Glazier v Harris
2016 NY Slip Op 31146(U)
June 17, 2016
Supreme Court, New York County
Docket Number: 103482-2010
Judge: George J. Silver
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

---X

WILLIAM GLAZIER and GEORGE REID,

Plaintiffs,

Index No. 103482-2010

-against-

DECISION/ORDER

Motion Sequence 006

LYNDON HARRIS, ST JOHN'S LUTHERAN CHURCH, ROBERT A. RIMBO, THE METROPOLITAN NEW YORK SYNOD-EVANGELICAL LUTHERAN CHURCH IN AMERICA, MARK S. SISK and THE EPISCOPAL DIOCESE OF NEW YORK,

Defendants.

---X

HON. GEORGE J. SILVER, J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

Papers	Numbered
Defendants Sisk and Diocese's Order to Show Cause, Affirmation & Collective Exhibits Annexed	1, 2, 3
Defendants Rimbo and Synod's Notice of Cross Motion, Memorandum of Law, Affirmation & Collective Exhibits Annexed	4, 5, 6, 7
Defendants Harris and St. John's Notice of Cross Motion, Affidavits, & Collective Exhibits Annexed	8, 9, 10
Plaintiff's Answering Affirmation & Exhibits Annexed	11, 12
Defendants Sisk and Diocese's Reply Affirmation	13
Defendants Harris and St. John's Reply Affirmation	14
Defendants Rimbo and Synod's Reply Affirmation	15

In this defamation action, defendants Mark S. Sisk ("Sisk") and The Episcopal Diocese of New York ("the Diocese") move by way of order to show cause for an order granting them summary judgment dismissing plaintiffs' William Glazier ("Glazier") and George Reid ("Reid," together "Plaintiffs") complaint. Defendants Lyndon Harris ("Harris") and St. John's Lutheran Church ("St. John's") cross-move, pursuant to CPLR § 3212, for an order granting summary judgment dismissing Plaintiff's complaint. Defendants Robert A. Rimbo ("Rimbo") and The

Metropolitan New York Synod - Evangelical Lutheran Church in America ("the Synod") also cross-move, pursuant to CPLR § 3212, for an order granting summary judgment dismissing Plaintiffs' complaint. Plaintiffs submit papers in opposition to Harris and St. John's motion for summary judgment.

I. Facts

Plaintiffs were employed at St. John's from sometime in 1967 until June 6, 2009 (Plaintiffs' Mem. Supp. at 3). Reid was employed as a soloist and cantor, and then went on to serve as the parish administrator, receiving a salary of approximately $18,000 per year, until his dismissal in 2009 (*Id.*; Reid Tr. at 97). Additionally, Reid was president of the church council, an executive committee of the church that decides church policies, from 2002 to 2006 (*Id.*). Glazier was employed as St. John's organist and choir master, received a salary of approximately $10,000 per year, and later served as the church sexton until his dismissal in 2009 (*Id.* at 4; Glazier Tr. at 18:6-19). Beginning in the late 1990's, both Reid and Glazier started performing personal services for Lilly Jaffe, a parishioner at St. John's (Reid Tr. at 24:3-11). According to Plaintiffs, these services included taking her to various doctors' appointments, helping her with shopping and other personal errands, performing various home upkeep tasks, and general companionship (*Id.* at 23:17-21). On Reid's birthday in 2008, Ms. Jaffe gifted Reid a piece of property in Southbury, Connecticut, valued at the time at $300,000.00, and which Reid sold for approximately $270,000.00 some time in the intervening years (*Id.* at 25:2-6).

In 1998, Ms. Jaffe executed a Will ("the 1998 Will"), whereby Ms. Jaffe devised a gift of $10,000.00 to St. John's, among others, and left the residuary estate to Frank Rabbitto ("Rabbitto") and Catherine Drechsel, in shares of 95% and 5%, respectively (Plaintiffs' Ex. N at 2). In 2008, Ms. Jaffe executed a new Will ("the 2008 Will"), which also devised a gift of $10,000.00 to St. John's (Plaintiffs' Ex. N at 11). However, the 2008 Will changed the bequest of the residuary estate to reflect the following percentages: Reid, Glazier, and Rabbitto would each receive 33.33% of the residuary estate (Plaintiffs' Ex. N at 10-11). This sum entitled each beneficiary to approximately $500,000.00 (Reid Tr. at 29:22-24). Reid testified at deposition that the reason Ms. Jaffe altered the bequest of the residuary estate was that she was not previously aware of the size of her estate and did not want such a large estate going to one person (*Id.* at 33:11-34:6). Additionally, the 2008 Will named Glazier as the executor (Plaintiffs' Ex. N at 15). Present at the signing of the 2008 Will were Ms. Jaffe, Harris, Reid, Carly Ritter, and Ms. Jaffe's attorney, Violet Garrier (Reid Tr. at 30:6-17).

In 1991, Harris first became an Episcopal priest (Sisk Mem. Supp. at 5). Pursuant to an agreement between the Episcopal and Lutheran churches, Episcopal priests were permitted to take jobs at Lutheran churches subject to approval by both the Episcopal and Lutheran Bishops (*Id.*). It was one such agreement that brought Harris to St. John's in 2006 as a "vacancy," or "supply," pastor (*Id.* at 6). The agreement was approved by the Bishop of the Episcopal Diocese of New York at the time, Bishop Sisk, and the Bishop of the Evangelical Church in America Metropolitan Synod (the Lutheran Bishop) at the time, Bishop Bowman (Harris Tr. at 49:6-23).

