Penaherrera v New York Times Co.
2013 NY Slip Op 34181(U)
August 5, 2013
Supreme Court, New York County
Docket Number: 150336/12
Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

MARIA PENAHERRERA,
Plaintiff,

-against-

THE NEW YORK TIMES COMPANY, TIME WARNER CABLE, INC., NY1 NEWS and DAILY NEWS L.P.,
Defendants.

INDEX NO. 150336/12

MOTION SEQ. NO. 001

The following papers were read on this motion by defendants to dismiss the complaint.

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

Cross-Motion: ☐ Yes ☒ No

Motion sequences 001, 002 and 003 are hereby consolidated for purposes of disposition.

This is an action for defamation. In motion sequence 001, Time Warner Cable, Inc. and NY1 News (collectively, NY1), move to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7). In motion sequence 002, The New York Times Company (NYT) moves to dismiss the complaint as against it pursuant to CPLR 3211(a)(1) and (7). In motion sequence 003, the Daily News, L.P. (Daily News) moves to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7). Plaintiff Maria Penaherrera (Penaherrera) is in opposition to each of the respective motions to dismiss.

BACKGROUND

From 2005 through 2009, Penaherrera was the principal of Public School 114 Ryder Elementary School (PS 114) located in Brooklyn, New York. On December 17, 2010, the New York City Department of Education (DOE) published an Educational Impact Statement (EIS) proposing to phase out and eventually close PS 114 based on its poor performance and on the

DOE's assessment that the school lacked capacity to turn around quickly to support student needs.

According to the complaint, filed on February 28, 2012, articles were published by the NYT, NY1 and the Daily News concerning problems at PS 114, which included statements about Penaherrera's impact on the school. Penaherrera brought this lawsuit, seeking damages on the basis that the subject articles published by each of the respective defendants were allegedly defamatory and libelous.

The NYT Articles

According to the amended verified complaint, the NYT published two articles relevant to this lawsuit. The first was published on May 26, 2009, but Penaherrera does not allege any specific defamatory statements from this article. The second article was published on March 1, 2011. In the complaint, Penaherrera alleges that the following statements in that article were defamatory: (1) "'For five years, the principal of P.S. 114 in Brooklyn ran the school into the ground. She blew out the budgets, eventually costing the school its guidance counselors, special reading and math projects, and gifted program," (2) "Plaintiff 'forgot to schedule graduation one year,'"(3)"'The prospect of having a principal like the one at P.S. 114 making such decisions does not make the heart leap with joy,'" and (4)6"'The March 1, 2011 Times article is entitled 'How not to Rid New York City Schools of Bad Apples,' refers to Plaintiff'" (Affirmation [Aff.] of Stephen N. Gikow, exhibit A at 3).

In the complaint, Penaherrera goes on to allege that the NYT article gives the reader the impression that Penaherrera is an "incompetent, lazy and apathetic principal, causing the 'deterioration of the school'" (*id.*).

The Daily News Article

According to the complaint, the Daily News published an article on March 1, 2011 that contains defamatory statements about Penaherrera. In the complaint, Penaherrera sets forth

the subject statements in this way: "Plaintiff 'had run the school into the ground,'" and "Plaintiff ran up $180,000 in debt that required the school to cut guidance counselors and extra tutoring programs'" (*id.* at 4). In the complaint, Penaherrera alleges that these statements "mislead the reader" to believe that Penaherrera had: "(a) run the school into the ground, which she in fact did not; (b) mismanaged school finances resulting in $180,000 debt, which she did not in fact do; and (c) is incompetent to manage the school, which she in fact was not" (*id.*).

The NY1 Articles

Penaherrera alleges in the complaint that NY1 published an article on January 18, 2011, containing false statements that defamed her. In the complaint, she alleges the defamatory statements as follows:

> "a. 'By many measures, P.S. 114 in Canarsie is failing. Barely a third of students passed the state tests last year, teachers and parents gave the environment an "F" three years in a row, and professional reviewers rated the school underdeveloped–reasons the Department of Education says the school should be closed. But the 22-page report fails to mention the explanation teachers, parents and even reviewers hired by the city give for the decline the school's leader from 2004-2009, former principal Maria Penaherrera.'
> b. 'Penaherrera's failures as a leader and manager were also documented extensively by the special schools investigator. Her direct supervisor even admitted to investigators she knew there would be problems the first time she met Penaherrera, yet she remained principal for five years.'
> c. Penaherrera was removed only because one day when she failed to show up to work, a carbon monoxide alarm went off and students were kept in class. This, because the school had no safety plan and she had left no one in charge.'
> d. 'She also left the school $180,000 in debt'" (*id.* at 5-6).

