Conklin v Laxen
2018 NY Slip Op 33693(U)
July 23, 2018
Supreme Court, Onondaga County
Docket Number: Index No. 2017EF3210
Judge: Deborah H. Karalunas

DEBORAH H. KARALUNAS
JUSTICE

Supreme Court Chambers
ONONDAGA COUNTY COURTHOUSE
401 MONTGOMERY STREET, SUITE 401
SYRACUSE, NY 13202
(315) 671-1106
FAX (315) 671-1184

SANDRA J. SABOURIN
PRINCIPAL LAW CLERK

JANICE L. KORZYP
SECRETARY

July 23, 2018

Joseph S. Cote III, Esq.
COTE & VANDYKE LLP
214 North State Street
Syracuse, New York 13202

Robert J. Thorpe, Esq.
BARCLAY DAMON LLP
125 East Jefferson Street
Syracuse, New York 13202

LETTER DECISION

Re: Kerrin Conklin v. Stacy Laxen, DVM et al.
Index No.: 2017EF3210; RJI No.: 33-18-0276

Kerrin Conklin v. CNYSPCA et al.
Index No.: 006654/2017; RJI No.: 33-18-0269

Dear Counselors:

This constitutes the court's decision regarding defendants' motions to dismiss in the two above referenced actions.

Background

On January 19, 2017, Plaintiff Kerrin Conklin ("Conklin") began her job as Executive Director of Central New York Society for the Prevention of Cruelty to Animals ("CNYSPCA"). Compl. ¶¶ 139, 151-152.[1] That same day, Conklin executed an employment agreement for a two-year term. Id. ¶ 152. The employment agreement included a six-month probationary period, during which time "the Central New York SPCA may, in its absolute discretion, terminate employee's employment, for any reason without notice or cause." Id. ¶ 155 and Exh. E p. 2.

[1] Citations to "Compl. ¶__" are to allegations in the complaint in the Conklin v. Laxen action ("Action 1). Citations to "Compl2 ¶ __" are to the allegations in the complaint in the Conklin v. CNYSPCA action ("Action 2").

Sometime in May 2017 defendant Stacy Laxen, DVM ("Dr. Laxen"), the CNYSPCA vet center manager, used a wood lamp to tentatively diagnose a cat with ringworm; a culture was taken and sent to the lab to confirm the diagnosis. Id. ¶¶ 520, 529-532. Before the culture was returned from the lab the cat was placed back in "Mitzi's Room" allegedly exposing all other cats in that room to the contagious fungal infection. Id. ¶¶ 533-534. Plantiff alleges that within three to four days, several other cats in Mitzi's room began to show signs of the infection. Id. ¶ 537. The original cat's culture confirmed the diagnosis of ringworm. Id. ¶ 538.

On May 17, 2017, three CNYSPCA staff members and a volunteer expressed concerns to Conklin about the infection spreading and recommended euthanizing the cats before the outbreak spread to the point it could not be contained. Id. ¶¶ 543-550, 557, 563-566. That same day, based on the advice of the CNYSPCA staff and volunteer, not including Dr. Laxen, Conklin decided to euthanize all the cats in Mitzi's Room. Id. ¶ 576. Fifteen cats were euthanized on May 17, 2017, a decision with which Dr. Laxen did not agree. Id. ¶¶ 583 and 886.

Following a meeting of the CNYSPCA Board on May 25, 2017, Conklin was terminated. Id. ¶ 854. She was "officially advised of her termination via phone on May 31, 2017. . . [and] [l]ater in the week Conklin received a termination letter stating she was terminated on May 25, 2017 for failing to satisfy her duties as the Executive Director." Id. ¶¶ 924-925, Exh. BB.

