SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

135 GLEN COVE AVE. CORP., LIVINGSTON DEVELOPMENT CORPORATION and DANIEL LIVINGSTON,	**TRIAL/IAS PART 3**
Plaintiff(s),	**INDEX NO. 610442/17**
- against -	**MOTION SEQUENCE NO. 1 & 2**
RONI EPSTEIN and MARSHA SILVERMAN,	**MOTION SUBMISSION DATE: November 9, 2018**
Defendant(s).	

The following papers read on this motion:

Notice of Motion	**XX**
Affirmation	**X**
Affirmation in Opposition	**X**
Reply Affidavit	**X**
Memorandum of Law in Support	**XX**
Memorandum of Law in Opposition	**XX**
Reply Memorandum of Law	**X**

Defendants, Roni Epstein and Marsha Silverman, move [Seq. 001] for an Order, *inter alia*:

(1) pursuant to CPLR 3025(b), permitting them to file the proposed Amended Verified Answer to the Amended Verified Complaint; and,

(2) pursuant to CPLR 3211 (a)(5) and (7), dismissing the Amended Verified Complaint because all alleged defamatory statements which were made prior to November 2, 2016 are time barred; the allegations fail to specifically identify the language used or the time or date or the person to whom the alleged slanderous statements were made; and the causes of action as pled fail to state a cause of action

By separate motion [Seq. 002], defendants, Roni Epstein and Marsha Silverman, seek an Order, *inter alia*:

(1) pursuant to CPLR 3212, granting them summary judgment dismissal of the plaintiffs' first cause of action in the Amended Complaint because plaintiffs neither allege nor demonstrate special damages sustained as a result of the alleged non-time barred defamatory statements alleged; certain alleged defamatory statements are not susceptible to defamatory meaning or true and thus are not defamatory; certain alleged defamatory statements are non actionable opinions or rhetorical hyperbole; certain alleged defamatory statements are privileged and thus not actionable; and the alleged defamatory statements were not made with actual malice.

(2) pursuant to CPLR 3211(a)(7) and 3211(g), dismissing the plaintiffs' amended complaint in its entirety because the action "is an action involving public petition and participation as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law" and plaintiffs cannot demonstrate that their causes of action have "a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law";

(3) pursuant to CPLR 3211(h), for summary judgment dismissing plaintiffs' amended complaint in its entirety because the action "is an action involving public petition and participation as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law" and plaintiffs cannot demonstrate that their causes of action have "a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law".

The motions are determined as herein set forth below.

As best as can be determined from the papers submitted herein, the facts and the sequence of events giving rise to the instant lawsuit are as follows:

Plaintiff, Daniel Livingston ("Livingston") is the owner of the corporate plaintiffs, 135 Glen Cove Ave. Corp. and Livingston Development Corporation.

In 2007, plaintiffs 135 Glen Cove Ave. Corp., Livingston Development Corporation, and Daniel Livingston, sought permission from the City of Glen Cove to construct a 251-unit condominium development – namely, The Villa at Glen Cove ("The Villa") – on approximately 3.9 acres adjacent to but substantially lower than what later become the rear yard of defendants' home at 15 Rooney Court, Glen Cove, *infra*.

In May 2009, the Glen Cove City Council adopted a SEQRA Finding Statement and approved a new Master Plan for construction of The Villa.

On July 27, 2010, the City Council reviewed new Code Amendments to the City Code and adopted a SEQRA negative declaration.

On August 24, 2010, the City Council adopted the Code Amendments thus creating, in part, the Glen Cove Avenue Redevelopment Incentive Overlay District ("RIO-GCA District")

which was created specifically for plaintiffs' 3.9 acres. In part, the RIO-GCA permitted a density of 20 units per acre but authorized the City Council to grant incentive bonuses bringing allowable density to up to 50 units per acre if certain conditions were met. In addition, the RIO-GCA authorized the City Council to waive compliance with certain City Code requirements, including the Hillside Protection provisions of the City Code which are applicable to many steep hills on plaintiffs' property including the hill leading up to the defendants' property to the east, *infra*.

