NEW YORK SUPREME COURT--------COUNTY OF BRONX

PART IA - 5

NEW LINE REALTY V CORP., NEW LINE REALTY VI CORP., NEW LINE REALTY VII AND VIII CORP. and NEW LINE REALTY IX CORP.,

Plaintiffs,

-against-

UNITED COMMITTEES OF UNIVERSITY HEIGHTS and NORTHWEST BRONX COMMUNITY AND CLERGY COALITION,

Defendants.

INDEX NUMBER: **1021/2004**

Present:
HON. **SALLIE MANZANET**
Justice

The following papers numbered 1 - 5

Read on this Motion and Cross-Motions

On Calendar of **7/18/05**

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Upon the foregoing papers, plaintiff's motion seeking dismissal of defendants' First Counterclaim, defendants' Northwest Bronx Community and Clergy Coalition (hereinafter "NBCCC") and United Committees of University Heights ("University Heights") cross-motion seeking dismissal of plaintiff's Second Cause of Action for defamation, plaintiffs' cross-motion to amend the complaint and plaintiffs' cross-motion seeking dismissal of defendants' Jackie DelValle (hereinafter "DelValle") and Highbridge Community Life Center (hereinafter "Highbridge") are consolidated for purposes of this decision. For the reasons set forth herein, plaintiff's motion pursuant to CPLR Rule 3211(a)(7) to dismiss defendants' First Counter-Claim is denied; defendants' cross-motion pursuant to CPLR Rule 3211(a)(7) and 3211(g) to dismiss plaintiff's

Second Cause of Action for defamation is granted; plaintiff's cross-motion to amend the complaint is denied; and plaintiff's cross-motion seeking dismissal of defendants' DelValle and Highbridge's Sixth Counter-Claim is denied.

The original parties in this matter were Palazzolo Holding II Corp., plaintiff, against Highbridge Community Life Center, Northwest Bronx Community and Clergy Coalition and Jackie DelValle, defendants. By So-Ordered Stipulation dated March 3, 2005, the parties consented to remove plaintiff Palazzolo Holding II Corp. and defendants Highbridge Community Life Center and Jackie DelValle from the caption and consented to change the caption as reflected herein.

The original motion in this matter was filed by defendant NBCCC seeking to vacate a stay that was issued to plaintiffs by the Supreme Court, County of Westchester on November 3, 2003. Plaintiffs brought an Order to Show Cause seeking a Temporary Restraining Order ("TRO") against defendants Highbridge and DelValle. The Order to Show Cause was granted by the Court and entered against defendants on November 19, 2003. The TRO enjoined defendants from entering the property located at 1030 Woodycrest Avenue, Bronx, New York and stayed defendants from interfering in the relationship between Palazzolo Holding II Corp. and Washington Mutual Bank ("WAMU"). Thereafter, the parties agreed to vacate the TRO by So-Ordered Stipulation dated January 27, 2005. Thus, the original motion has been resolved and is not a part of this decision.

Plaintiff cross-moved pursuant to CPLR Rule 3211(a)(7) to dismiss defendants' First Counter-Claim to the extent that it seeks relief pursuant to New York Civil Rights Law §§70-a and 76-a. Defendants cross-moved pursuant to CPLR Rule 3211(a)(7) and 3211(g) to dismiss plaintiff's Second Cause of Action for defamation. Plaintiff filed two other cross-motions; one seeking to amend the complaint and the other seeking dismissal of the Sixth Counter-Claim interposed in the amended answer filed by defendants DelValle and Highbridge. Plaintiff's cross-motion for dismissal of defendants DelValle and Highbridge's Sixth Counter-Claim is denied as moot as these defendants are no longer parties to this action.

