To commence the statutory time period for appeals as of right (CPLR § 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Disp __x__ Dec ____ Seq. #s _3-4__ Type _dismiss_____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

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GREGORY P. SCIALDONE,

Plaintiff,

-against-

Index No. 61281/2012

JOHN DEROSA JR., J.S. DE MANAGEMENT, INC., LISA DEROSA and JOHN DOES 1-20,

DECISION AND ORDER

Defendants.

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The following papers numbered 1 to 5[1] were read on this motion and cross-motion:

Paper	Number
Notice of Motion, Affirmations and Exhibits[2]	1
Notice of Cross-Motion, Affidavit and Exhibits	2
Memorandum of Law	3
Affidavit in Opposition	4
Reply Affidavit and Exhibits	5

There are two motions before the Court in this defamation and harassment case. The first is brought by the remaining defendants, John DeRosa, Jr. and JS DeManagement, Inc., and seeks (1) to dismiss the case for failure to state a cause of action;

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[1]Plaintiff submitted two replies in support of his cross-motion. Since there is no authority for submitting one reply on a cross-motion, let alone two, the Court disregarded the second reply, although it did review it.

[2]Exhibits must be tabbed. Counsel is directed to review the Part Rules.

(2) to dismiss the case based on the prior Decision and Order of the Court dated April 8, 2013 (the "April Decision"), which dismissed Lisa DeRosa from the action; (3) to dismiss the action for plaintiff's failure to respond to discovery requests; (4) in the alternative, an order precluding plaintiff from offering any evidence at trial; and (5) in the alternative, an order compelling plaintiff to respond to defendants' discovery demands. In his cross-motion,[3] plaintiff seeks (1) to reargue the April Decision; (2) continue the automatic stay of discovery pursuant to CPLR § 3214; (3) "to move, object, respond, seek protective relief and seek all discoverly [sic] and a bill of particulars. . . ."

As an initial matter, the Court yet again reiterates that although the parties in this action raise many issues that are simply nasty, petty distractions, including accusations about untimeliness, the Court will not deign to address them. Again, this is not the forum in which the parties should vent their personal animosities.

Beginning with plaintiff's motion, the Court finds that plaintiff has failed to meet the standards for a motion to reargue pursuant to CPLR § 2221(d). This section provides that a motion for leave to reargue "shall be based upon matters of fact

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[3]Counsel for Ms. DeRosa argues that plaintiff cannot bring a cross-motion because Ms. DeRosa did not bring a motion. Because plaintiff could have simply filed another motion and not called it a "cross-motion," the Court declines to resolve this technical issue.

or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." Such a motion, addressed to the discretion of the Court, is designed to afford a party an opportunity to establish that the Court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. "Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided." *Foley v. Roche*, 68 A.D.2d 558, 418 N.Y.S.2d 588 (1st Dept. 1979). *See also Woody's Lumber Co., Inc. v. Jayram Realty Corp.*, 30 A.D.3d 590, 817 N.Y.S.2d 391 (2d Dept. 2006). That is exactly what plaintiff is attempting to do here. Indeed, a review of the motion shows that plaintiff does not even differentiate between trying to reargue the April Decision and to defeat defendants' motion to dismiss. This is improper, since a motion to reargue must be specifically identified as such pursuant to CPLR § 2221(d)(1). However, even if the Court were to grant reargument, it would adhere to the same result, as set forth below.

The Court will not address the discovery aspects of either of the motions, as they are moot, as discussed below. However, the parties are advised for future reference that potentially dispositive motions made in this Part do not stay any discovery, absent express direction of the Court to the contrary.