In 2011, defendant Roni Epstein ("Epstein") purchased her home at 15 Rooney Court, City of Glen Cove. Prior to doing so, she checked the Glen Cove Zoning Map to determine the surrounding zoning. It is undisputed that the Zoning Map was last modified in 2000. This was the Zoning Map that Epstein examined. Thus, this map did not reflect the change of zoning obtained by plaintiffs in 2010.

In 2013, defendant Marsha Silverman ("Silverman") moved into Epstein's house and in 2014, defendants Epstein and Silverman married.

On December 22, 2015, the City Council adopted a findings statement and resolution for density bonuses and waivers.

On March 1, 2016, Livingston formally amended its application to, among other things, reflect a further reduction in the number of units to a 176-unit plan. Thus, in a series of amendments between 2012 and 2016, the number of units and sizes of the buildings were reduced.

By March 15, 2016, plaintiffs received all required approvals from the City Council and Planning Board for a 176-unit condominium project, known as "The Villa at Glen Cove."[1] That is, on March 15, 2016, the Planning Board adopted a SEQRA Finding Statement with regard to The Villa's requested site plan and on April 5, 2016, the City of Glen Cove Planning Board approved the site plan to construct the total 176 condominium units.

Notably, from approximately 2013 when Silverman began living full time in the house purchased by Epstein in 2011, until April 2016, when plaintiffs received all approvals for their condominium project, defendants attended all or most of the hearings held by the City Council and Planning Board and along with other members of the public, consistently expressed opposition to the project, directly, or through counsel they retained, or by posting comments on community Facebook sites designed to get citizens to attend the public hearings. Defendants also challenged the approvals received from the City Council and Planning Board by timely filing Article 78 petitions (which were consolidated) in the Nassau County Supreme Court, *infra*.

That is, in January and April 2016, defendants herein – Roni Epstein and Marsha Silverman – timely filed two Article 78 petitions in this Court against the Glen Cove City Council

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[1]The plaintiffs' proposed project will consist of 176 condominium units in six buildings on 3.9 acres adjacent to defendants' residence at 15 Rooney Court, Glen Cove. Of the 176 units at the property, 160 will be market rate units and 16 will be affordable housing units. As best as can be determined from the papers submitted herein, the development is still under construction.

and Glen Cove Planning Board and joined the corporate plaintiffs named here as necessary parties. The Article 78 petitions challenged the resolutions of the City Council which granted the plaintiffs' requests for density bonuses for The Villa and waived certain City Code provisions which afforded hillside protections. The Article 78 proceedings also challenged approval of plaintiffs' site plan by the Planning Board. In response to Epstein and Silverman's Article 78 proceedings, the plaintiffs named herein– 135 Glen Cove Ave. Corp, Livingston Development Corporation and David Livingston – filed motions to dismiss said petitions.

In September 2016, plaintiffs commenced the removal of trees from many of the steep slopes on their property including trees on the hill that led up to the defendants' property. In response, in September 2016, defendants obtained a temporary restraining order (TRO) staying and preventing the removal of said trees.

On September 28, 2016, all parties, including the plaintiffs herein, stipulated that, with changes agreed to by all and which were placed on the record, the TRO would continue.

In June 2017, defendant Marsha Silverman announced she would run in a Democratic primary so she could run for a seat on the Glen Cove City Council.

On July 31, 2017, plaintiffs (who did not previously seek to alter the TRO that was continued by the parties who entered into the September 28, 2016 Stipulation, *supra*) moved to have this Court deem the TRO to be a preliminary injunction and to set an undertaking or to vacate the TRO altogether.

On September 12, 2017, Silverman secured one of six Democratic nominations for City Council and thereafter ran for City Council.

Plaintiffs filed their original complaint in this matter on October 3, 2017 ("the Original Complaint"). It is undisputed on this record that the Original Complaint,[2] was never served on the defendants herein.

By Decision and Order dated October 4, 2017, this Court (Peck, J.) issued an Order granting the motions to dismiss made by the plaintiffs herein of the Article 78 petitions brought by Epstein and Silverman; that is, this Court dismissed the Article 78 challenges of the defendants herein and also vacated the TRO. As a result of this Decision and Order, on November 1, 2017, defendants timely filed a Notice of Appeal of their Article 78 dismissals.

Notably, both before and after this Court's dismissal of the Article 78 petitions, defendants engaged in community Facebook groups to participate in conversations regarding the quality of the incumbent administration in Glen Cove.

