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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN PART 7
Justice

STUART SALENGER,
Plaintiff,

-against-

PETER K. BERTINE, JR.,
Defendant.

INDEX NO. 110869/09

MOTION SEQ. NO. 003

The following papers were read on this motion and cross-motion for partial summary judgment pursuant to CPLR 3212(a).

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Reply Affidavits — Exhibits (Memo)	

Cross-Motion: ■ Yes ☐ No

Stuart Salenger (plaintiff) moves, pursuant to CPLR 3212(a), for partial summary judgment as to liability on the second, fourth through ninth, and 11th causes of action alleged in his complaint. Peter K. Bertine, Jr. (defendant) cross-moves, also pursuant to CPLR 3212(a), for summary judgment dismissing the second through 11th causes of action. The first cause of action was severed and dismissed by the Honorable Michael D. Stallman in a decision and order dated December 25, 2009. Each cause of action in the complaint alleges libel.

BACKGROUND

In 2004, plaintiff purchased an estate in a rural residential neighborhood on the Neversink River in an area known as Philwood, near Forestburgh, Sullivan County. He brought along a number of his pets, including huge tortoises and a camel, and soon began to plan a farm, including alpacas and goats, the fibers of which would be spun into clothing. In 2008, plaintiff applied to have his land included in one of the two Sullivan County Agricultural Districts (the District), a designation that would allow him to change the use of his land and exempt the property from local taxes and zoning regulations. On August 21, 2008, the county legislature approved the application, although the Forestburgh town board had unanimously opposed it. In July of 2009 plaintiff, who was planning to harvest mosses, applied to have two additional lots that he had bought in the Neversink Gorge area included in the District. Again, the Forestburgh town board opposed the inclusion, but the Sullivan County legislature approved it. The comments that are the subject of the complaint involves alleged defamatory statements made

by defendant about plaintiff in blog postings as well as in various emails. It is undisputed that defendant owns or owned properties in Forestburgh, neighboring plaintiff's property.

STANDARDS

Summary Judgment

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212[b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied *(see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Libel and Defamation

"The essence of the tort of libel is the publication of a statement about an individual that is both false and defamatory. Since falsity is a necessary element of a libel claim, and only 'facts' are capable of being proven false, it follows that 'a libel action cannot be maintained

unless it is premised on published assertions of fact" (*Guerrero v Carva*, 10 AD3d 105, 112 [2004], citing *Brian v Richardson*, 87 NY2d 46, 50-51 [1995]).

A statement is defamatory if it tends "'to expose [the plaintiff] to hatred, contempt or aversion, or to induce an evil or unsavory opinion [of him] in the minds of a substantial number in the community'" (*Ansonia Tenants' Coalition v Collazo*, 251 AD2d 163, 163 [1st Dept 1998], quoting *Tracy v Newsday, Inc.*, 5 NY2d 134, 135 [1959]; *Sandals Resorts Intl. Ltd. v Google, Inc.*, 86 AD3d 32). Because the truth of a statement is an absolute defense to a claim that the statement is defamatory (*see Silverman v Clark*, 35 AD3d 1, 12 [1st Dept 2006]), in order to be actionable, a statement must be factual, and thus, capable of being shown to be false. Opinions may be wrong, but they cannot be proven untrue (*see Thomas H. v Paul B.*, 18 NY3d 580, 584 [2012]), and they are constitutionally protected, and thus, not actionable as defamation (*see Rinaldi v Holt Rinehart & Winston*, 42 NY2d 369, 380, *cert denied* 434 US 969 [1977]; *Jaszai v Christie's*, 279 AD2d 186, 188 [1st Dept 2001]). The determination of whether a statement is one of fact is for the Court (*see Steinhilber v Alphonse*, 68 NY2d 283, 290 [1986]). In addition to ascertaining whether the challenged statement can be proven true or false, the court must determine "whether the specific language in issue has a precise meaning which is readily understood" and "whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal . . . the readers or listeners that what is being read or heard is likely to be opinion, not fact" (*Brian v Richardson*, 87 NY2d 46, 51 [1995] [internal quotations and citations omitted]).