Plaintiff, a landlord, brought an action against defendants, housing organizers, for allegedly trespassing upon its premises to conduct organizing activities. Plaintiff has since withdrawn that claim but its claims of defamation and tortious interference remain. Defendants contend that these claims, like the trespass claim, were brought to stifle advocacy to improve conditions in plaintiff's buildings. Defendants allege that its

organizing activities are permitted by statute, Real Property Law Section §230, which bars landlords from interfering with tenants' rights to form, join and participate in tenant organizations and forbids landlords from harassing, punishing, penalizing and/or withholding any right, benefit or privilege of a tenant under his tenancy for exercising his right. Plaintiff, the landlords, are five corporations that each hold as their sole asset a residential apartment building located at 2334 Washington Avenue, 2668 Washington Avenue, 2315 Walton Avenue, 2205 Walton Avenue and 1055 Grand Concourse (hereinafter collectively "the Buildings"). Steve Tobia alleges that he is the sole owner of the Buildings. Defendants, housing organizers, are a thirty-year old, clergy based neighborhood association. As part of their duties, defendants perform building assessments, help tenants complain about repairs to the Department of Housing Preservation and Development ("HPD"), present such complaints to HPD on behalf of tenants and help tenant form tenant committees. Defendants performed these tasks as part of a contractual relationship with HPD. Defendants also helped tenants advocate with "WAMU" to enforce the good repair clause in the mortgages of various apartment buildings including those alleged to be owned by plaintiff. Several weeks after defendants held the first tenant meeting in 2334 Washington Avenue and held a meeting with WAMU, plaintiff filed the instant action which alleged four causes of action: trespass (which has been withdrawn); defamation, based on flyers that were allegedly distributed by defendants; and tortious interference based on the alleged denial by plaintiff's bank WAMU of a mortgage refinance for the Buildings. Defendants also sought and received ex-parte TROs prohibiting defendants from entering the Buildings and interfering with defendants' relationships with the tenants, HPD and WAMU. (The TRO's were later withdrawn by So-Ordered Stipulation). Defendants deny any wrongdoing and assert nine counterclaims against plaintiff.

Plaintiff seeks dismissal of defendants' First Counter-Claim pursuant to Civil Rights Law §§70-a and 76-a also known as the "SLAPP" statute. Section §70-a provides that a defendant in an action involving public petition and participation as defined in §76-a may maintain a counterclaim to recover damages including costs and attorney's fees from any person who commenced such action provided that: a)the action was without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law; b)other compensatory damages may only be recovered upon an additional demonstration that the action was commenced or continued for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association

rights; and, c) punitive damages may only be recovered upon an additional demonstration that the action was commenced or continued for the sole purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights. Section 76-a provides that 1) an "action involving public petition and participation" is an action, claim, cross-claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission; b) "public applicant or permittee" means any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission; 2) Damages may only be recovered if the plaintiff, in addition to all other necessary elements, shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue.

Dismissal Pursuant to C.P.L.R. §3211(a)(7)

When a party moves to dismiss a pleading, the opposing party has no obligation to show evidentiary facts to support its allegations. Generally, on a motion to dismiss made pursuant to C.P.L.R. §3211, the court must "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 into any cognizable legal theory". Leon v. Martinez, 84 N.Y.2d 83 (1994). Plaintiff here has moved pursuant to C.P.L.R.§3211(a)(7) to dismiss defendants' First Counter-Claim. On a motion to dismiss pursuant to C.P.L.R. §3211(a)(7), the complaint survives when it gives notice of what is intended to be proved and the material elements of each cause of action. Rovello v. Orofino Realty Co., Inc. 40 N.Y.2d 633 (1976); Underpinning & Foundation Construction v. Chase Manhattan Bank, 46 N.Y.2d 459 (1979).

In support of its motion to dismiss, plaintiff argues that defendants have sought inappropriate relief under the SLAPP statute as it is not a public applicant or permittee; the action is not materially related to any application or permission; and plaintiff's claims are supported by a substantial basis in fact and law.

