

Last month, Sean walked into Hustedt Chevrolet in Centereach and traded in his fully paid 1997 Ford Explorer for a 2,500 credit toward a 2002 Chevy Malibu with 50,000 miles. He owed an additional \$11,400 on the Malibu.

After Beaudoin's mother discovered the purchase and complained to the dealership, the manager agreed to lower the total price to \$8,550. That's more than the car's \$6,940 retail value in excellent condition, according to the Kelley Blue Book.

Paula Beaudoin said she agreed to the purchase because the dealership refused to reverse the deal. Hustedt Chevrolet has an unsatisfactory record with the Better Business Bureau of Metropolitan New York for failure to respond to complaints.

Edward Reyer, general manager of Hustedt, said Beaudoin seemed more intent on getting the price lowered than on reversing the deal. And he said the price had nothing to do with Sean's condition.

"Anybody can be overcharged," Reyer said. "Forget about autism. If you come in here and you like a car and you're given a price - no matter how much it's marked up - and you accept a price, you're accepting the price, no matter who you are."

Sean Beaudoin had "everything we need," Reyer said - a driver's license, good credit, a job and car insurance. "He's as normal as normal can be as far as having the proper stuff."

The defamation claims against "NEWSDAY" allege that the article:

- (1) "falsely stated that the plaintiffs subsequently renegotiated the price of the sold motor vehicle because the subject motor vehicle was sold to a handicapped person" *when they actually lowered the price of the motor vehicle because of a computation error,* *id.* 16-17;
- (2) "falsely stated that the mother of the handicapped [man] attempted to void or reverse the sale of the motor vehicle, when in truth, she attempted to obtain a lower sales price," *Id.* 19; and
- (3) "false reported that plaintiff, Edward Reyer was the general manager of Hustedt," *id.* 18.

Plaintiffs have withdrawn by stipulation their claims against defendants PAULA BEAUDOIN and SEAN P. BEAUDOIN and have never served a copy of the complaint upon defendant RICHARD J. DALTON, JR..

Defendant "NEWSDAY's" motion seeks an order granting summary judgment dismissing plaintiffs complaint claiming that no viable libel claim has been asserted against "NEWSDAY" since the article contains no false implication that "HUSTEDT" knowingly took advantage of a handicapped person. In support of the motion, defendant submits an affidavit from defendant "DALTON" together with two affirmations reciting relevant portions of the parties deposition testimony. Defendant claims that plaintiff's complaint must be dismissed since: 1) the undisputed facts reported in the article are accurate; 2) the article cannot be reasonably read to imply that "HUSTEDT" took unfair advantage of a customer because he was "disabled"; and 3) even if the article was deemed to provide such implication, it is fully protected as an opinion based upon facts set forth in the article. Defendant claims that plaintiffs have failed to submit any evidentiary proof in support of their claims to show that the facts contained in the article were false. Defendant asserts that no proof exists to support plaintiff's unfair advantage claims since nothing in the text of the article indicates that plaintiffs were aware that "BEAUDOIN" was disabled. Defendant contends that the article makes clear that "BEAUDOIN" was "highly functioning" and that his disability was not readily apparent. Finally defendant argues that even were the article to implicate to the reader that plaintiffs took advantage of "BEAUDOIN" because of their awareness of "BEAUDOIN's" disability, that inference would constitute an opinion about plaintiff's motives which is purely subjective and cannot form the basis of a defamation action. It is defendant's position that plaintiffs complaint must be dismissed since as a matter of law no viable libel claim exists against "NEWSDAY".

