

Boards and Community Members Beware: Your Speech May Not Be Protected After All!

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Historically, community members would save a year's worth of complaints and frustration for the annual meeting where disgruntled community members attempt to confront the Board and management in person. Today, in the age of the internet and social media, many disgruntled community members are no longer waiting

for the annual meetings and, instead, are voicing their concerns and frustrations on online message boards and websites. While typically these types of opinions are legally permissible, a recent case has attempted to draw the line in the sand.

Generally, the "common interest" privilege exists to protect statements which might otherwise be defamatory if they are made between persons on a subject in which they share a common interest. In addition, statements that consist entirely of pure opinion are generally considered to be non-actionable. Based on this, persons living in a community association are typically free to say and write what they want about the community and the community's Board members. However, recent litigation stemming from community members' use of a public website to make statements about the community's Board of Directors, sets new precedent for internet-based defamation claims.

In *Trump Village Section 4 v. Bezvoleva*, 509277/2014 (a case pending in the Supreme Court of the State of New York, Kings County – a lower Court in New York State), a Co-op and the former President of the Board of Directors brought a lawsuit against two shareholders of the Co-op for their alleged defamation of the Board's President. The Co-op and former Board President asserted that the shareholders were using a website in order to defame them. The Defendants who were allegedly involved in the statements and publication requested the Court dismiss the lawsuits. Ultimately, the Court did not dismiss the lawsuit and the lawsuit will continue. The following is a summary of the major issues and the Court's finding on same with respect to the dismissal request.

The shareholders claimed that the website was created with the purpose of discussing events, and to provide news, announcements, and legal advice in the Trump Village community. Additionally, they claimed it was designated only for community tenants. The Co-op asserted that although the shareholders' website appears to be a community website, the shareholders have used the website to defame the Co-op and Board President. The shareholders allegedly posted at least 19 defamatory statements over the period of a year, stating instances of alleged abuses of power by the Board President and the Co-op.

For instance, one post on the website was entitled "Trump Village 4 Election Fraud," which accused the Co-op of committing fraud in its election process, and which specifically named the Board President, accusing him of inappropriately placing his own name first on the proxy even though he was allegedly not entitled to that placement based upon the election lottery. The shareholders then wrote a series of posts focused on election fraud, illegality of the

Board President, and other abuses committed by the Board against the community such as spending of corporate money for personal use.

In a motion to dismiss the lawsuit, the shareholders argued that the challenged statements are not actionable because they are privileged speech, or in the alternative, that the statements are purely non-actionable opinion.

In this case, the Court held that the shareholders' statements on the website are neither protected by privilege nor are they non-actionable opinions. The Court held that although the shareholders may have directed their statements to residents of the Trump Village community, the communications on the website were not disseminated solely to residents of the Community, and that the shareholders knowingly published the statements on the worldwide web to the public at large. Given that the public at large was able to see the statements as opposed to just the shareholders, and since the shareholders at issue were well aware that anyone having internet access could read the statements, the "common interest" privilege does not apply.

Therefore, where statements have been posted on a public website where anyone searching the worldwide web can see said statements, the statements lose their privilege under the "common interest" privilege. Essentially, the Court found anyone typing the name of the Co-op into a Google search were able to quickly find the statements.

In addition, the Court analyzed the content of the statements made by the shareholders on the website, and determined that the same were not merely non-actionable opinion. Generally, opinions are privileged speech, and are therefore, non-actionable. In this case, the Court held that although a reader may be less likely to read statements as facts if they are made on the internet, that simply because a statement is posted on the internet does not exempt it from being libelous where it does not constitute opinion. Here, where the shareholders used specific and easy to understand information, and implied that their statements are based upon undisclosed facts (i.e. – facts anyone else could find or verify), and where the parties expressing those statements purport to represent the community, such statements are not opinion and therefore not protected speech.

The bottom line: If you are making statements about someone else in the community, you must indicate that it is your opinion. Additionally, do not disseminate or post the statements on the internet where anyone can see them. The best practice would actually be abstinence unless you have actual facts and evidence to support your statements.

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