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[2]The Original Complaint alleged three causes of action; to wit, libel, slander and intentional infliction of emotional distress. It is undisputed that the claimed defamatory statements listed in this Original Complaint ran from January 30, 2014 to August 3, 2017 and did not allege each defamatory statement as a separate cause of action for libel or slander as required in New York.

On November 1, 2017 (the same day that the defendants' appealed the dismissal of their Article 78 proceedings), plaintiffs filed an Amended Verified Complaint ("AVC") in this matter which added Daniel Livingston as a plaintiff and also added a fourth cause of action for malicious prosecution.

Thus, the AVC asserts four causes of action – to wit, (1) libel, (2) slander, (3) intentional infliction of emotional distress, and (4) malicious prosecution.[3]

The AVC repeated each of the alleged defamatory statements in the Original Complaint and added eleven allegedly defamatory statements, all of which occurred in October 2017 after the dismissal of the Article 78 petitions by this Court (Peck, J.), supra. Indeed, the plaintiffs' fourth cause of action for malicious prosecution also stemmed from the unsuccessful Article 78 petitions filed by the defendants in early 2016.

On November 7, 2017, Marsha Silverman was elected to the Glen Cove City Council. She currently holds said office.

On July 6, 2018, defendants moved (Seq. 001 herein) for permission to file an Amended Answer to the AVC in which they add several affirmative defenses, including statute of limitations, dismissal pursuant to CPLR 3211(g) and also add anti-SLAPP counterclaims against the plaintiffs (Civil Rights Law §70[a]). The proposed Amended Answer also clarifies the basis for the existing counterclaim for abuse of process. Thus, in their proposed Amended Answer – which forms the basis for the defendants' first motion (Seq. 001) – defendants assert, among other things, the following: a counterclaim stating a claim for abuse of process and malicious prosecution; a counterclaim for libel and/or slander; and, a counterclaim based on Civil Rights Law §70-a, the law adopted by the New York Legislature to provide protection for members of the public who oppose projects sought by developers from being sued by the developer for exercising their First Amendment rights. The defendants also assert, among other things, an affirmative defense based on statute of limitations; an affirmative defense based on CPLR 3211(g) and CPLR 3211(a)(7) on the grounds that all of the causes of action in the AVC are claims involving public petition and participation as defined in Civil Rights Law § 76-a(a)(1); and an affirmative defense based on the failure of plaintiffs to have a separate cause of action for each statement they allege to be defamatory.

In total, there are eleven affirmative defenses and five counterclaims in the proposed amended answer to the AVC.

In addition, as part of their motion (Seq. 001 here), defendants also seek an Order, pursuant to CPLR 3211(a)(5) and (7) dismissing the second (slander), third (intentional infliction of emotional distress) and fourth (malicious prosecution) causes of action as set forth in the AVC as to both defendants; move to dismiss the first cause of action (libel) against defendant Marsha Silverman, in its entirety and to dismiss all alleged defamatory statements supporting the first cause of action (libel) against defendant Roni Epstein because plaintiffs failed to plead

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[3]This Court notes at the outset that the plaintiffs have withdrawn their second cause of action for slander (Plaintiffs' Opp. Memo of Law, p. 1, fn. 1; Plaintiff's Aff. In Opp., ¶18).

each alleged defamatory statements against defendant Epstein which are barred by the one year statute of limitations applicable to intentional torts.

Moreover, by separate motion – Sequence 002 – defendants also seek partial summary judgment dismissing all alleged defamatory statements supporting the plaintiffs' first cause of action for libel which are not time barred. Defendants submit that none of the non-time barred statements alleged to be defamatory are actionable. Thus they further move to dismiss the entire complaint pursuant to CPLR 3211(a)(7), and 3211(g) and for summary judgment on the entire complaint pursuant to CPLR 3212(h).

Thus, upon the instant motion (Seq. 002), defendants concurrently move to dismiss the AVC in its entirety against both defendants. However, because the immediate ground for dismissal of the non-time barred libel claims is based on the defendants' failure to plead a separate cause of action as to each allegedly defamatory statement – a defect that can be cured by further amending the complaint – defendants also move for summary judgment on any cause of action which may not be dismissed based on statute of limitations or a failure to state a cause of action.