DISCUSSION

The Court will first discuss those causes of action as to which both parties seek summary judgment. The second cause of action which alleges that defendant libelled plaintiff by writing that he had been convicted of a crime, is based upon a blog posting, dated October 6, 2008. The posting states, in relevant part, "Find out what Salenger doesn't want you to know about what he did in Florida and why his court records are sealed. Click here for the truth." The website to which the reader of the posting is led, "www.felonspy.com," (FelonSpy) features a caption reading "Felon Search." Plaintiff contends that a reasonable person who had read

the blog posting and then clicked onto FelonSpy would conclude, erroneously, that plaintiff had been convicted of one or more felonies.

Initially, the Court notes that the posting does not state that plaintiff has committed any crime, let alone a felony, and the part of the posting which states that plaintiff does not want certain information to be known, purports to describe plaintiff's unvoiced thoughts and is necessarily, therefore, a statement of opinion. Moreover, counsel for defendant represents that a person who clicks onto FelonSpy and then clicks on the link labelled "Start your felon search" is led to the site's Terms and Conditions, which include the statement "FelonSpy Pages are completely random and fake," as well as a disclaimer that states "we can only promise to flood you with arbitrary unverified information." Thus, neither the blog posting, nor the website to which it leads, makes any factual statement that purports to be true, and that states that plaintiff has committed one, or more, felonies. An opinion not accompanied by a recitation of the facts supporting it may be pure opinion "if it does not imply that it is based on undisclosed facts" (*Steinhilber v Alphonse*, 68 NY2d at 289; *see also Mercado v Shustek*, 309 AD2d 646 [1st Dept 2003]; *Daniel Goldreyer, Ltd. v Van de Wetering*, 217 AD2d 434 [1st Dept 1995]).

In *Guerrero v Carva* (10 AD3d 105 [1st Dept 2004]), the defendant's flyers were defamatory because they contained affirmative statements that a reasonable reader would understand as assertions of fact and which tended to disparage plaintiff in his profession as a property manager (*see Gross v New York Times Co.*, 82 NY2d 146, 154 [1993]). Specifically, the Appellate Division pointed to assertions of fact in the flyers, such as plaintiff is unfit to manage anymore buildings, that he engaged in illegal evictions against tenants, that he engages in racial discrimination and made racist remarks (*Guerrero*, 10 AD3d at 113). In contrast, the relevant blog post in the case at bar does not contain assertions of fact nor does it contain specific instances of conduct and it refers its readers to a website that expressly denies that it offers a factual basis for the posting. Counsel for plaintiff points out that a person logging on to FelonSpy can bypass the Terms and Conditions, and upon paying a fee, directly access the search function. However, anyone who does would discover that, as is undisputed, plaintiff has not been convicted of any felony. The mere possibility that someone seeking to follow up

on defendant's suggestion would neither read the Terms and Conditions, nor engage in a search, does not suffice to transform defendant's opinion into an actionable mixed opinion.

Moreover, it appears that defendant's opinion in the blog post, that plaintiff had done something in Florida that he would prefer his neighbors not to know about, was substantially correct, as shown by plaintiff's answers to defendant's interrogatories. In his answers plaintiff acknowledged that he was arrested twice, once in Florida on a charge of soliciting a prostitute, that the case was resolved by a plea of "no contest" and that the pertinent court records were sealed. Plaintiff has not been advertising these facts. Indeed, when he was deposed in an action entitled *Timber Rattlesnake, LLC v Wechsler*, Sullivan County Index No. 410-06, plaintiff initially testified, with regard to both of his arrests, that he could not remember why he had been arrested. Accordingly, even if defendant's blog posting affirmatively stated that plaintiff did something illicit in Florida that he did not want his neighbors to know about, this cause of action would be dismissed, because, as stated above, truth is an absolute defense to a claim of defamation (*see Silverman*, 35 AD3d at 8).

The fourth through the seventh causes of action allege that, in the blog posting and e-mails that are quoted in those portions of the complaint, defendant falsely asserts that plaintiff is a pedophile. The fourth, fifth, and sixth causes of action quote e-mails that defendant sent to some of his neighbors in Forestburgh. The first of those states:

> it has not been decided if I am, in geek speak, an attention whore or worse, someone who is pretending to care about the gorge and river when his intent is to profit and exploit it. Thus, you, me and Salenger are being sort of judged on different levels with Salenger clearly being seen as a very bad guy. The level of bad being determined with the worse case being Salenger is a pedophile who can buy his way out of trouble like Michael Jackson, and that the Philwold zoo is analogous to Michael Jackson's Neverland Ranch. The closed/expunged "files" for Salenger in Florida are being sought.