By summons and verified complaint filed July 31, 2017, Conklin sued defendants Dr. Laxen and the "Board of Directors of the Central New Society for the Prevention of Cruelty to Animals, individually and as Agents and Servants, of, and doing business as the Central New York Society for the Prevention of Cruelty to Animals" ("the CNYSPCA Board") in four causes of action. More specifically, in the 1061 paragraph, 143 page complaint in Action 1, Conklin asserts claims for:

(1) tortious interference with employment relationship against Dr. Laxen;

(2) defamation against Dr. Laxen and the CNYSPCA Board;

(3) intentional infliction of emotional harm against Dr. Laxen and the CNYSPCA Board; and

(4) breach of contract against the CNYSPCA Board.

Conklin also seeks punitive damages against Dr. Laxen.

On November 22, 2017, plaintiff filed a second complaint arising from her termination. In Action 2, Conklin names as defendants the Central New York Society for the Prevention of Cruelty to Animals ("CNYSPCA"), Nicholas J. Pirro, Monica Williams, Nicholas Jacobson, individually and as a member of the Board of Directors of the CNYSPCA, and DeeAnn Schaeffer, individually and as an employee of the CNYSPCA. The complaint references and improperly purports to incorporate plaintiff's 1061 paragraph complaint from Action 1 into the Action 2 complaint. In the 184 paragraphs of the complaint in Action 2, plaintiff asserts claims for:

(1) defamation against CNYSPCA;[2]

(2) intentional infliction of emotional harm against CNYSPCA;[3] and

(3) breach of contract against CNYSPCA.

Defendants move pre-answer to dismiss plaintiff's complaint in Action 1 pursuant to CPLR 3211(a)(1), (7), (10) and (11) or, in the alternative, to strike all scandalous and prejudicial matter unnecessarily inserted in the complaint pursuant to CPLR 3024(b). Defendants also move pre-answer to dismiss plaintiff's complaint in Action 2 pursuant to CPLR 3211(a)(1), (4), (7) and (11) or, in the alternative, to strike all scandalous and prejudicial matter unnecessarily inserted in the complaint pursuant to CPLR 3024(b).

Plaintiff opposed the motion in Action 1 with an untimely, unsigned and unnotarized affidavit of Conklin.[4] This court exercises its discretion not to consider Conklin's affidavit since it is not in admissible form and no excuse was provided for its untimeliness. See, CPLR 2214(c); Gagnon v. St. Joseph's Hosp., 90 A.D.3d 1605, 1607 (4th Dep't 2011); see also Payne v. Buffalo Gen. Hosp., 96 A.D.3d 1628, 1629 (4th Dep't 2012)(while court has discretion to accept late papers, CPLR 2214 and 2004 mandate the delinquent party offer a valid excuse for the delay); Mallards Dairy, LLC v. ESM Engrs. & Surveyors, PC, 71 A.D.3d 1415, 1416 (2010)(same); Risucci v. Zeal Mgmt. Corp., 258 A.D.2d 512 (3d Dep't 1999). In Action 2, plaintiff did not submit any papers in opposition to the motion. Nonetheless, plaintiff's failures in both cases does not absolve defendants from having to meet their burden of proof on these motions to dismiss.

As a preliminary matter, at oral argument Conklin's counsel conceded that in Action 1 defendant CNYSPCA Board is not a proper defendant, and plaintiff consented to dismissal of that complaint against all parties except Dr. Laxen. In addition, plaintiff's counsel consented to dismissal of the complaint in Action 2 against defendant Nicholas Jacobson.

Dismissal pursuant to CPLR 3211(a)(4) and CPLR 3211(a)(10)

A Court may dismiss one or more causes of action because "the court should not proceed in the absence of a person who should be a party." CPLR 3211(a)(10). Defendant argues that the complaint in Action 1 should be dismissed because CNYSPCA is an unnamed, indispensable party. However, CNYSPCA is a named defendant in Action 2, and consolidation under CPLR 602(a) would remedy plaintiff's deficit in Action 1.

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[2] The complaint lists "Cause of Action Defamation as Against CNYSPCA," however, the *ad damnum* clause seeks damages for defamation against also defendants Pirro, Williams and Shaeffer.

[3] The complaint lists "Cause of Action Intentional Infliction of Emotional Harm as Against Defendant CNYSPCA," however, the *ad damnum* clause seeks damages for infliction of emotional pain against also defendants Pirro, Williams and Shaeffer.