Turning to the merits of defendants' motion to dismiss the complaint, the Court finds the following. Starting with the Seventh and Eighth Causes of Action, for Harassment and Harassment of a Rent Stabilized Tenant, these claims must be dismissed, because there is no common law claim for harassment. *Mago, LLC v. Singh*, 47 A.D.3d 772, 851 N.Y.S.2d 593 (2d Dept. 2008). To the extent that plaintiff argues that he has stated a claim for harassment and the intentional infliction of emotional distress under the rent stabilization laws, these too must fail for the simple reason that the statute to which plaintiff refers, 22 NYCRR § 2525.5, only concerns the "owner or any person acting on his or her behalf, directly or indirectly." Defendants herein are not the owner or, as plaintiff's own Exhibit E states, persons acting on the owner's behalf, directly or indirectly." Defendants are related to the owner by blood, and may each own real estate-related businesses, but there is no evidence that defendants act on behalf of the owner in any fashion. Accordingly, this Court finds that there is no claim for harassment in this litigation, under any statute or common law provision.

Moreover, many of his allegations relate to the issue of plaintiff's claims regarding the third parking spot addressed by the Court in the *Scialdone v. Stepping Stones*, Index Number 12514/2011, litigation (the "Stepping Stones litigation"). In its Decision and Order dated February 27, 2013 in the Stepping

Stones litigation, the Court held that "there is no evidence that suggests that plaintiff had a **right** to the **third** parking spot." Since the Court has already held that plaintiff had no right to that parking spot, allegations concerning the third parking spot cannot form the basis for a harassment claim, or any other claims. Nor can the alleged defamatory statements in the July 22, 2011 letter at issue in this litigation be the basis for a harassment or intentional infliction of emotional distress cause of action, as addressed below.

Finally, plaintiff refers in paragraph 42 of his Affidavit sworn to on April 30, 2013 to several other incidents, documented in an exhibit to the motion that was decided by the Court with the April Decision. A review of those papers (which should have been annexed as an exhibit, but which the Court was able to locate) shows that most of the incidents involve the defendants in the Stepping Stones litigation, and not defendants hereto. To the extent that plaintiff refers to the letter that John DeRosa, Jr. wrote to plaintiff's wife stating that if she were to leave plaintiff, he could get her an apartment - while that letter may have been in poor taste, inappropriate or obnoxious to plaintiff and his wife, it does not constitute harassment as a matter of law since there is no common law cause of action for harassment.

Additionally, the Court finds that although plaintiff plainly states that he has been annoyed/angered/frustrated beyond measure by defendants, and has repeatedly argued that he has been

deeply harmed in many different ways, none of the things recited by plaintiff in his complaint[4] in this action is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and . . . utterly intolerable in a civilized community." *Baumann v. Hanover Community Bank*, 100 A.D.3d 814, 957 N.Y.S.2d 111 (2d Dept. 2012). *See also G.L. v. Markowitz*, 101 A.D.3d 821, 955 N.Y.S.2d 643 (2d Dept. 2012). This dispute is nasty, personal and most unfortunate, but it does not rise to the level of "utterly reprehensible behavior" required by the law. *Howell v. New York Post Co., Inc.*, 81 N.Y.2d 115, 596 N.Y.S.2d 350 (1993) (noting that the "requirements of the rule are rigorous, and difficult to satisfy.").

Next, the Court addresses the First, Second and Third Causes of Action, which alleges defamation per se, slander per se and libel per se, respectively, based on a letter written by John DeRosa, Jr. to the extended family. "The elements of a cause of action to recover damages for defamation are a false statement, published without privilege or authorization to a third party,

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[4]Plaintiff's list of abuses runs for a paragraph of over four single-spaced pages, including multiple references to the statements contained in the letter; the circumstances surrounding the removal of the third parking spot; allegations that defendants caused plaintiff to "re-live painful feelings and emotions related to the death of plaintiff's sister;" defendants "t[ook] such steps to evict and/or displace the plaintiff knowing that the automobile belonging to his deceased sister Maria A. Scialdone would be or could be or was the vehicle displaced and forced to be placed upon the streets," among many other things.

constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se." *Epifani v. Johnson*, 65 A.D.3d 224, 882 N.Y.S.2d 234 (2d Dept. 2009).