In this statement, plaintiff's being a pedophile is stated as the worst case that might be made against him in the future, not as a known fact. The statement adds that the information that might establish whether plaintiff is a pedophile, is "being sought." The statement neither states nor implies that there is information that, if found, will establish that plaintiff is in fact a pedophile.

The second e-mail states:

> Jessica ... you should ask yourself this: What other mysterious and odd places, with swan boat rides, monkeys, kid-related activit[ie]s, and a petting zoo for children run by a rich and very strange single man. A place that also has a big fence with high security and has been quite controversial in the media. Recently ... Salenger told Cassia to bring her children to [his] petting zoo, not his *farm*[.] [H]e had no idea who she was. This was my first tipoff that something could be very wrong. Jessica, this is about far more than a deed restriction violation and a farm in my back yard. It is about protecting my son from a very strange single man who has a petting zoo behind a big fence with high security.

After the allusion to Neverland Ranch, the late Michael Jackson's property, this text makes the factual statement that plaintiff invited a woman whom he met, but did not know, to bring her children to his "petting zoo," and that invitation made plaintiff think that something could be very wrong, to wit, that plaintiff could be a pedophile. This statement, like the preceding one, does not go beyond stating a suspicion.

The third e-mail states:

> I am sending this e-mail to all my neighbors near me with children. I have CC'd it to people who should be as concerned as I am at the possibility that children will be hurt at a strange and unsafe zoo owned by a strange and unbalanced man. I am not yet able to make firm allegations against [plaintiff] and his Petting Zoo/Farm at Philwold in Forestburgh, N.Y. 12777, until I have ample evidence to prove my suspicions. ... I fear that if I get any more specific in my correspondence that I will be liable for slander.
> But I am willing to go as far as to force Salenger to sue me for slander so that I can have a forum to use every legal means to confirm my worst fears as has been suggested by Anon[y]mous at www.philwold.net.

This text could not more plainly state that plaintiff suspects that plaintiff is a pedophile, but cannot make firm allegations against him, and that he would welcome a forum where he could confirm what at present are no more than fears. That such fears may have been unjustified does not transform defendant's stated fears into assertions of fact. No reasonable reader of these statements would have understood them to be stating that plaintiff is, in fact, a pedophile.

The seventh cause of action is based upon an October 31, 2008 blog posting in which defendant wrote:

> Why does [plaintiff] have a petting zoo at Philwold in Forestburgh, NY 12777? [Plaintiff] has opened his "farm" to local schools to be used as a petting zoo for children. The petting zoo was never part of the application to get Salenger's agricultural district exemption from Forestburgh laws, taxes and regulations. He tells women he has never met before to bring their children to his petting zoo. [Plaintiff] has a swan boat ride on Gilman Pond[.] [Plaintiff] has a basement full of monkeys why does he have a petting zoo? Ask him for yourself: ... Is [plaintiff] Michael Jackson?

This text sets forth a number of factual assertions, none of which is defamatory, and ends with a question that defendant urges his readers to ask. Some of defendant's fellow-townspeople were apparently asking that question with varying degrees of seriousness. Mr. Wechsler testified at his deposition that:

> Mr. Salenger was doing a couple of things that seemed to be quite strange, at a time the Michael Jackson case was all over television and the newspapers. And one of those things was the swan boat. [... I]t looked like it could handle six to eight people ... . [H]ow many men do you know that buy a lake and put a swan boat in it? And then, of course, there was a zoo and the petting zoo and the invitations for children and the talk about getting two giraffes (Hurteau Affirm., exhibit 4, Part 2, at 251).

In sum, none of the statements voicing defendant's suspicions makes an actionable statement that, in fact, defendant is a pedophile. Statements that contain "no hard facts, only generalized suspicions" are not actionable (*600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d 130, 143 [1992], *cert denied* 508 US 910 [1993]). Accordingly, the fourth through the seventh causes of action are dismissed.