In opposition plaintiff submits an affidavit from the owner of "HUSTEDT" and an attorney's affirmation and claims that sufficient evidence exists to set forth a viable defamation claim against "NEWSDAY". Plaintiffs claim that the false and defamatory accusation and innuendo contained in the article was that plaintiffs knowingly took advantage of a disabled person. Plaintiffs claim that the article directly implied that the car dealer took complete advantage of "BEAUDOIN" and were aware of his vulnerable autistic condition when "HUSTEDT" sold him a used car for more than double the advertised price. Plaintiffs assert that reading the article as a whole the average reader would conclude that the dealership took unfair advantage of a disabled customer. Plaintiffs claim that the article's author made a decision not to contact "HUSTEDT's" owner who would have reversed the transaction and assert that ultimately the deal was redone and made at cost with "HUSTEDT" making no profit. Plaintiffs claim that under these circumstances "HUSTEDT" was defamed by implication which is not "constitutionally protected" opinion and argue that a jury trial is required to determine the amount of damages to be awarded to the plaintiffs.

CPLR §3212(b) states that the motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (OLAN v. FARRELL

LINES INC., 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985); SPEARMAN v. TIMES SQUARE STORES CORP., 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller. NEW YORK CIVIL PRACTICE Sec. 3212.09)). Moreover, it is well settled that a party opposing a motion for summary judgment must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (CASTRO v. LIBERTY BUS CO., 79 AD 2d 1014, 435 NYS 2d 340 (2nd Dept., 1981)).

With respect to plaintiffs' defamation claim, a writing is libelous per se if it tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number of the community (SCHERMERHORN v. ROSENBERG, 73 AD2d 276, 426 NYS2d 272 (2nd Dept., 1980); RINALDI v. KING PENGUIN, INC., 101 Misc 2d 928, 422 NYS2d 552, modified 73 AD2d 43, 425 NYS2d 101 aff'd 52 NY2d 422, 438 NYS2d 496 (1976)). The test of libel is whether to the mind of an intelligent person, the tenor of the language used naturally imparts a criminal or disgraceful charge (see COLE-FISCHER-ROGOW, INC. v. CARL ALLY, INC., 29 AD2d 423, 288 NYS2d 556 (1st Dept., 1968)).

The question of whether particular words are reasonably susceptible of a defamatory meaning is to be resolved by the Court in the first instance (ARONSON v. WIERSMA, 65 NYS2d 592, 593-594 NYS2d 1006 (1985); TRACY v. NEWSDAY, 5 NY2d 134, 182 NYS2d 1 (1950)). As the Court of appeals ruled in ARSON v. WIERSMA 65 NY2d 592, 594, 497 NYS2d 1006, 1007 (1085):

The 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 reasonable susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction.

When a claim for libel by implication is asserted it is for the court to determine whether the challenged publication is reasonably capable of conveying the defamatory meaning alleged (see JAMES v. GANNET CO., 40 NY2d 415, 386 NYS2d 871 (1976); TRACY v. NEWSDAY, supra.)). If the court concludes that the alleged implication could reasonably be conveyed, it must then also assess whether the words used can reasonably support the further conclusion that the defamatory implication was one intended by the defendant (McCORMACK v. COUNTY OF WESTCHESTER, 286 AD2d 24, 731 NYS2d 58 (2nd Dept., 2001)).

Upon reviewing the article in its entirety it cannot be stated that the article was written to imply that plaintiff "HUSTEDT" was motivated to take advantage of "BEAUDOIN" because of his disability. The article read as a whole presents the issue of difficulties faced by families of "highly functioning" autistic young adults and goes on to detail "BEAUDOIN's" attempted purchase of a used car from plaintiff's dealership. The article does not suggest that "HUSTEDT" employees know or should have known of "BEAUDOIN's" condition and generally details the original sale and renegotiation which took place between the dealership and "BEAUDOIN's" mother, defendant

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PAULA BEAUDOIN. Moreover even were this Court to accept the claimed implication, the "NEWSDAY" article outlined all the relevant facts surrounding the transaction and any negative implication constitutes an opinion based upon the disclosed facts and is therefore not actionable as libel (see Steinhilber v. Alphonse, 68 NY2d 283, 508 NYS2d 901(1986)). Under these circumstances plaintiffs complaint must be dismissed. Accordingly it is'

ORDERED that the complaint is hereby dismissed.

Dated: April 6, 2011

MELVYN TANENBAUM

J.S.C.