[4] Neither the e-filed affidavit nor the hard copy provided to court in support of this motion were signed by Ms. Conklin or properly notarized.

"The traditional purpose of a motion under CPLR 3211(a)(4) is to prevent a person from being harassed and annoyed by unnecessary actions seeking the same, or substantially the same, relief and growing out of the same subject matter." Phelps v. Phelps, 84 A.D.2d 911, 912 (4th Dep't 1981). While Action 1 and Action 2 seek substantially the same relief, and both grow out of Conklin's termination, dismissal on CPLR 3211(a)(4) grounds is not appropriate when, as here, the actions do not share an identity of parties. Based on plaintiff's concessions at oral argument, the only defendant in Action 1 now is Dr. Laxen, and the remaining defendants in Action 2 are CNYSPCA, Nicholas J. Pirro, Monica Williams, and DeeAnn Schaeffer. Under these facts, consolidation rather than dismissal would be the appropriate remedy. Henry v. Solomon & Solomon, P.C., 203 A.D.2d 791, 792 (3d Dep't 1994); MLF3 Airtran LLC v. 2338 Second Ave. Mazal LLC, 55 Misc.3d 241, 245-46 (New York Co. 2016). Accordingly, the Court DENIES defendants' motions to dismiss pursuant to CPLR 3211(a)(4) and (10).

Dismissal pursuant to CPLR 3211(a)(1), 3211(a)(7) and CPLR 3211(a)(11)

In the context of a CPLR 3211 motion to dismiss, the court must afford the pleading "a liberal construction" and "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). However, in assessing a CPLR 3211 motion, "bare legal conclusions and factual claims that are flatly contradicted by the evidence are not presumed to be true." Matter of Niagara Cty. v. Power Auth. of New York, 82 A.D.3d 1597, 1600 (4th Dep't 2011); see also Liberty Affordable Hous. Inc. v. Maple Ct. Apts., 125 A.D.3d 85 (4th Dep't 2015); Younis v. Martin, 60 A.D.3d 1373 (4th Dep't 2007); Olszewki v. Waters of Orchard Park, 303 A.D.2d 995 (4th Dep't 2003).

Under CPLR 3211(a)(1), dismissal is warranted "where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." Goshen v. Mut. Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); see also, Divito v. Meegan, 156 A.D.3d 1408, 1410 (4th Dep't 2017). CPLR 3211(a)(7) authorizes dismissal when the "pleading fails to state a cause of action," but "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." Leon, 84 N.Y.2d at 88.

Breach of contract

Conklin alleges defendant CNYSPCA breached her employment contract by improperly terminating her without just cause. However, the terms of the employment contract on which Conklin relies belie her claim.

Conklin's employment contract explicitly states "the first six (6) months of employment shall constitute a probationary period during which [CNYSPCA] may, in its absolute discretion, terminate employee's employment." There is no dispute Conklin was hired on January 19, 2017 and terminated on May 25, 2017, prior to the expiration of her probationary period. As such, she was an at-will employee subject to termination for any nondiscriminatory reason, or for no reason at all.

> New York law is clear that 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. Thus, either the employer or the employee generally may terminate the at-will employment for any reason, or for no reason. . . . [W]e have repeatedly refused to recognize exceptions to, or pathways around, these principles.

Smalley v. Dreyfus, 10 N.Y.3d 55, 58 (2008)(citations omitted).

Conklin attempts to circumvent this well settled law by arguing she was not terminated in accordance with the terms of CNYSPCA's bylaws because the Board voted to terminate her by ballot vote rather than voice vote. However, the Board's alleged non-compliance with its bylaws is not Conklin's argument to make. See e.g, Mason v. Cent. Suffolk Hosp., 3 N.Y.3d 343, 349 (2004); Maas v. Cornell Univ., 94 N.Y.2d 87, 93 (1999).

Accordingly, even accepting Conklin's allegations as true, she fails to state a cause of action for breach of her employment contract.