The eighth cause of action alleges that, on February 5, 2009, defendant sent an e-mail, the subject line of which states "[plaintiff] has attempted to hire a hit man to kill Ben Wechsler," to a number of officials of the Town of Forestburgh and the State of New York, among other individuals. The body of that e-mail states:

> An ongoing private investigation has just caught [plaintiff] attempting to hire an undercover detective to kill Ben Wechsler. The FBI was alerted after [plaintiff] accosted John [*sic]* Wallach in his Fish Market last night and threatened him in a deranged state. Salenger is still at large. Until an arrest is made[,] [plaintiff] should be considered extremely dangerous. He has threatened John [*sic*] Wallach and others in the last few days and is experiencing a psychotic episode. Law enforcement and the courts are taking action as swiftly as possible. protect yourself and your family from [plaintiff].

The ninth cause of action alleges that, also on February 5, 2009, defendant sent an e-mail to a principal of the real estate agent that plaintiff retained to sell his Manhattan town house, as well as to numerous local and State officials, among other individuals. The subject line of this e-mail was, "Convicted sex offender [plaintiff] trying to escape New York City ... broke and unable to sell the home where 10 young boys from Mexico were found raped and half starved, Salenger runs for the hills." The body of the e-mail, which purports to include a picture of the garage to the house, as well as a copy of the real estate listing therefore, states:

> Why is Mobius Realty working for a known sex offender? Why is a known sex offender being allowed to build a Neverland-themed petting zoo in the family neighborhood of Philwold, NY? How much blood money and corruption will New York State allow its politicians to get away with? Demand answers now.

These e-mails, both sent on the same day, clearly state a number of defamatory statements, to wit, that plaintiff; (1) was caught attempting to hire a hit man to commit murder; (b) threatened Jon Wallach; (3) is experiencing a psychotic episode; and (4) is a known and convicted sex offender. However, as discussed below plaintiff is not entitled to summary judgment against defendant on liability on these e-mails alone, as the Court has determined that plaintiff is a limited-purpose public figure, and the issue of whether defendant acted maliciously in sending these e-mails is a question for the jury.

In order to prevail in an action alleging defamation, public figures, including limited-purpose public figures, plaintiff must make a clear and convincing showing that the defamatory statements of which they complain were made "`with knowledge that [they were] false or with reckless disregard of whether [they were] false or not'" (*Guerrero v Carva*, 10 AD3d at 115, quoting *New York Times v Sullivan*, 376 US 254, 279-280 [1964]). A statement is made with reckless disregard of its falsity if it was made with "a high degree of awareness of [its] probable falsity" (*Foster v Churchill*, 87 NY2d 744, 752 [1996] [citation and internal quotation marks omitted]).

Limited-purpose public figures, for purposes of the law governing claims of defamation, are "those who have `thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved'" (*Huggins v Moore*, 94 NY2d 296, 301-302 [1999], quoting *Gertz v Welsh, Inc.*, 418 US 323, 345 [1974]). It cannot seriously be disputed that plaintiff knew that the activities in which he proposed to engage on his property were at large variance with his neighbors' uses of their land, and that, therefore, plaintiff was a limited-purpose public figure in regard to his applications for inclusion of his properties in the District. An article in the August 22, 2008 edition of the Mid-Hudson News Network (Network) reported that:

> Impassioned opinions on both sides of the issue continued for an hour and a half before the Sullivan County Legislature voted to include 15 new parcels in the county's agricultural district. Most of the input ... surrounded [plaintiff's] use of a

large parcel of Town of Forestburgh land (Clewell Affirm., exhibit A).

A year later, the July 17, 2009 edition of the Network reported

> last fall, there were impassioned feelings ... over [plaintiff's] request to include his Cold Springs Road menagerie in the [District].
> [Plaintiff] is back, with a request to add two isolated parcels ... in the pristine Neversink Gorge area.
> The Forestburgh Town Board is already on record opposing the inclusion (*id.* at exhibit H).