The parties' positions and arguments

This Court notes at the outset that the plaintiffs have withdrawn their second cause of action for slander (Plaintiffs' Opp. Memo of Law, p. 1, fn. 1; Plaintiff's Aff. In Opp., ¶18).

In bringing this suit, plaintiffs claim that "despite being confronted with their false statements on several occasions beginning as early as August 8, 2014, defendants repeated their false statements about Dan Livingston and The Villa Project over and over again for years, forcing the plaintiffs to commence the instant lawsuit, as a last resort to clear plaintiffs' name and reputation" (Plaintiffs' Memo of Law, p. 4). Plaintiffs maintain that, contrary to the defendants' arguments, this is not a SLAPP suit as defined by Civil Rights Law §76-a, infra.

Indeed, plaintiffs claim that, given defendant Silverman's elected position on the Glen Cove City Council, it is she who is deemed a public person for the purposes of a SLAPP suit determination. Plaintiffs also claim that their admitted posting of a copy of the AVC – a public document – on Facebook in an advertisement opposing Silverman's candidacy is constitutionally protected speech and "[t]hat defendants do not like it is irrelevant." Plaintiffs complain that ironically, it is the defendants who have "weaponized Facebook to unleash dozens of false and defamatory statements about the plaintiffs over the last four or five years, including posts about their own Article 78 petitions filed against plaintiffs" which were ultimately dismissed as being untimely and lacking merit. Plaintiffs submit that the defendants used their defamatory statements about plaintiffs to promote Silverman's candidacy.

In addition, plaintiffs point out that while they were granted the approval to construct the condominium development in April 2016, the fact that they waited until October 3, 2017 demonstrates that Livingston has no interest in punishing the defendants; rather the plaintiffs commenced this suit simply to hold the defendants "accountable for their persistent and unhinged reckless disregard for the rights of the Livingston plaintiffs."

Plaintiffs also argue that this action is not a SLAPP suit. Specifically, they argue that none of the posts complained of are materially related to efforts by the defendants "to report on, comment on, rule on, challenge or oppose plaintiffs' application for density bonuses and waivers of otherwise applicable City Code provisions from the Glen Cove City Council, and their application for approval of their site plan by the Glen Cove Planning Board." They argue that the posts came long after the plaintiffs had already been denied all density bonuses and other waivers other than one for structured parking, and had been granted approval of their site plan on about April 5, 2016. Plaintiffs argue that, as such, the current action is not a SLAPP suit and plaintiffs are not subject to the heightened standard of having to prove actual malice.

Additionally, plaintiffs argue that the current action is not a SLAPP suit because the defendants' false claims – such as those accusing plaintiffs of illegally and irresponsibly trespassing onto defendants' property and grossly evicting minorities and those "less fortunate" who had lived in this building for "over 50 years" – were irrelevant to whether Livingston was entitled to a density bonus or other waivers or the applicable process. Instead, the plaintiffs argue that the defendants' posts were designed to garner contempt and hatred for Livingston and to make the defendants feel supported in their own hatred because Livingston was granted site approval.

Plaintiffs submit that to the extent that any of the false statements are deemed to be materially related to the application process that was finalized on or about April 5, 2016, there at least exists a question of fact as to whether the false statements were made with actual malice. Plaintiff submit that there exists ample evidence that defendants knew their statements were false or had a reckless disregard for the truth or falsity of their statements when they were made. It is plaintiffs' position that the defendants make false accusations of defendant Livingston's alleged wrongful, illegal, and hostile conduct to support their claims and repeatedly and intentionally spread false information about plaintiffs' real estate development project – The Villa – to incite hatred and contempt from the residents of Glen Cove towards the Livingston plaintiffs.

Plaintiffs admit that they only seek to hold defendants liable for unprivileged defamatory and malicious statements and actions that occurred within the applicable statute of limitations period. As to those statements falling outside of the relevant statute of limitations period, the plaintiffs maintain that the various false statements and bad faith conduct by defendants that fall within certain privileges or outside the statute of limitations are described because they demonstrate the defendants' knowledge of the falsity of their statements and the actual malice with which they continued to make similar or other types of false statements.

