SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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STEPHEN J. COLE-HATCHARD,

Plaintiff,

DECISION AND ORDER
Index No.: 4368/11

-against-

DICK EGGERS and "JOHN DOES 1-5",
whose identities are unknown at present,

Defendants.

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STEPHEN J. COLE-HATCHARD,

Plaintiff,

-against- Index No.: 032554/12

WILLIAM SHERWOOD, WILLIAM MADDEN,
Individually and as Vice-President of COO of
Focus Media Inc., and FOCUS MEDIA INC.,

Defendants.

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LOEHR, J.

The following papers numbered 1 to 5 were read on Plaintiff's motion in the first-captioned matter to re-schedule an inquest and for a ruling that Plaintiff could seek to prove punitive damages at such inquest:

	Papers Numbered
Notice of Motion - Affirmation - Exhibits	1
Memorandum of Law in Support	2
Affirmation in Opposition	3
Reply Affirmation	4
Reply Memorandum of Law	5

and the following papers numbered 1 to 3 were read on the motion of all Defendants in the second-captioned action to dismiss the Complaint based on the statute of limitations:

	Papers Numbered
Notice of Motion - Affirmation[1] - Exhibits	1
Affirmation in Opposition - Exhibits	2
Reply Affirmation	3

and the following papers numbered 1 to 3 were read on the motion of all Defendants in the second-captioned action to consolidate the two actions and to dismiss the consolidated actions:

Notice of Motion - Affirmation - Exhibits	1
Affirmation in Opposition[2] - Exhibits	2
Memorandum of Law in Opposition	3

Upon the foregoing papers, Plaintiff was a member of the Town of Stony Point Town Board from 2006 through 2009 and the North Rockland School Board from July 2007 to February 2011. In 2011, Plaintiff had been nominated by the Democratic Party to again run for the office of Stony Point Council.[3] On May 16, 2011, in advance of the election, Dick Eggers published a letter concerning Plaintiff's candidacy. The letter stated:

> "As a Stony Point town board member in 2006, he botched a $100 million settlement on the Mirant lawsuit that would have saved Stony Point residents thousands of dollars in

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[1] Both Plaintiff and Defendant Sherwood are attorneys and the statute of limitations motion and opposition thereto were supported by only such parties' affirmations. Parties, even if attorneys, cannot submit affirmations in lieu of an affidavit (CPLR 2106). The motion and opposition were therefore nullities.

[2] *See* note 1, *supra.*

[3] When Plaintiff had been on the Town Board, he had apparently been a member of a different party.

taxes.

"He served as Treasurer for two different businesses that have filed for bankruptcy.

"He lost millions of his family's savings in a real estate investment fund that went bad.

"He resigned from the North Rockland school board after one term. School taxes increased every year that he served on the board! (By the way, his attendance record at meetings for the town board and school board was dreadful, yet he still finds the time to sell real estate in Colorado in his 'spare time!')

"He is employed by the Clarkstown police department, one of the highest paid police departments in the nation, but defiantly broke the law by having an illegal fireworks display at his home in 2007. He was also cited by the DEC for disturbing a stream in his backyard."

On May 20, 2011, Plaintiff commenced the first-captioned action. The Complaint asserted five causes of action for defamation – one cause of action for each paragraph of the letter above – and a cause of action for an injunction against further defamation. The Complaint also named "John Does" as unidentified "co-conspirators," although Plaintiff suspected these included Town of Stony Point Supervisor (and former Supreme Court Judge) William Sherwood with whom Plaintiff had been engaged in a political war. Although properly served, Eggers defaulted in answering, whereupon Plaintiff moved for a default judgment and Eggers cross moved to serve a late Answer. In a decision and Order dated August 3, 2011, Supreme Court granted the motion for a default judgment, scheduled an inquest and denied the cross motion based entirely on Eggers having failed to offer a reasonable excuse for his default.[4] Although CPLR 3215 requires the Court to find that the movant has a viable cause of action (see *Beaton v Transit Facility*

[4] It does not appear that Eggers appealed.

Corp., 14 AD3d 637 [2d Dept 2005]), the Court failed to do so, nor reviewed the claims in the Complaint for an appearance of merit. On May 14, 2012, having concluded that William Sherwood (and the other Defendants named in the second-captioned action) were involved in the publication of Eggers May 16, 2011 letter, Plaintiff commenced the second-captioned action. On September 25, 2012, Sherwood, then representing himself and the other Defendants, moved to dismiss based on the statute of limitations. The second-captioned case was also assigned to the first Justice who recused himself in both cases (as did all of the other Judges in this Court.) The undersigned having been transferred to this Court on January 1, 2013, the above-captioned actions were assigned to me on that date and I held a status conference with respect to both cases on January 22, 2013. At the conference, it was decided that Plaintiff would make a motion to determine whether he could seek punitive damages under the August 3, 2011 default Order and Sherwood would move to consolidate the two actions and dismiss both as failing to state a cause of action for defamation. It was also determined that Sherwood's motion to dismiss based on the statute of limitations would, at a minimum, be held in abeyance pending the making and resolution of the other motions.[5]

As to consolidation, as the Plaintiff in both actions is the same, both actions seek damages for defamation based on the same letter and the Defendants in both actions are asserted to be co-conspirators in the publication, the actions must be consolidated. Plaintiff objects that a matter to be determined at inquest and a matter to be tried cannot be consolidated. Of course they

[5] As noted above, as the statute of limitations motion was supported only by affirmations of the parties, it was a nullity. If it were not a nullity, the Court would deny it. The letter was published on May 16, 2011 and the Complaint in the second-captioned action was filed on May 14, 2012 within the statute of limitations. That Sherwood was served thereafter is of no moment (CPLR 306-b; *Leader v Mohoney, Ponzini & Spencer*, 97 NY2d 95 [2201]).

can, and should. Otherwise, at a minimum, the issue of damages would have to be tried twice.[6] Accordingly, the actions are consolidated.

