Stega v New York Downtown Hosp.
2014 NY Slip Op 32409(U)
September 11, 2014
Sup Ct, NY County
Docket Number: 152716/13
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - PART 59

JEANETTA STEGA, M.D., Ph.D., M.S.N.,
a/k/a Jeanetta Malanowska-Stega;
WESLEY TZALL, M.D.,

Index No.: 152716/13

Plaintiffs,

- against -

DECISION/ORDER

NEW YORK DOWNTOWN HOSPITAL; JEFFREY MENKES, President and Chief Executive Officer of New York Downtown Hospital; LEONARD A. FARBER, M.D.; STEPHEN G. FRIEDMAN, M.D., Acting Chief Medical Officer; CHRISTOPHER L. MANN, Chairman of the Board of Trustees of New York Downtown Hospital; FRANCES G. LASERSON, Vice Chairman of the Board of Trustees of New York Downtown Hospital; RALPH M. MASTRANGELO, Vice Chairman of the Board of Trustees of New York Downtown Hospital; RONALD H. MENAKER, Vice Chairman of the Board of Trustees of New York Downtown Hospital; ROBERT D. HUNTER, Vice Chairman of the Board of Trustees of New York Downtown Hospital; NELSON SCHAENEN, JR., Vice Chairman of the Board of Trustees of New York Downtown Hospital; KATHRYN GEORGE TYREE, Treasurer of the Board of Trustees of New York Downtown Hospital; TROLAND S. LINK, Secretary of the Board of Trustees of New York Downtown Hospital; GIOVANNA CIPRIANI, Trustee, New York Downtown Hospital; JOHN G. DANIELLO, Trustee, New York Downtown Hospital; SUN-HOO FOO, M.D., Trustee, New York Downtown Hospital; STEPHEN J. FRIEDMAN, J.D.,Trustee, New York Downtown Hospital; LAI WAH FUNG, Trustee, New York Downtown Hospital; PETER JAMES JOHNSON, JR., ESQ., Trustee, New York Downtown Hospital; RONALD M. KRINICK, M.D. Trustee, New York Downtown Hospital; SANDRA LEE, R.N., Trustee, New York Downtown Hospital; GEORGE C. K. LIU, Ph.D., M.D., FACP, Trustee, New York Downtown Hospital; BRUCE D. LOGAN, M.D., Trustee, New York

Downtown Hospital; EDWARD C. MAIMSTROM, Trustee, New York Downtown Hospital; JULIE MENIN, Trustee, New York Downtown Hospital; NEIL MOSKOWITZ, Trustee, New York Downtown Hospital; PATRICIA BAKWIN SELCH Trustee, New York Downtown Hospital; PHILIP SESKIN, Trustee, New York Downtown Hospital; DOUGLAS A. SKOLNICK, Trustee, New York Downtown Hospital; STEVE SQUERI, Trustee, New York Downtown Hospital; RONALD J. STRAUSS, Trustee, New York Downtown Hospital; RONALD J. STRAUSS, Trustee, New York Downtown Hospital; JOHN A. WARD, III, Trustee, New York Downtown Hospital; STANLEY ZINBERG, M.D., Trustee, New York Downtown Hospital; JOHN T. FLYNN, M.D., Life Trustee, New York Downtown Hospital; SUSAN BROWN ROSHEN, Life Trustee, New York Downtown Hospital; HERBERT ROSENFELD, Life Trustee, New York Downtown Hospital,

Defendants.

DEBRA JAMES, J.:

In this action, plaintiffs Jeannette Stega, M.D., Ph.D., M.S.N. (Stega) and Wesley Tzall, M.D. (Tzall) sue to recover damages for alleged defamation. In addition, the complaint asserts causes of action, on behalf of plaintiff Stega, for gross negligence, tortious interference with prospective contractual relations, prima facie tort, and intentional infliction of emotional distress. Defendants move, pre-answer, to dismiss the complaint in its entirety, pursuant to CPLR 3211 (a) (7), for

failure to state a cause of action.[1] Plaintiffs cross move to amend the complaint.

BACKGROUND

Defendant New York Downtown Hospital (NYDH, or, the Hospital) is a not-for-profit community hospital, serving lower Manhattan, affiliated with New York Presbyterian Hospital and Weill Cornell Medical Center. At all times relevant to the complaint, defendant Jeffrey Menkes (Menkes) was President and Chief Executive Officer (CEO) of NYDH, defendant Leonard A. Farber, M.D. (Farber) was an oncologist affiliated with NYDH, and defendant Stephen G. Friedman, M.D. (Friedman) was the Acting Chief Medical Officer of NYDH. The other individual defendants were members and officers of the NYDH Board of Trustees.

Plaintiff Stega, a research scientist, was employed by NYDH from 2004 until her termination in February 2012. During her tenure with NYDH, Stega, among other duties, participated as the principal investigator in numerous medical studies; was promoted to Vice President of Research; and became Chairperson of the Hospital's Internal Review Board (IRB), a committee appointed by the Hospital to review, approve and oversee biomedical research involving human subjects, subject to the United States Food and

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[1]Defendant Leonard A. Farber, M.D., has separately moved to dismiss the complaint and joins in the motion to dismiss made by the other defendants. The two motions (seq. nos. 001 and 002) are consolidated for purposes of their disposition.

Drug Administration (FDA) regulations. Plaintiff Tzall is a nuclear cardiologist who was employed by NYDH for more than 28 years, until his employment was terminated in or around December 2011. Tzall served as the Hospital's Director of Nuclear Cardiology, was appointed to the IRB in 1992 and became its Vice Chairperson in 2005.

In 2005, Stega was the principal investigator for the Ovaprene Intravaginal Contraceptive Ring Study, sponsored by the device's manufacturer, Ovatech, LLC, which paid, through the Hospital, 80% of Stega's salary. The complaint alleges that in 2011, after the sponsor informed NYDH that it could not make the final payment of the study to NYDH, Menkes and NYDH proposed to the IRB that, given the sponsor's inability to make a full payment, the sponsor should make a partial payment. The IRB voted to reject that proposal, on the grounds that a reduced payment from the sponsor to NYDH could suggest receipt of an unlawful kickback, and Tzall, as Vice Chair of the IRB, signed a letter to Menkes and NYDH objecting to the lower payment, but the Hospital overrode the IRB and accepted a reduced amount from the sponsor. The complaint alleges that effective December 31, 2011 the Hospital terminated Tzall's employment in retaliation for objecting to the Hospital's plan to accept a reduced payment from the sponsor.