In reviewing defendants' First Counter-Claim, this Court accepts the facts as alleged as true and

accords defendants the benefit of every possible favorable inference. In determining whether the facts as stated by defendants fit into the cognizable legal theory alleged, this Court finds in defendants' favor and denies plaintiff's motion to dismiss the SLAPP statute Counter-Claim. Plaintiff has obtained multiple licenses, permits and subsidies from government entities in connection with owning the aforementioned buildings as plaintiff's buildings are multiple dwellings that require Certificate of Occupancies. Plaintiff itself concedes that it holds several governmental permits with respect to the Buildings in the form of Multiple Dwelling Registrations and Certificate of Occupancies and that it also receive state rental subsidies. Thus, defendants are involved in an action involving public petition and participation. See, Guerrero v. Carva, 779 N.Y.S.2d 12 (1st Dept. 2004). In addition, the Counter-Claim is materially related to defendants' efforts to report on such permits. Pursuant to its contract with HPD, defendants were engaged in advocacy on behalf of the tenants in the Buildings and were to report alleged Housing Code violations. Defendants' contact with WAMU was also pursuant to the aforementioned contract. See, Duane Reade, Inc. v. Clark, 784 N.Y.S.2d 920 (N.Y. Cty. 2004). Accordingly, liberally construing defendants' Counter-Claim and accepting its allegations as true, defendants' actions were performed in furtherance of advocating on behalf of the tenants and were materially related to its advocacy with HPD regarding defendants' fitness to maintain their government issued permits, licenses and funds with respect to the Buildings. See, Street Beat Sportswear, Inc. v. National Mobilization Against Sweatshops, 698 N.Y.S.2d 820 (N.Y. Cty. 1999).

Cause of Action for Defamation

Defendants cross-move pursuant to CPLR §§3211(a)(7) and 3211(g) to dismiss plaintiff's Second Cause of Action for defamation. Defendants argue that plaintiff has failed to state a claim in that the alleged defamatory statements in the complaint do not mention New Line corporations or Steve Tobia.

Defamation arises from "the making of a false statement which tends to 'expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society' ". Dillon v. City of New York, 704 N.Y.S.2d 1 (1st Dept.1999) citing Foster v. Churchill, 87 N.Y.2d 744, 751 quoting Rinaldi v. Holt, Rinehart, & Winston, Inc., 42 N.Y.2d 369, 379, *cert. denied*, 434 U.S. 969 quoting Sydney v. MacFadden Newspaper Publishing Corp., 242 N.Y. 208. The elements of defamation are a false statement, published without privilege or

authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se. Dillon *supra* citing Restatement of Torts, Second §558. In addition, the alleged statement must be of and concerning the plaintiff. Dillon. The test for whether a statement is "of and concerning" an individual is whether "an average viewer would... taking into account the context in which the remark was uttered, perceive that [the speaker] was making a factual statement about [the individual]." Lauren Feche v. Viacom International, 649 N.Y.S.2d 782 (1st Dept. 1996). .

C.P.L.R. 3016(a) requires that "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. Dillon *supra* citing Arsenault v. Forquer, 602 N.Y.S.2d 653; Vardi v. Mutual Life Insurance Co. of New York, 523 N.Y.S.2d 95. In evaluating whether a cause of action for defamation is successfully pleaded, "[t]he words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction." Dillon citing Silsdorf v. Levine, 59 N.Y.2d 8, *cert. denied*, 464 U.S. 831. Loose, figurative or hyperbolic statements, even if deprecating the plaintiff, are not actionable. Dillon *supra* citing Gross v. New York Times, 82 N.Y.2d 146, 152-153. If the words are conclusory rather than accusatory, fail to specify time, place and manner of the communication, then there can be no cause of action for defamation. Arsenault, *supra*; Vardi, *supra*.