As the Second Department further explained in that case, "Generally, a plaintiff alleging slander must plead and prove that he or she has sustained special damages, i.e., the loss of something having economic or pecuniary value. A plaintiff need not prove special damages, however, if he or she can establish that the alleged defamatory statement constituted slander per se." *Id.* It then explained that slander per se is one of the following "statements (i) charging plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman." *Id.*

Even if the Court's statement in the April Decision that plaintiff is unemployed is incorrect, as plaintiff states, the statements in the letter still do not constitute slander per se. In order to constitute slander per se, the statements in the letter, as the Court of Appeals has held, "must be more than a general reflection upon [plaintiff's] character or qualities. Rather, the statement must reflect on [his] performance or be incompatible with the proper conduct of [his] business. Here, however, the statement did not impugn, or even relate to, any

particular talent or ability needed to perform in [plaintiff's] profession as a publicist." *Golub v. Enquirer/Star Group, Inc.*, 89 N.Y.2d 1074, 659 N.Y.S.2d 836 (1997).

So here too, the statements in the letter do not impugn plaintiff's talent or ability needed to perform in his profession as a lawyer. The only mention of plaintiff being a lawyer is in the closing statement that he "uses his law degree like a club but not to earn a living." This does not mean that plaintiff is incapable of using his law degree to earn a living, but that he, according to defendant, chooses not to do. This does not reflect on his performance as a lawyer.

The other statements,[5] as disagreeable as they may be, do not constitute slander per se either. *See, e.g.*, Liberman v. Gelstein, 80 N.Y.2d 429, 590 N.Y.S.2d 857 (1992) ("We disagree, however, with plaintiff's contention that the statement "Liberman . . . threatened to kill me and my family" was slanderous per se. Plaintiff claims these words falsely attributed to him the commission of the crime of harassment. Harassment is a relatively minor offense . . . and thus the harm to the reputation of a person falsely accused of committing harassment would be correspondingly insubstantial. Hence, even if we agreed with plaintiff that the statement would not have been construed

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[5]The other statements include "his quixotic yet self-absorbed efforts to retain this third parking space. . .;" and "I thought it important that the entire family know the [sic] he is a narcissistic, ungrateful, delusional, paranoid pompous ass. . . ."

by the listeners as rhetorical hyperbole, the cause of action must nevertheless be dismissed because it is not slanderous per se to claim that someone committed harassment."). Thus, as the Court of Appeals has explained, even if the statements made by defendant **were** more than just "rhetorical hyperbole," they do not constitute slander per se because they "at worst, reflect generally upon plaintiff's character or qualities, and do not relate to his occupation." Accordingly, the First, Second and Third Causes of Action are dismissed, as a matter of law.

The Fourth, Fifth and Sixth Causes of Action are for defamation, libel and slander, respectively. Determining these claims is a question of law for the Court. *See Steinhilber v. Alphonse*, 68 N.Y.2d 283, 508 N.Y.S.2d 901 (1986). Reading the letter written by defendant, the salient parts of which are set forth herein at footnote 5, it is clear that these claims must be dismissed because the alleged statements are pure statements of opinion. *Id.* ("the bald statement that someone is a 'failure', standing alone and removed from any context, would, we believe – even more than an assertion that a person lacks 'talent, ambition, and initiative' – be understood as opinion."). None of the objectionable statements "constitute false factual statements." *Fleischer v. NYP Holdings, Inc.*, 104 A.D.3d 536, --- N.Y.S.2d ----, 2013 WL 1105005 (1st Dept. March 19, 2013). Rather, they are "expressions of opinion," which "are

non-actionable." *Id.* *See also Abakporo v. Daily News*, 102 A.D.3d 815, 958 N.Y.S.2d 445 (2d Dept. 2013) ("even when the statements contained in the articles annexed by the plaintiff to the complaint are considered, those statements consist of protected expressions of opinion.").

The Court has now dismissed all of the claims against the remaining defendants. There is no need to address the remaining issues regarding discovery.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
August 13, 2013

HON. LINDA S. JAMIESON
Justice of the Supreme Court

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