In 2011, Farber entered into an agreement with Luminant Bio-

Sciences, LLC (Luminant) to conduct a trial of a new cancer-treating compound manufactured by Luminant. Farber applied for and received IRB approval for the study in November 2011. Prior to approval of the study, Farber asked Stega for help in developing the protocol and patent application for the Luminant study. Stega met with Luminant officials and, in or around October 2011, she alleges, informed NYDH's Chief Operating Officer Anthony Alfano (Alfano), Chief Compliance Officer Chad Harris (Harris), and Menkes that she planned to write the protocol and patent application for the Luminant study, to which there was no objection. In or around November 2011, Stega was paid $50,000 by Luminant for completing the protocol and patent application, work performed outside her Hospital work hours, and she deposited the money in the Stega Research Group bank account; she performed no other duties in connection with the Luminant study. At the time that Stega was paid, the Hospital had no involvement with the Luminant study. Farber applied for IRB approval of the study in November 2011, and Stega, who was then IRB Chairperson, recused herself from voting on Farber's application, although she was present during the IRB meeting when the application was considered, to answer questions about the study.

In late 2011 and early 2012, Farber allegedly encountered financial difficulties related to his medical practice,

complained he was not receiving enough money from Luminant, accused Stega of taking money from Luminant that he should have received, and resigned from the Luminant study. Stega then sought treatment for the study's patients from the Hospital, and Luminant requested that NYDH take over the study.

In January 2012, Farber allegedly sought to resume his role as principal investigator on the Luminant study, but Stega informed him that he was no longer part of the study. Farber accused Stega of taking money from Luminant that belonged to him, and reportedly told Menkes that she had stolen the study from him and taken money he should have received. Stega claims that, in meetings with Menkes, Friedman and Alfano in late January 2012, she was accused of stealing money from Ovatech and other study sponsors and using Hospital property to develop patents, and was suspended without pay and barred from the Hospital premises. The Hospital then conducted an investigation of the charges against Stega, concluded that Stega had a conflict of interest with respect to the Luminant study, and had improperly taken money from study sponsors and the Hospital; and, on February 2, 2012, she was fired.

On February 3, 2012, Stega wrote a letter to three members of the NYDH Board of Trustees, in which she alleged that Menkes and the Hospital wrongfully suspended her without an investigation, unjustly expelled and slandered her, denied cancer

patients entry into the Luminant study, and violated confidentiality laws in accessing records of patients in clinical trials. After Stega was informed that the Board of Trustees intended to take no action in response to her letter, she sent another letter to all the Board members, charging that the reasons for the termination of her employment, that she had improperly taken money from outside sponsors and had a conflict of interest with respect to the Luminant study, were demonstrably untrue, that Menkes and other Hospital officials slandered her, and that the Hospital's legal counsel had tried to force her to reveal confidential information pertaining to the Luminant study and improperly went through study records and protocols not belonging to the Hospital. According to Stega, the Board of Trustees again did not respond to her allegations, denied her the opportunity to be heard regarding the charges against her, and failed to properly review the Hospital's investigation of her.

In March 2012, after both Stega and Tzall were fired, they filed a complaint with the FDA about their removal and alleged improprieties related to the NYDH IRB. In response to their complaint, an FDA investigator spoke to Friedman on May 22, 2012. Plaintiffs allege that Friedman slandered Stega when he told the FDA investigator that Stega had channeled funds from the Luminant study to the Stega Research Group, and then he told the investigator that Stega reportedly demanded that because she was

the IRB, Farber include a patient in the Luminant study, whom Farber thought would not be approved by the IRB. Plaintiffs also allege that Friedman slandered Stega and Tzall when he reported to the FDA investigator that the Hospital had removed them from their positions as Chairperson and Vice Chairperson, respectively, of the IRB because the IRB approvals of studies done during the time Stega was Chairperson were all "tainted." Plaintiffs further allege that they were slandered when Friedman's comments to the FDA investigator were republished in a letter sent by the FDA to the Hospital on August 16, 2012.

Plaintiffs commenced the instant action in March 2013, and served an amended complaint in April 2013.

DISCUSSION

It is well settled that, on a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must afford the pleadings a liberal construction (*see* CPLR 3026), "accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion ... [and] accord plaintiffs the benefit of every possible favorable inference." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 152 (2002) (internal citations omitted); see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co., 5 NY3d 582, 591 (2005); Leon v Martinez, 84 NY2d 83, 87 (1994). "The motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken

together manifest any cause of action cognizable at law.'" 511 W. 232nd Owners Corp., 98 NY2d at 152, quoting Polonetsky v Better Homes Depot, Inc., 97 NY2d 46, 54 (2001); see Guggenheimer v Ginzburg, 43 NY2d 268, 275 (1977). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." EBC I., Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005).

The court is not required, however, to accept as true, or accord favorable inferences to, "bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence." Biondi v Beekman Hill House Apt. Corp., 257 AD2d 76, 81 (1st Dept 1999)(internal quotation marks and citation omitted), affd 94 NY2d 659 (2000); see Robinson v Robinson, 303 AD2d 234, 235 (1st Dept 2003). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one" (Guggenheimer, 43 NY2d at 275), and dismissal is warranted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 (2002); see Leon, 84 NY2d at 88.

At the outset, in her opposition to defendants' motions, plaintiff Stega expressly withdraws, as untimely, her claim for

intentional infliction of emotional distress. At oral argument on the instant motions, plaintiffs also conceded that the cause of action for prima facie tort is time-barred. The fourth and fifth causes of action, therefore, are dismissed without further discussion.