Penaherrera further alleges that in an article published on January 19, 2011, NY1 made the following statements that defamed plaintiff:

> "a.'P.S. 114 is $180,000 in debt and hasn't been able to get back on track after former principal Maria Penaherrera was removed two years ago. Teachers say they've had to abolish programs, counselors and support staff. Yet the DOE knew about Penaherrera's mismanagement.'
> b. 'But now the one's who are suffering are the children.'
> c. 'The DOE won't say why Penaherrera remained principal for five years, but it wasn't because of her union and it wasn't for lack of evidence.'
> d. 'Penaherrera had no plan to reverse declining test scores. Teachers gave her the second lowest rating of any principal in the city.'

e. 'Plaintiff 'never got anything done.'
f. 'Plaintiff 'went crazy with the budget.'
g. 'Plaintiff 'could not function without constant support.'
h. 'Investigators found she hired multiple assistant principals then replaced them with expensive outside consultants.'
I. 'She used school funds to pay for traffic tickets, benefit tickets [sic].'
j. 'She faked financial documents.'
k. 'She refused to let a student back into school after his family filed a lawsuit saying he'd been bound, gagged and locked in a closet by classmates.'
l. 'Teachers say she spent money on a whim, sending bags filled with books and teddy bears home with every student, then cutting a literacy program.'
m. 'Everyone we spoke to mentioned how badly she was running the school, including one of the two consultants she had hired.'
n. 'DOE officials don't acknowledge that a failure of leadership may be one of the reasons the school is struggling.'
o. 'Whose [sic] holding them accountable? We're gonna let this principal ruin this school, now close you [sic] and we're not going to be held accountable for it. It's really one of the most disgusting things I have seen under this administration.'
p. 'We are actually paying for her mistakes. And the children are paying for the mistakes'" (*id.* at 7-8).

In the complaint, Penaherrera denies the truth of all of these statements, and alleges that these statements "mislead the reader to believe that" she, among other things, mismanaged the school, was incompetent and lazy, that she spent money on a whim and that there was evidence supporting the decision to fire her before her reassignment (*id.* at 8).

Penaherrera further alleges that, in an article published on January 20, 2011, another false statement was published by NY1 that defamed her. The alleged defamatory statement is set forth in the complaint as: "[T]he DOE has abandoned their school, letting an incompetent principal remain for five years, driving it into debt" (*id.* at 9).

She additionally alleges that an article published by NY1 on February 28, 2011, contained the following false and defamatory statements:

"a. 'P.S. 114's principal was to blame for the school's lagging performance.'
b. '[T]he old principal racked up lots of bills that were inappropriate.'
c. 'PS 114 only had one year of bad scores, due to a former principal who allegedly mismanaged funds'" (*id.*).

In the complaint, Penaherrera denies the truth of the statements and alleges that they give the reader a false impression.

With respect to all the defendants, Penaherrera alleges that if they had contacted her for information during the drafting of the articles, she would have told them, among other things, that:

> a. The debt occurred in 2007-2008, mainly based on decreased student enrollment and was rectified based on a Department of Education ("DOE") action plan to eliminate it ...
> b. According to DOE documentation, the services of guidance counselors, coaches, AIS programs, support services, and educational resources were lost **after Plaintiff's reassignment**, based on the discretion of the Principal that followed Plaintiff ...
> d. According to DOE documentation, under Plaintiff's tenure, there was approximately a sixty percent (60%) decrease in safety incidents ...
> g. Plaintiff never forgot to schedule graduation ... (*id.* at 10-11).

In the summons with notice, Penaherrera also brings a cause of action for intentional infliction of emotional distress as against all defendants. She seeks exemplary and punitive damages on all causes of action.

NYT's Motion to Dismiss

The NYT moves to dismiss the complaint, pursuant to CPLR 3211(a)(1) and (7). According to his affidavit in support of the NYT's motion to dismiss, Jim Dwyer (Dwyer), NYT columnist, avers that he wrote a column entitled "How Not to Rid New York City Schools of Bad Apples," (the article) which was published on March 1, 2011. Dwyer states that in writing the article, he relied upon public documents as sources for information contained in the article.

Those documents are annexed to his affidavit, which include: (1) a 13-page report from Richard Condon, the Special Commissioner of Investigation for the New York City School District to Chancellor Joel Klein (report from Commissioner Condon), dated July 21, 2010; (2) a February 26, 2011 report issued from the Office of Bill DeBlasio, Public Advocate for the City of New York entitled: "Learning to Listen[:] Why the City Shouldn't Give up on P.S. 114," (Public Advocate report); (3) a transcript from a public hearing conducted by the New York City Department of Education, Division of Portfolio Planning, held January 28, 2011; and (4) a press

release issued to the public by New York City Council Member Lew Fidler (Councilman Fidler) on or about March 1, 2011. The subject article is also annexed, and it does contain the statements alleged by Penaherrera in her complaint.

In his affidavit, Dwyer states that he had no reason to doubt the "accuracy" of the reports "in their recounting of Maria Penaherrera's actions as principal of P.S. 114" (Aff. of Dwyer, ¶ 4). Dwyer further avers that no one, including Penaherrera, sought a correction of the article, and that the NYT did not publish any correction.

The report from the Office of the Public Advocate refers to Penaherrera's leadership failures, describes the community's vocal dissatisfaction with Penaherrera, and notes that, under her mismanagement, the school accrued a budget deficit of $180,000 that led to the loss of guidance counselors, support services, and educational resources, and offers points to save the school and turn it around.

According to the press release from the Office of Councilman Fidler, "[a] unified group of elected officials, teachers and civic leaders had argued that PS 114 had been sabotaged when DOE left a principal in charge for 5 years who had overspent the school budget by $180,000, failed one year to schedule a graduation ceremony and had mismanaged the school and its funds badly ..." (Aff. of Dwyer, exhibit E at 1). The report from Commissioner Condon indicates that, as a result of an investigation, his office made the determination to terminate Penaherrera's employment, and she was made ineligible for work with the DOE. It further states that: "The former principal, Maria Penaherrera, committed various financial infractions, when she was assigned to PS 114, including the use of false bids ..." (Aff. of Dwyer, exhibit B at 1), and that Network Leader Julia Bove, who was Penaherrera's direct supervisor during the 2005-2006 school year, stated that a carbon monoxide alarm had gone off inside the school, but "Penaherrera was not there because she was late getting to work. Bove said that there was no safety plan in place and no leadership in Penaherrera's absence" (Aff. of Dwyer, exhibit B at

2).

The NYT argues that Dwyer's column is protected by the fair report privilege set out in Civil Rights Law § 74, and by the ample precedent in New York, protecting opinion from libel lawsuits. Furthermore, the NYT argues that Penaherrera's claim must fail as she has not alleged any facts that would support a finding of actual malice.

The Daily News Motion to Dismiss

The Daily News likewise moves to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7), and argues that its column is protected by Civil Rights Law § 74, and that Penaherrera has not sufficiently plead actual malice. Annexed to the Daily News' motion are the report from the Commissioner Condon and the Public Advocate report.

NY1's Motion to Dismiss

NY1 moves to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7). NY1 states that the challenged articles published by NY1 include: (1) a series of stories published on January 18-20, 2011 (the January articles) and (2) two stories published on February 28, 2011 (the February articles). The January articles address the problems at PS 114, including Penaherrera's performance as principal, and the February articles address the Public Advocate report concerning the school. In addition to these articles, NY1 annexed to its papers: (1) the DOE January 14, 2011 Amended Revised Educational Impact Statement for the proposed phase-out of PS 114, (2) the report from Commissioner Condon, and (3) the Public Advocate report.

NY1 argues that: (1) Penaherrera's causes of action based upon the January articles are barred by the statute of limitations; (2) the February articles are absolutely privileged under Section 74 of the Civil Rights Law; and (3) in her complaint, Penaherrera fails to sufficiently allege actual malice.

DISCUSSION

Standard for Motion to Dismiss

When determining a CPLR 3211(a) motion, "we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Wieder v Skala*, 80 NY2d 628 [1992]). "We also accord plaintiffs the benefit of every possible favorable inference" (*511 W. 232nd Owners Corp.*, 98 NY2d at 152; *Sokoloff v Harriman Estates Dev. Corp*, 96 NY2d at 414).

Upon a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the "question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts 'can be fairly gathered from all the averments'" (*Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept 1964], quoting *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). "However imperfectly, informally or even illogically the facts may be stated, a complaint, attacked for insufficiency, is deemed to allege 'whatever can be implied from its statements by fair and reasonable intendment'" (*Foley v D'Agostino,* 21 AD2d at 65, quoting *Kain v Larkin*, 141 NY 144, 151 [1894]). The court is not permitted "to assess the merits of the complaint or any of its factual allegations, but [may] only ... determine if, assuming the truth of the facts alleged, the complaint states the elements of any legally cognizable cause of action" (*Skillgames, L.L.C*, 1 AD3d at 250), citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). "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*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233, 233-234 [1st Dept 1994]). Under 3211(a)(1), where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will

succeed if "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]).

NY1/Statute of Limitations

NY1 argues that Penaherrera's causes of action that address the January articles are time-barred, because the complaint was filed on February 28, 2012, more than one year after those articles were published. They argue that Penaherrera offers the conclusory allegation that the January articles were republished in February, however, according to NY1, this is not the case. NY1 posits instead, that the January articles were included as hyperlinks in the second of the February articles and argues that including this link to the earlier published articles is not a republication for the purpose of the statute of limitations.

Annexed to NY1's submission are the following articles: (1) "The Failure of PS 114, Part 1," dated January 18, 2011, (2) "The Failure of PS 114, Part 2," dated January 19, 2011, (3) "The Failure of PS 114, Part 3," dated January 20, 2011, (4) "Public Advocate Criticizes City's Plan to Close P.S. 114," dated February 28, 2011, 8:40 a.m., and (5) "DOE to Keep Brookyln's PS 114 Open," dated February 28, 2011 11:00 p.m. Attached to the last article listed is a list of links to other articles, including the January articles.

Penaherrera argues that NY1 republished the defamatory statements from the January articles in the February articles "by stating that plaintiff 'was to blame for the school's lagging performance;' that she 'racked up lots of bills that were inappropriate,' and 'PS 114 only had one year of bad scores, due to a former principal who allegedly mismanaged funds'" (Penaherrera's Memo. of Law in Opposition to NY1's Motion to Dismiss, at 10). Thus, Penaherrera argues that her claims as against NY1, which are based on the January articles are not time-barred.

New York has a one-year statute of limitations for libel (*see* CPLR 215[3]). The accrual

of a cause of action for libel occurs upon the "publication" of the material, "which the case law has repeatedly defined as the date on which the libelous work was placed on sale or became generally available to the public" (*Love v William Morrow & Co., Inc.*, 193 AD2d 586, 589 [2d Dept 1993], citing *Gregoire v G.P. Putnam's Sons*, 298 NY 119, 126 [1948]; *see also Castel v Jean Norihiko Sherlock Corp.*, 159 AD2d 233, 233 [1st Dept 1990]). "[U]nder the single publication rule followed by New York courts, 'the single publication of a defamatory comment, regardless of the number of copies the comment appears in or the range of the publication's distribution, constitutes only one publication and gives rise to only one cause of action'" (*Martin v Daily News, L.P.*, 35 Misc 3d 1212[A], *3, 2012 NY Slip Op 5066[U] [Sup Ct, NY County 2012] [citations omitted]).

If a "defamatory comment or writing is republished in a new format, the statute of limitations begins to run anew from the date of republication" (*id.* at *3). "Republication, retriggering the period of limitations, occurs upon a separate aggregate publication from the original, on a different occasion, which is not merely 'a delayed circulation of the original edition'" (*Firth v State of New York*, 98 NY2d 365, 371 [2002] [citation omitted]). The inclusion of hyperlinks in an internet publication, allowing continuous access to a web article, is not a republication (*see Haefner v New York Media, LLC*, 82 AD3d 481, 482 [1st Dept 2011]).

As the January articles were published more than one year from the date this action was filed, Penaherrera must establish that these articles were republished in order to retrigger the period of limitations. Penaherrera argues that three of the statements were republished, but offers no further explanation for this assertion. The specific statements she cites are not included in the February articles, although the ideas are there. Both February articles address events that took place after the January articles were published: the issuance of the Public Advocate's report and the DOE's decision to allow PS 114 to remain open. The February article that addresses the release of the Public Advocate report on February 26th includes

statements concerning Penaherrera that were made by the Public Advocate. These statements are not in the earlier articles.

Moreover, both Penaherrera and NY1 argue that the January articles were annexed as hyperlinks to the February 28, 2011 article. NY1 offers for the court's attention all the relevant articles to support this fact. The Court finds, based upon the relevant case law cited above, that the publication of the January articles as hyperlinks in the February article does not constitute republication, such that it would retrigger the statute of limitations. As this matter was filed on February 28, 2012, the January articles, published more than one year from that date, may not form the basis for this lawsuit.

Civil Rights Law §74

Section 74 of the New York Civil Rights Law prohibits civil actions as follows:

> "A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published."

The privilege under the statute is absolute, and it applies even in instances where the plaintiff alleges bad faith or malice (*see Panghat v New York State Div. of Human Rights*, 89 AD3d 597, 597 [1st Dept 2011]). "New York courts have broadly construed the meaning of an official proceeding as used in Section 74" (*Test Masters Educ. Servs., Inc. v NYP Holdings, Inc.*, 603 F Supp 2d 584, 588 [SD NY 2009], *citing Easton v Public Citizens, Inc.*, 1991 WL 280688, 1991 US Dist LEXIS 18690 [SD NY Dec. 26, 1991, No. 91 Civ 1639 (JSM)], *affd* 969 F2d 1043 [2d Cir 1992]). It includes the protection of reports that "[concern] activities which are within the prescribed duties of a public body" (*Freeze Right Refrig. & A.C. Servs. v City of New York*, 101 AD2d 175, 182 [1st Dept 1984] [holding that publication of an article by the *New York Times* concerning an investigation by the New York City Department of Consumer Affairs into the practices of air conditioning repair shops was protected]).

"The test is whether the report concerns 'action taken by a person officially empowered to do so'" (*id.* at 182 [citation omitted]). "New York courts have found that an administrative agency investigation into activities within its purview is an official proceeding" (*Test Masters Educ. Services, Inc.*, 603 F Supp 2d at 588 [internal quotation marks and citation omitted]).

If the article is not commenting on an official proceeding, then the statute is not applicable (*see Cholowsky v Civiletti*, 69 AD3d 110, 114 [2d Dept 2009]). More precisely, the privilege does not apply where the statements, in context, "make it 'impossible for the ordinary viewer [listener or reader] to determine whether defendant was reporting' on a judicial proceeding ..." (*id.* at 114-115 [citation omitted]; *see also Corporate Training Unlimited, Inc. v National Broadcasting Co.*, 868 F Supp 501, 509 [ED NY 1994]). In *Corporate Training Unlimited, Inc.*, the court found that the defense of Civil Rights Law § 74 was unavailable where the alleged defamatory statement contained in a broadcast by the defendant was styled in a "narrative fashion," organized as a succession of interviews with participants in the incident, rather than a report of a judicial proceeding (*id.* at 508). The court noted that this statutory privilege only protects reporting that provides a "fair and true report of a judicial proceeding" (*id.* at 509).

For a report to be characterized as "fair and true" within the meaning of the statute, "it is enough that the substance of the article be substantially accurate" (*Holy Spirit Assn. for Unification of World Christianity v New York Times Co.*, 49 NY2d 63, 67 [1979]). "Judicial interpretation of section 74 has made it clear that an article need not be a verbatim account or even a precisely accurate report of an official proceeding to be a 'fair and true report' of such a proceeding" (*Freeze Right Refrig. & A.C. Servs.*, 101 AD2d at 183, citing *Briarcliff Lodge Hotel, Inc. v Citizen-Sentinel Publs.*, 260 NY 106 [1932]).

I. NYT's motion

In his affidavit in support of NYT's motion, Dwyer identifies the official reports that he

relied upon for his article. With respect to the few statements concerning Penaherrera, the article itself does not stray far from the substance of those reports. In fact, the article places the statements, which Dwyer received from New York City government officials after an investigation, that Penaherrera overspent and mismanaged the school's budget and failed to schedule graduation one year, in the context of the City's "solution" to close the school (Aff. of Dwyer, exhibit A at 1), which is a conclusion set forth in the report from the Office of the Public Advocate:

> "An investigation released July 21, 2010 by the Special Commissioner of Investigation for New York City School District found substantiated serious misconduct by Principal Penaherrera at P.S. 114. In interviews with individuals and consultants who worked with the school, one consultant explicitly stated that in 'his years of working in education he had never seen a school being run as poorly as P.S. 114.' The [sic] P.S. 114 is now at risk of closure largely because the Department demonstrated consistent apathy and inaction when red flags were raised by the school"

The article then focuses mostly on the government process and how best to structure the school system so that it meets the needs of the children.

By referring to the DOE proposal to close the school, the "report by the Office of the Public Advocate," and the statement of local Councilman Fidler, Dwyer made it amply clear to the reader that government officials were commenting upon, and taking action with respect to, the deterioration of the school (*see* Aff. of Dwyer, exhibit C at 2). Accordingly, the Court finds that the statements in the article are protected by Civil Rights Law § 74, as they directly relate to official statements concerning the result of an investigation and reflect accurately the content of those statements (*see Freeze Right Refrig. & A.C. Servs.*, 101 AD2d at 182; *Test Masters Educ. Services, Inc.*, 603 F Supp 2d at 588).

ii. Daily News' motion

For these same reasons, the statements in the Daily News article are likewise privileged under the statute. The statements that plaintiff: "[ran] the school into the ground," "mismanaged

its finances resulting in $180,000" debt, and was "incompetent to manage the school," are all pulled from the contents of the reports issued from the offices of public officials. In fact, the statement in the article is: "Parents had charged that the former principal had run the school into the ground, including running up $180,000 in debt that required the school to cut guidance counselors and extra tutoring programs" (*see* Aff. of Anne B. Carroll, exhibit B at 1).

Furthermore, the content of the article makes it clear that there was official public action being undertaken by the DOE with respect to the potential closing of PS 114, and Penaherrera's actions as principal were placed in that context. This is also true of the caption of the photograph, which states in substance that the Public Advocate's Office and parents were protesting the closing of PS 114, "because they said that former principal Maria Pena-Herrera []had run up debt that caused program cuts" (Daily News' notice of motion, exhibit B at 1).

iii. NY1's motion

Likewise, the NY1 February 28, 2011 8:40 a.m. article begins with the statement that the Public Advocate is challenging the City's proposal to close PS 114 for poor performance. In this context, the article contains statements made by Public Advocate Bill deBlasio about Penaherrera. Although her name is not included, the statements refer to the PS 114 principal who was to blame for the school's "lagging" performance and who "racked up lots of bills that were inappropriate" (Aff. of Lindsey Whitton, exhibit E at 1). The statement is written as follows:

> "[The Public Advocate] released a report yesterday outlining why he thinks the school should stay open, and what the Department of Education should do to help it improve. He says P.S. 114's principal was to blame for the school's lagging performance" (Aff. of Whitton, exhibit D at 1).

Similarly, the NY1 February 28, 2011 11:00 p.m. article begins with the statement that the DOE announced its decision to keep PS 114 open. In this context, the article expressly

refers to statements from parents and from the Public Advocate. This article contains two statements that refer directly to Penaherrera: "[Supporters of the school, including Public Advocate Bill deBlasio,] said PS 114 only had one year of bad scores, due to a former principal who allegedly mismanaged funds" (Aff. of Lindsey Whitton, exhibit E at 1). The article further includes the statement that "[t]hey said the DOE ignored their pleas to remove her" (Aff. of Whitton, exhibit E at 1).

The Court determines that the statements in these articles are privileged under Section 74 of the Civil Rights Law, as they are expressly attributed to the parents and the Public Advocate, and they were made in the context of the community and the Public Advocate's challenge to the DOE's proposal to close the school, which included an investigation and the issuance of a report by that government office. Additionally, the statements are all taken from the reports compiled by government officials and recited above.

iv. Actual Malice

Penaherrera, as a public school principal, was a public figure, and as such, is required to allege actual malice in a defamation action (*see Jee v New York Post Co.*, 176 Misc 2d 253, 259-260 [Sup Ct, NY County 1998], affd 260 AD2d 215 [1st Dept 1999]; *Jiminez v United Fedn. of Teachers*, 239 AD2d 265, 266 [1st Dept 1997]).

As a public official, Penaherrera must demonstrate that the subject defamatory statements were "made with actual malice, i.e., knowing falsity or reckless disregard for truth" (*Jee*, 176 Misc 2d at 260, citing *New York Times Co. v Sullivan*, 376 US 254, 285-286 [1964]). "The Supreme Court has defined reckless disregard for the truth as a 'high degree of awareness of ... probable falsity'" (*Suozzi v Parente*, 202 AD2d 94, 101 [1st Dept 1994] quoting *Gertz v Robert Welch*, 418 US 323, 332 [1974]). The allegations in the complaint must include "facts sufficient to show actual malice with convincing clarity" (*Jiminez*, 239 AD2d at 266; *see also Themed Rests., Inc. v Zagat Survey, LLC*, 4 Misc 3d 974, 982 [Sup Ct NY County 2004],

affd 21 AD3d 826 [2005] ["the court holds that specificity in the pleading of constitutional or actual malice is required"]). "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 [his or] her allegations of malice" (*Pezhman v City of New York*, 29 AD3d 164, 169 [1st Dept 2006] [citations omitted]; *see also Hanlin v Sternlicht*, 6 AD3d 334, 334 [1st Dept 2004] [appellate court grants motion to dismiss finding that plaintiff's allegations of actual malice "rest only on surmise and conjecture"].

The federal courts have held that specificity is of the utmost importance in pleading defamation:

> 'for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required' (*Themed Restaurants, Inc.*, 4 Misc 3d at 982, quoting *Franchise Realty Corp. v San Francisco Local Joint Executive Bd of Culinary Workers*, 542 F2d 1076, 1082-1083 [9th Cir 1976]).

The Court notes this is no less important in New York State under the State Constitution (*id.*). "[A]ctual malice cannot be established merely because reliance on a source's information is negligent; the mere failure to conduct further investigation is insufficient to establish actual malice" (*Suozzi*, 202 AD2d at 101-102). The failure to investigate the truth of a given statement is not enough to prove actual malice (*see Sweeney v Prisoner's Legal Servs. of N.Y.*, 84 NY2d 786, 793 [1995]).

Here, Penaherrera alleges in her complaint that the NYT, the Daily News and NY1 published the statements "with actual malice, with knowledge that they were false and/or with reckless disregard of their truth" (Aff. of Stephen N. Gikow, exhibit A at 4, 5 and 10). She further alleges that the NYT, the Daily News and NY1 made no attempt to contact her before or after the publication of the subject articles to discuss the accusations made against her in the newspaper articles. According to the complaint, the failure to contact Penaherrera by the three

publications constituted conduct that was reckless and irresponsible, and resulted in the libelous publications with reckless disregard for the truth of the subject articles.

In his affidavit in support of the NYT's motion, Dwyer avers that he relied on the documents issued by government officials that are listed therein and attached thereto, and that he had no reason to doubt the credibility of those records. Likewise, the Daily News and NY1 annexed, in part, the same official reports to their papers, and they argue their reliance on these reports in the drafting of the articles.

Penaherrera has failed to plead any facts to support an inference of actual malice. Her allegations of actual malice are no more than conclusory statements. She offers no grounds to support how the defendants were aware or should have been aware of the alleged falsity of the defamatory statements. The only factual statement that she offers, that the three publications failed to contact her, does not as a matter of law, establish actual malice (*see Suozzi*, 202 AD2d at 101-102; *Sweeney*, 84 NY2d at 793). Penaherrera has offered no explanation as to the defendants' actual malice beyond surmise and conjecture.

NYT/The Opinion Privilege

The NYT argues that the complaint should be dismissed because the NYT is shielded/insulated by the privilege which protects expressions of opinion. The NYT argues that the article in question is plainly an opinion column, located on the opinion page of the newspaper, and contains language which includes hyperbole, colorful expression, and a tone and style that convey the message to the reader that the article contains opinion. In opposition, Penaherrara argues that the article appears to convey facts to the reader.

With respect to this argument, both the NYT in its motion and Penaherrera in her opposition, focus on the following statements about Penaherrera, which were set forth in the article: (1) "She ran the school into the ground," (2) She "blew out the budgets," (3) "The prospect of having a principal like the one at P.S. 114 making such decisions does not make

the heart leap with joy," and (4) The headline "How Not to Rid New York City Schools of Bad Apples" (memo of law in support of NYT motion to dismiss at 18; plaintiff's memo of law in opposition to defendant NYT's motion to dismiss, at 14).

"Expressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation" (*Mann v Abel*, 10 NY3d 271, 276 [2008]). The Court of Appeals sets out the following factors in an attempt to distinguish fact from opinion:

> "(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; (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" (*id.* at 276 [internal quotation marks and citation omitted]).

In *Mann*, the Court of Appeals found that the subject article when viewed as a whole, conveyed to a reasonable reader that the statements at issue were opinion. The Court noted that the column was on the opinion page of the newspaper and that it was accompanied by a note from the editor that it was an expression of opinion. Further, the Court noted that the tenor of the article and the statements:

> "that Mann was a 'political hatchet Mann' who appeared to 'pull [] the strings,' clearly signals the reader that the piece is likely to be opinion, not fact. Likewise, the statement that Abel thought Mann's actions were 'leading the Town of Rye to destruction' could not be anything but a statement of opinion" (*id.* at 277).

The Court further held that:

> "[a]lthough one could sift through the article and argue that false factual assertions were made by the author, viewing the content of the article as a whole, as we must, we conclude that the article constituted an expression of protected opinion" (*id.*).

The facts here similarly support the conclusion that the NYT article conveyed Dwyer's opinion, rather than fact, to the reader. Dwyer's article appeared on the opinion page of the NYT. Additionally, the statements that Dwyer made about Penaherrera, that she "ran the

school into the ground," and "blew out the budgets" focus on issues of public concern and have the same expressive, hyperbolic tenor as those statements examined by the Court of Appeals in *Mann*. Furthermore, the tenor of the entire article, which focuses on the question of what should we do to improve our schools, likewise conveys the sense that it is the writer's opinion. Moreover, the title of the article: "How Not to Rid the Schools of Bad Apples," contains the sort of humorous pun to be expected from articles that convey the writer's opinion.

The Court has reviewed the remaining arguments set forth in Penaherrera's opposition papers and finds them unavailing. Penaherrera argues that the defendants failed to verify facts by checking with her, which contributed to the publication of the defamatory articles. In support of these arguments, Penaherrera relies mostly upon cases in which the plaintiffs are not public figures. In that circumstance, a different legal standard than that of actual malice is applied. As stated above, where the plaintiff is a public figure, the defendants did not have an obligation to reach out to Penaherrera for her version of the facts.

The summons with notice

Although the summons with notice refers to a cause of action for intentional infliction of emotional distress, no such claim has been specifically plead in the amended complaint. Furthermore, Penaherrera does not defend such claim in her opposition papers. In any event, Penaherrera has not even generally plead the type of conduct necessary to sustain this cause of action (*see Lau v S&M Enters.*, 72 AD3d 497, 498 [1st Dept 2010] [The first element of a claim for intentional infliction of emotional distress is extreme and outrageous conduct]). As such, this cause of action is deemed abandoned and is properly dismissed.

CONCLUSION

Accordingly, it is hereby

ORDERED that the defendants Time Warner Cable, Inc. and NY1 News's motion to dismiss the complaint, motion sequence number 001, herein is granted and the complaint is

dismissed in its entirety, with costs and disbursements to said defendants as taxed by the Clerk of the Court; and it is further,

ORDERED that the defendant The New York Times Company's motion to dismiss the complaint, motion sequence number 002, herein is granted and the complaint is dismissed in its entirety, with costs and disbursements to said defendants as taxed by the Clerk of the Court; and it is further,

ORDERED that the defendant Daily News, L.P.'s motion to dismiss the complaint, motion sequence number 003, herein is granted and the complaint is dismissed in its entirety, with costs and disbursements to said defendants as taxed by the Clerk of the Court; and it is further,

ORDERED that Time Warner Cable, Inc. is directed to serve a copy of this order with Notice of Entry upon the plaintiff and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 8-5-13

Paul Wooten J.S.C.

Check one: ☒ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**