Plaintiffs also contend that the defendants offer no legitimate excuses for their consistent lies to the public, who trusted them when they gave information about The Villa project since it was common knowledge that the defendants had commenced an Article 78 petition to try and stop the development and were thus leaders of the issue.

The plaintiffs add that there is no merit to the defendants' argument that their statements were not intended to be taken literally because the evidence – namely the "likes" and the nature of the comments following defendants' posts on Facebook which responded in a serious fashion to the information dispersed – shows that their statements coincide with what a reasonable person would regard as fact. Plaintiffs point out that while the false statements at

issue go back one year before the commencement of the current action, they started long before. Indeed, going back as far as 2013, plaintiffs submit that the defendants relentlessly and maliciously attacked Livingston every chance they got.

In support of their motions seeking to dismiss the plaintiffs' claims, the defendants argue that the entire purpose of plaintiffs' suit is to punish them for opposing the plaintiffs' applications to construct a condominium development. It is the defendants' position in this case that the AVC in this matter was filed against them for the purpose of punishing them for opposing plaintiffs' efforts to gain approval for their project, for challenging the approvals granted to the plaintiffs by filing the Article 78 challenges to those approvals and for filing a notice of appeal on November 1, 2017 from the Order of this Court (Peck, J.) dated October 4, 2017 which dismissed the Article 78 petitions.

It is also the defendants' position that the plaintiffs amended their complaint in this action for the purpose of helping people in Glen Cove who wanted to defeat defendant Marsha Silverman at the polls to do so. Defendants argue that the AVC is replete with vitriolic statements against the defendants which malign their character and have no place in a proper pleading. The defendants submit that the AVC was not served upon defendants until November 2, 2017 – five days before the election – thereby depriving Silverman of the opportunity to effectively defend herself. They submit that the allegations in the complaint serve no purpose in a proper pleading and were intended solely to help defeat Marsha Silverman's candidacy, to embarrass and humiliate the defendants as punishment for their continued efforts to challenge the approvals received by plaintiffs from the City of Glen Cove and to ingratiate the plaintiffs with Glen Cove officials whose assistance might be needed as The Villa at Glen Cove project went forward.

Sequence 001

CPLR 3025(b) provides as follows:

> (b) Amendments and supplemental pleadings by leave. A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.

Under CPLR 3025(b), a party may amend a pleading "at any time" by leave of the court (CPLR 3025[b]), even after trial (*Kimso Apts., LLC v. Gandhi*, 24 NY3d 403, 411 [2014]). Leave to amend "shall be freely given upon such terms as may be just including the granting of costs and continuances" (CPLR 3025[b]). Generally, courts should grant leave to amend when (1) there has been no "prejudice or surprise resulting directly from the delay in seeking leave," and (2) the proposed amendment is neither palpably insufficient nor patently devoid of merit (*Lucido v. Mancuso*, 49 AD3d 220, 222 [2nd Dept. 2008]; *Katz v. Castlepoint Ins. Co.*, 121 AD3d 948, 950 [2nd Dept. 2014]). Indeed, even when a defense is waived under CPLR 3211(e), "it can nevertheless be interposed in an answer amended by leave of court pursuant to CPLR 3025(b), as long as the amendment does not cause the other party prejudice or surprise resulting

directly from the delay, and is not palpably insufficient or patently devoid of merit" (*Bank of N.Y. Mellon v. Aquino*, 131 AD3d 1186, 1187 [2nd Dept. 2015]; *see also, Lucido v. Mancuso*, *supra* at 222; *Onewest, F.S.B. v. Goddard*, 131 AD3d 1028, 1029 [2nd Dept. 2015]). The party opposing the application has the burden of establishing prejudice (*Kimso Apts., LLC v. Gandhi*, supra at 411), which requires a showing that the party "has been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position" (*Loomis v. Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981]; *see Kimso Apts., LLC v. Gandhi*, supra at 411). That is, where the party opposing a motion to serve an amended pleading cannot demonstrate prejudice resulting directly from the delay, denial of the motion has been deemed an abuse of discretion (*Murray v. City of New York*, 43 NY2d 400 [1977] *rearg. dismissed* 45 NY2d 966 [1977]; *Caruso v. Hoyer & Co.*, 79 AD2d 670, 671 [2nd Dept. 1980]).