Defamation

Defamation, whether in the form of libel or slander, generally is defined as the making of a false statement which "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." Golub v Enquirer/Star Group, Inc., 89 NY2d 1074, 1076 (1997) (internal quotation marks and citation omitted); see Rinaldi v Holt, Rinehart & Winston, Inc., 42 NY2d 369, 379 (1977), cert denied 434 US 969 (1977). "The elements 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 v City of New York, 261 AD2d 34, 38 (1st Dept 1999); see O'Neill v New York Univ., 97 AD3d 199, 212 (1st Dept 2012). A statement that "suggests improper performance of one's professional duties or unprofessional conduct" (Frechtman v Gutterman, 115 AD3d 102, 104 [1st Dept 2014]), or otherwise "tend[s] to injure another in his or her trade, business or profession" is actionable as defamation

per se without proof or allegations of special damages. Liberman v Gelstein, 80 NY2d 429, 435 (1992); see Geraci v Probst, 15 NY3d 336, 344 (2010).

To state a cause of action for defamation, the complaint must set forth "the particular words complained of (CPLR 3016 [a]), and "it must also allege the time when, place where, and manner in which the false statement was made, and specify to whom it was made." Epifani v Johnson, 65 AD3d 224, 233 (2d Dept 2009); see Dillon, 261 AD2d at 38. "Whether particular words are defamatory presents a legal question to be resolved by the court in the first instance. 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 reasonably susceptible of a defamatory meaning, they are not actionable." Aronson v Wiersma, 65 NY2d 592, 594 (1985) (internal citations omitted); see Golub, 89 NY2d at 1076; James v Gannett Co., 40 NY2d 415, 419 (1976).

The court also must "read the alleged defamatory words against the background of their issuance, giving due consideration to the circumstances underlying the publication of the communication in which the words appeared. Thus, the context in which the allegedly defamatory statement was made is critical." Ava v NYP Holdings, Inc., 64 AD3d 407, 413 (1st Dept 2009) (internal citations omitted); see Aronson, 65 NY2d at 594;

Silsdorf v Levine, 59 NY2d 8, 13 (1983). "Courts therefore are accorded the discretion and flexibility to consider all relevant factors in reaching a conclusion on the issue of whether a particular word is defamatory in a given instance." Farber v Jeffreys, 33 Misc 3d 1218(A), *15, 941 NYS2d 537, 2011 NY Slip Op 51966(U) (Sup Ct, NY County 2011), affd 103 AD3d 514 (1st Dept 2013), citing Steinhilber v Alphonse, 68 NY2d 283, 291-292 (1986).

Even when defamatory statements are made, however, they may be protected by an absolute or qualified privilege, because of public policy concerns, "depending on the occasion and the position or status of the speaker." Park Knoll Assoc. v Schmidt, 59 NY2d 205, 208-209 (1983); see Rosenberg v MetLife, Inc., 8 NY3d 359, 365 (2007); Liberman, 80 NY2d at 437; Toker v Pollak, 44 NY2d 211, 218-219 (1978). An "absolute privilege generally is reserved for communications made by individuals participating in a public function, such as executive, legislative, judicial or quasi-judicial proceedings." Rosenberg, 8 NY3d at 365; see Park Knoll Assoc. 59 NY2d at 209; Stukuls v State of New York, 42 NY2d 272, 278 (1977). The privilege "is designed to ensure that such persons' 'own personal interests - especially fear of a civil action, whether successful or otherwise - do not have an adverse impact upon the discharge of the public function.'" Rosenberg, 8 NY3d at 365, quoting Toker, 44 NY2d at 219.

A qualified privilege applies to statements "'made by a person in the discharge of some public or private duty, legal or moral'" (*id.*), or "where the communication is made to persons who have some common interest in the subject matter." Foster v Churchill, 87 NY2d 744, 751 (1996). "'The shield provided by a qualified privilege may be dissolved if plaintiff can demonstrate that defendant spoke with malice,' which may mean either spite or ill will, or knowledge that the statement was false or made in reckless disregard of its truth or falsity." Frechtman, 115 AD3d at 107-108, quoting Liberman, 80 NY2d at 437-438; see Rosenberg, 8 NY3d at 365.

Plaintiffs allege defamation as against Friedman and the Hospital based on statements made by Friedman to an FDA investigator, during an investigation prompted by plaintiffs' complaint to the FDA regarding their removal from and problems with NYDH's IRB. More particularly, plaintiffs allege that Friedman stated to the FDA investigator, on May 22, 2012, with respect to reasons for Stega's termination, that she had created the Stega Research Group, using her home address, and that funds from the sponsor for the Luminant study "were channeled to the Stega Research Group"; that she had asked Farber to add a patient with prostrate cancer to the Luminant study, and, when Farber said that the IRB would not approve the addition, stated, "I am the IRB and I want the patient entered"; that all of the IRB's

approvals of studies while Stega was chairperson were "tainted," and, therefore, Stega and Tzall and all IRB members who had direct contact with Stega were removed; and that Friedman wanted to disband the IRB due to the "taint."[2]

Defendants argue that the defamation claims should be dismissed because Friedman's statements to the FDA investigator are protected by an absolute privilege, having been made during an official governmental investigation, "which is a quasi-judicial administrative function within the FDA's regulatory authority." Alternatively, defendants argue that the statements are protected by a qualified "common interest" privilege, and are either true, not defamatory, and/or protected opinion.

"[S]tatements uttered in the course of a judicial or quasi-judicial proceeding are absolutely privileged so long as they are material and pertinent to the questions involved notwithstanding the motive with which they are made." Herzfeld & Stern, Inc. v Beck, 175 AD2d 689, 691 (1st Dept 1991); see Wiener v Weintrub, 22 NY2d 330, 331 (1968). "An administrative function is considered quasi-judicial when it is adversarial, results in a determination that derives from the application of appropriate provisions in the law to the facts and is susceptible to judicial

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[2]Although the complaint includes allegations that slanderous statements were made by other defendants (*see* Compl., ¶¶ 118-124), it is not disputed that plaintiffs' defamation claim is based on Friedman's statements.

review." Herzfeld & Stern, Inc., 175 AD2d at 691 (citation omitted); see Toker, 44 NY2d at 222. New York courts have extended the absolute privilege to statements made in a variety of administrative proceedings considered to be quasi-judicial. See e.g. Rosenberg, 8 NY3d at 368 (statements made by employer on brokerage firm employee's termination notice as part of investigative stage of NASD quasi-judicial process); Wiener, 22 NY2d at 331-332 (statements in complaint sent to grievance committee of a bar association; Julien J. Studley, Inc. v Lefrak, 50 AD2d 162, 164 (2d Dept 1975), affd 41 NY2d 881 (1977)(communication to state real estate licensing agency in connection with a license revocation proceeding); Philip v Sterling Home Care, Inc., 103 AD3d 786, 787 (2d Dept 2013) (statements made to Department of Labor in connection with unemployment benefits proceeding); Allan & Allan Arts Ltd. v. Rosenblum, 201 AD2d 136, 140-142 (2d Dept 1994) (statements made at a public hearing held by a zoning board of appeals); Jafar v Blue Cross Blue Shield of Greater N.Y., 129 Misc 2d 584 (Sup Ct, NY County 1985) *affd* 125 AD2d 1015 (1st Dept 1986) (statements made at Medicare overcharge hearing); see generally Toker, 44 NY2d at 219-222 (comparing absolute and qualified privilege and finding complaint to District Attorney subject to qualified not absolute privilege).

