Thomas v G2 FMV, LLC
2016 NY Slip Op 30143(U)
January 27, 2016
Supreme Court, New York County
Docket Number: 152318/2015
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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THOMAS, PATRICK J.,

Plaintiff,

-against-

Index No. 152318/2015

DECISION & ORDER

G2 FMV, LLC, G2 INVESTMENT GROUP, LLC, JONATHAN TODD MORLEY, TREVOR NEILSON, MARIA BOYAZNY and DORI VICKEN KARJIAN,

Defendants.

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SHIRLEY WERNER KORNREICH, J.

The decision and order in Motion Sequence 003 [Dkt 47][1] is vacated and this decision and order is substituted in its place. The cross-motion in Motion Sequence 001, and Motion Sequences 002 and 003 are consolidated for disposition.

Motions & Cross-Motion before the Court

Defendants G2 FMV LLC (G2) and G2 Investment Group, LLC (G2IG, with G2, G2 Defendants) cross-move in Motion Sequence 001 to dismiss the first amended complaint (AC, Dkt 8). Defendants Jonathan Todd Morley and Neilson move (Motion Sequence 002) and Dori Vicken Karjian moves (Motion Sequence 003, Morley, Neilson and Karjian collectively, Individual Defendants) to dismiss the causes of action against them. At oral argument, the pro se plaintiff, Patrick Thomas, agreed to withdraw his motions (Motion Sequences 001 and 004) for a default judgment.[2] Thomas opposes the motions to dismiss. Thomas discontinued the action

[1] References to "Dkt" followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing System (NYSCEFS). The court erroneously entered an order stating that Motion Sequence 003 was moot, instead of Motion Sequence 004. Dkt 47.
[2] Dkt 73, Oral Argument Transcript (Tr), pp 7-8.

against defendant Maria Boyazny. Dkt 72. The AC contains four causes of action, numbered here as in the complaint: 1) malicious prosecution against all defendants; 2) defamation per se against all defendants; 3) breach of contract against G2, and 4) indemnification against G2.

The Parties

G2 is a hedge fund. G2IG and non-party G2 Capital Markets LLC (Markets) are wholly-owned subsidiaries of G2. Thomas is a member of G2 and the former Chief Operating Officer (COO) of G2IG. Thomas owns 20,200 (2.36%.) of G2's Class A Units (Units). Morley is G2's Chairman and a member of its Management Committee, as well as Chairman, Chief Executive Officer (CEO) and a member of the Executive Committee of G2IG. Karjian is General Counsel of G2 and G2IG,[3] a member of G2's Management Committee, and Secretary of G2IG's Executive Committee. Neilson is President of G2IG and regularly participates in G2IG Executive Committee meetings.

Factual Background

The genesis of the present case is an underlying action currently pending before this court entitled *G2 FMV, LLC v Thomas*, Supreme Court, New York County, Index Number 650753/2014 (Underlying Action).[4] The Underlying Action, with which this court is intimately familiar, initially was commenced by G2, a Delaware limited liability company (LLC). However, G2 withdrew its complaint less than four months after the Underlying Action was commenced and before any discovery had taken place. Compare UA Dkt 1 & 57. The underlying complaint (UA Complaint) contained a single cause of action in which G2 sought a

[3] The AC alleges that Karjian is general counsel only to G2IG, but Patrick's affidavit says he is counsel to both G2 Defendants. Compare Dkt 8, ¶22 & Dkt 165, ¶8(d).
[4] References to "UA Dkt" filed by a number refer to documents filed in the Underlying Action in the NYSCEFS.

declaration that Thomas resigned as G2IG's COO[5] without "Good Reason", a defined term in G2's amended and restated operating agreement, effective January 5, 2011 (Operating Agreement, UA Dkt 24). Section §1.2 of the Operating Agreement defined "Good Reason" as including, "a significant, sustained reduction in or adverse modification of the nature and scope of an employee's authority, duties and privileges in his employment by the Company or any of its Affiliates ...." UA Dkt 65. The Operating Agreement's definitions of "Affiliate" and "Person" included G2IG as a G2 Affiliate. *Id*, Operating Agreement, §§ 1.6 & 1.45.

In the UA Complaint, G2 accused Thomas of serious misconduct in the performance of his duties as COO.[6] UA Dkt 1. Specifically, the UA Complaint alleged that G2 had been "plagued by Thomas's increasingly unsatisfactory performance as ... COO," which had caused "significant financial damage and legal exposure...." UA Complaint, ¶1. It elaborated that Thomas' "improper conduct went far beyond his consistent failure to perform basic responsibilities, ... such as his inability to carry out routine financial reporting duties to G2's management"; included breach of his obligations "to keep sensitive; non-public financial data ... confidential"; improper use of G2's email security protocol; conversion of G2's sensitive financial and business data to his personal use and sharing of it with third parties; profanity; and, most seriously, without authority, diversion of IRS payroll trust funds to satisfy other company expenses (Tax Problem), which caused the IRS to commence a proceeding (IRS Proceeding)

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[5] The court notes that the UA Complaint and the instant AC differ in that the former alleged that Thomas was COO of G2 and the latter alleges that he was COO of G2IG.