In the end, the decision to allow or disallow an amendment to the pleading is committed to the trial court's discretion (*Edenwald Contr. Co. v. City of New York*, 60 NY2d 957 [1983]; *see also, Mayers v. D'Agostino*, 58 NY2d 696 [1982]).

In this case, while the defendants' proposed answer to the AVC asserts eleven affirmative defenses and five counterclaims, this Court does not find said defenses and counterclaims to be either "palpably insufficient" or "patently devoid of merit." Nor is there any evidence on this record that allowing such amendments at this juncture prejudices or surprises the plaintiff herein (CPLR 3025[b]; *Matter of Roberts v. Borg*, 35 AD3d 617 [2nd Dept. 2006]; *Public Adm'r of Kings County v. Hossain Constr. Corp.*, 27 AD3d 714 [2nd Dept. 2006]). Indeed, inasmuch as all of the affirmative defenses and counterclaims sought to be interposed via the proposed amended verified answer are supported by facts already developed and known to both parties since the inception of the case, this Court finds that the granting of the subject motion does not unduly prejudice the plaintiffs.

Thus, in the absence of such factors as substantial prejudice to the plaintiffs, or the patent futility of the proposed amendments, this Court herewith grants the defendants' motion permitting them to file the proposed Amended Verified Answer to the AVC (CPLR 3025[b]; *Cutwright v. Central Brooklyn Urban Dev. Corp.*, 127 AD2d 731 [2nd Dept. 1987]).

Moreover, having granted the defendants leave to amend their answer to include, among other things, a statute of limitations defense, this Court turns to that part of the defendants' motion which seeks to dismiss each of the four[4] causes of action -- to wit, libel, slander, intentional infliction of emotional distress and malicious prosecution – each of which is an intentional tort and therefore subject to the one year statute of limitations (CPLR 215[3]; *E.B. v. Liberation Publs.*, 7 AD3d 566 [2nd Dept. 2004] [libel]; *Cullin v. Lynch*, 113 AD3d 586 [2nd Dept. 2014] [slander]; *Bellissimo v. Mitchell*, 122 AD3d 560 [2nd Dept. 2014] [intentional infliction of emotional distress]; *Williams v. CVS Pharmacy, Inc.*, 126 A.D.3d 890 [2nd Dept. 2015] [malicious prosecution]).

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[4]While the plaintiffs have withdrawn their second cause of action for slander, supra, the claim would in any event be dismissed under the statute of limitations (*Cullin v. Lynch*, 113 AD3d 586 [2nd Dept. 2014]).

This Court notes that aside from the first cause of action for libel which advances allegations of libel against Roni Epstein that fall within the appropriate one year statute of limitations period, the balance of plaintiffs' claims – specifically the second, third and fourth causes of action against both defendants and the first cause of action against defendant Marsha Silverman – are time barred under the one year statute of limitations period applicable to intentional torts and are therefore dismissed (*Redd v. Village of Freeport*, 150 AD3d 780 [2nd Dept. 2017]; *see also, Matter of Guimarales [New York City Bd. of Educ.—Roberts]*, 68 NY2d 989, 991 [1986]; *Abrahams v. Commonwealth Land Tit. Ins. Co.*, 120 AD3d 1165, 1166 [2nd Dept. 2014]).

Specifically, no claimed defamatory statements are alleged to have been made by Marsha Silverman within the applicable statute of limitations period. Indeed, according to the AVC, the last (most recent) statement by Marsha Silverman alleged to be defamatory was purportedly made on October 7, 2015 – more than two years before the filing of the AVC. Similarly, inasmuch as there is no allegation that Marsha Silverman made any defamatory statements on or after November 2, 2016, whether oral or written, the third cause of action for intentional infliction of emotional distress against defendant Silverman also fails.

Sequence 002

As for the plaintiffs' first cause of action for libel as asserted against Roni Epstein, this Court turns to the defendants' separate motion (Seq. 002) which seeks, pursuant to CPLR 3212, an Order granting them summary judgment dismissal of said cause of action on the grounds that the plaintiffs neither allege nor demonstrate special damages sustained as a result of the alleged non-time barred defamatory statements alleged; certain alleged defamatory statements are not susceptible to defamatory meaning or true and thus are not defamatory; certain alleged defamatory statements are non actionable opinions or rhetorical hyperbole; certain alleged defamatory statements are privileged and thus not actionable; and the alleged defamatory statements were not made with actual malice.