The Complaint pleads the following statements as defamatory:

> Tell Washington Mutual to stop lending to slumlords! WaMu [sic] has lent tens of millions of dollars to slum landlord Frank Palazzolo. But WaMu refusing to meet with the community to discuss long term solutions for this problem!
>
> Attention Tenants! Are you sick of landlords running of with bags of $$$ while your buildings goes to waste! Does it make you angry that Washington Mutual lends tons of money to some of the worst landlords in NYC (including Frank Palazzolo) while advertising to Bronx residents that they care about "human interest?"
>
> Tired of the conditions in the [sic] your building? Do you want a landlord who care about how you live? Maybe it's time to kick your landlord out!
>
> Attention Bronx Residents and Tenants of Palazzolo buildings! Did you know that Washington Mutual Bank has lent over $60 million to slumlord Frank Palazzolo?

Defendants argue that not one of these statements mention Steve Tobia or New Line corporations. Three of the statements mention Frank Palazzolo who is not a party to this case and one statement does not mention anyone at all. Defendants further argue that under no set of circumstances would the average viewer perceive these statements to be about Steve Tobia or New Line corporations when they distinctly mention someone else.

Plaintiff, however, argues that while the aforementioned statements does not specifically mention plaintiff by name, it is a question of fact whether the statements had a defamatory connotation that could be attributed to the actions of plaintiff with respect to the operation of the Buildings. Moreover, in addition to the aforementioned alleged defamatory statements, plaintiff seeks to amend the Complaint to add an additional instance where defendants allegedly defamed plaintiff specifically by name in a flyer. The flyer was marked into evidence as Exhibit "L" at an evidentiary hearing held before this Court on February 15, 2005 and upon which plaintiff now seeks to amend the Complaint so as to assert a separate, specific act of defamation against defendants. The subject flyer states that

> Washington Mutual bank has lent Frank Palazzolo and his group tens of millions of dollars for their buildings (Palazzolo's companies include: BBY, FJF, CPR, Loran, New Start, Next Step, New Line, Quest and others). But WaMu is trying to avoid meeting with tenants to solve this problem! ...tell WaMu to stop lending to criminal landlords!

In opposition to plaintiff's cross-motion, defendants argue that it should be denied as untimely. Defendants argue that plaintiff was aware of the subject flyer in September, 2003, as he testified during the Court's hearing, yet did not include that allegation in its Complaint which was served in December, 2003. Defendants also argue that the any reference to the New Line corporations as "criminal" landlords constitutes constitutionally protected opinion. See, Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) (statements that cannot reasonably be interpreted as representing actual facts are opinion entitled to full constitutional protection).

It is the policy of this State is to freely grant leave to amend pleadings in the absence of prejudice or surprise providing that the proposed amendment is not plainly and clearly lacking in good faith and merit. See, Fahey v. Ontario County, 44 N.Y.2d 934 (1978). See also, Sclafani v. City of New York, 706 N.Y.S.2d 129 (2d Dept. 2000)(while a Court has broad discretion in deciding whether leave to amend should be granted,

it is an improvident exercise of discretion to deny leave so as to assert an otherwise apparently meritorious cause of action absent an inordinate delay and a showing of prejudice or where the party opposing the motion to serve an amended pleading cannot demonstrate prejudice resulting directly from the delay).

Defendants' motion to dismiss plaintiff's defamation claim must be granted. The statements as provided in plaintiff's Complaint clearly do not mention plaintiff New Line corporations and, thus, no claim against defendants for defamation is stated. In addition, plaintiff's motion seeking to amend the complaint is denied. The motion is patently untimely as plaintiff was aware of the allegations against "New Line" in the flyer prior to filing and serving its Complaint. As he testified, Steve Tobia knew about the subject flyer in September, 2003, yet claimed it was not included in the Complaint when it was filed months later. Moreover, defendants have made a showing of prejudice should the Court permit the amendment at this juncture.

This constitutes the decision and order of this Court.

Dated: June 19, 2006

Hon. Sallie Manzanet