"In the administrative context, the absolute privilege

attaches not only to the hearing stage, but to every step of the proceeding even if it is preliminary and/or investigatory, and irrespective of whether formal charges are ever presented." Cicconi v McGinn, Smith & Co., 27 AD3d 59, 62 (1st Dept 2005); see Rosenberg, 8 NY3d at 365. Nonetheless, in almost all of the administrative proceedings addressed in the above cases, as well as others found to be quasi-judicial, "[a] hearing was held at which both parties were entitled to participate. The administrative body was empowered, based upon its findings, to take remedial action, whether it be an award of compensation, disbarment, or revocation of a license." Toker, 44 NY2d at 222. In those cases where a hearing is not held, commonly in proceedings in the context of the securities' industry regulation of brokers, the courts, in determining whether an administrative process was quasi-judicial, have noted that the possibility of a hearing existed in the process, and that there was an avenue available to plaintiffs to challenge the alleged defamation. Rosenberg, 8 NY3d at 367, 368 (quasi-judicial function of NASD involves investigation and adjudication of suspected SEC violations; disciplinary hearings may be held and determinations are subject to SEC and judicial review, and employees have means to challenge statements); see Cicconi, 27 AD3d at 62-63; Herzfeld & Stern, Inc., 175 AD2d at 691; see also Able Energy, Inc. v Marcum & Kliegman LP, 69 AD3d 443, 444 (1st Dept 2010) (claims

against accounting firm in letter to SEC absolutely privileged as letter "potentially" could be used in SEC quasi-judicial proceeding). In other words, once courts have found a process to be quasi-judicial in nature, then "statements made at every stage of the proceedings are absolutely privileged, even those made at the investigatory stage." Reid v Ernst & Young Global Ltd., 13 Misc 3d 1242(A), *6, 831 NYS2d 362, 2006 NY Slip Op 52298(U) (Sup Ct, NY County 2006) ("the adversarial process by which regulatory bodies investigate and discipline violators is quasi-judicial in nature").

In this case, the FDA investigation at issue had none of the indicia of a quasi-judicial proceeding. The FDA, among other things, regulates and approves clinical drug trials involving human subjects and, in connection with that, monitors IRB compliance with FDA regulations. To that end, it may investigate complaints of non-compliance by inspecting IRB records and interviewing institutional officials. *See* 21 CFR 56.121-124; 21 CFR 312, 812; see generally fda.gov/Drugs. If a violation is found, the FDA will direct the IRB to take corrective action, and in the event that an institution refuses or repeatedly fails to correct violations, the FDA may take actions against the IRB or the parent institution to enforce compliance with its regulation. See 21 CFR 56.121-124. The purpose of such investigations, which, as in this case, follow receipt of a complaint, is to

review the conduct of the IRB, not that of the complainant. Plaintiffs here were not participants in the investigation, which was not an adversarial process; nor could plaintiffs challenge the statements made about them. That it was an official governmental investigation conducted by a regulatory agency does not by itself make it a quasi-judicial function. See Fernandez v State of New York, 36 Misc 3d 1212(A), *14, 957 NYS2d 264, 2011 NY Slip Op 52516(U) (Ct Cl 2011) (statements in Department of Health reports of inspections of adult care facility subject to qualified not absolute privilege).

The court finds, therefore, that Friedman's statements are not protected by an absolute privilege. They are, however, as plaintiff essentially acknowledges, subject to a qualified "common interest" privilege as "a communication made by one person to another upon a subject in which both have an interest." *See Liberman*, 80 NY2d at 437, quoting Stillman v Ford, 22 NY2d 48, 53 (1968). To overcome the qualified privilege on a motion to dismiss, the plaintiff must allege facts demonstrating that the alleged defamatory statements were made with malice, that is, with spite or ill will or a reckless disregard for the falsity of the statement. See Graphic Artists Guild, Inc. v Holland, 2011 WL 11072772, *5-6 , 2011 NY Misc LEXIS 6853, *12-14, 2011 NY Slip Op 33785(U) (Sup Ct, NY County 2011). "To satisfy the reckless disregard standard, plaintiff had to allege that defendants in

fact 'entertained serious doubts as to the truth of [the] publication . . . or that they actually had a . . . high degree of awareness of [its] probable falsity.'" Id., quoting *Harte-Hanks Communications v Connaughton*, 491 US 657, 667 (1989). "Although allegations of malice may not rest on mere surmise and conjecture, on a motion to dismiss a plaintiff is not obligated to show evidentiary facts to support her allegations of malice." Pezhman v City of New York, 29 AD3d 164, 169 (1st Dept 2006) (internal citations omitted); see Weiss v Lowenberg, 95 AD3d 405, 406 (1st Dept 2012); Shaw v Club Mgrs. Assn. of Am., Inc., 84 AD3d 928, 930-931 (2d Dept 2011); Sokol v Leader, 74 AD3d 1180, 1182 (2d Dept 2010); Kotowski v Hadley, 38 AD3d 499, 500 (2d Dept 2007).

Courts also have repeatedly held that "[a] claim of qualified privilege is an affirmative defense to be raised in defendants' answer and 'does not lend itself to a preanswer motion to dismiss pursuant to CPLR 3211 (a).'" Wilcox v Newark Valley Cent. Sch. Dist., 74 AD3d 1558, 1562 (4th Dept 2010), quoting Demas v Levitsky, 291 AD2d 653, 661 (3d Dept 2002); see Garcia v Puccio, 17 AD3d 199, 201 (1st Dept 2005). As other courts in the First Department have found, this court is bound to follow the decision in Garcia, holding that the question of qualified privilege is premature on a motion to dismiss. See Tax Club, Inc. v Precision Corp. Servs., 2011 WL 5295039, 2011 NY

Misc LEXIS 5171, *27, 2011 NY Slip Op 32852(U) (Sup Ct, NY County 2011); Recant v New York Presbyt. Hosp., 25 Misc 3d 1219(A), *5, 2009 NY Slip Op 52195(U) (Sup Ct, NY County 2009); Dickert v Massa, 2007 WL 3128234, 2007 NY Misc LEXIS 9112, *9, 2007 NY Slip Op 33367(U) (Sup Ct, NY County 2007); Benedict P. Morelli & Assoc., P.C. v Cabot, 11 Misc 3d 1065(A), *2, 2006 NY Slip Op 50390(U) (Sup Ct, NY County 2006); see also Ward v Klein, 10 Misc 3d 648, 651-52 (Sup Ct, NY County 2005) (applying same to affirmative defense of truth).

Instead, "the recognized procedure is to plead the privilege as an affirmative defense and thereafter move for summary judgment on that defense, supporting the motion with competent evidence." Demas, 291 AD2d at 661; see Garcia, 17 AD3d at 201. "The rationale for this rule is that a defendant raising this defense should not be permitted to '"short-circuit that procedure" and improperly place the burden on plaintiff of anticipating their affirmative defense prior to joinder of issue.'" Dickert, 2007 NY Misc LEXIS 9112, at *9, quoting *Garcia*, 17 AD3d at 201, quoting Demas, 291 AD2d at 662.

The complaint in this case alleges that Friedman's statements were false and made with malice. In the proposed amended complaint, submitted with plaintiffs' cross motion to amend, plaintiffs additionally allege that Friedman knew that his statements were false or he had a high degree of awareness of

their falsity based on his knowledge that the investigation of Stega failed to substantiate any accusations against her. Stega further alleges in the proposed amended complaint that Friedman participated in the investigation into Stega's activities, and that, during the investigation, Friedman learned that all payments from sponsors of clinical trials were made to the Hospital's finance department, that Stega had received money from only one company and her receipt of the payment was proper, and that accusations that she had stolen money from sponsors, improperly channeled funds to the Stega Research Group, or otherwise engaged in financial improprieties or improperly participated in IRB determinations of studies, were unsubstantiated. Stega also alleges that she spoke with Hospital officials about her work with Luminant and they knew that she had received money for work done before the study began, that she had done this work outside of her regular hours and had followed Hospital rules in informing officials of her work, that she received no other payment from Luminant and did not participate in the IRB determination of its application. Thus, while the common interest privilege applies, plaintiffs' allegations of a high degree of awareness of the falsity of the statements are sufficient to survive a pre-answer motion to dismiss. See Arts4All, Ltd. v Hancock, 5 AD3d 106, 110 (1st Dept 2004); Belsito Communications. Inc. v Dell, Inc., 2013 WL 4860585, *9,

2013 US Dist LEXIS 130598, *31-32 (SD NY 2013).

The court rejects defendants' arguments that the allegations are not sufficiently specific to satisfy pleading requirements (see generally Moreira-Brown v City of New York, 71 AD3d 530, 530 [1st Dept 2010]), and that the statements, as a matter of law, are nonactionable as true, not defamatory or pure opinion. Contrary to defendants' contention, the statement that Stega "channeled" money is not, at this stage, demonstrably true; plaintiffs have alleged facts to show that there was no improper transfer, and that Friedman knew that. Further, the statement that Stega told Farber to include in his study a patient he believed would not be approved by the IRB, because she wanted the patient included and "she is the IRB," is reasonably susceptible of a defamatory meaning, as it implies that plaintiff engaged in wrongdoing amounting to using her position as Chair of the IRB to exert undue and improper influence on the study. See Glazier v Harris, 99 AD3d 403, 404 (1st Dept 2012). With respect to the statement that Friedman "felt that the IRB and their approvals were tainted" while Stega was Chair, defendants argue that this statement is protected as an expression of pure opinion.

The question of "whether a given statement expresses fact or opinion . . . is one of law for the court and one which must be answered on the basis of what the average person hearing or reading the communication would take it to mean." Steinhilber,

68 NY2d at 290; see Mann v Abel, 10 NY3d 271, 276 (2008), cert denied 555 US 1170 (2009); Rinaldi, 42 NY2d at 381. The court, in addition to considering whether the statement has a "precise meaning which is readily understood . . . [and] is capable of being proven true or false . . . should look to the over-all context in which the assertions were made and determine on that basis 'whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff.'" Brian v Richardson, 87 NY2d 46, 51 (1995), quoting Immuno AG. v Moor-Jankowski, 77 NY2d 235, 254 (1991), cert denied 500 US 954 (1991); see Mann, 10 NY3d at 276; Steinhilber, 68 NY2d at 293. Courts also must "consider the impression created by the words used as well as the general tenor of the expression, from the point of view of the reasonable person . . . false statements are actionable when they would be perceived as factual by the reasonable person." Immuno AG., 77 NY2d at 243, 254.

Considering the over-all context of Friedman's statements, including his alleged defamatory assertions that Stega had misappropriated funds and improperly attempted to interfere with a clinical study, the court finds that Friedman's statement, suggesting that the IRB's activities were tainted by, and had to be disbanded as a result of, Stega's wrongdoing, disparages Stega in her profession and would lead the average person to believe that the statement was "proffered for [its] accuracy" (Brian, 87

NY2d at 53) as a matter of fact, and had a readily understood meaning and can be shown to be true or false. The statement, in this context, is not rendered a pure opinion by adding that Friedman "felt" that Stega tainted the IRB. See Thomas H. v Paul B., 18 NY3d 580, 585 (2012); cf Frechtman, 115 AD3d at 106.

The court finds, however, that plaintiff Tzall's defamation claim cannot survive. Tzall's sole allegation of a defamatory statement is that Friedman told the FDA investigator that Tzall, and other members of the IRB, were removed from the IRB due to the "taint." Friedman's alleged defamatory statements, in view of the circumstances surrounding them, were directed at Stega, but even "[a]side from the question of whether the statement can be read to be 'of and concerning'" Tzall (Aronson, 65 NY2d at 594), his allegation is not sufficient, on its face, to demonstrate defamation per se.

GROSS NEGLIGENCE

The second cause of action of the complaint alleges gross negligence as against (31) individual members and officers of the Hospital's Board of Trustees (collectively, the Board of Trustees, or Board members), based on the Board of Trustees' failure to respond to, or otherwise investigate, Stega's complaints about the Hospital's wrongdoing and its investigation and termination of her employment. More particularly, Stega alleges that the Board of Trustees failed to take any action in

response to two letters sent by her, which protested "her expulsion from the Hospital and defendant Menkes' slanderous statements about her", and charged "serious wrongdoing by the Hospital," including wrongfully terminating her employment; "failed to review Menkes' actions and performance in connection with Stega"; failed to assure that the Hospital conducted an impartial investigation of the charges against her and failed to review the investigation; failed to give her an opportunity to refute the charges against her; and allowed the Hospital to fire her following "a flawed investigation."

Defendants contend that this cause of action should be dismissed because the Board members are entitled to immunity under New York's Not-For-Profit Corporation Law (N-PCL) § 720-a; because the Board of Trustees owes plaintiff no duty to investigate her complaints; and because, as an at-will employee, plaintiff has no wrongful discharge claim. Pursuant to N-PCL § 720-a, no person serving without compensation as a trustee of a not-for-profit corporation "shall be liable to any person other than such corporation . . . based solely on his or her conduct in the execution of such office unless the conduct . . . constituted gross negligence or was intended to cause the resulting harm to the person asserting liability." See Thome v Alexander & Louisa Calder Found., 70 AD3d 88, 112 (1st Dept 2009); Pontarelli v Shapero, 231 AD2d 407, 410 (1st Dept 1996). It is not disputed

that NYDH is a New York not-for-profit corporation, and that the Board members are not compensated for their service. Plaintiffs contend, however, that the Board members' conduct constituted gross negligence, and they therefore are not immune from liability under N-PCL § 720-a.

"'[G]ross negligence' differs in kind, not only degree, from claims of ordinary negligence. It is conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing." Colnaghi, USA v Jewelers Protection Servs., Ltd., 81 NY2d 821, 823-824 (1993), citing Sommer v Federal Signal Corp., 79 NY2d 540, 554 (1992); see also Kalisch-Jarcho, Inc. v City of New York, 58 NY2d 377, 385 (1983). "'[T]he act or omission must be of an aggravated character as distinguished from the failure to exercise ordinary care.'" Kofin v Court Plaza, 23 Misc 3d 1121(A), *5, 2009 NY Slip Op 50876 (Sup Ct, NY County 2009), quoting Weld v Postal Tel. Cable Co, 210 NY 59, 72 (1913); see Sutton Park Dev. Corp. Trading Co. v Guerin & Guerin Agency, 297 AD2d 430, 431 (3d Dept 2002). "Stated differently, a party is grossly negligent when it fails 'to exercise even slight care' or 'slight diligence.'" Goldstein v Carnell Assoc., Inc., 74 AD3d 745, 747 (2d Dept 2010), quoting Food Pageant, Inc. v Consolidated Edison Co., 54 NY2d 167, 172 (1981) and Dalton v Hamilton Hotel Operating Co., 242 NY 481, 488 (1926).

"To state a claim for gross negligence in New York, a plaintiff thus must demonstrate that the defendant owed the plaintiff a duty and the defendant failed to exercise 'even slight care' in the discharge of that duty." Dilworth v Goldberg, 914 F Supp 2d 433, 473 (SD NY 2012), quoting Food Pageant, Inc., 54 NY2d at 172; see Greenberg, Trager & Herbst, LLP v HSBC Bank USA, 17 NY3d 565, 576 (2011) (negligence claim requires a duty, breach of the duty and damages). "In the absence of duty, there is no breach and without a breach there is no liability." Pulka v Edelman, 40 NY2d 781, 782 (1976); accord Strauss v Belle Realty Co., 65 NY2d 399, 402 (1985).

Further, "to prevail against an assertion of [N-PCL § 720-a] immunity, the plaintiff must demonstrate a 'reasonable probability' that the Individual Defendants' conduct constitutes either gross negligence or was intended to cause harm." Johnson v Black Equity Alliance, Inc., 26 Misc 3d 1219(A), *4, 2010 NY Slip Op 50178(U) (Sup Ct, NY County 2010), citing Thome, 70 AD3d at 112; see CPLR 3211 (a) (11) (on motion to dismiss, where defendants establish they are unpaid trustees of non-profit corporation, court shall determine "whether there is a reasonable probability" that defendants' conduct constitutes gross negligence); see also Krackeler Scientific, Inc. v Ordway Research Inst., Inc., 97 AD3d 1083, 1083-1084 (3d Dept 2012) (on 3211 [a] [11] motion, "plaintiff must come forward with

evidentiary proof showing a fair likelihood that he or she will be able to prove that the defendant was grossly negligent").

Here, the factual allegations underlying Stega's gross negligence claim, accepting them as true and according them every favorable inference, as the court must, "fall far short of satisfying [plaintiff's] burden" to demonstrate a "reasonable probability" that the Board members acted with gross negligence or with an intent to cause her harm. Johnson, 26 Misc 3d 1219(A), at *4. There are, first, no allegations of any wrongful acts taken by individual Board members, and no allegations that the Board members played a part in the termination of plaintiff's employment. The claim is based instead on allegations that the Board members failed to act, and that by failing to investigate Stega's allegations against Menkes and the Hospital, and denying her an opportunity to refute the charges against her, they "violated their duty of care flowing from their responsibility to oversee the governance of the Hospital."

These allegations, however, fail to demonstrate conduct of "such aggravated character" or that "evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing." Colnaghi, USA, 81 NY2d at 823-824; see Thome, 70 AD3d at 112 ("bare suggestion" that the individual defendants acted with gross negligence not enough); Haire v Bonelli, 57 AD3d 1354, 1358

(3d Dept 2008) (alleged "actions or inactions" of defendants "do not rise to that level of aggravated conduct"); see also Sutton Park Dev. Corp. Trading Co., 297 AD2d at 431 (insurance broker's misrepresentations which led to denial of claim after building destroyed in storm not conduct of "such aggravated character"); Compare Rabushka v Marks, 229 AD2d 899, 900 (3d Dept 1996) (allegations that individual defendants accused plaintiff of embezzlement and fraud sufficient to state claim but allegation that one defendant circulated letters critical of plaintiff's performance and stated removal of plaintiff would benefit organization not sufficient); Samide v Roman Catholic Diocese of Brooklyn, 194 Misc 2d 561, 571 (Sup Ct, Queens County 2003) (allegations that trustees of diocese ignored actual notice of sexual abuse of plaintiff by priest and suggested plaintiff should keep quiet and put up with the conduct sufficient to allege gross negligence).

The allegations further are insufficient to show that the Board of Trustees breached a duty owed to plaintiff, or even to identify what duty was owed. While the board members and trustees of a not-for-profit corporation undisputedly owe a fiduciary duty, including a duty of loyalty, to the corporation (see S.H. & Helen R. Scheuer Family Found., Inc. v 61 Assoc., 179 AD2d 65, 70 [1st Dept 1992]), "there is no basis in the allegations to support a claim that any of the defendants owed a

fiduciary duty to *plaintiff*, and, absent that, plaintiff has no cause of action for the alleged breach of such a duty." Thome, 70 AD3d at 109 (emphasis in original) (citations omitted); see Mason Med. Communications, Inc. v Rogers, 2008 WL 206971, 2008 NY Misc LEXIS 8252, *17, 2008 NY Slip Op 30133(U) (Sup Ct, NY County 2008). Plaintiff's apparent argument that the Board members' duty of care under the N-PCL § 717 and the New York City Department of Health regulations may extend to employees, is unsupported by any legal authority; the cases on which plaintiff relies to support this argument are inapposite. See e.g. Manhattan Eye, Ear & Throat Hosp. v Spitzer, 186 Misc 2d 126, 151-153 (Sup Ct, NY County 2000) (attorney general's opposition to hospital's proposed sale of all of its assets required court to analyze whether hospital board was acting in best interests of hospital).[3]

Moreover, to the extent that plaintiff alleges that the Board members had an obligation, whether under law or the Hospital's By-Laws and Code of Conduct, to conduct a good faith investigation into the charges that led to her termination and to give her a fair hearing before she was terminated, "[a]t most, this amounts to a claim for negligent discharge, which is not

[3]Other cases on which plaintiffs rely similarly support the well-settled principle that not-for-profit board members have duties to the organizations they serve, which is neither disputed nor at issue here.

available to an at-will employee." Johnson v MediSys Health Network, 2011 WL 5222917, *11, 2011 US Dist LEXIS 156828, *35-36 (ED NY 2011) (citations omitted); see De Petris v Union Settlement Assn., 86 NY2d 406, 410 (1995) (New York "neither recognizes a tort of wrongful discharge nor requires good faith in an at-will employment relationship"); see also Colodney v Continuum Health Partners, Inc., 2004 WL 829158, *6, 2004 US Dist LEXIS 6006, *20-21 (SD NY 2004) (dismissing negligent discharge claim by at-will employee who alleged that defendants violated a duty to conduct a good faith investigation into the charges that led to his termination). Where, as here, "a complaint does not allege facts sufficient to constitute gross negligence, dismissal is appropriate." Lemoine v Cornell Univ., 2 AD3d 1017, 1020 (3d Dept 2003).

TORTIOUS INTERFERENCE WITH PROSPECTIVE CONTRACTUAL RELATIONS

The third cause of action alleges that Menkes "tortiously interfered with Stega's prospective contractual relation with NYDH as an employee at will," by using "wrongful means to bring about the termination of Stega's employment with NYDH, in particular, by making slanderous representations about her." The allegedly slanderous representations were made on two occasions in January 2012, when, in the presence of Friedman and Alfano, Menkes accused plaintiff of stealing money from Ovatech and other research sponsors that belonged to the Hospital. Menkes also

told plaintiff that she had engaged in a conflict of interest with respect to the Luminant study, and he put her on administrative leave without salary. Menkes' statements were made after Farber reportedly told him that plaintiff had taken money from the Luminant sponsor which belonged to Farber, and, the complaint alleges, Menkes' actions were "influenced by Farber's baseless accusations" and taken "to avenge the wrongs she allegedly had inflicted upon his friend." Subsequently, according to the complaint, "Chief Compliance Officer Harris enlisted the Hospital's outside counsel to investigate the accusations against Stega only after she had already been ousted from the Hospital" and "both knew Menkes' opinion that she was guilty of financial impropriety . . . [and] were influenced by CEO Menkes's pre-judgment of Stega, and shaped their investigation to reach the same conclusion as his."

Defendants contend that this cause of action should be dismissed, as a matter of law, because plaintiff, as an at-will employee, cannot assert a tortious interference with prospective contractual relations based on her prior employment, and cannot assert such a claim against Menkes as a fellow employee.

It is not disputed that plaintiff was an at-will employee and that, under New York law, such employment "'may be freely terminated by either party at any time for any reason or even for no reason.'" Wieder v Skala, 80 NY2d 628, 633 (1992), quoting

Murphy v American Home Prods. Corp., 58 NY2d 293, 300 (1983); see generally Horn v New York Times, 100 NY2d 85 (2003). It further remains the law that "New York does not recognize the tort of wrongful [or abusive] discharge." Lobosco v New York Tel. Co./NYNEX, 96 NY2d 312, 316 (2001), citing Murphy, 58 NY2d at 297; see Ingle v Glamore Motor Sales, Inc., 73 NY2d 183, 188 (1989). "Moreover, this rule cannot be circumvented by casting the cause of action in terms of tortious interference with employment." Barcellos v Robbins, 50 AD3d 934, 935 (2d Dept 2008); see Smalley v Dreyfus Corp., 10 NY3d 55, 58 (2008); *Ingle*, 73 NY2d at 188-189; Marino v Vunk, 39 AD3d 339, 340 (1st Dept 2007).