This Court begins by noting that, in pertinent part, the first cause of action for libel is based on the assertion that Roni Epstein made nineteen posts on restricted community Facebook websites which were libelous. Specifically, the statements are identified in the AVC at Paragraphs 99, 101, 105, 107, 109, 111, 113, 116, 118, 120, 122, 124, 126, 128, 130, 132, 134, 136, and 138.

Moreover, this Court finds that despite plaintiffs' arguments to the contrary, this action – i.e., one involving public petition and participation within the meaning of Civil Rights Law § 76–a – is a Strategic Lawsuit Against Public Participation (SLAPP) suit which in effect places additional restrictions on the ability of "public applicants" – including, this Court finds, the plaintiffs herein – to seek redress from the courts. Specifically,

Civil Rights Law § 76–a(1) provides, in relevant part:

> (a) 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' shall mean 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."

"Civil Rights Law § 76–a was enacted to provide special protection for defendants in actions arising from the exercise of their rights of public petition and participation by deterring SLAPP actions" (*Novosiadlyi v. James*, 70 AD3d 793, 794 [2nd Dept. 2010]; *Allan & Allan Arts v. Rosenblum*, 201 AD2d 136, 143–144 [2nd Dept. 1994]). SLAPP suits are designed to intimidate defendants into "dropping their initial petitions due to the expense and fear of extended litigation." The primary motivation behind filing SLAPP suits is to retaliate against "successful opposition and prevent future opposition" (*Hariri v. Amper*, 51 AD3d 146 [1st Dept. 2008]). Thus, this statute creates a new right of action for victims of SLAPP suits, and places additional restrictions on the ability of public applicants, such as the plaintiffs herein, to seek redress from the courts. Indeed, the Legislature, at the same time that the amendments to the Civil Rights Law were passed, also amended the CPLR in order to impose upon plaintiffs, in actions involving public petition and participation, a heightened standard of proof to avoid dismissal of the action (*Guerrero v Carva*, 10 AD3d 105, 116 [1st Dept. 2004]).

Specifically, CPLR 3212 (h) provides that a motion for summary judgment to dismiss a SLAPP suit shall be granted unless the responding party demonstrates its action, claim or cross claim "has a substantial basis in fact and law or is supported by a substantial argument for an extension, modification or reversal of existing law." CPLR 3211(g) echoes the provisions of CPLR 3212(h) (*Id.* at 117; *Yeshiva Chofetz Chaim Radin, Inc. v Village of New Hempstead*, 98 F. Supp. 2d 347, 362 [SDNY 2000]).

Here, this Court begins by finding that it is plain herein that the plaintiffs are "public applicants" as defined by the Civil Rights Law because they "applied for [and] obtained a permit, zoning change ... or other entitlement for use or permission to act from [the relevant] government body [and] any person with an interest, connection or affiliation with such person that is materially related to such application or permission."

In addition, this Court finds that the AVC in this case is "an action involving public petition and participation" within the meaning of this statute because it is materially related to efforts by defendants Epstein and Silverman "to report on, comment on, rule on, challenge or oppose" plaintiffs' application for density bonuses and waivers of otherwise applicable Glen Cove City Code provisions from the Glen Cove City Council and their application for approval of their site plan by the Glen Cove Planning Board.

Thus, this Court turns to the burden shifting framework set forth in CPLR 3211(g) and 3211(h).

Specifically, this Court notes that the defendants have carried their *prima facie* burden of proving that the complaint is a SLAPP suit. Thus, the burden shifts to the plaintiff to prove that the action has "a substantial basis in fact and law or is supported by a substantial argument for

an extension" (CPLR 3212[h]; *Edwards v. Martin*, 158 AD3d 1044 [3rd Dept. 2018]). The plaintiffs have failed to make this showing.

As stated above, the law requires that the plaintiffs carry their burden of establishing "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" (Civil Rights Law 76-a(2)). The plaintiffs have failed to also make this showing.