[6] Whether or not Thomas resigned for Good Reason was an issue that affected the amount G2 was required to pay him for his Units. Pursuant to §9.1 of the Operating Agreement, if Thomas had resigned with Good Reason, his Units would vest immediately and, pursuant to §9.2(d), he could require G2 to purchase them at their fair market value (FMV) or for his unreturned capital contribution, whichever was greater. If Thomas resigned without Good Reason, or was terminated for "Cause", his Units would not be vested (§9.1) and G2 could purchase them for the lesser of his unreturned capital contribution or their FMV [Operating Agreement, §9.2(b)].

against Markets. UA Complaint, ¶¶ 3 & 4. G2 alleged in the UA Complaint that it first discovered the Tax Problem in the Fall of 2013, but did not fire him "in order to avoid any further collateral damage" from the IRS Proceeding. *Id.*

Simultaneously with the UA Complaint, G2 filed an order to show cause to seal it, as well as the affirmation supporting the motion and all subsequent documents to be filed in the action. UA Dkt 2 & Oral Argument Transcript, UA Dkt 9, pp 12-13. In the affirmation in support of sealing, G2 alleged that in order to pursue its claim against Thomas, it would have to disclose information concerning the IRS Proceeding; sensitive and confidential information about G2, including G2's ownership interests; unspecified contracts with outside entities that might be subject to non-disclosure agreements; and unspecified information that would provide a competitive advantage to market participants. UA Dkt 5, ¶5. Thomas opposed the motion. UA Dkt 7-8. This court denied it, except for sealing financial data and information that involved specific numbers.[7] UA Dkt 9, pp 14-16 & 10.

Thomas filed an answer to the UA Complaint with counterclaims for, *inter alia*, breach of the Operating Agreement, based on G2's failure to purchase Thomas' Units for their FMV (1st); a declaration that Thomas resigned for Good Reason (2nd, with 1st cause of action, Mirroring CCs); and, pursuant to §§ 3.6 and 4.7 of the Operating Agreement, indemnification and advancement by G2 of legal fees and costs incurred (and to be incurred) by Thomas in the

[7] The court ruled that the existence of the IRS Proceeding and unidentified secrets that might be disclosed, did not outweigh the strong right of the public, particularly G2's investors, to know about the issues raised in the UA Complaint. *In re Will of Hofmann*, 284 AD2d 92 (1st Dept 2001); 22 NYCRR 216.1(a). G2 did not identify any particular trade secret or proprietary information in the court papers it sought to seal. The public's interest in access to the court records was more than "mere curiosity". *Danco Lab., Ltd. v Chemical Works of Gedeon Richter, Ltd.*, 274 AD2d 1, 6-9 (1st Dept 2000); *see also*, *Applehead Pictures LLC v Perelman*, 80 AD3d 181 (1st Dept 2010).

Underlying Action (3rd, with Mirroring CCs, Underlying CCs, each an Underlying CC). UA Dkt 14.

The CCs alleged that Thomas resigned with Good Reason because he had been placed on Administrative Leave; deprived of access to G2's network, offices, email and phone; relieved of responsibilities; and prevented from participation in company meetings; -- all in retaliation for his refusal to accept a "coercive" termination agreement under which he would forfeit his Units. UA Dkt 14, ¶¶ 62-73. The retaliation allegedly occurred after he was threatened by Karjian with termination for cause and Thomas' counsel wrote a January 24, 2014, letter to G2IG, addressed to Karjian, outlining alleged self-serving business decisions by Morley that redounded to the detriment of G2's other investors.

On June 12, 2014, Thomas moved in the Underlying Action for summary judgment dismissing G2's complaint, and in his favor on the Underlying CCs. UA Dkt 34.[8] On July 8, 2014 (after receiving an adjournment of its time to respond to Thomas' motion – UA Dkt 55), G2 sent a letter asking the court to approve a draft stipulation in which G2 conceded that Thomas had resigned with Good Reason. UA Dkt 57. G2's letter said that it was withdrawing its complaint to avoid the expense of complying with electronic disclosure and depositions. *Id.* Later, G2 admitted liability on the Mirroring CCs in its opposing memorandum of law on Thomas' motion for summary judgment, dated July 24, 2014, i.e., admitting that Thomas resigned with Good Reason and that G2 was obligated to purchase his Units for their FMV. UA Dkt 62, p 2. With respect to summary judgment on the 3rd Underlying CC for indemnification, G2 agreed that it was obligated to indemnify Thomas for "reasonable fees for defensive legal

[8] Thomas withdrew his 5th Underlying CC for a permanent injunction on May 1, 2014. UA Dkt 25.

representation once G2 sued him," but not for "payment of fees for any of his pre-litigation or other offensive pursuits," for which G2 sought partial summary judgment in its favor. UA Dkt 62, pp 2-3. The court entered an interim order requiring G2 to advance Thomas' legal fees pending determination of the summary judgment motion. UA Dkt 118.

Subsequently, this court granted summary judgment in Thomas' favor on most of the 3rd Underlying CC, except for the portion seeking indemnification for the IRS Proceeding, which was against Markets, not G2 and, therefore, not covered by the indemnification clause in the G2 Operating Agreement. UA Dkt 139. The court also granted Thomas' motion seeking advancement of fees he incurred in the Underlying Action, and for the period from October 22, 2013, when G2 first threatened to terminate his employment for cause, through October 4, 2014. *Id.* This court later amended the order to require G2 to continue to advance Thomas' legal fees pending a determination that Thomas was not entitled to advancement, as required by the Operating Agreement. UA Dkt 148. The amended order recently was affirmed by the First Department. *G2 FMV, LLC v Thomas*, 2015 NY Slip Op 72147; 2015 WL 2018174 (1st Dept 1/7/16) (nor).[9]

The instant AC alleges that G2's allegations in the UA Complaint concerning Thomas' performance as COO were false. Thomas asserts that they were manufactured to cover up wrongdoing of Morley, about which Thomas had repeatedly complained to management. Thomas alleges that he was an exemplary employee for five years and G2 was fully aware of the

[9] G2 filed a notice of appeal and a bond staying its obligation to advance the fees. By order dated February 26, 2015, this court vacated the bond, on the ground that it would defeat the purpose of advancement. UA Dkt 195. None of the indemnification ordered by the court had been paid by G2 at the time the present motions in this case reached oral argument, due to a stay pending appeal granted by the First Department. Dkt Tr, 13-14; 2015. Thus, plaintiff proceeds here pro se.

Tax Problem, which was discussed with G2's Executive Committee, Morley, the G2 Defendants' counsel, Karjian, and non-party George Bonini, G2IG's outside counsel, all of whom decided that money would be used to fund G2's expenses instead of Market's payroll taxes. Thomas says that Morley planned to make up the shortfall from future earnings and that Morley said that he could have covered it had he wished to, but he chose not to.

Thomas alleges that the turning point in his relationship with defendants was his January 24, 2014 letter addressed to Karjian as Managing Director and General Counsel of G2IG (Jan 24 Letter), which attached emails supportive of Thomas' claim that beginning in 2012, he repeatedly warned Morley and Karjian about cash shortfalls and difficulty meeting payrolls, as well as penalties that would be assessed by the IRS. Thomas alleges that he sent the Jan 24 Letter after Karjian asked him to resign voluntarily and forfeit his Units. 10/22/13 email from Karjian to Thomas annexed to Jan 24 Letter. Karjian's email threatened for Cause termination: "I want to be clear that G2 has not yet made a final decision that it intends to terminate you, for cause or without cause."

After submission of the motion, the court asked Thomas to supplement the record with the Jan 24 Letter and annexed email correspondence, which were submitted but not efiled in the Underlying Action. Thomas supplied them to the court by email, with copies to the opposing parties. The court has considered only the emails annexed to the Jan 24 Letter, over defendants' objection, as they were part of the Underlying Action record and bear on Thomas' claims in this action. Specifically, Thomas' opposing affidavit on this motion averred that written communications would prove that G2 put him on Administrative Leave without Good Reason

because he complained about Morley's breaches of fiduciary duty, not because Thomas caused the Tax Problem or engaged in misconduct. Dkt 65, pp 9-10, fn 6.[10]

One could infer that Thomas' version of the facts is correct from the email annexed to the Jan 24 Letter. On March 24, 2012, Morley told Thomas that he was doing a great job, but the accounting functions should be turned over to the new Chief Financial Officer, Jonathan Lerman. From May 21, 2012 through September 2013, email correspondence with Thomas, involving George Bonini, G2IG's outside counsel and Karjian, supports the proposition that the G2 Defendants were aware of, and approved of, Thomas' handling of the Tax Problem. Viewing Morley's emails to Thomas[11] in a light most favorable to Thomas, they could be interpreted to show that Morley was angry when Thomas pointed out problems in writing; Morley avoided putting the Tax Problem and cash shortages in writing; and Morley believed that Thomas was over-dramatizing them. On October 17, 2012, Morley in fact did write to Thomas, "I can bridge these deficits but I don't want to." Morley also threatened to fire Thomas if he used the term "deep trouble" again. Thomas says that he voluntarily agreed to be the sole "responsible person" in the IRS Proceeding against Markets. In an August 22, 2012, email to Thomas and Bonini concerning the Tax Problem, Karjian apparently joked, "Does that mean Patrick is or is not

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[10] A court should afford a liberal and broad interpretation of papers submitted by a pro se litigant. *Matter of Stephen W. v Christina X.*, 80 AD3d 1083, 1084 (3d Dept 2011), lv den, 16 NY3d 712 (2011)(overlooking failure to submit proof of service of objections to petition). The court finds good cause to consider the email admissions that the pro se plaintiff did not put in the record because it tends to support his version of the facts. CPLR 2103 & 3211. The court will not consider the January 24 Letter because it is a self-serving writing and because, on its face, it says that it was sent by plaintiff's attorney for the purpose of settlement negotiations. *Central Petroleum Corp. v Kyriakoudes*, 121 AD2d 165 (1st Dept 1986), *app dismissed*, 68 NY2d 807 (1986) (evidence of settlement negotiations generally inadmissible, except for admissions of fact made in connection with them).

[11] Emails annexed as Exhibits A and B to the January 24 Letter.

going to jail?" On September 23, 2013, G2IG and Markets entered into a written agreement to indemnify Thomas for the IRS Proceeding against Markets. UA Dkt 78.

On January 29, 2014, Thomas notified G2 that he had "Good Reason" to resign (Good Reason Notice), pursuant to §1.29(9) of the Operating Agreement, i.e., because there had been a significant, sustained reduction in his authority, duties and privileges. Dkt 66. Thomas cited the Good Reasons that formed the basis of his Mirroring CCs. Thomas' Good Reason Notice blamed G2's financial problems on Morley's self-dealing and breaches of fiduciary duty. Thomas timely resigned with Good Reason by letter dated March 3, 2014. Dkt 67. The UA Complaint was filed a week later.

At no point did G2 or G2IG terminate Thomas for "Cause", a term defined in the Operating Agreement, or give Thomas the required advance written notice that he would be terminated for Cause. Nevertheless, the UA Complaint alleged that Thomas' actions violated §§ 1.13 (iii) and (v) of the Operating Agreement. UA Complaint, ¶26. Those sections defined "Cause" for termination as, respectively: 1) a material violation of an employee's responsibilities that continued for 30 after receipt of written notice; and 2) fraud, gross negligence or other willful misconduct that continued for 5 days after written notice. Operating Agreement, §1.13. Both sections required the conduct constituting Cause to be reasonably likely to have a material adverse effect on G2, G2IG or their subsidiaries or Affiliates, as determined in good faith by the Executive Committee. UA Dkt 65, Operating Agreement, §1.13.

As previously noted, pursuant to the Operating Agreement, §9.2, if Thomas were terminated for "Cause" or resigned "without Good Reason," G2 did not have to purchase his Units for their FMV. Thomas alleges that when Karjian told Morley what it would cost to

terminate him without Cause, they conspired to coerce him into a voluntary separation, using a baseless threat of for-Cause termination. AC, Dkt 8, ¶32.

The UA Complaint's allegations about Cause for termination were not germane to the Good Reasons cited in Thomas in his Good Reason Notice, i.e., changes in his privileges and responsibilities. The declaration sought by G2 in the UA Complaint was that Thomas did not have Good Reason to resign. Furthermore, without a written notice, which was never sent, Thomas could not have been terminated for Cause.

After the UA Complaint was filed, a publication called *Hedge Fund Alert* (HFA) printed two articles about the Underlying Action on June 25 and July 16, 2014 (each an Article, collectively, Articles). Both Articles were published after Thomas moved for summary judgment in the Underlying Action [UA Dkt 34], and the second Article was published after G2 asked the court to approve a stipulation agreeing that Thomas resigned with Good Reason [UA Dkt 57]. The AC alleges, on information and belief, that the defendants published or caused the Articles to be published, but does not name any particular defendant. Dkt 8, ¶¶ 80-81. The AC describes HFA as a weekly newsletter with "a wide audience of Mr. Thomas' industry peers." *Id.* The AC alleges that after the HFA Articles were published, Thomas' consulting arrangement with Forbes Private Capital Group, LLC, was terminated. Dkt 8, AC, ¶¶ 83.

The first Article is entitled "*Court Case Exposes Tax Problems for G2*" and essentially paraphrased the UA Complaint and some of Thomas' Underlying CCs. Expressly, it reported that the UA Complaint accused Thomas of skipping tax payments without authorization and creating "false alarms" about cash shortfalls to justify it. The first Article also reported that Thomas claimed that Morley knew about the plan to defer payroll taxes to plug budget deficits,

and quoted Morley's "deep trouble" threat and his statement that he could cover the shortages but didn't want to.

The second Article entitled "*G2 Seeks Resolution of Bitter Suit*" reported that G2 was planning on putting an end to the Underlying Action because it was excessively expensive and time consuming; that G2 projected that electronic discovery would cost $250,000; and that Thomas planned to take two dozen depositions. The Second Article quotes an unnamed G2 official, as saying:

> We are considering dropping our claim simply because of the time and expense related to litigation. This has not yet occurred and will be subject to certain conditions.

Dkt 3.

Thomas alleges that in reference to him and the Underlying Action, Morley and Neilson, respectively, made statements from which malice can be inferred. Morley allegedly said, "we're going to bury him," while Neilson allegedly said, "this lawsuit is going to bankrupt him" and advocated a "shock and awe" litigation offensive against Thomas. Dkt 65, 9/8/15 Affidavit of Patrick J. Thomas, ¶8; & Dkt 57, ¶10.

Discussion

Standard of Review

On a motion to dismiss, the 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 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1st Dept 1992); *see also Cron v Hargo Fabrics*, 91 NY2d 362, 366 (1998). 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 and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits and other evidence submitted by the plaintiff, which shall be given their most favorable intendment. *Amaro*, 60 AD3d at 491; *Cron*, *supra*. "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 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed only 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 NY*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

Malicious Prosecution

The elements of a claim for malicious prosecution are an action begun by the defendant, with malice, without probable cause, that ends in failure, and causes special injury. *Engel v CBS, Inc.*, 93 NY2d 195 (1999), *citing Burt v Smith*, 181 NY 1 (1905); *see also*, *Howard v City of New York*, 294 AD2d 184, 185 (1st Dept 2002). Special injury is defined as "a highly substantial and identifiable interference with person, property, or business" that causes "some concrete harm that is considerably more cumbersome than the physical, psychological or financial demands of defending a lawsuit." *Engel*, 205. Special injury is not limited to the imposition of provisional remedies. *Id.* A substantial and verifiable loss of business is sufficient. *Id*, 207. In order to sustain the element of interference with person or property, the defendant must have issued

process or commenced an action against the plaintiff. *Carroll v New York Prop. Ins. Underwriting Ass'n*, 88 AD2d 527 (1st Dept 1982).

Engel held that loss of at least one ***potential*** client and possibly others, and general emotional and financial harm tied to damage to reputation, was not special injury. *Engel*, 205-207. However, *Engel* approvingly cited *Groat v Town Bd. of Town of Glenville*, 73 AD2d 426, 430 (3d Dept 1980), *appeal dismissed* 50 NY2d 928 (1980). *Groat* held that there was a sufficient interference with person or property where the plaintiff was suspended from the police force without pay, dismissed, and temporarily disgraced in the police department and the community. The *Groat* court emphasized that the plaintiff had lost his livelihood.

A corporate officer who participates in a tort committed by his corporation may be held personally liable for the tort. *Greenway Plaza Office Park-1, LLC v Metro Constr. Servs.*, 4 AD3d 328 (2d Dept 2004); *Van Wormer v McCasland Truck Ctr.*, 163 AD2d 632 (3d Dept 1990); *Slavenburg Soelling Corp. v W. A. Assomull & Co.*, 15 AD2d 645 (1st Dept 1962). Indeed, a malicious prosecution claim is properly maintained against the principals of the corporations that brought the underlying action. *Honzawa v Honzawa*, 268 AD2d 327 (1st Dept 2000) (malicious prosecution claim reinstated as against the corporate defendants and their individually named principals).

Defendants move to dismiss the malicious prosecution claim on the ground that Thomas cannot show malice or special damages. In addition, they urge that G2IG, Morley, Karjian and Neilson did not commence the Underlying Action. The motion is granted as to G2IG and Neilson, and otherwise denied.

Thomas has stated a malicious prosecution claim against G2, which commenced the Underlying Action, and its CEO and general counsel, Morley and Karjian, who allegedly

participated in the decision to bring it. Giving plaintiff the benefit of every favorable inference, it is likely that Morley and Karjian, CEO and general counsel of G2, participated in the decision to bring the UA Action. Lack of probable cause can be inferred from the fact that G2 quickly withdrew the Underlying Action and conceded liability on the Mirroring CCs; Morley's statement that he wanted to bury Thomas; and the emails which tend to show that the UA Complaint contained false allegations, particularly that G2 knew about the Tax Problem before October 2013, authorized Thomas' handling of it, and caused its subsidiaries, G2IG and Markets, to agree to indemnify Thomas. Whether G2 legitimately discontinued to save the expense of litigation is a question of fact that must be resolved in plaintiff's favor on a motion to dismiss. The Underlying Action terminated in Thomas' favor when G2 withdrew it voluntarily. Thomas alleges that he suffered actual damages in the amount of $120,000. AC, ¶¶ 84 & 110. In his memorandum of law in opposition to the motion, he alleges that he lost a $20,000 per month retainer agreement with Forbes Private Capital Group, LLC. Dkt 69, p 5; AC, ¶107. This is special injury beyond defending a lawsuit. *Engel & Groat, supra.* Thus, the motion to dismiss the malicious prosecution claim is denied as to G2, Morley and Karjian.

With respect to Neilson and G2IG, the motion to dismiss the malicious prosecution claim is granted. G2IG did not commence the Underlying Action. *Carroll, supra.* Nielson is not alleged to be a member or officer of G2. He is alleged to have been affiliated only with G2's wholly-owned subsidiary, G2IG. Therefore, he could not have participated in G2's decision to commence the Underlying Action, which negates one element of the tort. *Id.* While Neilson may have wanted G2 to sue Thomas, as evidenced by his alleged "shock and awe" comment and the fact that G2IG was Thomas' employer, there is nothing in the record to suggest that Neilson had decision-making power with respect to G2.

Defamation Per Se

The elements of a cause of action for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, that causes special damages or constitutes defamation per se. *Dillon v City of New York*, 261 AD2d 34, 38 (1st Dept 1999). Defendants move to dismiss the claim on the grounds that: 1) the statements made in the UA Complaint were true; 2) plaintiff does not allege who made the defamatory statements, as required by CPLR 3016(a); 3) G2's statements in the UA Complaint are protected by absolute immunity because they were made in the course of a judicial proceeding and were pertinent to the G2's declaratory judgment claim; 4) plaintiff caused publication of the statements by opposing the motion to seal; 5) the HFA Articles were privileged as fair and accurate reports of a judicial proceeding, pursuant to Civil Rights Law, §74; and 6) plaintiff is not entitled to punitive damages because he cannot prove that malice was defendants' sole motivation.

CPLR 3016(a) provides that "[i]n an action for libel or slander, "the particular words complained of shall be set forth in the complaint...."

The absolute privilege accorded statements made in the course of a judicial proceeding may be lost if the privilege is abused. *Front, Inc. v Khalil*, 24 NY3d 713, 718 (2015) (privilege withdrawn where statements so needlessly defamatory that express malice may be inferred); *Halperin v Salvan*, 117 AD2d 544, 548 (1st Dept 1986) (for privilege to apply, statements must be made in good faith and without malice). The policy undergirding the privilege is that fear of a later defamation suit would be an impediment to justice, hampering a bold search for the truth and the ability of attorneys to speak freely while zealously representing their clients. *Front*, 710. The test is whether the statements are material and pertinent to the proceeding, or whether they

are so needlessly inflammatory that malice can be inferred. *Front, supra.* Pertinence is judged by an extremely liberal standard and any doubts are to be resolved in favor of pertinence. *Sexter & Warmflash, PC v Margrabe,* 38 AD3d 163 (1st Dept 2007). The test for pertinence is whether the statements are so outrageously out of context that one could conclude that they were motivated only by a desire to defame. *Sexter*, 173. Whether the statements are pertinent is a question of law for the court. *Sexter*, 174; *Mosesson v Jacob D. Fuchsberg Law Firm*, 257 AD2d 381, 382 (1st Dep't 1999), *app den* 93 NY2d 808 (1999).

On a motion to dismiss, failure to pursue the underlying case is a distinguishing factor that tends to support allegations that the underlying action was brought maliciously for the purpose of defamation. *Flomenhaft v Finklstein*, 127 AD3d 634, 638 (1st Dept 2015) (refusing to dismiss defamation claim where underlying action discontinued and record did not reveal whether or not it was prosecuted), *citing Halperin v Salvan*, 117 AD2d 544, (1st Dept 1986) (refusing to dismiss defamation claim where underlying action not vigorously pursued); *Lacher v Engel*, 33 AD3d 10, 14 (1st Dept 2006) (dismissing defamation and distinguishing *Halperin* on ground that underlying action was pursued vigorously, while in *Halperin* malicious intent to defame was arguably substantiated by failure to pursue "sham" underlying lawsuit); *Casa de Meadows Inc. v Zaman*, 76 AD3d 917 (1st Dept 2010) (dismissing defamation claim on ground that it was not case where plaintiff in underlying action failed to move forward with it or underlying case was brought for purpose of defaming, citing *Halperin* and *Sexter*).

Civil Rights Law §74 provides:

> 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, ... or for any heading of the report which is a fair and true headnote of the statement published.

However, a person who gives a false statement to a news organization, authorizing or intending its publication, can be liable for damage caused by publication. *Acadia Site Contracting, Inc. v Skurka*, 129 AD3d 1453 (4th Dept 2015).

Whether the statements in the UA Complaint were false is a question of fact that must be resolved in plaintiff's favor at this juncture. Falsity of some of the UA Complaint's central and most defamatory allegations can be inferred from the email correspondence attached to the January 24 Letter and the agreement to indemnify Thomas for the IRS Proceeding. Specifically, it can be inferred that it was false that: 1) G2 first learned of the extent of the Tax Problem in the Fall of 2013; and 2) that Thomas deferred taxes without authorization. The allegations in the UA Complaint could amount to defamation per se. They accused Thomas of serious professional misconduct. AC, §44.

The judicial privilege defense does not require dismissal because a trier of fact could conclude that the UA Complaint was a sham maliciously filed solely to defame Thomas. G2's sole motivation to defame could be inferred from the fact that within four months, G2 discontinued the action and conceded liability on the Mirroring CCs, before any discovery took place. Malicious intent also could be inferred from Morley's statement about burying Thomas. The discontinuance and concession of liability on the Mirroring CCs before discovery and Morley's malicious statement lead the court to deny the motion to dismiss.

Furthermore, with regard to the pertinence standard, the sole cause of action in the UA Complaint was a declaratory judgment that Thomas did not resign with Good Reason, i.e., a change in his employment responsibilities and privileges. Nevertheless, the UA Complaint alleged that G2 had Cause to terminate Thomas' employment and outlined grounds for Cause that impugned Thomas' integrity and professionalism. The UA Complaint did not seek a

declaration that G2 or G2IG had Cause to terminate Thomas' employment, and they never sent the required notice for Cause termination. Thus, the alleged grounds for "Cause", like the UA Complaint, were never pursued, as in *Flomenhaft* and *Halperin*.

The alleged defamation consists of direct quotations from G2's UA Complaint. Therefore, the particular words are used, as required by CPLR 3016. However, as a corporation can only speak through human beings, and corporate officers who participate in the commission of a tort can be liable for a tort committed by the corporation [see discussion of malicious prosecution, *supra*], someone at G2 caused G2 to make the statements. Giving plaintiff the benefit of every favorable inference, Karjian and Morley made the decision to file the UA Complaint to intimidate Thomas into forfeiting his Units. As a result, the defamation claim survives against Morley, Karjian and G2.

Civil Rights Law §74 does not insulate the report of a sham complaint maliciously distributed for the purpose of defaming. *Williams v Williams*, 23 NY2d 592, 598-599 (1969). It insulates an accurate and "fair" report. If the UA Complaint was a sham, publication of it would not be "fair." Instead, a sham complaint would be a false statement given to a news organization for the purpose of publication. *Acadia Site Contracting, Inc., supra.*

Thomas' opposition to G2's order to show cause to seal the UA Complaint is not fatal to his defamation claim. G2's proposed order to show cause for sealing, third decretal paragraph, stated:

> IT IS FURTHER ORDERED that pending the hearing and determination of this motion ***all subsequent documents filed in this action shall be filed under seal as well pursuant to an appropriate protective order.***

[emphasis supplied] UA Dkt 2, p 2. As previously noted, G2 asserted that it was concerned about revealing the IRS Proceeding, which was mentioned in the UA Complaint, and other unspecified information that G2 might need to put in ***future*** filings. UA Dkt 5.

Thomas had no control over whether the court would grant the application, which it did not, except for specific financial numbers, because good cause for sealing did not exist. Furthermore, it could be inferred that the sealing motion was an additional, creative method of cloaking defamation with a judicial privilege. A trier of fact could be persuaded that a calculating litigant had hoped the motion would be opposed, knowing it would likely be denied, with the result that the opposition could be used later to defend against a defamation claim.[12] Furthermore, as Thomas points out, once the sealing order was denied, G2 could have withdrawn the UA Complaint, but instead it waited four months, while G2 allegedly caused the Articles to be published in HFA, one of which quoted a G2 representative. Lastly, the effect of the sealing order G2 requested would have prevented Thomas' side of the story from being publicly filed, a fact raised in Thomas' opposition to the sealing motion. UA Dkt 8, p 2. In sum, it cannot be said as a matter of law that Thomas' opposition to the sealing motion proves that G2 did not use the UA Complaint to defame him.

Defendants move to dismiss plaintiff's demand for punitive damages, arguing that plaintiff has failed to demonstrate that malice was the sole cause for the defamation. Defendnats are correct.

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[12] G2's counsel could have anticipated denial of the motion. There is a presumption in favor of public access and even where the parties agree to sealing, it should be granted sparingly. *Applehead Pictures LLC v Perelman*, 80 AD3d 181, 191-192 (1st Dept 2010), citing *Anonymous v. Anonymous*, 27 AD3d 356, 361 (1st Dept 2006).

Punitive damages for defamation are recoverable only if the defendant's sole motivation for making the statements was a malicious intent to inflict harm on the plaintiff. *Morsette v "The Final Call"*, 309 AD2d 249, 255 (1st Dept 2003), app den 5 NY3d 756 (2005). Saving money is a financial motive, which undercuts the sole motivation factor needed to recover punitive damages. *See, Squire Records, Inc. v Vanguard Recording Soc., Inc.*, 25 AD2d 190, 191 (1st Dept 1966) (punitive damages not recoverable for tort that must be motivated solely by malice where defendant motivated by profit, self-interest and business advantage).

Here, the request for punitive damages is dismissed. Plaintiff alleges that the sole motivation for filing the UA Complaint was to avoid paying FMV for his Units. Thus, the motive here was not malice alone, and punitive damages are not recoverable. Finally, the defamation claim must be dismissed against G2IG and Neilson because they are not alleged to have made defamatory statements and are not alleged to be able to speak for G2, who uttered the alleged defamatory words.

Breach of Contract

The motion to dismiss the breach of contract claim against G2 is denied. The G2 Operating Agreement is governed by Delaware law. The elements of a claim for breach of contract under Delaware law are the existence of the contract, breach of an obligation imposed by that contract; and resultant damage to the plaintiff. *VLIW Tech., L.L.C. v Hewlett-Packard Co.*, 840 A2d 606, 612 (DE Sup Ct 2003). The AC alleges that G2 failed to provide Thomas with financial records that he demanded in 2015, which members of G2 are entitled to receive pursuant to the Operating Agreement.[13] G2's only opposition is that Thomas is not entitled to

[13] Section 5.1 of the Operating Agreement provides:

The Company [G2] will cause to be delivered to each Member (i) audited

them because G2 agreed to purchase his Units for their FMV and he does not need the information he requested to determine his Units' value as of his resignation date in March 2013. G2 Memo of Law, Dkt 29, p 11. The Operating Agreement does not limit a member's entitlement to records on that basis, and because Thomas is still a member, failure to provide him with the documents would be a breach. Consequently, the motion to dismiss the contract claim is denied.

Indemnification

Thomas' third cause of action alleges that he is entitled to indemnification and advancement of legal fees he incurs in prosecuting this action, pursuant to the Operating Agreement, §4.7. Section 4.7 defines "Indemnified Party" as including each Member of G2 and each officer and employee of G2, and each Affiliate of G2's Members, including officers and employees of Affiliates of G2's Members. UA Dkt 65. An Affiliate is defined in §1.6 as including G2IG, but G2IG is not a Member of G2 or alleged in the AC to be an Affiliate of one of G2's Members.[14]

> financial statements of the Company, no later than one hundred twenty (120) days after each Fiscal Year and of [G2IG], as and when received from [G2IG] and (ii) unaudited financial statements of the Company within forty five (45) days after each calendar quarter and of [G2IG], as and when received from [G2IG]. ... The Company shall also cause to be delivered to each Member all budgets, reports and financial statements not referenced above from [G2IG], as and when received from [G2IG]. It is the intent of the Management Committee and the Members that each Member shall receive the same financial reporting information as such Member would receive if the Member were a member of [G2IG].

In addition, Section 11.3 of the Operating Agreement requires G2 to deliver to Members a K-1 and audited financial statements 120 days after each Fiscal Year and unaudited financial statements within 45 days of each quarter.

[14] Section 1.6 of the Operating Agreement defines "Affiliate" as follows: "a Person, directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common

G2's motion to dismiss is granted to the extent of dismissing the claim for advancement and indemnification for legal fees and costs incurred in prosecuting the defamation claim. Subsection 4.7(a) of the Operating Agreement provides that Thomas is entitled to indemnification for suits he brings that arise from his status as a Member, employee or officer of G2, but not from his status as an employee or officer of G2IG:

> [G2] shall indemnify and hold harmless, to the fullest extent permitted by law, any Indemnified Party from and against any and all losses, claims, damages, liabilities, expenses (including legal fees and expenses), judgments, fines, settlements, and other amounts ("Indemnified Costs") ***arising from all claims, demands, actions, suits, or proceedings ("Actions"), ... in which the Indemnified Party may be involved, ... as a party or otherwise arising as a result of its status as (i) a Member of [G2]***, ... ***or (iii) an officer, agent, employee ... or Affiliate of [G2]***, regardless of whether the Indemnified Party continues in such capacity at the time any such liability or expense is paid or incurred, and ***regardless of whether any such action is brought by*** a third party, ***a Member***, or by or in the right of [G2]; provided, however, that no such Person shall be indemnified hereunder for any Indemnified Costs which proximately result from such Person's gross negligence or willful misconduct or his material breach of this Agreement.

[emphasis supplied].

Section 4.7(b), which governs advancement, provides that:

> [G2] shall pay or reimburse, to the fullest extent allowed by law and consistent with Section 4.7(a), in advance of the final disposition of the proceeding, Indemnified Costs incurred by the Indemnified Party in connection with any Action that is the subject of Section 4.7(a), provided that the Indemnified Party shall provide to [G2] written confirmation that the Indemnified Party will return any amounts so advanced by the Company to the extent that it is subsequently determined that the Indemnified Party was not entitled to receive such amounts advanced.

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control with the Person in question. For purposes of this definition, 'control' means having the power under normal circumstances, whether by ownership of equity securities, by contract or otherwise, to determine the operating policies of the other Person." The definition of a "Person" includes a limited liability company. Operating Agreement, §1.45.

In the Underlying Action, the First Department has recently affirmed this court's ruling that, under Delaware Law, these provisions, according to their plain language, are comprehensive contractual advancement and indemnification clauses that are broad enough to cover personal, affirmative claims arising out of Thomas' status as a Member of G2. *G2 FMV, LLC v Thomas*, 2016 NY Slip Op 00026; 2016 NY App Div LEXIS 25 (Jan 7, 2016) (nor)[15]; citing 6 Del C §18-108. and *Seaford Golf & Country Club v E. I. du Pont de Nemours & Co.*, 925 A.2d 1255, fn 14 (DE Ch 2007) (when contractual language is clear and unequivocal, party is bound by its plain meaning).

Thomas is entitled to advancement of reasonable legal fees and costs he incurs in connection with his claims for malicious prosecution, breach of contract and indemnification/ advancement to the extent it is attributable to such claims. In addition, if he succeeds on those claims, he is entitled to indemnification for fees and costs attributable to them. The malicious prosecution and breach of contract claims arise out of Thomas' status as a Member of G2. The Underlying Action allegedly was brought with malice in order to deprive him of the FMV of his Membership Units in G2. Likewise, his right to financial records, pursuant to the Operating Agreement, arises from his status as a Member of G2. To the extent that he seeks advancement and indemnification for those two claims, that claim arises from his membership status.

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[15] 6 Del C §18-108 provides: "Subject to such standards and restrictions, if any, as are set forth in its limited liability company agreement, a limited liability company may, and shall have the power to, indemnify and hold harmless any member or manager or other person from and against any and all claims and demands whatsoever." The Delaware Chancery Court has interpreted the statute to mean that an LLC has nearly "unfettered contractual discretion" to determine whether to pay legal fees and that the issue turns on the relevant contractual language. *Accord, Donohue v Corning*, 949 A2d 574, 578 (Del Ch 2008); *see also, Branin v Stein Roe Investment. Counsel, LLC*, 2014 Del. Ch. LEXIS 112, 12-13, 2014 WL 2961084 (Del. Ch. June 30, 2014) (nor); Samuel T. Herzel & Dawn Kurtz Crompton, *Finding (and Funding) the Cost of Freedom: Indemnification and Advancement for Alternative Business Entities*, 15 Del. L. Rev. 83 ©2015

However, Thomas is not entitled to advancement or indemnification for his defamation claim, which arises out of his status as an employee and officer of G2IG. It was in those roles that he was allegedly defamed. Section 4.7 of the Operating Agreement does not provide for indemnification or advancement for fees and costs incurred by G2IG officers and employees. Accordingly, it is

ORDERED that the decision and order in Motion Sequence 003 [Dkt 47] is vacated and this decision and order are substituted in its place and Motion Sequence 004 is permitted to be withdrawn; and it is further

ORDERED that the motion by plaintiff PATRICK J. THOMAS for a default judgment (Motion Sequence 001) is permitted to be withdrawn; and the cross-motion by G2 FMV, LLC, and G2 INVESTMENT GROUP, LLC, dismissing the first amended complaint is granted solely to the extent of dismissing: 1) plaintiff's request for punitive damages on the second cause of action for defamation per se; 2) the first and second causes of action for malicious prosecution and defamation against G2 INVESTMENT GROUP, LLC; and the portion of the fourth cause of action against G2 FMV, LLC, seeking indemnification and advancement of legal fees and costs incurred by plaintiff in connection with the second cause of action; and the cross-motion is otherwise denied; and it is further

ORDERED that the motion by JONATHAN TODD MORLEY, MARIA BOYAZNY and TREVOR NEILSON (Motion Sequence 002), and the motion by DORI VICKEN KARJIAN (Motion Sequence 003) to dismiss are granted solely to the extent of dismissing the first amended complaint as to NEILSON and the request for punitive damages on the second cause of action against MORLEY and KARJIAN; Motion Sequence 002 is denied as moot as to BOYAZNY; and Motion Sequences 002 and 003 are otherwise denied; and it is further

ORDERED that defendants shall answer the first amended complaint within 10 days after service upon them of a copy of this order with notice of entry; and it is further

ORDERED that, upon service upon him of a copy of this order with notice of entry (at cc-nyef@nycourts.gov), the Clerk is directed to enter judgment dismissing the first amended complaint as against MARIA BOYAZNY, TREVOR NEILSON and G2 INVESTMENT GROUP, LLC, and to sever the remainder of the action, which shall continue; and it is further

ORDERED that the caption of the action is hereby amended as follows:

THOMAS, PATRICK, J.,

Plaintiff,

-against-

G2 FMV, LLC, JONATHAN TODD MORLEY, and DORI VICKEN KARJIAN,

Defendants

and henceforth all papers filed in the action shall bear the amended caption; and, upon service upon the Clerks of the Court and the Trial Support Office (at genclerk-ords-non-mot@nycourts.gov) of a copy of this order with notice of entry, they shall amend their records to reflect the severance and the amended caption.

Dated: January 27, 2016

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C