Tortious interference with employment relationship

Plaintiff asserts a tortious interference claim against Dr. Laxen. Specifically Conklin alleges Dr. Laxen tortiously interfered with Conklin's employment relationship with CNYSPCA. Conklin's tortious interference claim fails for several reasons.

First, absent breach of an existing contract, there can be no cause of action for tortious interference with that contract. Williams v. Cty. of Genesee, 306 A.D.2d 865, 868 (4th Dep't 2003); see also, Israel v. Wood Dolson Co., 1 N.Y.2d 116 (1956). As previously stated, plaintiff does not have a cause of action for breach of contract.

Second, a cause of action for tortious interference with an employment relationship cannot lie against a co-employee or agent of the employer, absent a showing the individual acted outside the scope of his or her authority. Ray v. Franchini, 133 A.D.3d 1235 (4th Dep't 2015); Miller v. Richman, 184 A.D.2d 191, 194 (4th Dep't 1992). "Conclusory allegations of malice, without more, are insufficient to place a defendant's actions outside the scope of their employment." Ray v. Franchini, 2014 N.Y. Slip Op 33929(U) **15 (Sup. Ct., Oneida County 2014), aff'd 133 A.D.3d 1235 (2015). When as here, Conklin does not even allege Dr. Laxen was acting outside the scope of her employment, plaintiff's cause of action for tortious interference with employment relationship necessarily fails. Miller, 184 A.D.2d at 194.

Defamation

To state a claim for defamation under New York law, a plaintiff must allege 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." Arcadia Site Contracting, Inc. v. Skuka, 129 A.D.3d 1453 (4th Dep't 2015). Moreover, the pleading must set forth "the particular words complained of and must state the time, place and manner of the allegedly false statements and to whom such statements were made." Nesathurai v. Univ. of Buffalo, 23 A.D.3d 1070, 1072 (4th Dep't 2005). See also CPLR §3016(a).

To determine the sufficiency of a defamation pleading, the court considers "whether the contested statements are reasonably susceptible of a defamatory connotation." Davis v. Boeheim, 24 N.Y.3d 262, 268 (2014). Because "falsity is a necessary element of a defamation cause of action and only 'facts' are capable of being proven false, only statements alleging facts can properly be the subject of a defamation action." Id. In contrast, pure opinion is not actionable because "expressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation." Id. at 269. See also, Mann v. Abel, 10 N.Y.3d 271, 276 (2008). The issue of whether a statement constitutes fact or opinion "is a question of law" to be resolved by the court. Davis, 24 N.Y.3d at 269; Mann, 10 N.Y.3d at 276; Boulos v. Newman, 302 A.D.2d 932 (4th Dep't 2003); Miller, 184 A.D.2d at 193.

To determine whether a statement is fact or opinion, New York courts apply a three-factor test:

> (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proved true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact.

Boulos v. Newman, 302 A.D.2d at 932.

As the Davis court noted:

> The third factor lends both depth and difficulty to the analysis, and requires that the court consider the content of the communication as a whole, its tone and apparent purpose. . . . Rather than sifting through a communication for the purpose of isolating and identifying assertions of fact, the court should look to the over-all context in which the assertions were made and determine on that basis whether the reasonable reader would have believed that the challenged statements were conveying facts about the plaintiff.

Davis, 24 N.Y.3d at 270. See also, Mann v. Abel, 10 N.Y.3d 271, 276 (2008).

A. Statements of Alleged Defamation

Plaintiff challenges as defamatory the following statements allegedly made by Nicholas Pirro and Nicholas Jacobson:

(1) Conklin violated the CNYSPCA's euthanasia policy;
(2) Conklin violated the mission of the CNYSPCA by not consulting the veterinarian;
(3) Conklin was terminated for the "unlicensed use of narcotics" euthanizing the cats;
(4) Conklin's actions put the veterinarian's license at risk;
(5) Conklin violated state law in euthanizing the cats;
(6) Conklin directed people who were not authorized or certified to euthanize the cats;
(7) Conklin euthanized healthy animals; and
(8) Conklin forced staff to perform the euthanasia against their will for fear of losing their jobs.

Compl2 ¶¶ 67, 76.

Noteworthy, Conklin maintains that Pirro made these statements "as an agent and spokesperson for the SPCA." Compl2 ¶ 65; see also, Compl. ¶5 (at all relevant times Nicholas Pirro was a member of the CNYSPCA Board); Compl2 ¶ 5 (same). Second, at oral argument, Conklin's attorney withdrew the complaint against Jacobson stating: "because on further reflection we look at his statements and they do not, in my mind, meet the definition of defamation." Finally, with one exception, [5] Conklin does not state the time or place or to whom these statements were allegedly made, although she states they were made "after the Board of Directors met on May 31, 2017." Compl2 ¶ 166.

Additional defamatory statements Conklin attributes to Pirro are:

(1) a June 6, 2017 statement to the Eagle News: the CNYSPCA had a euthanasia policy in place, at the time of Conklin's termination, which "requires three people, including a veterinarian, to sign off on euthanizations;"
(2) CNYSPCA had a policy that "no adoptable animal should be put down and when euthanasia is necessary, the final decision is supposed to be made by the veterinarian;"
(3) a June 1, 2017 statement released to the media: one of the reasons for Conklin's termination was she "approved the euthanasia of several cats, without input from a veterinarian, which the Board determined was directly contrary to their mission;"

[5] At paragraph 138 of the complaint in Action 2, Conklin states that Pirro made the statement regarding "forced staff" to euthanize on May 26, 2017 to a group of volunteers, donors and advocacy groups.

(4) a June 1, 2017 statement to NY Central: another reason for Conklin's termination was "that action involved the unlicensed use of narcotics and put our veterinarian's license at risk;"
(5) a May 26 2017 statement to a group of volunteers, donors and advocacy groups: Conklin was "incompetent" and "didn't know what she was doing;"
(6) Conklin's decision to euthanize the cats "wasn't necessary; it was just totally against the mission of the shelter;" and
(7) a June 6 statement to Eagle News: "How somebody could come in and say I want to head this place and then make a decision to put down healthy animals is beyond me."

Compl2 ¶¶ 95, 98, 99, 106, 137-38, 143, 144; Compl. Exhs. AD, AH, AJ.

As to defendant Monica Williams, also alleged by plaintiff to be a member of the CNYSPCA Board (see Compl. ¶5; Compl2 p5), Conklin makes no specific allegation of defamation. See generally, Compl2. Accordingly, to the extent Conklin purports to assert a cause of action for defamation in Action 2 against Williams, defendants' motion to dismiss is GRANTED.

As to defendant DeeAnn Schaeffer, Conklin maintains that on the Facebook page of the Animal Alliance of Greater Syracuse, Schaeffer posted an alleged colloquy between Conklin and Schaeffer and Schaeffer then posted that Conklin's statements in the colloquy were not true and posted "she broke the damn law." Compl2 ¶ 158.

As to defendant Dr. Laxen, Conklin attributes to her the following allegedly defamatory statements, all made at the May 25, 2017 CNYSPCA Board meeting:

(1) Conklin allowed a cat to remain in distress all night and die alone;
(2) Conklin forced someone to perform the euthanasia;
(3) Conklin yells and screams at everyone;
(4) the entire cruelty department was going to quit because of the way Conklin treated them;
(5) Conklin hates cats; and
(6) Conklin lies all the time.

Compl. ¶¶ 740, 751, 762, 763, 768, 780.

B. Is Conklin a limited purpose public figure?

Defendants argue that a higher level of scrutiny applies to Conklin's alleged defamation claims because, minimally, she is a limited purpose public figure. Whether plaintiff is a public figure or limited purpose public figure is a question of law to be determined by the court. White v. Berkshire-Hathaway, 195 Misc.2d 605, 606 (Erie Co. 2003), aff'd 5 A.D.3d 1083 (4th Dep't 2004).

A limited purpose public figure "is an individual who voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." Id. In determining whether a plaintiff is a limited purpose public figure, courts evaluate whether there was a public controversy that gave rise to the alleged defamation, the nature and extent of the plaintiff's participation in that controversy, and the relation of the alleged defamation to the controversy. Id.; see also, Farber v. Jefferys, 33 Misc.3d 1218(A) (New York Co. 2011).

A public controversy "affects the general public or some segment of it in an appreciable way." White, 195 Misc.2d at 607. Here, allegations of euthanasia of multiple animals in the care of an organization whose mission is to protect animals was a matter of public controversy that affected, at the very least, the many people who donate and/or volunteer services to the CNYSPCA if not the general public. Moreover, Conklin sufficiently participated in the developing controversy both prior to and following issuance of CNYSPCA's press release on June 1, 2017 through media interviews and her own press release, and the alleged defamatory remarks related directly to the controversy. See e.g., Compl. ¶¶ 740, 751, 762, 763, 768, 780, 888-89, 903 and Exhs. AD, AH, AJ, AY; Compl2 ¶¶ 67, 76, 95, 98, 99, 137-38, 143, 144, 147, 158, 166; Michael Benny, *CNYSPCA Director says she's been terminated*, CNYCENTRAL.com (May 30, 2017), http://cnycentralcom/news.local.cny-spca-director-says-shes-been-terminated; *Fired SPCA Director Files Lawsuit Alleging Defamation, Wrongful Termination*, Syracuse.com (July 31, 2017), http://www.syracuse.com/news/index.ssf/2017/01/cny_spca_announces_new_director_new_safe guards_to_prevent_fraud.html; *Ex-CNYSPCA Director Files Defamation Complaint*, CNYCENTRAL.com, http://cnycentral.com/news/local/ex-cny-spca-director-files-defamation-complaint; Kerrin Conklin, *Letter: Conklin Says CNYSPCA Lawsuit 'About the Job and the Animals*," Eagle News Online (August 4, 2017), https://www/eaglenewsonline.com/news/017/08/04/letter-coklin-says-cny-spca-lawsuit-about-the-job-and-the-animals.

On the record presented, this Court finds Conklin is a limited purpose public figure. See e.g., Kipper v. NYP Holdings Co., Inc., 47 A.D.3d 597, 598 (1st Dep't 2008) (doctor who was the subject of article that stated his medical license had been revoked when the Board had only "moved to" revoke his license was considered a public figure); Goldrever v. Dow Jones & Co., 259 A.D.2d 353, 353 (1st Dep't 1999) (an art restorer known within his profession but not outside of it was considered an involuntary limited purpose figure when an article detailing his questionable restoration techniques was published); Curry v. Roman, 217 A.D.2d 314, 319 (4th Dep't 1995)(by seeking media attention, art auctioneer and liquidator became public figures); Park v. Capital Cities Communications, Inc., 181 A.D.2d 192, 197 (4th Dep't 1992) (eye surgeon considered public figure by actively seeking media attention); Cera v. Gannett Co., 47 A.D.2d 797 (4th Dep't 1975) (chiropractors considered public figures following one appearance on a local television broadcast); White, 195 Misc. 2d at 608-09 (real estate developer's involvement in nursing home business rendered him limited purpose public figure).

Even if Conklin were to be considered a private person when, as here, the alleged defamation arises from "a matter of public concern, . . . defendants are answerable in libel only if their conduct is found to be grossly irresponsible." Park, 181 A.D.2d at 197-98; see also, Gaeta v. New York News, Inc., 62 N.Y.2d 340, 345 (1984).