That is, the plaintiffs have failed to demonstrate that any of the alleged defamatory statements "was made with knowledge of its falsity or with reckless disregard for whether it was false" (Civil Right law 76-a(2)). Indeed, the plaintiffs have failed to meet the burden of establishing not just that a false statement was made, but also that the false statement "is material to the cause of action at issue" (Id). For libel (and slander), the false statement must be material to the claim that the plaintiffs were defamed. The plaintiffs have failed to make this showing herein.

Moreover, this Court cannot overlook the fact that the law requires that the inquiry into whether words have defamatory meaning is a question of law and therefore must be determined by this Court in the first instance (*Aronson v Wiersma*, 65 NY2d 592 [1985]; *Gottlieb v Wynne*, 159 AD3d 799 [2nd Dept. 2018]). To that extent, this Court notes that none of the defendants' alleged statements herein – as identified in the nineteen posts on restricted community Facebook websites and as stated in the AVC at Paragraphs 99, 101, 105, 107, 109, 111, 113, 116, 118, 120, 122, 124, 126, 128, 130, 132, 134, 136, and 138 – can be deemed defamatory. Specifically, based on a plain and simple reading of the specific allegations of the AVC as well as based upon a reading of the AVC in its entirety, none of these alleged statements were susceptible to defamatory meaning (*Aronson v Wiersma*, supra at 594; *Samuels v Berger*, 191 AD2d 627, 628 [2nd Dept. 1993]), were otherwise "substantially true" (*Goldberg v Levine*, 97 AD3d 725 [2nd Dept. 2012]; *Shulman v Hunderfund*, 12 NY3d 143 [2009]), or constituted opinion or rhetorical hyperbole (*Gross v New York Times Co.*, 82 NY2d 146 [1993]; *Brian v Richardson*, 87 NY2d 46 [1995]; *Stolatis v. Hernandez,* 161 AD3d 1207, 1209 [2nd Dept. 2018]) and therefore are not actionable.

Indeed, many of the statements complained of by the plaintiffs are non-actionable opinions which even if they contained false factual assertions, as plaintiffs contend, the fact that in their full context they demonstrate an expression of protected opinion renders them non-actionable (*Stolatis v. Hernandez*, supra at 1210).

Finally, allegations of libel, unless defamatory per se, must be accompanied by allegations of special damages (*Liberman v Gelstein*, 80 NY2d 429, 435 [1992]; *Bernard v Grenci*, 48 AD3d 722,724 [2nd Dept. 2008]). That is, libel as a rule is not actionable unless the plaintiff suffers special damages (*Id.*) and the failure to sufficiently plead or prove special damages warrants dismissal (*Matherson v Marchello*, 100 AD2d 233, 235-37 [2nd Dept. 1984]).

Thus, in the end, the alleged defamatory statements in the AVC made on or after November 1, 2016 (one year before the AVC was filed on November 1, 2016) fail because, none of the alleged defamatory statements in the AVC claims that the plaintiffs suffered special

damages. Indeed, the evidence here establishes that the plaintiffs had their approvals long before the statements were made and this suit was commenced.

Insofar as the plaintiffs argue that the first cause of action for libel is based on the assertion that nineteen posts on restricted community Facebook websites by Roni Epstein are defamatory per se, such argument is unsubstantiated and therefore meritless and unavailing to defeat defendants' motion for summary dismissal of the second cause of action. Indeed, none of the claimed defamatory statements constitute defamation per se because none "charg[e] [the] plaintiff with a serious crime" and none of the alleged defamatory statements "tend to injure [the plaintiffs in their] trade, business or profession" (*Liberman v Gelstein*, supra at 435). The nineteen statements forming the basis of this cause of action, even under the most liberal construction and readings, are deemed by this Court to be opinion, substantially true and/or constitute rhetorical hyperbole and are therefore privilege. In any event, as stated above, the plaintiffs concede that they cannot show special damages arising from any of the claimed defamatory statements.

Therefore, the defendants' motion [Seq. 002] granting them summary judgment dismissal of the plaintiffs' first cause of action, including as against Roni Epstein, is granted.

The parties' remaining contentions have been considered and do not warrant discussion.

Any application not specifically addressed is denied.

This shall constitute the decision and order of this Court.

Settle judgment on notice.

DATED: 1/31/2019

Roy S. Mahon
J.S.C.

ENTERED
FEB 05 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE