SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 59

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SAM KELLNER,

Plaintiff,

-against-

Index No.
161387/2014

THE FORWARD ASSOCIATION, INC., FORWARD PUBLISHING COMPANY, INC., THE JEWISH DAILY FORWARD and PAUL BERGER,

Defendants.

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JAMES, J.S.C.:

Defendants move for an order dismissing the complaint based on documentary evidence and for failure to state a claim pursuant to CPLR 3211 (a) (1) and (7).

This is a defamation action arising from complicated series of overlapping sexual abuse and extortion prosecutions that involve members of an ultra-Orthodox Jewish community in Brooklyn.

The article at issue, written by defendant Paul Berger (the Article), and published by a Jewish newspaper, defendant the Jewish Daily Forward (the Forward), also appeared online and in print on or about November 14, 2013.

In the Article, Berger describes how plaintiff Sam Kellner pressed charges against a prominent cantor in his community, Baruch Lebovits, who plaintiff alleges molested his son, and how, thereafter, plaintiff was indicted on charges of extorting the Lebovits family, which charges were still pending at the time of the Article. The extortion charges against plaintiff

were later dropped. The Forward also promoted the Article in a "tweet," on November 16, 2013.

In this action, plaintiff alleges that Berger defamed him by falsely reporting that contents of certain "secret" recordings revealed that plaintiff was engaged in criminal conduct, and the "tweet" falsely accused him of being a convicted extortionist.

Defendants move to dismiss the claims contending that plaintiff has failed to allege any actionable false statement of facts, and that the Article was an expression of pure opinion, based on Berger's interpretation of the contents of secretly made audio recordings, and raised questions, rather than reported facts, about the disputes. Plaintiff counters that the Article is based on underlying false fact statements involving the recordings, as well as undisclosed facts, which make it actionable.

BACKGROUND

The following factual allegations are taken from the amended complaint, and are accepted as true for the purposes of this motion to dismiss.

In early 2008, plaintiff, a member of the ultra-Orthodox Jewish community in Brooklyn, learned that his son had been molested by Lebovits, a prominent cantor in the community. Plaintiff's son reported the incident to his yeshiva teacher who forbade him from speaking of the matter and threatened to expel him from the yeshiva. Plaintiff went to the Brooklyn District Attorney's office to speak with a prosecutor, and was told that the District Attorney would not proceed with the prosecution, primarily because the alleged offense was a misdemeanor and there were no other known victims. The District Attorney's office then

referred plaintiff to a detective, who was a longtime investigator of sexual abuse of children. Based upon his interview of plaintiff's son, the detective concluded that Lebovits was a serial offender, and told plaintiff that such a case would be viable only if additional victims came forward. Plaintiff learned of two other victims, who were referred to in the criminal complaint as "MT" and "YR". Both persons testified before a grand jury, which eventually indicted Lebovits. Plaintiff's actions in going outside of the community to secular authorities met with staunch opposition from the community, and he and his family were harassed and shunned. He received offers of money from associates of the Lebovits family to not press the charges.

The case involving MT was severed from that involving YR. At some point MT determined to no longer cooperate with the prosecution, and later the case involving plaintiff's son was also dismissed. Only the trial involving YR proceeded. Lebovits defended by claiming that he was a victim of an extortion plot by, among others, plaintiff. He was found guilty and, in April 2010, was sentenced to 10- 2/3 to 32 years in prison. Lebovits appealed his conviction.

Following the conviction, Lebovits and his supporters, seeking to overturn the conviction, asserted that Lebovits was the victim of an extortion plot, and reached out to the District Attorney's office for help. Eventually, Simon Taub, another member of the community, was arrested and pled guilty to attempted extortion after he was recorded demanding payment from Baruch's son, Meyer Lebovits, in exchange for not pressing charges against Meyer for molesting Taub's son. Another son of Baruch, Chaim Lebovits, then initiated a meeting with Taub in June 2010 in which he tried to get Taub to implicate plaintiff in the extortion plot. Chaim recorded phone conversations with Taub in which he urged Taub to bring plaintiff to a

meeting where an alleged handoff of money was going to take place. Taub came up with an excuse, telling Chaim that plaintiff would not be there for the first meeting, because "he's afraid, he tells me he's shaking with fear," but that he will be present at a second meeting if "the first time goes well. The meeting took place on July 7, 2010 without plaintiff, and shortly thereafter Taub was arrested.

On April 12, 2011, plaintiff was arrested on charges of extortion of the Lebovits family. The indictment stated that plaintiff conspired with five others to demand money from Lebovits in exchange for dropping charges and refraining from bringing forward any other victims. Plaintiff also was accused of paying MT $10,000 to testify falsely against Lebovits to the grand jury. Plaintiff further alleges that the District Attorney's office and the Lebovits family tried to pressure the other victim, YR, to testify that he had been paid off by plaintiff, but YR refused. The next day, Lebovits was released on bail, pending the appeal of his conviction, and placed under house arrest.

On April 25, 2012, Lebovits' conviction was overturned on appeal because of the prosecution's untimely disclosure of certain Rosario material (see People v Lebovits, 94 AD3d 1146 [2d Dept 2012]), and was sent back for retrial.

From March 2012 through 2013, the case against plaintiff was falling apart because the prosecutors discovered new information from witnesses, and from travel and bank records, suggesting that MT had been threatened and paid off by the Lebovits family and their allies.

In August 2013, plaintiff moved to dismiss the indictment against him, and Assistant District Attorneys assigned to the case refused to defend against such motion. In November

2013, a new District Attorney, Kenneth Thompson, was voted into office. On March 7, 2014, the case against plaintiff was dismissed in its entirety.

In May 2014, Lebovits pled guilty, but served only 86 days in jail.

The Article

The Article, written by defendant Berger, and published on Forward's website on November 14, 2013, appeared in print on November 15, 2013. The web version of the Article appeared with the headline "Sam Kellner's Tangled Hasidic Tale of Child Sex Abuse, Extortion and Faith: *Is Alleged Shakedown Artist a Hero or Crook?*". The print version's headlines were: "A Hasidic Tale of Abuse, Extortion, Fathers and Faith;" "New Brooklyn DA Inherits a Headache: Two Highly Charged Cases With Passionate Defenders;" and "Secret Recordings Show Challenge of Choosing Sides in Lebovits-Kellner Cases". The Article appears in the "News" portion of the web version, and on the front page of the print version. It is written in the first person, with the author, Berger, explaining how the story "began for me in 2010," when Lebovits was convicted and awaiting sentencing. Berger then discusses the difficulties of prosecuting sex crimes, particularly in the insular, ultra-Orthodox community, and describes parts of Lebovits' sentencing hearing. Berger then states that "during the past few years I have begun to have doubts about the Lebovits conviction," which doubts were not focused on "whether Lebovits sexually abused boys, but on whether Lebovits was denied a fair trial".

Berger goes on to state that the main "reason for such doubts lies with one man: Sam Kellner". He recounts the basic facts that plaintiff was a victim's father, sought out other victims, who testified, resulting in Lebovits' conviction, but that one victim then accused

plaintiff of bribing him to testify falsely, and plaintiff then was arrested. Berger states that the two sides have been locked in a battle for the last two years "to control the narrative of both cases" in the press and the courts, with one narrative holding Lebovits as a molester and plaintiff as innocent, and the other with plaintiff as extortionist and Lebovits as innocent. Berger then states "[b]ut there is a third possible narrative: that neither of the two men is as innocent as he claims to be". Berger further states:

> the more deeply I looked into the Lebovits and the Kellner cases – largely at the urging of the Lebovits family– the more questions I had. And while many of these questions reflected my growing skepticism about Kellner's claims, my skepticism about Lebovits, whose supporters were supplying me with much of the material, grew as well.

Berger wrote that the overwhelming narrative in the press was that plaintiff was a wounded father trying to get justice for his son, but "never mind" other "questionable facts," such as a police detective's note, that was withheld from the Lebovits defense until late in the trial, which quoted the victim as saying that the Lebovits family offered him money, but that plaintiff told him to hold out for more. Berger observed that "the modesty committees that plaintiff said he consulted with [before bringing the case to secular authorities] are often portrayed by [abuse] advocates as shadowy forces that use intimidation and blackmail to get their way".

Berger then states that plaintiff's "simple pursuit of justice does not explain the many recordings recently obtained by the Forward". He asserts that the tapes were provided by the Lebovits family and his legal team, and were "enough to make a reporter's head spin," and described plaintiff as a "man with ethical and legal standards that would make a true advocate for abusers [sic] blanch"..

The complaint, here, focuses on the Article's description of two specific recordings. In the first recording, made on the street in Boro Park, Brooklyn (the Street Recording),

> [Plaintiff] tells the family of a child molester who had pleaded guilty that he can help get the man off and that, citing the Hasidic bloc vote, they should tell the DA, 'Hey, you took a Jewish man, you railroaded him into a deal . . . and we won't forget it.

Berger further describes the recording:

> During the conversation, . . . [plaintiff] counseled the family on how the self-confessed molester might avoid jail time. He told them that they must appeal to leading rabbis to 'put the squeeze' on the Brooklyn DA, who is beholden to the rabbis for communal votes. The goal, [plaintiff] said, 'is, he shouldn't spend one day in jail'.

Berger wrote that "[plaintiff] also told the family they can buy off prosecutors with meals, New York Yankee tickets and other gifts to have the case thrown out," and that this was "'not really bribing,' [plaintiff] said". Berger explains that this recording:

> permanently altered my image of [plaintiff], not least because the very tactics he proposed to the molester's family are the ones that abuse advocates have long suspected of the Brooklyn DA's office – that it hands out so-called 'sweetheart plea deals' to ultra-Orthodox molesters in return for ultra-Orthodox votes come election time.

In the complaint, plaintiff asserts that these statements are false, and the recordings resulted from an illegal listening device in his vehicle, which were doctored by the Lebovits family to change the content and context in which his words were spoken.

In the second recording, a wiretapped conversation between Simon Taub and Baruch's son, Chaim Lebovits (the Taub Recording), Berger states that "Taub implicated [plaintiff] in

[Taub's] extortion plot by saying that [plaintiff] will appear in a second handover of money only if the first drop-off goes according to plan". Taub pled guilty to attempted grand larceny by extortion, and was sentenced to five years of probation. Plaintiff again asserts in his complaint that this was Berger's statement was false. Taub did not implicate him; rather, Chaim demanded that Taub bring plaintiff to their meeting, and Taub refused.

Berger further describes how his "sense of just how Byzantine the double-dealing among these actors may get took a quantum leap" when he spoke with a blogger, who runs a site by the name "Defend Kellner" and told Berger that she was having doubts about plaintiff's story. Berger investigated the blogger to discover she was likely a member of, or at least was connected to, the Lebovits family. He also states that the District Attorney's office had discovered that MT, who claimed that plaintiff paid him to testify falsely against Lebovits, was now contradicting that testimony, and was living in Israel at the expense of a close friend of the Lebovits family, and that the Assistant District Attorneys on the case against plaintiff were refusing to continue to prosecute that case.

Berger then opines that "[n]either side comes out of this clash well". He concludes his article, thusly:

> Having read through piles of court papers and transcripts, having listened to recordings and to the arguments of both sides, I'm filled with enormous sorrow for the vulnerable children whose welfare in this community is utterly ignored. But I am still no nearer to believing that I know the truth about the cases of Baruch Lebovits and Sam Kellner.
>
> To the contrary, I have learned to treat with a great deal of suspicion anyone who tells me he is convinced – one way or the other.

On November 16, 2013, defendants also published a "tweet" on their account @jdforward which posted a link to its "Audio Page." That link invited listeners to click on the link to the Audio Page to "Hear convicted extortionist Sam Kellner in his own words". Plaintiff states that such statement is false. He was not convicted, only indicted, and then the charges were dropped. Plaintiff's counsel notified defendants of the error on November 18, 2013. On November 21, 2013, defendants published a retraction of the tweet, which also appeared in the web version of the article:

> On November 16, 2013, we tweeted a link to this article that erroneously referred to Sam Kellner as having been convicted of extortion. This is incorrect. As the article itself accurately reports, Mr. Kellner has only been charged with extortion, a charge that he denies.

On November 14, 2014, plaintiff commenced this action seeking recovery for defamation per se.

Motion to Dismiss

Defendants move to dismiss, contending that the statements in the Article raise questions and offer conjecture, and that considered as a whole, the Article constitutes non-actionable opinion. Defendants urge that the Article explored a controversial set of facts, emphasizing the ambiguity, and invited the reader to question or inquire further. They contend that the Article contains numerous explicit signals to indicate to the reader that its content represents speculation, that is, opinion, not fact, and that the Article advances alternative answers to the questions it raises, but does not adopt any particular answer as correct.

Defendants also argue that the Article does not imply that it is based upon additional, undisclosed facts, and that the Article made clear that much of information was from the Lebovits family and his legal team, not a disinterested observer. Defendants argue that plaintiff's conclusory assertions that the recordings were illegally recorded and doctored are insufficient to establish falsity. They assert that plaintiff is objecting to Berger's interpretation of the recordings, not any statement of fact. For example, while plaintiff may now deny that he was providing "help" or "counsel" to the "wife of a particular molester," who he admits speaking to, he fails to explain his repeated instructions to the family of what "you've got to" do. Moreover, defendants contend that the Article's discussion of the Street Recording must be viewed in the context of the Article as a whole. They also contend that plaintiff challenges only the interpretation of the Taub Recording. Finally, with regard to the "tweet," defendants urge that plaintiff, as a limited purpose public figure, has not and cannot plead actual malice, which is necessary to establish defamation from the inadvertent and immediately retracted mistake. Even if plaintiff were considered a private figure, defendants contend that since the issue was within the sphere of legitimate public concern, plaintiff must, but cannot, allege that defendants acted with gross irresponsibility.

In opposition, plaintiff argues that the context of the Article indicates that it contained actionable facts. Contrary to defendants' contentions, plaintiff contends that facts have been repeatedly denied by him, and the reporting does not allow a different interpretation to the one supposedly offered by Berger. Further, the opinions offered by Berger are actually mixed opinions, because they are partly based on at least eight to nine undisclosed recordings, and

the facts concerning the three recordings specified in the Article are falsely reported and distorted. With regard to the "tweet," plaintiff urges that defendants failed to promptly correct the error, which calls into question defendants' claim that the error was inadvertent. He contends that the "tweet" was published on November 16, 2013, on November 17 other Twitter followers pointed out the error, and on November 18, 2013, his counsel notified defendants that it falsely stated that he was convicted of extortion. Defendants, however, did not remove it and or publish the retraction until three days later. Plaintiff maintains that he is not a limited purpose public figure with respect to the present matter, because he did not voluntarily seek attention in this matter. Rather, he merely responded to media inquiries. Finally, plaintiff urges that without discovery, defendants cannot establish as a matter of law that they were not grossly irresponsible with regard to the "tweet."

In reply, defendants contend that the Article contained repeated, explicit signals that it contained only Berger's surmise about a public controversy, raising questions, but not reaching conclusions. They assert that the challenged statements are supported by disclosed tape recordings, and that plaintiff does not deny that the recordings capture words that he and others spoke. Instead, plaintiff merely takes issue with Berger's interpretation of those statements, and in his complaint, admits having a conversation with a family member of a molester. Defendants argues that Berger's statement that Taub implicated plaintiff was his opinion. Moreover, defendants assert that plaintiff has not demonstrated that the Article constitutes a mixed opinion based solely upon its mere failure to describe in detail every

recording. As to the "tweet," plaintiff has not asserted facts that may establish that such statement was published with actual malice, particularly since he is a public figure.

DISCUSSION

The motion to dismiss shall be denied.

On a motion to dismiss, the pleading is liberally construed and court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts (Amaro v Gani Realty Corp., 60 AD3d 491, 492 [1st Dept 2009]; Skillgames, LLC v Brody, 1 AD3d 247, 250 [1st Dept 2003]). The merits of the complaint, or any of its factual allegations, are not assessed, and the court will only determine if, assuming the truth of the alleged facts, and the inferences that can be drawn therefrom, the complaint states a legally cognizable claim (Skillgames, LLC v Brody, 1 AD3d at 250, citing Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff (see Amaro v Gani Realty Corp., 60 AD3d at 492). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration" (*Skillgames, LLC v Brody*, 1 AD3d at 250 [citation omitted]). Where the defendant seeks dismissal based upon documentary evidence (CPLR 3211 [a] [1]), it must establish that "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] [citation omitted]; Leon v Martinez, 84 NY2d 83, 88 [1994]).

"Defamation is 'the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society'" (Stepanov v Dow Jones & Co., Inc., 120 AD3d 28, 34 [1st Dept 2014], quoting Foster v Churchill, 87 NY2d 744, 751 [1996]). To state a claim for defamation, a plaintiff must allege 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" (Martino v HV News, LLC, 114 AD3d 913, 913-914 [2d Dept 2014] [quotation marks and citations omitted]). Statements are libelous per se if they, inter alia, accuse the plaintiff of a serious crime (Liberman v Gelstein, 80 NY2d 429, 435 [1992]; Harris v Hirsh, 228 AD2d 206, 208 [1st Dept 1996]).

Where a plaintiff alleges that a defendant published false and defamatory statements, the legal question for the court on a motion to dismiss is whether the contested statements are reasonably susceptible of a defamatory connotation (Weiner v Doubleday & Co., 74 NY2d 586, 592 [1989]). To determine this, the court must give the disputed language a fair reading in the context of the publication as a whole, giving the language a natural reading tested against the understanding of the average reader (Armstrong v Simon & Schuster, 85 NY2d 373, 380 [1995]; Weiner v Doubleday & Co., 74 NY2d at 592; Aronson v Wiersma, 65 NY2d 592, 594 [1985]; James v Gannett Co., 40 NY2d 415, 419-420 [1976]; see also Stepanov v Dow Jones & Co., Inc., 120 AD3d at 34 ["On a motion to dismiss a defamation claim, the court must decide whether the statements, considered in the context of the entire publication, are 'reasonably susceptible

of a defamatory connotation,' such that the issue is worthy of submission to a jury"] [citation omitted]). The court must consider the content as a whole, and the tone and apparent purpose, and "look to the over-all context" (Brian v Richardson, 87 NY2d 46, 51 [1995] [quotation marks and citation omitted]).

Since falsity is an element of the claim, substantial truth is an absolute defense (Stepanov v Dow Jones & Co., Inc., 120 AD3d at 34). Similarly, opinion is a defense, that is, that the statements, when read in context, would be perceived by a reasonable person to be nothing more than a matter of personal opinion (Immuno AG. v Moor-Jankowski, 77 NY2d 235, 243-244 [1991]). "'[O]nly statements of fact can be defamatory because statements of pure opinion cannot be proven untrue"' (Martin v Daily News L.P., 121 AD3d 90, 100 [1st Dept 2014], quoting Thomas H. v Paul B., 18 NY3d 580, 584 [2012]; see Mann v Abel, 10 NY3d 271, 276 [2008] [opinion, as opposed to fact assertions, are privileged and, no matter how offensive, cannot be the subject of a defamation action]; see generally Gross v New York Times Co., 82 NY2d 146, 153-154 [1993]). While distinguishing between opinion and fact "has often proved a difficult task" (Brian v Richardson, 87 NY2d at 51), the Court of Appeals has set out the following factors to be considered:

> (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) 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 . . . readers or listeners that what is being read or heard is likely to be opinion, not fact'

(Gross v New York Times Co., 82 NY2d at 153, quoting Steinhilber v Alphonse, 68 NY2d 283, 292 [1986] [internal quotation marks and other citations omitted]; see Mann v Abel, 10 NY3d at 276). The court must begin its analysis by looking at the context of the entire communication, its tone and apparent purpose, and not parse out and evaluate challenged statements in isolation (Brian v Richardson, 87 NY2d at 52; see Immuno AG v Moor-Jankowski, 77 NY2d at 254-255). "When the defendant's statements, read in context, are readily understood as conjecture, hypothesis, or speculation, this signals the reader that what is said is opinion, and not fact" (Levin v McPhee, 119 F3d 189, 197 [2d Cir 1997], citing Gross v New York Times Co., 82 NY2d at 155).

While pure opinion is not actionable, "[a] statement of opinion that implies a basis in facts which are not disclosed to the reader or listener is actionable not because it conveys a false opinion but rather because a reasonable listener or reader would infer that the speaker or writer knows certain facts, unknown to the audience, which support the opinion and are detrimental to the person toward whom the statement is directed" (Brian v Richardson, 211 AD2d 413, 413 [1st Dept 1995], affd 87 NY2d 46 [citation omitted]; but see Gross v New York Times Co., 82 NY2d at 153-154 [if the opinion statement either discloses the factual basis or does not imply that there are undisclosed facts, then the opinion is not actionable]). This is referred to as mixed opinion, and the actionable element "is not the false opinion itself – it is the implication that the speaker knows certain facts, unknown to his audience, which support his opinion " (Steinhilber v Alphonse, 68 NY2d at 290 [citations omitted]). Mixed opinion also includes a defamatory opinion which is ostensibly accompanied by a recitation of the

underlying facts upon which it is based, "but those underlying facts are either falsely misrepresented or grossly distorted" (Parks v Steinbrenner, 131 AD2d 60, 62-63 [1st Dept 1987], citing Silsdorf v Levine, 59 NY2d 8, 15-16, cert denied 464 US 831 [1983] and Chalpin v Amordian Press, 128 AD2d 81, 85 [1st Dept 1987]). This is actionable because the plaintiff's challenge to the fact statements disclosed in the underlying opinion may convince the trier of fact that the factual disparities would affect reader's conclusions about the validity of the expressed opinions (Silsdorf v Levine, 59 NY2d at 14-16; see Chalpin v Amordian Press, 128 AD2d at 85).

Applying the test to the facts of this case, this court finds that, while it appears that the general tone of the Article is one that conveys Berger's opinion as to whether plaintiff was an extortionist or an advocate for abuse victims, the Article constitutes mixed opinion, because it refers both to underlying facts, which plaintiff asserts are misrepresented and distorted, and to undisclosed facts. The court notes that the Article was on the front page, in the news section of the paper, and not on the opinion or editorial pages. It was a fairly lengthy article, written after what appeared to be an investigation by Berger, including purportedly listening to more than a dozen tape recordings. It gave the impression that it was "'the product of some deliberation, not of the heat of the moment'" (Gross v New York Times Co., 87 NY2d at 156, quoting 600 W. 115th St. Corp. v Von Gutfeld, 80 NY2d 130, 142 [1992] [internal citations omitted]). These circumstances encouraged the reader to be less skeptical and more willing to conclude that Berger was stating or implying facts that were proffered for their accuracy (id.; cf. Jewell v NYP Holdings, Inc., 23 F Supp 2d 348, 379-380 [SD NY 1998] [preliminary nature of reported

information, as in breaking news report, supports that statements may be opinion]; Brian v Richardson, 87 NY2d at 53 [article in op-ed, which is forum reserved for airing ideas on public concern issues, representing authors' opinions]). Even if the preliminary tone of the Article purports to raise questions about plaintiff's role, later in the Article where Berger makes the statements regarding the tape recordings, the tone changes. For example, he states that "the recordings – more than a dozen in total– are enough to make a reporter's head spin," and that the "Sam Kellner described by these people, including former business associates of Kellner's and the relatives and acquaintances of abusers and their victims-- is a man with ethical and legal standards that would make a true advocate for abusers [sic] blanch," and then that this '"recording permanently altered my image of Kellner". With such implied facts, Berger supports his conclusion that plaintiff is not "as innocent as he claims to be."

In his complaint, plaintiff alleges that four factual statements, taken by Berger from three recordings described in the Article and underlying his opinions and questioning of plaintiff's ethics, were false. The first three statements are from the Street Recording, which Berger states "has been verified by the Forward," and involve plaintiff telling "the family of a child molester" who had pleaded guilty "that he can help get the man off," and "citing the Hasidic bloc vote, they should tell the DA, 'Hey, you took a Jewish man, you railroaded him into a deal . . . and we won't forget it'". The second statement Berger makes is that plaintiff counseled the molester's family to appeal to leading rabbis to "'put the squeeze' on the Brooklyn DA," and the goal is that "he shouldn't spend one day in jail". The third is that plaintiff

told the family that "they can buy off prosecutors with meals, New York Yankees tickets and other gifts to have the case thrown out," and that "'It's not really bribing,' said [plaintiff]".

The mere appearance of opinions in the Article does not insulate Berger's underlying factual news reporting from liability. Contrary to defendants' contentions, plaintiff is not just disputing the conclusions or opinions that Berger has drawn from these facts. Rather, plaintiff asserts in the complaint that the underlying fact statements are false, that the recording was "doctored" in that "extracts of conversations [plaintiff] conducted at other times with other people" were inserted; and general and non-specific accounts given by plaintiff of how his community interacts with the DA's office were manipulated into specific advice given by him to a family of a molester. In addition, plaintiff points to the fact that on the Audio Page, which was a link from the web version, defendants purportedly provide a transcript of the Street Recording. The transcription, on the Audio page only, however, nowhere mentions a child molester or a molester's family, and it is not clear to whom plaintiff was speaking. Plaintiff contends that Berger's statements manipulated the context in which plaintiff was describing his community's interactions with the DA's office, and, thus, his statements, as reported by Berger, were false and grossly distorted. The challenged statements are capable of being true or false – either plaintiff was the party speaking on the recording, and said these statements to a child molester's family, or not.

Defendants' argument that the Article was merely Berger's "interpretation" of the tape recordings is unpersuasive and flies in the face of defendants' assertions that the account of plaintiff's recorded statements were "verified by the Forward." Plaintiff sufficiently alleges and

presents some basis that the facts are falsely misrepresented or grossly distorted in the Article, and form the basis of Berger's derogatory statements of opinion. Such statements constitute mixed opinion which is actionable (see Silsdorf v Levine, 59 NY2d at 15-16 [defamatory statements of opinion, contained in letter in political campaign, sufficient to state defamation claim where plaintiff alleged that facts set forth in support of opinions were "gross distortions" and "misrepresentations of fact"]; Chalpin v Amordian Press, 128 AD2d at 86 [where plaintiff claimed facts set forth in support of defendant's defamatory opinion were false and distorted]).

With respect to the Taub Recording, again, plaintiff clearly asserts that Berger's statement that Taub implicated plaintiff in the extortion plot was false. He contends that his name was mentioned because Chaim was demanding that Taub bring plaintiff to their meeting, Taub was refusing and Chaim was telling him that he would not pay Taub the money unless he complied with the demand. Then, Chaim and Taub were discussing the need to hide the purpose of the meeting from plaintiff if they wanted him to show up. By leaving out these details, Berger not only failed to disclose an important fact, but by doing so falsely stated and grossly misrepresented as a fact that plaintiff had been implicated. This also constitutes mixed opinion, and is actionable. Defendants' contention that it was Berger's conjecture, based on disclosed facts, that Taub's words implicated plaintiff, that such was supported by plaintiff's pending indictment, and that readers could draw their own conclusion, is unavailing. The Taub plot is unrelated to plaintiff's indictment, and, as discussed above, the complaint sufficiently alleges that Berger's report leaves out key details regarding the recording and distorts and misrepresents the underlying facts.

Moreover, the Article also refers to the "more than a dozen in total" of recordings, but then describes only three of those recordings (the Street Recording, the Taub Recording, and another recording, which plaintiff is not challenging). The Article, therefore, implies a basis in fact for Berger's opinions from the undisclosed other recordings, another basis for finding it actionable as mixed opinion (see Daniel Goldreyer, Ltd. v Van de Wetering, 217 AD2d 434, 435 [1st Dept 1995] [opinion based upon fact which contains implications of additional undisclosed facts is actionable]).

Plaintiff has the right of the opportunity to demonstrate the falsity of the Article's statements of fact regarding these recordings and to convince the trier of fact that the factual disparities would affect the conclusions drawn by the reasonable reader regarding the validity of the opinions expressed (see Silsdorf v Levine, 59 NY2d at 15-16; Chalpin v Amordian Press, 128 AD2d at 86).

With regard to the "tweet," which referred to plaintiff as a "convicted extortionist," not an indicted one, defendants concede that this was false and defamatory (*see LeBlanc v Skinner*, 103 AD3d 202, 214 [2d Dept 2012] [false statement that person committed serious crime is defamation per se]), but contend that the inadvertent error was immediately corrected, and, thus, plaintiff cannot show intent. While readers may give less credence to rhetorical hyperbole and epithets posted on the internet than in other milieus (see LeBlanc v Skinner, 103 AD3d at 213; see Sandals Resorts Intl. Ltd. v Google, Inc., 86 AD3d 32, 43-44 [1st Dept 2011]), this tweet was not rhetorical, and clearly stated that plaintiff had committed a serious crime, constituting defamation per se. Plaintiff asserts that the "tweet" was published on November

16, 2013 and the next day other twitter users pointed out the error, plaintiff's counsel directly contacted defendants about it on November 18, 2013, but that it was not retracted until November 21, 2013. Whether this was an inadvertent error or corrected immediately, and whether plaintiff can show that defendants had the required intent cannot be determined on these motion papers.

On the element of intent, defendants urge that plaintiff is a public figure, and must, but cannot, show actual malice. Plaintiff, however, is not a public official or a general purpose public figure (see Gertz v Robert Welch, Inc., 418 US 323, 345 [1974] [person in position of "persuasive power and influence" in affairs of society]). He is not even a limited purpose public figure, which has been defined as those who "have thrust themselves to the forefront of a particular public controversies in order to influence the resolution of the issues involved" (*id.*) Plaintiff did not voluntarily seek out the media, or seek to influence others prior to the incident that is the subject of this action. Rather, he was involuntarily thrust into it by reporting the crime committed against his minor son, and cooperating with the police, and then, several years later, defending against his indictment (see James v Gannett Co., 40 NY2d at 421-422 [public figure if invite attention and comment]; Lerman v Flynt Distrib. Co., 745 F2d 123, 136-137 [2d Cir 1984]). His name was not known to the general public until after his indictment in 2011. He was drawn into the public forum against his will in order to obtain redress for his son, and then to defend himself (see Time, Inc. v Firestone, 424 US 448, 457 [1976]). While articles were written about him in 2013, he contends that he simply responded to the media inquiries. Voluntary discussion of events with the media does not mean per se that the plaintiff has

voluntarily thrust himself to the forefront of a public controversy (id. at 454 n 3). If a defamation plaintiff has attempted to influence the merits of a controversy or drawn attention to himself to invite public comment through his interaction with the press, then he may become a limited purpose public figure (id.; see also Wolston v Readers Digest Assn., Inc., 443 US 157, 168 [1979]). However, a private person does not become transformed into a public figure just by "becoming involved in or associated with a matter that attracts public attention" (Wolston v Readers Digest Assn., Inc., 443 US at 167). Defendants fail to show that plaintiff has taken affirmative steps to attract public attention, and plaintiff asserts that he simply responded to media questions and did not seek them out. Thus, defendant fail to document that plaintiff was a limited purpose public figure (see Time, Inc. v Firestone, 424 US at 454 n 3 [even the holding of a few press conferences by a private person did not convert her to a public figure for the purposes of the litigation]).[1]

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[1] In their reply brief, for the first time defendants raise an argument that plaintiff is an involuntary limited purpose public figure, and that, based on that status, he must show actual malice. Plaintiff appropriately objected to this late argument, and was permitted to orally sur-reply on the record of the oral argument. Plaintiff contended that he was totally anonymous before this happened to his son, and then he was indicted--there was nothing he did or could have done to stop the publicity. He was contacted by the media and simply responded to their questions. This, he urges, fails to provide a basis for finding him any type of public figure.

In Gertz v Robert Welch, Inc., the Supreme Court opined that private individuals are able to recover for a defamation injury based on a liability standard defined by the individual states, but that that such laws may not impose liability without fault. It also noted, "[h]ypothetically," that a person could become an involuntary public figure, but that those instances "must be exceedingly rare" (418 US at 345). The Appellate Division, First Department, in Daniel Goldreyer, Ltd. v Dow Jones & Co. (259 AD2d 353, 353 [1st Dept 1999]), found such a rare instance where a controversial, but well-known art restorer, restored a valuable painting for a Dutch museum using certain questionable techniques, and the restoration job became the subject of a *Time* magazine article and a "brief, droll article" in *The Wall Street Journal* on the ensuing controversy. After discovery and on a summary judgment motion, it determined that

Finally, defendants urge that there is no basis for a finding that they were grossly irresponsible, so the complaint must be dismissed. Where a private plaintiff asserts a libel claim and the "content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition" the plaintiff must establish "by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties" (Chapadeau v Utica Observer-Dispatch, 38 NY2d 196, 199 [1975]). None of the parties in this action would dispute that the issues of child abuse and sexual molestation constitute matters of great public concern. In determining whether defendants acted with "gross irresponsibility" various factors must be considered, such as were sound journalistic practices and normal procedures followed; did an editor review it; was there any reason to doubt the accuracy of the source which might create a duty to investigate further; and was the truth easily accessible (Hawks v Record Print & Publ. Co., 109 AD2d 972, 975 [3d Dept 1985]). Naturally, at this early stage, plaintiff cannot possibly plead the relevant facts concerning the defendants' methods for gathering the information, researching, writing,

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under the circumstances, plaintiff was being cast as an involuntary limited purpose public figure, applied the actual malice standard, and dismissed the action (id. at 353-354; see also Dameron v Washington Magazine, Inc., 779 F2d 736, 742 [DC Cir 1985] [air traffic controller on duty at time of crash, who appeared at government agency hearings, testifying extensively about his role therein, all widely publicized, was an involuntary public figure for the very limited purpose of discussion of crash]). Here, in contrast, plaintiff presents some evidence that he was a private individual, was not seeking attention nor trying to influence others, and did not testify, but just responded to media inquiries. Again, this issue cannot be determined before discovery.

and editing the Article (see Knutt v Metro Intl., *S.A.*, 91 AD3d 915, 917 [2d Dept 2012]). This issue must await discovery with respect to these factors (see e.g. id.; Daniel Goldreyer, Ltd. v Van de Wetering, 217 AD2d at 437).

Defendants' reliance on Kipper v NYP Holdings Co. (12 NY3d 348 [2009]), is unavailing as that case is clearly distinguishable. In Kipper, the New York Post rewrote an article that had originally appeared as a Los Angeles Times wire service story, which had accurately reported that the California Medical Board had moved to revoke the license of a doctor. In the New York Post rewrite, the headline stated that the board had in fact revoked the doctor's license. In determining a post-discovery motion for summary judgment, after reviewing the editing process of the newspaper through testimony from editors involved with the article, the Court of Appeals found that the plaintiff failed to present clear and convincing evidence of actual malice (Kipper v NYP Holdings Co., 12 NY3d at 351-353, 356). Similarly, Martin v Daily News L.P. (121 AD3d 90 [1st Dept 2014]), also relied upon by defendants, on a summary judgment motion, after reviewing deposition testimony, the court determined, that there was no actual malice, just careless and sloppy reporting (*id.* at 103). In contrast, here, like in Daniel Goldreyer, Ltd. v Van de Wetering (217 AD2d at 437), dismissal due to a lack of actual malice or the absence of "gross irresponsibility" should await discovery. "Evidence needs to be developed as to whether proper journalistic practices were followed and whether there was editorial review" (*id.* [citation omitted]).

The court has considered the parties' remaining arguments and finds them to be without merit.

Accordingly, it is

ORDERED that defendants' motion to dismiss is denied; and it is further

ORDERED that defendants are directed to serve and answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 103, 71 Thomas Street, on April 5, 2016, at 9:30 AM.

Dated: February 23, 2016

ENTER:

DEBRA A. JAMES J.S.C.