To state a cause of action for defamation on behalf of a non-public figure, it must be alleged that the defendant published facts concerning the plaintiff that tends to expose him or her to public contempt, hatred, ridicule, aversion or disgrace (*Thomas H. v Paul B.*, 18 NY3d 580, 584 [2012]; *see also Golub v Enquirer/Star Group, Inc.*, 89 NY2d 1074, 1075 [1997][or to induce an evil or unsavory opinion of him in the minds of a substantial number of the community]). At common law, falsity was presumed and the defendant had to plead and prove truth (*Rinaldi v Holt, Rinehart & Winston,* 42 NY2d 369, 380 [1977]). Where, as here, the plaintiff is a public figure (*Shulman v Hunderfund,* 12 NY3d 143, 147 [2009]), the burden is on the plaintiff to plead and prove falsity and actual malice (*id.*; *Rinaldi v Holt, Rhinehart & Winston,* 42 NY2d 369, 380 [1977]). Moreover, opinions are generally constitutionally protected (*Abakporo v Daily News,* 102 AD3d 815, 817 [2d Dept 2013], although it is for the Court to determine what is opinion and what is fact (*id.*) and whether the fact is susceptible to a defamatory connotation (*James v Gannett Co.*, 40 NY2d 415, 419 [1976]).

Here, the first statement, that Plaintiff "botched" a settlement, is, on its face, non-actionable opinion. The next three statements are that Plaintiff served as a Treasurer for two companies that filed for bankruptcy; that Plaintiff lost millions of his family's savings in a real estates investment fund that went bad; and that school taxes increased while Plaintiff served on the school board. Inasmuch as Plaintiff submitted an unauthorized affirmation in opposition, he has submitted no evidence that the statements were not true. Moreover, were the Court to

[6] In fact, the full merits would have to be tried twice because, the default Order notwithstanding, the Court would not be able to determine Plaintiff's damages without exploring the truth or falsity of the statements and Defendants' knowledge or belief in the truth or falsity.

consider what Plaintiff did submit, he did not deny that he lost money, only that it was not his fault. In any event, the statements are not defamatory (*id.*; *see Golub v Enquirer/Star Group, Inc.*, 89 NY2d 1074 [1997]). The statement that Plaintiff's attendance at the school board was "dreadful" is non-actionable opinion.

The last statement is that Plaintiff "defiantly broke the law by having an illegal fireworks display at his home in 2007." Absent an affidavit, there is no evidence that this statement is false. Moreover, what Plaintiff did submit admitted that the accusation was front page news in the Journal News in 2005 and the matter was investigated by a Grand Jury. This is non-actionable (*compare Shulman v Hunderfund,* 12 NY3d 143 [2009][that plaintiff "broke the law" is not actionable] *with Sildorf v Levine,* 59 NY2d 8 [1983][statement that plaintiff is corrupt is actionable]). Finally, Eggers statement that Plaintiff had been "cited by the DEC for disturbing a stream in his backyard," appears to be both essentially true and not defamatory in any event. Accordingly, Sherwood's motion to dismiss the Complaint as against him (and therefore the other Defendants in the second-captioned action) as failing to state a cause of action is granted.[7]

That brings the Court back to the first-captioned action. Plaintiff wants to have the inquest which the default Order granted him, and to prove punitive damages thereat, [8] while Eggers (*see* note 7, *infra*) seeks to dismiss the Complaint. Plaintiff argues that the law of the case

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[7] As indicated above, Sherwood is representing Eggers and originally represented himself and the other Defendants in the second-captioned action. Thereafter, Boggeman, George & Corde, P.C. took over Sherwood's defense. Boggeman moved to dismiss the Complaint on behalf of Sherwood and, based on the decision, all of the Defendants in both actions.

[8] As Plaintiff's Complaint did not seek punitive damages, he cannot seek to prove them at the inquest (*Aragona v Allstate Insurance Co.*, 2013 WL 3927801 [Dist Ct, 1st Dist]; *see Pellegrini v Richmond County Ambulance Service, Inc.*, 48 AD3d 436 [2d Dept 2008]). Plaintiff relies on *Korber v Dime Sav. Bank* (139 AD 149 [2d Dept 1909]). While there is language therein to the effect that punitive damages can be proven even when not pleaded, it is dictum in a 3-2 decision in a 1909 case.

bars that result. Eggers argues that Plaintiff cannot prove damages at an inquest for the publication of a letter that the Court has held – in a decision binding on Plaintiff – is not defamatory. These inconsistent rulings, of course, resulted from different courts adjudicating these matters when they were separate. They are now, however, no longer separate; both actions are before this Court, which is the IAS court. As the IAS court, the original Justice having recused himself, this Court may reconsider the default decision based on the inconsistent decisions reached and new circumstances present (see *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]; *Posada v New York State Department of Health,* 47 AD3d 1026, 1026-27 [3d Dept 2008]; *Eckerd Corporation v Semon*, 44 AD3d 1232, 1233 [3d Dept 2007]). Based thereon, Sherwood's motion is granted and the Complaints in both actions are dismissed as to all Defendants.

The foregoing constitutes the decision and order of this Court.

Dated: New City, New York
August 14, 2013

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