.2d 671), and the email did not contain any other statements that could be deemed defamatory per se. Moreover, the email did not make any potentially defamatory assertions concerning the plaintiff Yeheskel Elias (*see Three Amigos SJJL Rest., Inc. v. CBS News Inc.*, 28 N.Y.3d 82, 86, 42 N.Y.S.3d 64, 65 N.E.3d 35; *Chicherchia v. Cleary*, 207 A.D.2d 855, 616 N.Y.S.2d 647).

Accordingly, we agree with the Supreme Court's determination to grant that branch of the defendant's motion which was pursuant to [CPLR 3211\(a\)\(7\)](#) to dismiss the cause of action alleging defamation.

[RIVERA, J.P.](#), [MILLER, BARROS](#) and [CONNOLLY, JJ.](#), concur.

All Citations

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