Plaintiff argues that the statements complained of in the eighth and ninth causes of action bear no relationship to the controversy concerning his applications for inclusion of his properties in the District. The record shows, however, that quite apart from those applications, and commencing well before the first of them, plaintiff sought to impose upon his neighbors a view of himself and his staff that would tend to instill apprehension about him. For example, nonparty Justin Askins states in his affidavit that, in 2004, when he went to plaintiff's home to return a visit that plaintiff had paid him, plaintiff met him when he got out of his car and told him that he had "a number of Filipino assassins with blow guns on his property," as well as poisonous snakes, that he always carried a pistol, and that "[y]ou have to be careful when you deal with me" (Hurteau, exhibit F at 2). Nonparty Jon Wallach, who for some time operated a fish hatchery in Forestburgh, stated at his deposition that plaintiff sought to become his partner in that venture and repeatedly threatened that, if Mr. Wallach did not accept him as a partner, he would complain to the New York State Department of Environmental Conservation that Mr. Wallach was dumping toxic waste at the hatchery. Mr. Wallach testified that, on one of those occasions, plaintiff showed him photographs, that he could have taken only by trespassing, of the area in which he claimed that Mr. Wallach was dumping toxic waste. Additionally, Mr. Wallach testified that, after he decided not to take plaintiff on as a partner, plaintiff told him that he needed to pay for the labor of one of plaintiff's workers, one Gustavo, who had performed some work at the hatchery, and that, after Mr. Wallach paid plaintiff for Gustavo's work, plaintiff stated that:

> having paid Gustavo was one thing, but that Gustavo's life was -- he had brought Gustavo up to work at the hatchery, and now -- I had destroyed Gustavo's life and he needed to give Gustavo money because he was afraid that Gustavo might come and slit my throat (Hurteau, exhibit 5 at 47-48).

Resa Wallach, Mr. Wallach wife, testified at her deposition that plaintiff "had a habit of coming to my house, pulling in [to] my driveway, and stalking my daughter and [me]. Did I feel threatened. you bet ya" (Hurteau Affirm. exhibit 7 at 31). Mr. Wechsler testified that "[t]he general feeling was that Mr. Salenger was a terrorist and deliberately goes and attempts to scare people with a number of mantras, one of which is so don't mess with me. And he even says that to strangers" (Hurteau Affirm., exhibit 4, Part 2, at 115).

In sum, by virtue of repeatedly thrusting himself into the public eye of Forestburgh as a person whom it might be dangerous to oppose, plaintiff made himself a public figure for the people of Forestburgh. Indeed, the October 26, 2008 edition of the Times Herald-Record quotes plaintiff as saying "Let's understand this, I'm a major player around here" (Clewell Affirm., exhibit D).

It is undisputed that defendant developed bi-polar disease as a young man, that we was hospitalized in 2002 for approximately one month, and since then defendant has been only briefly employed and is currently receiving social security supplementary security income benefits. Defendant testified at his deposition that his recurring symptoms were "uncontrollable speech, letter writing, communication with everybody, unstoppable, and just a complete -- completely being divorced from reality" (Hurteau, exhibit B at 6). Defendant testified that his hypomania peaked from the winter of 2009 through December 2010. He characterized the two e-mails quoted above as "insane manic rambling" and "just a ramble with nonsense" (*id.* at 136 and 45). Defendant also testified that at a time including the time that he sent those two e-mails, he had "horrible paranoid fears in a manic episode" (*id.* at 165). Mr. Wechsler testified at his nonparty deposition that he had known defendant for 20 years and known that he was struggling with bipolar disorder, that defendant was out of control most of the time, that "[i]t was generally accepted that Peter was unbalanced" (Hurteau Affirm., exhibit 4 at 29), that "Peter is delusional" (*id.* at 50), and that "the last two or three years [i.e. from 2007, or 2008 through 2010], he's been very, very bad" (*id.* at 23). He also testified that "[t]his was going on for a long time. It was going on before Salenger. That was Peter's major symptom, his addiction to the computer" (*id.* at 81). Mr. Wallach similarly testified at his deposition that "there was a

pattern of [defendant] definitely putting lots of e-mails out (Hurteau Affirm., exhibit 5 at 67), and Katarzyna Nolan, defendant's wife, testified at her deposition that, prior to March 2010 defendant had been manic and "uncontrollably sending numerous e-mails" (Hurteau Affirm., exhibit 6 at 10). Accordingly, the Court finds that plaintiff has not made a clear and convincing showing that, at the time that defendant published the statements complained of in the eighth and ninth causes of action, he had a high degree, or indeed any degree, of awareness of their probable falsity.