C. Does a qualified privilege protect defendants from liability for the alleged defamatory statements?

New York recognizes a qualified privilege for communications made in connection with an employee's performance and for allegedly defamatory statements made between persons who share a common interest. Vaughn v. Am. Multi Cinema, Inc., 2010 U.S. Dist. LEXIS 96609 * 8 (S.D.N.Y. Sept. 13, 2010). More particularly, "communications by supervisors or co-workers made in connection with the evaluation of an employee's performance, including allegations of employee misconduct and communications regarding the reasons for an employee's discharge, fall within the privilege." Albert v. Loksen, 239 F.3d 256, 272 (2d Cir. 2001); see also, Vaughn v. Am. Multi Cinema, Inc., 2010 U.S. Dist. LEXIS 96609 * 8 (S.D.N.Y. Sept. 13, 2010)(communications by an employer's agents concerning the conduct of a fellow employee protected by privilege); Anas, 269 A.D.2d at 762 (report by professor critical of department chair protected by privilege); McDowell, 201 A.D.2d at 895 (employer's statement regarding employee protected by privilege); Messina v. Roosevelt Union Free School Dist., 2011 N.Y. Misc. LEXIS 5345 at *12-13 (Sup. Ct. Nassau County 2011) (an unfavorable characterization of plaintiff's job performance made during executive closed session of a Board meeting protected by privilege).

More broadly, in New York, "[a] communication made *bona fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contained criminating matter which, without this privilege, would be slanderous and actionable; and this though the duty be not a legal one, but only a moral or social duty of imperfect obligation." Anas v. Brown, 269 A.D.2d 761, 762 (4th Dep't 2000); see also, McDowell v. Dart, 201 A.D.2d 895 (4th Dep't 1994) (statements "made by one person to another upon a subject in which both have an interest," are protected by a qualified privilege). This privilege is to be "broadly applied." Anas, 269 A.D.2d at 762. Thus, "[t]he parties need only have such a relation to each other as would support a reasonable ground for supposing an innocent motive for imparting the information." Id.

Here, the alleged defamatory statements of Dr. Laxen, CNYSPCA, Pirro and Schaeffer concerned Conklin's job performance, and were all allegedly made at a meeting of the CNYSPCA Board or between individuals or organizations that shared a common interest. Accordingly, they clearly fall within the scope of the qualified privilege.

D. Are defendants protected by immunity pursuant to Not-for-Profit Corporation Law 720-a?

New York Not-For-Profit Corporation Law 720-a provides in pertinent part:

> [n]o person serving without compensation as a director, officer or trustee of a [not-for-profit corporation] shall be liable to any person . . . based solely on his or her conduct in the execution of such office unless the conduct . . . constituted gross negligence or was intended to cause the resulting harm.

N-PCL 720-a.

The Court takes judicial notice of the fact that CNYSPCA is a Not-For-Profit Corporation. Thus, because Conklin pleads that defendants Pirro and Williams were directors of that corporation, any statements made by them in the execution of their positions are qualifiedly protected by N-PCL 720-a.

E. Do the Complaints Sufficiently Allege Malice, Gross Responsibility, or Gross Negligence Sufficient to Overcome the Qualified Privileges and Immunity Defendants Enjoy?

As a limited purpose public figure, any statements made by the defendants, even if understood as defamatory, are not actionable unless published with actual malice. Curry v. Roman, 217 A.D.2d 314, 318 (4th Dep't 1995). Likewise, to recover on a claim for defamation against someone protected by the qualified privilege attaching to employment or the common-interest privilege, a plaintiff must demonstrate malice. McDowell, 201 A.D.2d at 896 (in the absence of "malice, statements protected by a qualified privilege are not actionable").

Actual malice is defined as making an alleged false statement with knowledge that it was false or with reckless disregard as to whether it was false or not. New York Times Co. v. Sullivan, 376 U.S.254, 279-280 (1964). Malice is "actual spite or ill will," Anas, 269 A.D.2d at 763, and requires "spite or a knowing or reckless disregard of a statement's falsity." Tattoos By Design, Inc v Kowalski, 136 A.D.3d 1406, 1408 (4th Dep't 2016).

In the context of a motion to dismiss, "[m]ere conclusory allegations or surmise [of malice] are insufficient to defeat the claim of qualified privilege," Messina, 2011 N.Y. Misc. LEXIS 5345 at *13 (Nassau Co. Nov. 2, 2011); see also, Vaughn, 2010 U.S. Dist. LEXIS 96609 at * 9.

Here, accepting the truth of the allegations in plaintiff's complaints in Action 1 and Action 2, plaintiff has neither alleged nor shown malice or gross negligence in connection with the challenged statements. Reviewing the content of the alleged allegations as a whole, made in a protected CNYSPCA Board meeting, or to other individuals or groups sharing a common interest, or in response to Conklin's own public statements, they are qualifiedly privileged, and simply nonactionable expressions of opinion. See, Miller, 184 A.D.2d at 193; see also, Messina, 2011 N.Y. Misc. LEXIS at *12-13.

Even if some of defendants' statements can fairly be characterized as fact, the documentary evidence attached to Conklin's complaint in Action 1, and her own admissions, demonstrate those statements were either true or, minimally, had a sufficient basis in fact so as not to be deemed in reckless disregard of the truth. Conklin had drafted and circulated to the CNYSPCA Board euthanasia policy that announced its dedication "to the preservation of life and restoration of health in all adoptable animals that come into [its] care," and required "a minimum of 3 signatures to include, but not limited to (1) the Executive Director, (2) The Veterinarian on staff and (3) the Kennel Director" to approve the euthanasia of any animal. Compl. ¶¶ 662 – 675 and Exh. AI. Likewise, with respect to the use of narcotics, and the certification necessary to euthanize the cats, Conklin admitted to "an error in protocol." Compl. Exhs. AD, AH, AO. Conklin also admitted that in euthanizing the cats, she "mishandled a CII narcotic, and "acted irrationally and too quickly without professional input." Compl. Exh AO.

Intentional Infliction of Emotional Harm

To establish a cause of action for intentional infliction of emotional distress, plaintiff must allege: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress." Howell v. New York Post Co., 81 N.Y.2d 115, 121 (1993); see also, Gilewicz v. Buffalo Gen Psychiatric Phyciatric, 118 A.D.3d 1298, 1299 (4th Dep't 2014). Liability has been found to exist "only where the conduct has been so outrageous in character, and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Gilewicz, 118 A.D.3d at 1299; Harville v. Lowville Cent. Sch. Dist., 245 A.D.2d 1106 (4th Dep't 1998); Sodus Mfg. Corp. v. Reed, 94 A.D.2d 932 (4th Dep't 1983).

Here, the facts alleged by Conklin against Dr. Laxen, Pirro, Williams and Schaeffer "fall far short" of the requisite standard. The alleged statements are not so outrageous or extreme as to go beyond all possible bounds of decency. Moreover, the complaint is "devoid of any indication that plaintiff actually suffered any emotional distress as a result of [the] alleged actions." Natoli v. City of Kingston, 195 A.D.2d 861, 862 (3d Dep't 1993); see also, Klinge v. Ithaca College, 235 A.D.2d 724, 727 (3d Dep't 1997).

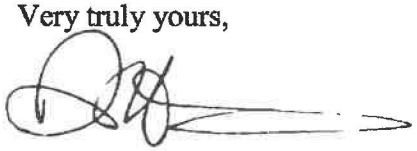
Conclusion

Summarizing, defendants' motion to dismiss plaintiff's causes of action for tortious interference with employment relationship, defamation and intentional infliction of emotional harm against Dr. Laxen in Action 1 is GRANTED and the complaint in Action 1 is dismissed in its entirety. Likewise, defendants' motion to dismiss plaintiff's causes of action for defamation, intentional infliction of emotional harm, and breach of contract against CNYSPCA (and to the extent alleged against defendants Pirro, Williams and Shaeffer) in Action 2 is GRANTED and the complaint in Action 2 is dismissed in its entirety.

Defendants' motion to strike all scandalous and prejudicial matter unnecessarily inserted in the complaints is DENIED as moot.P

Counsel for defendants is directed to prepare an Order in each action consistent with this decision to be submitted to the Court on notice within 30 days. The Orders shall attach a copy of this decision and incorporate it therein.

Very truly yours,



Deborah H. Karalunas, J.S.C.

DHK/sjs