In limited circumstances, however, a cause of action for tortious interference with prospective contractual relations may exist where the underlying agreement is terminable at-will. See Guard-Life Corp. v Parker Hardware Mfg. Corp., 50 NY2d 183, 193-194 (1980); Nelson v Capital Cardiology Assoc., P.C., 97 AD3d 1072, 1074 (3d Dept 2012); McHenry v Lawrence, 66 AD3d 650, 651 (2d Dept 2009); Perry v Collegis, 55 AD3d 459, 460 (1st Dept 2008). To state a cause of action for tortious interference with prospective contractual relations, a plaintiff must plead that the defendant directly interfered with a third party and that the defendant either employed wrongful means or acted 'for the sole purpose of inflicting intentional harm on plaintiff[].'" Posner

v Lewis, 18 NY3d 566, 570 (2012), quoting Carvel Corp. v Noonan, 3 NY3d 182, 190 (2004); see Guard-Life Corp., 50 NY2d at 189-190; Snyder v Sony Music Entertainment, Inc., 252 AD2d 294, 299-300 (1st Dept 1999).

"'Wrongful means' includes physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract." Guard-Life Corp., 50 NY2d at 191, citing Restatement, Torts 2d, § 768, Comment e, § 767, Comment c; accord Carvel Corp., 3 NY3d at 191; NBT Bancorp v Fleet/Norstar Fin. Group, 87 NY2d 614, 624 (1996). A plaintiff also must allege facts to show that he or she would actually have entered into or continued a business relationship "but for" a defendant's wrongful conduct. See Merisel, Inc. v Weinstock, 117 AD3d 459, 985 NYS2d 490, 492 (1st Dept 2014); Hadar v Pierce, 111 AD3d 439, 441 (1st Dept 2013); Vigoda v DCA Productions Plus Inc., 293 AD2d 265, 266 (1st Dept 2002); see also Scalise v Adler, 267 AD2d 295, (2d Dept 1999) (plaintiff must establish "direct link" between defendant's conduct and termination or "but for" defendant's conduct employment would have continued); Jabbour v Albany Med. Ctr., 237 AD2d 787, 790 (3d Dept 1997) ("plaintiff must also establish that the wrongful acts were the proximate cause of the rejection of the plaintiff's proposed

contractual relations").

Further, as tortious interference with contractual relations requires interference by a third party, that is, a "stranger" to the contractual relationship (see Ashby v ALM Media, 110 AD3d 459, 459 [1st Dept 2013]; Koret, Inc. v Christian Dior, S.A., 161 AD2d 156, 157 [1st Dept 1990]), a plaintiff has no cause of action for tortious interference with prospective employment against co-employees unless the "defendant co-employees acted outside the scope of their authority." Marino, 39 AD3d at 340; see Kosson v "Algaze", 203 AD2d 112, 113 (1st Dept 1994), affd 84 NY2d 1019 (1995); Pressler v Domestic and Foreign Missionary Socy. Of Protestant Episcopal Church in the U.S.A., 113 AD3d 409 (1st Dept 2014); Baker v Guardian Life Ins. Co. of Am., 12 AD3d 285 (1st Dept 2004); see also Ahead Realty LLC v India House, Inc., 92 AD3d 424, 425 (1st Dept 2012) (clearly no cause of action when allegation is that defendant tortiously interfered with its own contract).

Applying the above principles, Stega's claim against Menkes fails on several counts. Significantly, plaintiff has not alleged that Menkes was acting outside the scope of his authority. The allegations instead indicate that, as President and CEO of NYDH, he had the authority to place her on administrative leave and withhold her salary, as well as to participate in any decision to terminate her employment.

Assuming that defamation is a wrongful act in connection with a tortious interference claim (see Stapleton Studios, LLC v City of New York, 26 AD3d 236, 237 [1st Dept 2006]), there are no factual allegations to show that Menkes' statements to Stega influenced Harris or other investigators. The allegation that Harris and the Hospital's legal counsel knew Menkes' opinion before they conducted an investigation provides no basis for finding that wrongful means were used to influence the investigation or effect her termination, or that Menkes acted for the sole purpose to hurt plaintiff. See Lobel v Maimonides Med. Ctr., 39 AD3d 275, 276-277 (1st Dept 2007). In addition, there are no factual allegations to show either a direct link between the allegedly defamatory remarks made to plaintiff by Menkes and the termination of her employment, or that but for Menkes' actions her employment would have been continued. See Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae, 243 AD2d 168, 183 (1st Dept 1998) (plaintiffs' allegations, without more, that third parties cancelled contracts with them because of alleged defamatory remarks made by defendant was insufficient to state a cause of action); M.J. & K. Co. v Matthew Bender & Co., 220 AD2d 488, 490 (2d Dept 1995) (same).

PLAINTIFFS' CROSS MOTION TO AMEND

In their cross motion, plaintiffs seek leave to serve a second amended complaint "to clarify the allegations and theories

of recovery," and submit a proposed Second Amended Verified Complaint, reflecting additional allegations, chiefly pertaining to the defamation claim. Defendants offer no opposition to the cross motion, other than generally to assert that it fails to cure the defects in the first amended complaint. In the absence of any substantial opposition, and in its discretion (see Edenwald Contr. Co. v City of New York, 60 NY2d 957, 959 [1983]), the court will grant leave to serve a second amended complaint, but limited to the amendment of allegations pertaining to the first cause of action for defamation, and in accordance with the court's decision on the instant motions to dismiss.

Accordingly, for the reasons stated above, it is

ORDERED that defendants' motions to dismiss are granted to the extent that the second, third, fourth and fifth causes of action are dismissed; and it is further

ORDERED that plaintiff Tzall's cause of action for defamation is dismissed; and it is further

ORDERED that the remaining cause of action is severed and shall continue; and it is further

ORDERED that plaintiffs' cross motion to amend is granted to the limited extent of granting leave to serve a second amended complaint adding allegations, as set out in the proposed amended complaint, pertaining to the cause of action for defamation; and it is further

ORDERED that, within thirty (30) days of service of this order with notice of entry, plaintiff Stega shall serve and file a second amended complaint, as limited by the preceding paragraph and in accordance with this order; and it is further

ORDERED that, within the time set forth in the CPLR, defendants shall serve and file an amended answer to the second amended complaint.

Dated: September 11, 2014

ENTER:

J.S.C.

DEBRA A. JAMES