Bishop Bowman was later succeeded by Bishop Rimbo, the named defendant (*Id.*). Towards the conclusion of this temporary appointment, in early 2009, Harris accepted a "term call" to become the permanent pastor at St. John's, where he remained until he was fired as a result of accusations of sexual harassment by a parishioner, unrelated to the matter at hand. The "Letter of Agreement for Term Call" was signed by Harris, Sisk, and Rimbo (Sisk Mem. Supp. at 6).

In accordance with the contract by which Harris became a "term call" pastor at St. John's, a council retreat was called to take place on June 6, 2009 (*Id.* at 7). At some point during this retreat, Harris called for an executive session to take place (*Id.* at 8). An executive session can only be attended by elected council members and executive committee members, as opposed to a council retreat which can be attended by any member of the church. (Harris Tr. at 87:9-17). The purpose, according to Harris, is "[t]o give members of the church council an opportunity to have a dialogue with the elected council members and the executive council members about an issue that has to remain totally discreet. No discussion outside of the executive session" (*Id.* at 241:2-7). There was no notice of intent to have an executive session given to the members entitled to be present, despite such a requirement in St. John's constitution (Sisk Mem. Supp. at 5). Despite this, an executive session was held, during which Plaintiffs allege that Harris made false and defamatory statements, namely:

1. Defendant Harris stated that a long-time parishioner, Ms. Lilli Jaffe, had gifted to plaintiff Reid property in Connecticut and that plaintiffs Glazier and Reid, were beneficiaries in Ms. Jaffe's Will; 2. Defendant Harris stated that at some point prior to June 6, 2009, he had seen papers showing that Ms. Jaffe's estate was worth well over $1,000,000.00 and that she intended to leave her estate to defendant St. John's at that time; 3. Defendant Harris stated that while Ms. Jaffe's initial plan had been to leave all of her money to defendant St. John's, now the money was being left to plaintiffs Glazier and Reid; 4. Defendant Harris also stated that a church member, Lud Mayleas, was initially to have had sole Power of Attorney for Ms. Jaffe but because of plaintiffs' undue influence on Ms. Jaffe, the Power of Attorney would now be solely with plaintiff Glazier; 5. Defendant Harris stated that plaintiffs Glazier and Reid had been visiting Ms. Jaffe and taking care of her and that it was immoral for any person in a caregiver capacity to be a recipient of such gifts; 6. Defendant Harris stated that if plaintiffs Glazier and Reid had been professional caregivers, they would be arrested as a result of their conduct towards Ms. Jaffe; 7. Defendant Harris stated that a Connecticut statute outlawed Ms. Jaffe's purported gift to plaintiff Reid and that he would follow up on such illegal behavior; 8. Defendant Harris stated that plaintiff Glazier unduly influenced Ms. Jaffe to change her Will; 9. Defendant Harris stated that plaintiff Reid unduly influenced Ms. Jaffe to change her Will; 10. Defendant Harris stated plaintiff Glazier diverted funds that were to go to St. John's upon Ms. Jaffe's death for his own benefit; 11. Defendant Harris stated that plaintiff Reid diverted funds that were to go to St. John's upon Ms. Jaffe's death for his own benefit; 12. Defendant Harris stated that plaintiff Glazier stole from the church; 13. Defendant Harris stated that plaintiff Reid stole from the church; 14. Defendant Harris stated at the aforementioned retreat that he could not work with an immoral person such as plaintiff Glazier; 15. Defendant Harris stated at the aforementioned retreat that he could not work with an immoral person such as plaintiff Reid (*see Glazier v.*

Harris, 2011 NY Slip 33720 [U] [Sup Ct, New York County 2011]).

At the time, members of the church council were aware that Harris had been a witness to Ms. Jaffe's 2008 Will (Plaintiffs' Mem. Opp. at 10). Harris also admitted to telling members of the church council that he and the Pastor Lee Wesley ("Wesley"), also of St. John's, had gone to visit Ms. Jaffe and had seen her Will (Harris Tr. at 193:4-9). After Harris allegedly made the defamatory statements, a vote was called for and taken, whereupon the church council voted to terminate both Glazier and Reid (*Id.* at 11). Further, on June 8, 2010, Reid alleges he was telephoned by a member of St. John's inquiring about the allegations made against Plaintiffs at the executive session (*Id.* at 12). Reid also testified that another member of St. John's had subsequently made disparaging remarks to him about his role in getting Ms. Jaffe to change her Will (Reid Tr. at 113:2-25).

II. Discussion

Plaintiffs allege that Harris' statements injured them in their professions with St. John's, and exposed the Plaintiffs to public hatred, contempt, ridicule, and/or disgrace. While Plaintiffs initially asserted five causes of action, only the action for defamation survives (*Glazier v Harris*, 99 AD3d 403, 404 [1st Dept 2012]).

It is well-settled that on a motion for summary judgment, the moving party has the initial burden of demonstrating, by admissible evidence, its right to judgment (*Bendik v Dybowski*, 227 AD2d 228 [1st Dept 1996]). The burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists warranting a trial (*Id.*). Summary judgment is a drastic remedy that should only be employed where no doubt exists as to the absence of triable issues (*Leighton v Leighton*, 46 AD3d 264 [1st Dept 2007]). The key to such procedure is issue-finding, rather than issue-determination (*Id.*). Where movant fails to meet their burden, summary judgment is not appropriate, "irrespective of the sufficiency of the opposing papers" (*Flynn v Fedcap Rehab. Servs., Inc.*, 31 AD3d 602, 603 [2d Dept 2006]).

"The elements of a cause of action [to recover damages] for defamation are a 'false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se' " (*Salvatore v Kumar*, 45 AD3d 560, 563 [2nd Dept 2007] *quoting Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]). "Generally, a plaintiff alleging slander must plead and prove that he or she has sustained special damages, i.e., 'the loss of something having economic or pecuniary value'" (*Rufeh v Schwartz*, 50 AD3d 1002, 1003 [2nd Dept 2008] *quoting Liberman v Gelstein*, 80 NY2d 429, 434–435, [1992]). "A plaintiff need not prove special damages, however, if he or she can establish that the alleged defamatory statement constituted slander per se" (*Rufeh*, 50 AD3d at 1003). The four exceptions which constitute "slander per se" are statements (i) charging plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman (see *Liberman*, 80 NY2d at 435). When statements fall

within one of these categories, the law presumes that damages will result, and they need not be alleged or proven (*Id.*). Slander per se that tends to injure another in his or her trade, business or profession "is limited to defamation of a kind incompatible with the proper conduct of the business, trade, profession or office itself. The statement must be made with reference to a matter of significance and importance for that purpose, rather than a more general reflection upon the plaintiff's character or qualities" (*Rufeh*, 50 AD3d at 1004-05 *citing Liberman*, 80 NY2d at 436).

III. Harris and St. John's Motion for Summary Judgment

Defendants Harris and St. John's argue that the defamation claim is actually an impermissible claim for wrongful termination of an at-will employee (Harris' Mem. Supp. at 17). In the alternative, Harris and St. John's argue that the statements were protected by the common interest privilege, and that the Plaintiffs have not sufficiently alleged malice such to overcome the privilege (*Id.* at 11-16).

A. Wrongful Termination

Defendants Harris and St. John's seek summary judgment under the theory that Plaintiffs' defamation claim is actually an impermissible claim for wrongful termination. In response, Plaintiffs argue that because the defamation claim survived the motion to dismiss stage, the law of the case doctrine dictates that they have already met their burden as to the defamation claim (Plaintiffs' Mem. Opp. at 24). Further, Plaintiffs argue that they have established the existence of a triable issue of fact as to whether they were employed at-will (*Id.* at 26).

Plaintiffs' claim that the law of the case doctrine applies is without merit. While the claim for defamation survived the motion to dismiss stage, that does not mean it automatically survives summary judgment. Indeed, "[t]he doctrine of law of the case is inapplicable 'where ... a summary judgment motion follows a motion to dismiss' " (*Friedman v Connecticut Gen. Life Ins. Co.*, 30 AD3d 349, 349 [1st Dept 2006] citing *Riddick v City of New York,* 4 AD3d 242, 245 [1st Dept 2004]). A motion to dismiss "examines the sufficiency of the pleadings, whereas summary judgment examines the sufficiency of the evidence underlying the pleadings" (*Id. citing* T*enzer, Greenblatt, Fallon & Kaplan v Capri Jewelry,* 128 AD2d 467, 469 [1st Dept 1987]). Thus, Plaintiffs' claim for defamation does not automatically survive a motion for summary judgment because it survived a motion to dismiss.

At-will employees have no cause of action for wrongful termination in New York State (*Smalley v Dreyfus Corp.*, 10 NY3d 55, 58 [2008]). Indeed, there is even considerable case law to support Defendants' further position that at-will employees cannot assert defamation claims against their employers as a way to side-step the barrier on wrongful termination claims (*See Ranieri v Lawlor*, 211 AD2d 601 [1st Dept 1995] ["[P]laintiff's claims for defamation [was] properly dismissed because such [cause] of action may not be interposed as a means of circumventing this jurisdiction's continuing refusal to recognize a cause of action for wrongful discharge"]; *Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994] ["[T]he [cause]

of action for ... defamation ... merely constitute[s] an improper attempt by the plaintiff to circumvent the traditional at-will employee rule"]; *Baker v Guardian Life Ins. Co. of Am.*, 12 AD3d 285, 285 [1st Dept 2004] ["Plaintiff's cause of action for defamation is an improper attempt to circumvent the rule that an at-will employee has no cause of action for wrongful discharge"]; *McEntee v Van Cleef & Arpels, Inc.*, 166 AD2d 359, 359-60 [1st Dept 1990] ["[P]laintiff's first cause of action [for defamation] was properly dismissed as merely a common law cause of action in tort for abusive or wrongful discharge based upon the termination of an at-will employment. Such an action may not be maintained under New York law"]; *Miller v Richman*, 184 AD2d 191, 192 [4th Dept 1992] ["Plaintiff cannot circumvent the employment at-will rule by asserting [a cause] of action for defamation"]).

Under New York law, absent "a constitutionally impermissible purpose, a statutory proscription, or an express limitation in the individual contract of employment, an employer's right at any time to terminate an employment at will remains unimpaired" (*Murphy v American Home Prods. Corp.*, 58 NY2d 293, 305 [1983]). "Thus, either the employer or the employee generally may terminate the at-will employment for any reason, or for no reason. In the decades since *Murphy*, [courts] have repeatedly refused to recognize exceptions to, or pathways around, these principles" (*Smalley v Dreyfus Corp.*, 10 NY3d 55, 58 [2008]). An employee may rebut this presumption if he demonstrates that his employer made him aware of an express written policy limiting [the employer's] right of discharge and that the employee relied upon that policy to his detriment (*Matter of De Petris v Union Settlement Assn.*, 86 NY2d 406, 410 [1995]). Further, in order for an employment contract to be valid, it must contain, "the identity of the parties, the terms of employment, which include the commencement date, the duration of the contract and the salary" (*Elite Tech. N.Y. Inc. v Thomas*, 70 AD3d 506, 507 [1st Dept 2010]).

To support their claim that Plaintiffs were employed at-will, Defendants Harris and St. John's offer Plaintiffs' assertions during their respective depositions that they did not have formal contracts. Indeed, both Reid and Glazier admit to having no formal contract at their depositions (Glazier Tr. at 17:9-20; Reid Tr. at 18:10-13). Further, Glazier states that it is his belief that he was an at-will employee (Glazier Tr. at 66:14-19, 115:15-17), and that under the terms of his employment he could be fired for any reason (*Id.* at 92:13-19).

There is however, conflicting testimony by Plaintiffs. Reid, in testimony at deposition and by sworn affidavit, testified to having an employment contract through church council minutes. Specifically, Reid testified there was "not a written contract, there was a contract as all lay people were at St. John's through the church council in which motions were made, seconded and agreed upon by the council. That was the legal document used for the employment of lay people at St. John's" (Reid Tr. at 18:3-9). At deposition, Glazier never claimed to have had an employment contract through church council minutes. However, in their affidavits, both Reid and Glazier stated that "in 1976, due to the loss of [its] full-time pastor and secretary as well as budgetary restrictions, the church council voted to have all terms of employment and agreements for lay employees documented in the minutes of the church council rather than in lengthy contracts" (Reid Aff. at ¶ 22; Glazier Aff. at n. 2). Further, in his affidavit, Glazier stated, "[after 1992] the

council voted that my position was to be in perpetuum until I decided to retire, at which time I would be awarded the title of Organist Emeritus" (Glazier Aff. at ¶ 5).

Plaintiffs argue that there is an issue of fact as to whether the church council minutes created employment contracts (Plaintiff's Mem. Opp. at 24). Accordingly, Plaintiffs assert that the motion for summary judgment should be denied pursuant to CPLR § 3212, as the church council minutes are in the exclusive possession of the defendants (Plaintiff's Mem. Opp. at n. 1).

Standing alone, Glazier's conflicting testimony would normally constitute only a feigned issue of fact (*see Telfeyan v City of New York*, 40 AD3d 372 [1st Dept 2007]). However, Reid's consistent testimony that the church council minutes governed the terms of employment for lay employees of St. John's is enough to create a triable issue of fact. Because Defendants are in possession of the church council minutes, summary judgment is not appropriate.

B. Common Interest Privilege

In the alternative, Defendants Harris and St. John's argue that even if Plaintiffs were not at-will employees, Harris' statements were protected by the common interest privilege and that Plaintiffs have not sufficiently alleged malice such to overcome the privilege (Harris' Mem. Supp. at 11-15). Plaintiffs argue that the common interest doctrine is inapplicable, and in the alternative that they have alleged malice sufficient to create a triable issue of fact under both the common-law and constitutional standards (Plaintiffs'Mem. Opp. at 16-24).

Courts recognize that public interest is served by protecting certain communications from litigation (*Liberman*, 80 NY2d at 437). That is, to make certain communications privileged. One such privilege exists between "communications made by one person to another upon a subject in which both have an interest (*Id.* citing *Stillman v Ford*, 22 NY2d 48, 53 [1968]; *see e.g. Loughry v Lincoln First Bank*, 67 NY2d 369, 376 [1986] [applying the common interest privilege to employees of an organization]; *Stukuls v State of New York*, 42 NY2d 272 [1977] [applying the common interest to members of a faculty tenure committee]; *Shapiro v Health Ins. Plan*, 7 NY2d 56, 60-61 [1959] [applying the common interest privilege to constituent physicians of a health insurance plan]). "The rationale for applying the privilege in these circumstances is that so long as the privilege is not abused, the flow of information between persons sharing a common interest should not be impeded" (*Liberman*, 80 NY2d at 437). However, the protection provided by the common interest privilege, "may be dissolved if plaintiff can demonstrate that defendant spoke with 'malice'" (*Id.*). Further, there are two applicable standards of malice, "common-law" malice, and "constitutional" malice (*Id.* at 437-438).

Under the common-law malice standard, malice means spite or ill will that is referable not to defendant's general feelings about plaintiff, but to the speaker's motivation for making the defamatory statements (*Id.* at 439). "Thus, a triable issue is raised only if a jury could reasonably conclude that malice was the one and only cause for the publication" (*Id.*). "Suspicion, surmise and accusation are not enough ... [and] [t]he existence of earlier disputes between the parties is

not evidence of malice" (*Shapiro v Health Ins. Plan of Greater New York*, 7 NY2d 56, 64 [1959]). However, in certain circumstances, common law malice may be inferred where plaintiff alleges the defamatory statements were made as part of a campaign of harassment undertaken to retaliate for plaintiff's whistle-blowing activities (*Pezhman v New York*, 29 Ad3d 164 [1st Dept 2006]; *but see O'Neill v New York University*, 97 AD3d 199 [1st Dept 2012] [conclusory allegations insufficient to overcome qualified privilege]).

Under the so-called "constitutional" standard set forth in *New York Times Co. v Sullivan*, 376 US 254, 286 (1964), a statement is malicious when the speaker exhibits reckless disregard to whether or not the statements are false (*see Liberman*, 80 NY2d at 438). In order to demonstrate constitutional malice, the plaintiff must show that the 'statements [were] made with [a] high degree of awareness of their probable falsity" (*Liberman*, 80 NY2d at 438, citing *Garrison v Louisiana*, 379 US 64 [1964]). "Where it is evident that the speaker took care to provide a factual basis for his allegations, the fact that he felt strongly about the subject is simply irrelevant to the constitutional question of malice" (*Moore v Dormin*, 252 AD2d 421, 422 [1st Dept 1998]). Further, "there is a critical difference between not knowing whether something is true and being highly aware that it is probably false. Only the latter establishes reckless disregard in a defamation action" (*Liberman*, 80 NY2d at 438). "To cross the constitutional threshold of actual malice, there must be clear and convincing evidence ... that the author in fact entertained serious doubts as to the truth of his publication or acted with a high degree of awareness of ... probable falsity" (*Kipper v NYP Holdings Co.*, 12 NY3d 348, 354 [2009]).

Here, Defendants Harris and St. John's are correct that Harris and the council shared a common interest (*see e.g. Loughry*, 67 NY2d at 376 [1986]; *Stuklis*, 42 NY2d at 288 [1977]). That interest is the well-being of St. John's and it is shared by all members of the council, voting and non-voting alike, as a matter of law (*see e.g. Kantor v Pavelchak*, 134 AD2d 352 [2d Dept 1987] [applying the common interest privilege to members of a church council]). The burden now shift to Plaintiff, who must demonstrate that Harris spoke with "malice," in order for the qualified privilege to no longer shield the statement from litigation (*Park Knoll Assocs. v Schmidt*, 59 NY2d 205 [1983]).

As to common-law malice, Defendants have established their entitlement to summary judgment. First, Plaintiffs offer only conclusory allegations that Harris acted out of malice, and further offer evidence that Harris acted out of economic self-preservation (Plaintiffs' Mem. Opp. at 18-19). Additionally, Plaintiffs offer evidence that Glazier testified that his relationship with Harris was "excellent" (Glazier Tr. at 146:25-147:10), and that "he received nothing but praise from [Harris]" (*Id.* at 148:18-149:6). Indeed, Plaintiffs' relevant evidence that Harris made the statements exclusively out of malice were that Reid had allegedly conducted investigations into Harris' charity work (Reid Tr. at 195:14-197:2), that Reid and Glazier were a "threat" to Harris because of the power they held over parishioners (*Id.* at 197:21-198:9), that Reid had questioned the compensation package Harris asked for (Reid Aff. at ¶¶ 60, 64). Not only are the allegations of malice conclusory, but by the Plaintiffs' own argument, Harris made the statements for the purpose of "not having the budget meeting reconvened and thus risk having his compensation

package disapproved." Thus, Plaintiffs argue that Harris acted, at least partially, out of self-preservation. Therefore, common-law malice could not have been the one and only cause for the publication and Plaintiffs have failed to create a triable issue of fact.

As to "constitutional" malice, Plaintiffs offer evidence, sufficient to create a triable issue of fact, that Harris made the statements with a high degree of awareness of their probable falsity. Plaintiffs offer Harris' testimony that he visited Ms. Jaffe with Wesley to discuss her Will and that she voiced her concerns about Plaintiffs (Harris Tr. at 130:23-131:3). Harris stated that his and Wesley's visit took place "at her home ... on Bleecker Street" (*Id.* at 132:4-6) between May 17, 2009 and June 6, 2009 (*Id.* at 131:4-19). Harris testified that he knew that it happened after May 17, 2009, because there was a church council meeting that day and he had not met with Ms. Jaffe prior to that church council meeting (*Id.*). Harris also testified that the meeting took place before June 6, 2009, the day of the church council meeting that resulted in the vote to terminate Plaintiffs (*Id.* at 139:19-21). Harris further testified that he asked Wesley to accompany him on this particular visit because he wanted a witness to the conversation with Ms. Jaffe (*Id.* at 134:6-14).

Harris testified that at the executive session, he told the members that "[r]ecently, Pastor Wesley and I visited Lilli Jaffe and we saw her Will" (*Id.* at 193:4-9), and that based on the information he gave to the Council about Plaintiffs being beneficiaries of Ms. Jaffe's Will, there was a vote to dismiss Plaintiffs (*Id.* at 193:10-14). This is corroborated by affidavits, submitted by Plaintiffs, from two church council members present at the June 6, 2009 executive session, Steve Smith and Craig Snoke. Both Mr. Smith and Mr. Snoke testify that at the June 6, 2009 executive session, Harris stated that he had visited Ms. Jaffe with Wesley and "he had seen papers showing that Ms. Jaffe intended to leave ... her Estate, which according to Pastor Harris, consisted of over a million dollars, to St. John's Church." (Smith Aff. at ¶ 8; Snoke Aff. at ¶ 8).

Crucially however, both Plaintiffs testify that Ms. Jaffe did not live in New York during the period dating May 17, 2009 to June 6, 2009. Plaintiffs testify that Ms. Jaffe was, on April 29, 2006, transferred by ambulance from St. Vincent's Hospital to an assisted living facility in Rock Hill, Connecticut, where she remained until she died in 2012 (Reid Aff. at ¶ 32; Glazier Aff. at ¶ 44). This is corroborated by an email submitted by Plaintiffs dated May 4, 2009, from Amy Silva, Executive Director of The Atrium at Rocky Hill, to Plaintiff Reid referencing "Lilli," and her condition at the "Benchmark Senior Living Community" in Rocky Hill, Connecticut (Plaintiff's Ex. R). If true, the meeting could not have taken place as Harris testified, and the factual basis for the statements made by Harris could not have been true. Therefore, Plaintiffs have established the existence of a triable issue of fact as to whether Harris acted with a high degree of awareness of the probable falsity of his statements, and the motion must be denied.

IV. Sisk and the Diocese's Motion for Summary Judgment

The court now turns to Defendants Sisk and the Diocese's motion, by way of order to show cause, for summary judgment. Plaintiffs allege liability with regard to Sisk and the Diocese

under the theory of respondeat superior. As a matter of law this Court finds Sisk and the Diocese cannot be held liable for Harris' actions under a theory of respondeat superior.

To invoke liability under respondeat superior, "[p]laintiff has the burden of establishing by a fair preponderance of the credible evidence that the act complained of occurred while [the defendant ...] was acting within the scope of his [or her] employment." (*Hacker v City of New York*, 26 AD2d 400, 402 [1st Dept 1966] aff'd, 20 NY2d 722 [1967]). Further, "[r]espondeat superior cannot exist without a present employer-employee relationship" (*K.I. v New York City of Bd. of Educ.*, 256 AD2d 189, 191 [1st Dept 1998]). "Under [the] doctrine [of respondeat superior], plaintiff must, as a threshold requirement, demonstrate that there either is or was an existing employer/employee relationship at the time of the alleged wrongful conduct" (*Schlesinger v Pitney Bowes, Inc.*, 187 Misc 2d 298, 300, 2001 NY Slip Op 21103 [Sup Ct, NY County 2001]). Further, liability under respondeat superior can only extend to a parent organization where the parent "participated in the unlawful activity or exercised day-to-day 'control over the employee's conduct and the incidents of his employment' " (*Brady v Calyon Sec. (USA)*, 406 F Supp 2d 307, 319 [SDNY 2005]). "The determination of whether an employer-employee relationship exists turns on whether the alleged employer exercises control over the results produced, or the means used to achieve the results. Control over the means is the more important consideration" (*Abouzeid v Grgas*, 295 AD2d 376, 377 [2nd Dept 2002]; *see Rivera v Fenix Car Serv. Corp.*, 81 AD3d 624, 624 [2nd Dept 2011]; *Chuchuca v Chuchuca*, 67 AD3d 948, 950 [2nd Dept 2009]).

Additionally, while such a determination is usually a factual issue best suited for a jury, where there is no conflict in the evidence, the question may properly be determined by the court as a matter of law (*Melbourne v New York Life Ins. Co.*, 271 AD2d 64, 66 [1st Dept 2000]). Here, the record demonstrates that Sisk and the Diocese did not have the requisite control. It is undisputed that Harris negotiated his salary and benefits package directly with St. John's and that St. John's subsequently paid Harris' salary and benefits (Plaintiffs' Mem. Opp. at 6). The checks issued to Harris bore the name "Saint John's Lutheran Church" (Harris Tr. at 53:20) and were signed by Lud Mayleas, St. John's treasurer, and either Violet Guerrier, secretary of the church council, or Susan Crowson, her successor – all employees of St. John's (*Id.* at 252:10-253:22). Harris was given instructions on how to perform his job on a day-to-day basis in his term call contract that he entered into directly with St. John's via negotiations with the church council (*Id.* at 251:3-11). It is also undisputed that Harris did not need permission from Sisk or the Diocese in order to fire church employees, but was permitted to do so in conjunction with the church council (Plaintiffs' Mem. Opp. at 11).

Harris testified that in order to become the vacancy pastor at St. John's, the church council made a "requisition to [Sisk, of the Diocese, and Bishop Bowman, Rimbo's predecessor, of the Synod] to seek their approval" (Harris Tr. at 49:6-50:3). Harris further testified that as St. John's pastor, he attended "annual meetings of the [S]ynod rather that the [D]iocese, because [he] was serving the Lutheran church" (*Id.* at 232:24-233:3). Neither Sisk, nor the Diocese, were involved in the day-to-day activities of St. John's (*Id.* at 247:10-17). Similarly, neither Sisk, nor

the Diocese, were involved in Harris' daily job duties (*Id.* at 247:18-25). Additionally, there is nothing in the record to suggest Sisk and the Diocese could exert control over St. John's, beyond the Diocese's approval or disapproval of pastoral "calls." It is also undisputed that neither Sisk nor the Diocese participated in, or approved of Harris' statements. Plaintiffs offer evidence that Sisk and the Diocese had to sign off on Harris' assignment to St. John's as evidence that Sisk and the Diocese had control over Harris. But such approval is more synonymous with the retention of general supervisory powers over Harris, which cannot form the basis for the imposition of liability against Sisk and the Diocese (*Melbourne*, 271 AD2d at 297 [internal citations omitted]).

Further, while Harris testified that only Sisk could "defrock" him (Harris Tr. at 233:9-11), this is better characterized as a religious ceremony and is not definitive of Harris' employment relationship with Sisk and the Diocese while he was employed by St. John's (*See Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 162 [1997]). The record demonstrates there is insufficient control by Sisk and the Diocese to raise a triable issue of fact as to whether Sisk and the Diocese can be liable under the theory of respondeat superior. There is no evidence that Sisk or the Diocese, other than signing off on Harris' "Term Call," had anything to do with Harris' work performance at St. John's. Additionally, this motion is not premature because Plaintiffs have failed to show that discovery is necessary to oppose Sisk and the Diocese's motion (*Fulton v Allstate Ins. Co.*, 14 AD3d 380, 381 [1st Dept 2005]). Therefore, summary judgment is granted in favor of Defendants Sisk and Diocese.

V. Rimbo and the Synod's Cross-Motion for Summary Judgment

Lastly, Defendants Rimbo and the Synod cross-move, pursuant to CPLR § 3212, for an order granting summary judgment against Plaintiffs on multiple grounds. First, that the alleged statements are shielded by the common interest privilege, and that Plaintiffs have failed to raise a triable issue of fact as to whether there was malice sufficient to overcome the common interest privilege. Second, that the alleged statements are non-actionable statements of opinion, and that Plaintiffs failed to sufficiently plead defamation because Plaintiffs did not plead the exact words in compliance with CPLR § 3106. And third, that Defendants Rimbo and the Synod cannot be liable under a theory of respondeat superior, or in the alternative, that the alleged statements were made outside the scope of Harris' employment.

A. Common Interest Privilege

As an initial matter, Rimbo and the Synod's motion for summary judgment on the grounds that Plaintiffs failed to raise a triable issue of fact as to whether there was malice sufficient to overcome the common interest privilege is denied pursuant to the analysis regarding Harris and St. John's motion on the same grounds.

B. Failure to Properly Plead Defamation

Further, Rimbo and the Synod's motion for summary judgment on the grounds that

Plaintiffs failed to properly plead defamation because a) the alleged words are non-actionable statements of opinion and b) Plaintiff did not plead the exact words in compliance with CPLR § 3106, are both denied. Both issues were properly raised on the motion to dismiss, and both were decided (*see Glazier v Harris*, 99 AD3d 403, 404 [1st Dept 2012] ["The complaint states a cause of action for defamation as against defendants Harris and St. John's Lutheran Church since it is pleaded with the required specificity, identifying the particular words that were said, who said them and who heard them, when the speaker said them, and where the words were spoken. That every alleged defamatory statement set forth in the complaint is not enclosed in quotation marks does not, without more, render the complaint defective. The challenged statements are actionable as mixed opinions, since they imply that the opinions are based upon facts unknown to the church council members who heard the statements. In the context of the entire publication, the unmistakable import of Harris's statements is that plaintiffs engaged in inappropriate conduct, essentially amounting to exerting undue influence over a parishioner and stealing from the church, and accordingly cannot be trusted"] [internal citations omitted]).

As previously mentioned, "[t]he doctrine of law of the case is inapplicable 'where ... a summary judgment motion follows a motion to dismiss' " (*Friedman v Connecticut Gen. Life Ins. Co.*, 30 AD3d 349, 349 [1st Dept 2006] citing *Riddick v City of New York*, 4 AD3d 242, 245 [1st Dept 2004]), because the scope of review on the two motions usually differs. Specifically, "a motion to dismiss under CPLR § 3211 (a) (7) for failure to state a cause of action addresses merely the sufficiency of the pleadings, [and] is distinct from a motion for summary judgment pursuant to CPLR § 3212, which searches the record and looks to the sufficiency of the underlying evidence" (*Tenzer, Greenblatt, Fallon & Kaplan v Capri Jewelry, Inc.*, 128 AD2d 467, 469 [1987]). Thus, while the law of the case doctrine is generally inapplicable where a motion for summary judgment follows a motion to dismiss, the law of the case doctrine would apply, and thus would bar relitigation of issues challenged under CPLR § 3212, where the identical issues were decided under CPLR § 3211, where the Court is making a determination of law, such as the sufficiency of the pleadings (*see e.g. GG Managers, Inc. v Fidata Trust Co. New York*, 215 AD2d 241, 241[1st Dept 1995] [barring relitigation of denial of CPLR § 3211 motion to dismiss for statute of limitations grounds under a subsequent CPLR § 3212 summary judgment motion]). Thus, where a court has made a determination of law under a motion to dismiss, such determinations may not be relitigated under a motion for summary judgment, which seeks to identify issues of fact for trial (*Id.*).

Presently, Rimbo and the Synod argue that the alleged words are non-actionable statements of opinion. "Whether a statement is one of fact or opinion is a question of law for the court, and depends upon whether a reasonable reader or listener would understand the complained-of assertions as opinion or statements of fact" (*Millus v Newsday*, 89 NY2d 840, 842 [1996], *cert. den.* 520 US 1144 [1997]). A determination of law was already made in this case that the alleged statements were actionable as "mixed opinions, since they imply that the opinions are based upon facts unknown to the church council members who heard the statements" (*Glazier*, 99 AD3d at 404). Similarly, Rimbo and the Synod challenge the sufficiency of the pleadings, arguing that Plaintiffs failed to properly plead the exact words.

However, a determination of law was made on this issue at the motion to dismiss stage (*Id.* ["That every alleged defamatory statement set forth in the complaint is not enclosed in quotation marks does not, without more, render the complaint defective."]). Thus, the law of the case doctrine governs because a determination of law was made as to the sufficiency of the pleadings.

C. Respondeat Superior

Finally, Rimbo and the Synod move for Summary Judgment on the grounds that they cannot be liable under a theory of respondeat superior, and in the alternative that the alleged statements were not in furtherance of Harris' employment. New York Courts have not foreclosed liability on a Religious Diocese based on respondeat superior for actions committed by a member church's employees, as long as the act in question was committed in furtherance of their employment (*see Robinson v Downs*, 39 AD3d 1250, 1252 [4th Dept 2007] [denying defendant Diocese's summary judgment where Diocese had failed to establish that a church volunteer was not their employee for the purposes of liability under respondeat superior]; *Wadsworth v Beaudet*, 267 AD2d 727, 730 [3d Dept 1999] [concluding, on a motion to dismiss, that the allegations of the complaint stated a valid cause of action for vicarious liability against the Diocese based upon respondeat superior for actions committed by a church pastor]). Liability under respondeat superior can only extend to a parent organization where the parent "participated in the unlawful activity or exercised day-to-day 'control over the employee's conduct and the incidents of his employment' " (*Brady v Calyon Sec. (USA)*, 406 F Supp 2d 307, 319 [SDNY 2005]). "The determination of whether an employer-employee relationship exists turns on whether the alleged employer exercises control over the results produced, or the means used to achieve the results. Control over the means is the more important consideration" (*Abouzeid v Grgas*, 295 AD2d 376, 377 [2nd Dept 2002]; *see Rivera v Fenix Car Serv. Corp.*, 81 AD3d 624, 624 [2nd Dept 2011]; *Chuchuca v Chuchuca*, 67 AD3d 948, 950 [2nd Dept 2009]). Thus, respondeat superior is inapplicable where a superior does not retain sufficient control over the actions of the agent (Restatement [Third] Of Agency § 7.07[3][a] [2006]).

Defendants argue that Plaintiff has not met the threshold demonstrating an "existing employer/employee relationship at the time of the alleged wrongful conduct" between Harris and the Synod, because neither Rimbo nor the Synod had sufficient control over Harris. Plaintiffs, in opposition, offer Harris' testimony on the issue of control.

Here, the record demonstrates that Rimbo and the Synod do not have the requisite control in order to be held vicariously liable under respondeat superior. While Harris testified that he reported to Rimbo (Harris Tr. at 51:23-24; 232:11-15), he further testified that he only met with Rimbo "two times, maybe three times" a year while he was the pastor at St. John's (*Id.* at 239:3), and that he called Rimbo "[t]hree or four times a year" (*Id.* at 239:8). Further, neither Rimbo, nor the Synod, were involved in Harris' day-to-day activities at St. John's (*Id.* at 264:22-265:5). Further, as mentioned above, it is undisputed that Harris negotiated his salary and benefits package directly with St. John's and that St. John's subsequently paid Harris' salary and benefits (Plaintiffs' Mem. Opp. at 6). The checks issued to Harris bore the name "Saint John's Lutheran

Church" (Harris Tr. at 53:20) and were signed by Lud Mayleas, St. John's treasurer, and either Violet Guerrier, secretary of the church council, or Susan Crowson, her successor – all employees of St. John's (*Id.* at 252:10-253:22). Harris was given instructions on how to perform his job on a day-to-day basis in his term call contract that he entered into directly with St. John's via negotiations with the church council (*Id.* at 251:3-11). It is also undisputed that Harris did not need permission from Sisk or the Diocese in order to fire church employees, but was permitted to do so in conjunction with the church council (Plaintiffs' Mem. Opp. at 11).

Further, Harris' testimony that Rimbo reviewed a dossier regarding Plaintiffs' dismissal with Harris (*Id.* at 233:13-24), that as St. John's pastor, he attended "annual meetings of the [S]ynod rather that the [D]iocese, because [he] was serving the Lutheran church" (*Id.* at 232:24-233:3), and Rimbo did ultimately fire Harris from St. John's (*Id.* at 255:20-22), is insufficient to create a triable issue of fact, and it is hereby

ORDERED that Defendants Sisk and the Diocese's motion for summary judgment is granted and the complaint against them is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that Defendants Rimbo and the Synod's cross-motion for summary judgment is granted and the complaint against them is dismissed; and it is further

ORDERED that Defendants Harris and St. John's motion for summary judgment is granted with respect to the application of common-law malice, and denied as to all other aspects; and it is further

ORDERED that the caption is to be amended to reflect the above dismissals, and should read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10
--X

WILLIAM GLAZIER and GEORGE REID,

Plaintiffs, Index No. 103482-2010

-against-

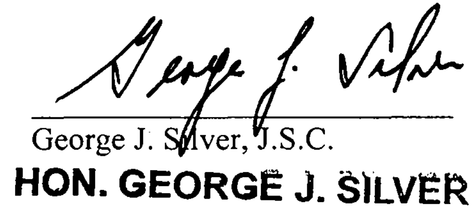
LYNDON HARRIS and ST JOHN'S LUTHERAN CHURCH

Defendants.
--X

And it is further

ORDERED that the remaining parties are to appear for a status conference on August 2, 2016 at 9:30 a.m. at Part 32, Room 308, 80 Centre St. New York, NY 10007; and it is further

ORDERED that Defendants Sisk and the Diocese are to serve a copy of this order, with notice of entry, upon all parties within 20 days of entry.



George J. Silver, J.S.C.

HON. GEORGE J. SILVER

Dated: 6/17/16
New York County