The eleventh cause of action alleges that, on June 18, 2009, defendant posted a statement on his blog that stated:

> Bees in the Neversink Gorge? Who has [plaintiff] bought off now? Does the State of New York want a bee "farm" in the Neversink Gorge? Why would the state of New York allow [plaintiff] to "farm" Ferns and Mosses in the Neversink Gorge? Why? Because [plaintiff] has attempted to buy off the Legislators of Sullivan County. [Plaintiff] attempted to "pay off" the Town of Forestburgh with a $2[,]000 check at the recent Town Board Meeting just before they were to make a decision about his Bee Farm. The board voted against the extension of his farm/zoo into the Agricultural District. BUT HOW WILL THE COUNTY LEGISLATORS VOTE IN JULY AFTER BEING WINED AND DINED BY SALENGER? (Complaint, exhibit M).

Plaintiff contends that this posting falsely accuses him of corruption and criminal conduct. The statement, that the State permits plaintiff to use his land in certain ways, because plaintiff "has attempted to buy off" the Sullivan County legislature, makes no literal, or metaphorical, sense. No reasonable reader of the blog would think that it does. The statement, that plaintiff "attempted to `pay off' the Town of Forestburgh," is ambiguous, inasmuch as the primary meaning of the phrase "to pay off" is to discharge a debt by paying any remaining indebtedness, "to yield full recompense or return" (*Webster's New Twentieth Century Dict. Unabridged* [2d Ed. 1979] 1317). However, the phrase also has a slang meaning, which is, to bribe. In the context of the statement as a whole, starting with the question "who[m] has [plaintiff] bought off now," a reasonable reader of the statement could conclude that defendant was accusing plaintiff of having attempted to bribe the Forestburgh Town Board. However, plaintiff is not entitled to summary judgment on this cause of action for the same reasons that he is not entitled to summary judgment on the eighth and ninth causes of action.

The Court now turns to the third and 10th causes of action, upon which defendant,

alone, seeks summary judgement. The third cause of action alleges that in an October 6, 2008 e-mail sent to local and State officials, as well as to other individuals, defendant stated, "Don't let New York State protect the rich. Stop [plaintiff]--see www.philwold.net and hear him say "If I don't get my way I'll sell to the Jews" (Complaint ¶ 33). Plaintiff alleges that this posting is defamatory as it falsely describes him as anti-Semitic. The Court finds that defendant is entitled to summary judgment on this cause of action, as the statements within the email were taken from comments plaintiff had previously made regarding selling his land. This is corroborated by the deposition testimony of Mr Wechsler's who, when asked by plaintiff's counsel whether anyone had told him that plaintiff had "said something to the effect of, if he doesn't get his way, he's going to sell his property to the Jews?" (Hurteau Affirm., exhibit 4 at 119), Mr. Wechsler answered, "what I heard was that [plaintiff] had said he could sell it to the Indians. At that time there was a great deal of tumult about Indian casinos operating in Sullivan County . . . And that he could sell it to the Hassids" (*id.* at 119-120).

The 10th cause of action alleges that, in a February 5, 2009 e-mail, defendant stated that plaintiff was (1) broke, (2) had no teeth, and was (3) a bully and (4) a coward. The statement that plaintiff is "broke" is not libellous, inasmuch as it was not made in reference to a context, such as an incipient business deal, in which plaintiff's being broke might be significant. Moreover, no reader of defendant's previous e-mails would take the statement as stating a fact, given plaintiff's ownership of both a multimillion dollar house in Manhattan and his properties in Forestburgh. As for the rest of the e-mail, the very cumulation of epithets in this e-mail shows them to be no more than "loose, figurative, hyperbolic language" that is not actionable as defamation (*Immuno AG. v Moore Jankowski*, 77 NY2d 235, 245 [1991], *cert denied* 500 US 954 [1991]; *see also Dillon v City of New York*, 261 AD2d 34 [1st Dept 1999]).

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff Stuart Salenger's motion for partial summary judgment is denied; and it is further

ORDERED that defendant Peter K. Bertine, Jr.'s cross motion for summary judgment is

granted to the extent that the second through the seventh, and the 10th causes of action are dismissed; and it is further

ORDERED that defendant Peter K. Bertine, Jr. is directed to serve a copy of this Order with Notice of Entry upon the plaintiff and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 10/18/12

PAUL WOOTEN J.S.C.

Check one: ☐ FINAL DISPOSITION ■ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE