Wax v Alexandra Sherer
2020 NY Slip Op 33302(U)
October 7, 2020
Supreme Court, New York County
Docket Number: 159002/2019
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12

Justice

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GAVIN WAX,

Plaintiff,

- v -

ALEXANDRA SHERER, ROBERT MORGAN, ROBERT MORGAN, BRYAN JUNG, EUGENE RESLER,

Defendants.

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INDEX NO. 159002/2019

MOTION DATE

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 28-31, 33, 38, 43, 47, 49-56, 58-60

were read on this motion to dismiss.

Defendant Jung moves pursuant to CPLR 3211 (a)(7) for an order dismissing this action as against him for defamation and intentional infliction of emotional distress. Plaintiff opposes. The case as against defendants Sherer, Morgan, and Morgan III has been discontinued. (NYSCEF 57).

I. AMENDED COMPLAINT (NYSCEF 31)

As this motion relates solely to Jung, only those allegations relating to him are set forth here, with some exceptions.

Plaintiff, a member of the board of directors (board) of a political club (club) in Manhattan, voluntarily served as campaign manager for a club member who was running for the club presidency against another board member, defendant Morgan, whose campaign was managed by his son, defendant Morgan III, a board member and local district leader (collectively, Morgan defendants). Board members, defendants Jung and Sherer, served as

volunteers for Morgan's campaign and also as local district leaders. Defendant Ressler is a member of the club. The election was hotly contested.

On December 17, 2018, during the campaign for the club presidency, plaintiff and defendant Sherer attended a party along with other club members, after which Sherer accepted plaintiff's offer of a taxicab ride home. After they entered the taxi, Sherer rested her head on plaintiff's shoulder and began kissing and embracing him. Plaintiff reciprocated; Sherer did not protest. Approximately 10 to 15 minutes later, when the taxi stopped at a red light, Sherer suddenly withdrew, blurting out, "I can't do this" and "I need to go." She immediately exited the taxi.

Two days later, plaintiff received a text message from Morgan III stating that, "[y]ou should apologize for sexually assaulting my girlfriend." In the following days, anonymous telephone hang-up calls were received by plaintiff and his grandmother. Upon plaintiff's information and belief, the calls originated with Morgan, Morgan III, Sherer, and/or Jung.

Defendants leveled additional accusations at plaintiff, fueling his belief that Sherer and the Morgan defendants had concocted a false sexual assault accusation against him to discredit his candidate. He later learned that during the second half of December 2018, the Morgan defendants were spreading rumors that he was under police investigation for sexual assault, even though, upon information and belief, it was not true at that time. Also on information and belief, throughout December 2018 and January 2019, and thereafter, Morgan III, Sherer, and Jung, with Morgan's knowledge and pursuant to his direction, engaged in what then became a coordinated plan to perpetuate the false accusations against plaintiff in order to influence the outcome of the upcoming election, among other motivations.

Plaintiff complains that Sherer's lies were repeated by defendants to many club members

and to its president, along with Sherer's allegations that she was considering bringing criminal charges against plaintiff and that plaintiff had assaulted other women. On January 14, 2019, Jung and Morgan III sent an email from Jung's personal account to the club's membership and others. Jung first characterized the club's presidential campaign as a crisis, and after introducing himself and calling plaintiff's candidate a fraud and sociopath, he and Morgan III wrote that they will:

> not tolerate a crowd that includes an attempted rapist such as [plaintiff] ("The Groper") [], who has unapologetically boasted about sexually assaulting one of my closest friends in a NYC taxi cab and who has been accused by three other women (NYPD Police Complaints have been filed in all four cases) . . . .

(¶ 125).

On plaintiff's information and belief, on January 18, 2019, Jung spoke with the club president and admitted that Morgan III had worked closely with him to draft the email, and on February 19, 2019, Jung made the same admission to plaintiff's candidate. As the election approached, Sherer's false allegations were repeated at club meetings as a means of winning support for motions they were trying to pass and to win votes. At a board meeting held on January 27, 2019, which on information and belief, was attended by over a dozen individuals, including the entire board and other leaders, Morgan III made multiple defamatory statements about plaintiff while also discussing Jung's email. Although some board members called for a resolution condemning the email, Morgan III argued against condemning it and falsely denied having assisted in composing it.

On January 31, 2019, plaintiff's candidate was elected club president.

On February 24, 2019, one or more defendants, using a pseudonym, knowingly, maliciously, and willfully published on Twitter the following false and harmful statements about plaintiff:

And as we know, approx. 35 of those votes were literally bought and paid for through a

> fund provided by the sexual predator [plaintiff], a close associate of [his candidate]. 35 people were signed up as paid members without consent, then pressured to vote for [plaintiff's candidate] by paid proxy mailer.
>
> [Plaintiff], the close associate of [the candidate] who has sexually assaulted more than one woman and is on file with the NYPD, literally purchased the election for [his candidate]. The 35 proxy votes bought by [plaintiff's] slush fund was just enough to secure the dubious victory of his charge.

(¶ 129).

Thereafter, on February 25, 2019, a criminal court complaint, based on information provided by Sherer, was filed. As a result, plaintiff was arrested and charged with two misdemeanors, forcible touching and third-degree sexual abuse. Defendants Morgan, Morgan III, and Sherer continued to defame plaintiff.

Plaintiff denies all of the allegations against him.

On June 20, 2019, the criminal charges against plaintiff were dismissed and the case was sealed. Both before and after the dismissal, articles were written about Sherer's false allegations and on August 17, 2019, an anonymous letter arrived at plaintiff's place of employment containing the false allegations and others, which plaintiff believes was sent by defendants:

> What a shame to see you[r] employee [plaintiff] the far right leader of [another political club] who is sponsored by [], hold events at gun shops, and has invited an anti muslim rhetoric spouting maniac in to New York City. Do you keep tabs on your employees? Sexual abuse and forcible touching charges? Will you be held accountable for the actions of your employee [plaintiff]? Perhaps a protest in front of your office shall do the trick. We are appalled by you helping facilitate this kind of behavior.

(¶ 135).

Based on these allegations and other statements and conduct set forth in the amended complaint, plaintiff advances against Jung causes of action for defamation *per se* and intentional infliction of emotional distress.

II. CPLR 3016(a)

To the extent that the email was sent to "others," Jung claims that absent the "persons to whom the publications were made," the email is insufficiently specific and thus violates CPLR 3016(a). He denies that there is evidence connecting him to the tweet or to the anonymous letter to plaintiff's employer or details concerning its delivery. He also argues that none of the allegations of defamation or defamation *per se* against him is legally cognizable and that only those set forth in paragraphs 125, 129, and 135 involve him. (NYSCEF 33).

"In an action for libel or slander, the particular words complained of shall be set forth in the complaint . . ." (CPLR 3016 [a]), along with "the time, place and manner of publication." (*Khan v Duane Reade*, 7 AD3d 311, 312 [1st Dept 2004]).

As plaintiff alleges that Jung was involved in the publication of the pseudonymous tweet and in the composition and delivery of the anonymous letter to plaintiff's employer, and as the dates, places, and manners of the publications are included therein, there is no basis for dismissing these claims for lack of specificity. That plaintiff may ultimately be unable to prove Jung's involvement in these publications is immaterial at his stage of the litigation.

Jung's email, however, is actionable solely to the extent that it was sent to every club member. Plaintiff's allegation that the email was sent to "others" lacks the requisite specificity. (*See e.g. Williams v Varig Brazilian Airlines*, 169 AD2d 434, 437 [1st Dept 1991], *lv denied* 78 NY2d 854 [1991] [plaintiff's allegation that 62 persons were present when defamatory statement made insufficient, where plaintiff failed to identify by name those present]).

III. CPLR 3211(a)(7)

In considering a motion to dismiss pursuant to CPLR 3211(a)(7) for a failure to state a cause of action, the court must construe the pleading liberally, accept the facts alleged as true,

and afford the plaintiff "the benefit of every possible favorable inference." (*JP Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334 [2013] [citation omitted]; *AG Cap. Funding Partners, LP v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). "The motion must be denied if from the four corners of the pleadings 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002], quoting *Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001]; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). "[O]n a motion made pursuant to CPLR 3211(a)(7), the burden never shifts to the nonmoving party to rebut a defense asserted by the moving party." (*Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]).

A. Defamation

A defamatory statement is one that "tends to expose a person to public contempt, hatred, ridicule, aversion or disgrace" *(Thomas H. v Paul B.,* 18 NY3d 580, 584 [2012]; *see Rinaldi v Holt, Rinehart & Winston, Inc.,* 42 NY2d 369, 379 [1977], *cert denied* 434 US 969 [1977]), "or to induce an evil or unsavory opinion of him [or her] in the minds of a substantial number of the community" *(Golub v Enquirer/Star Group, Inc.,* 89 NY2d 1074, 1076 [1997] [citation omitted]; *see Foster v Churchill,* 87 NY2d 744, 751 [1996]; *Franklin v Daily Holdings, Inc.,* 135 AD3d 87, 91 [1st Dept 2015]; *see also Jewell v NYP Holdings, Inc.,* 23 F Supp 2d 348, 360-61 [SD NY 1998]).

Thus, the elements of a cause of action for defamation are 1) a false statement, 2) published to a third party, 3) without privilege or authorization, which 4) causes harm, unless the statement is defamatory *per se*, in which case harm is presumed. (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014]; *Frechtman v Gutterman*, 115 AD3d 102, 104 [1st

Dept 2014], citing *Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]; *see Franklin*, 135 AD3d at 91). A statement is defamatory *per se* if, it consists of, *inter alia*, statements "(i) charging plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession . . ." (*Liberman v Gelstein*, 80 NY2d 429, 435 [1992]).

1. Falsity

Jung maintains that the statements contained in the letter to plaintiff's employer about plaintiff's arrest are true, and thus, not actionable. (NYSCEF 33).

As the complaint reflects that by the time the employer received the letter, plaintiff had been charged, and as truth is a complete defense to defamation (*Birkenfeld v UBS AG*, 172 AD3d 566 [1st Dept 2019]), the statement is not defamatory.

2. Privilege

Not all false statements are defamatory. Some are privileged, such as opinions (*Mann v Abel*, 10 NY3d 271, 276 [2008]), statements to another with a common interest (*Foster*, 87 NY2d at 751), and statements concerning public figures (*Huggins v Moore*, 94 NY2d 296, 301 [1999]).

a. Opinion

The privilege protecting the expression of an opinion is rooted in the preference that ideas be fully aired. *(Davis v Boeheim,* 24 NY3d 262, 269 [2014], citing *Steinhilber v Alponse,* 68 NY2d 283, 289 [1986], and *Gertz v Robert Welch, Inc.,* 418 US 323, 339-40 [1974]). It is, thus, well-settled that "[e]xpressions 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." *(Davis,* 24 NY3d at 269; *Mann,* 10 NY3d at 276; *see Steinhilber,* 68 NY2d at 289; *Rinaldi,* 42 NY2d at 380; *Martin v Daily News L.P.,* 121 AD3d 90, 100 [1st Dept 2014], *lv denied* 24 NY3d

908 [2014]). "Loose, figurative or hyperbolic statements, even if deprecating the plaintiff, are not actionable." *(Dillon,* 261 AD2d at 38, citing *Gross v New York Times Co.,* 82 NY2d 146, 152 [1993] and *Immuno AG. v Moor-Jankowski,* 77 NY2d 235, 244 [1991], *cert denied* 500 US 954 [1991]).

Whether particular words are defamatory constitutes "a legal question to be resolved by the court in the first instance." *(Golub,* 89 NY2d at 1076; *Armstrong v Simon & Schuster,* 85 NY2d 373, 380 [1995]; *Aronson v Wiersma,* 65 NY2d 592, 593 [1985]; *James v Gannett Co.,* 40 NY2d 415, 419 [1976]).

A statement of fact may be distinguished from a nonactionable opinion if the statement (1) has a precise, readily understood meaning, that is (2) capable of being proven true or false, and (3) where the full context in which it is asserted or its broader social context and surrounding circumstances indicates to readers or listeners that it is likely fact, not opinion. *(Davis,* 24 NY3d at 271, citing *Mann,* 10 NY3d at 276, and *Brian v Richardson,* 87 NY2d 46, 51 [1995]; *Gross,* 82 NY2d at 153; *Steinhilber,* 68 NY2d at 292).

When a statement of opinion implies that it is based on unstated facts that justify the opinion, the opinion becomes an actionable 'mixed opinion'" *(Egiazaryan v Zalmayev,* 880 F Supp 2d 494, 503 [SD NY 2012], quoting *Steinhilber,* 68 NY2d at 289), "because a reasonable listener or reader would infer that 'the speaker [or writer] knows certain facts, unknown to [the] audience, which support [the] opinion and are detrimental to the person [toward] whom [the communication is directed]'" *(Gross,* 82 NY2d at 153-154, quoting *Steinhilber,* 68 NY2d at 290).

Whether the statements contained in the tweet constitute opinion is not addressed by the parties. Thus, only the email and the letter to plaintiff's employer are addressed.

i. Contentions

Jung characterizes his email as hyperbolic in its reference to Sherer's allegations, and maintains that the statements contained in the letter to his employer, aside from that concerning plaintiff's arrest, are expressions of opinion and are, thus, not actionable. To the extent that he alleged in the letter that plaintiff invited an "anti muslim rhetoric spouting maniac," Jung maintains that it is a statement of opinion. (NYSCEF 33).

In reply, Jung reiterates that the emailed "vituperative" characterization of plaintiff as an attempted rapist, under the totality of the circumstances, constitutes a nonactionable opinion in the context in which it was used, namely, Sherer's allegations concerning plaintiff's conduct in the back of the taxi, and that absent an indication therein that undisclosed information supported his characterization, it does not constitute a mixed opinion. He also maintains that plaintiff's failure to address his arguments about paragraphs 129 and 135 of the amended complaint amounts to a concession that the allegations contained therein are baseless.

ii. Analysis

That plaintiff does not address some of Jung's arguments in opposition is immaterial, as Jung bears the burden of demonstrating that plaintiff fails to state a cause of action. (*Connolly v Long Island Power Auth.*, 30 NY3d 719, 728 [2018]).

Jung's email

There are five allegedly defamatory statements in Jung's email: that plaintiff is an attempted rapist, that he is a groper, that he "unapologetically boast[s] about sexually assaulting one of [Jung's] closest friends in a NYC taxi cab," that he "has been accused by three other women," and that criminal complaints have been lodged against him in all four cases. It is not disputed that all of these statements have readily understood meanings and are capable of being

proven true or false. Thus, it must be determined whether their context and surrounding circumstances indicates that they are likely expressions of fact and not opinion.

Although it has been held that defamatory statements advanced during the course of a heated public debate, during which an audience would reasonably anticipate the use of "epithets, fiery rhetoric or hyperbole," are not actionable (*Frechtman*, 115 AD3d at 106, quoting *Steinhilber,* 68 NY2d at 294), context is key. Here, the statements were made to an audience of club members, and Jung offers no basis for inferring that club members would reasonably anticipate that he was exaggerating or lying in leveling his comments. (*Compare Cardali v Slater*, 56 Misc 3d 1003, 1013 [Sup Ct, NY County 2017], *affd* 167 AD3d 476 [1st Dept 2018], *lv denied* 33 NY3d 901 [2019] [former employee's statement to former colleague during attorney disciplinary proceeding that previous employer a common criminal constitutes nonactionable opinion, as identified by speaker as opinion and audience knew of facts surrounding disciplinary proceeding; no reasonable audience would understand it as accusation of actual crime], *with Levy v Nissani*, 179 AD3d 656, 657-59 [2d Dept 2020] [accusation that defendants scammers and thieves not opinions, as statements made at parties' place of worship before entire congregation and tone and overall context signaled to average listener that plaintiff was conveying facts; reasonable listener would likely understand statements based on undisclosed facts]). Thus, Jung fails to prove at his stage of the litigation that the email is susceptible to being read as protected hyperbole or opinion.

Anonymous letter to plaintiff's employer

Jung also fails to demonstrate that the statement in the anonymous letter about plaintiff's invitation to the highly controversial speaker contains no basis for implying the existence of undisclosed facts supporting his indication that the speaker was a bigot. (*See e.g. Arts4All, Ltd. v*

Hancock, 5 AD3d 106, 109 [1st Dept 2004] [statement that nonparty "would be extremely upset if he knew how [plaintiff] is really run," combined with statement that "she had terminated her relationship with [plaintiff] because the company is poorly run," implies knowledge of undisclosed, detrimental facts about plaintiff]).

b. Common interest

Even if a published factual statement is false, a defendant may nonetheless be shielded from liability, as "there exists a qualified privilege where the communication is made to persons who have some common interest in the subject matter." (*Foster*, 87 NY2d at 751). There is no bright line test when determining whether a statement is so privileged. (*Garson v Hendlin*, 141 AD2d 55, 61 [2d Dept 1988], *lv denied* 74 NY2d 603 [1989]). Rather, the only requirement for the privilege to apply is that the relationship of the parties "be such as to afford reasonable ground for supposing an innocent motive for giving the information, and to deprive the act of an appearance of officious intermeddling with the affairs of others." (*Silverman v Clark*, 35 AD3d 1, 12 [1st Dept 2006], quoting *Lewis v Chapman*, 16 NY 369, 375 [1857]).

i. Contentions

The emailed statements, Jung asserts, are protected by the common-interest privilege, as they were made in the discharge of a duty or in the conduct of his own affairs in a matter where his interest is concerned. Specifically, the statements were circulated among board members to address plaintiff's qualifications for election to the board, which coincided with the sending of the email. Thus, Jung argues, the email allegedly sent to the "entire MRC membership . . .," is encompassed by the common-interest privilege. (NYSCEF 33).

Plaintiff denies that the members of the board have a common interest in hearing unsubstantiated sexual assault allegations about him, including his alleged attempt to rape

Sherer, or that three other women had accused him of sexual crimes and filed criminal complaints against him. He references the recognition of the club's then-president that the incident was not connected to club business and to the resolution to condemn the email. Absent any common organizational interest to be protected in the publication of Jung's statements, plaintiff denies that Jung's email is privileged.

Moreover, plaintiff argues, the qualified privilege applies only to good faith, bona fide communications, and that the scope of the privilege was exceeded by Jung because his email was sent for improper purposes. In any event, he maintains that the affirmative defense that a statement is protected by a qualified privilege ought not be resolved on a pre-answer motion to dismiss but should be raised in the answer, and the record is insufficient to entertain the motion as so much of it depends on the resolution of numerous factual issues. (NYSCEF 53).

In reply, Jung reiterates his defense that his email is protected by the qualified privilege and that it relates to a matter of common interest, as he references in it an alleged assault of one incoming member of the board by another, a subject of obvious concern to the membership which could have resulted in reputational damage to the club. Thus, Jung claims that he had a right, if not a duty, to bring the information to the attention of the general membership. Plaintiff's assertion that the statement was made for an improper purpose, and thus not privileged, should be rejected, Jung maintains, at it is based solely on unsupported and conclusory allegations of a conspiracy between defendants to harm plaintiff.

ii. Analysis

Both plaintiff and Sherer became club board members at the same approximate time that Jung, also a board member, sent the email. Although in the context of a hotly contested election, with the focus on the composition of the club's leadership, Jung's statements, on their face, were

arguably made in the club members' interest in knowing of alleged misconduct by a member to another member, statements to those with a common interest may not be privileged when made (1) in an unreasonable manner or in furtherance of an improper purpose, (2) with common-law malice, or (3) with actual malice. (*Liberman*, 80 NY2d at 437–38 [qualified privilege dissolved where defendant spoke with common law or actual malice]; *Boyd v Nationwide Mut. Ins. Co.*, 208 F3d 406, 410 [2d Cir 2000]; *Harris v Hirsh*, 161 AD2d 452, 453 [1st Dept 1990] [qualified privilege applied if defendant acted for "proper purpose," and is forfeited if defendant abuses or acts outside scope of privilege]).

Here, plaintiff sufficiently alleges that Jung acted with an improper purpose, namely, to aid Morgan and Sherer, respectively, in winning the election and in damaging plaintiff's reputation. (*See e.g. Weldy v Piedmont Airlines, Inc.*, 985 F2d 57, 63 [2d Cir 1993] [manager's statement deliberately exaggerating fight not protected by common interest privilege given improper purpose of having employee discharged]). Again, Jung's responsibility for the email is sufficiently alleged at this stage of the litigation, and in any event, for the purposes of a motion to dismiss for failure to state a claim, plaintiff sufficiently alleges malice (*see infra* at III.A.2.d.ii). Consequently, Jung fails to demonstrate that his statements are privileged at this stage of the litigation.

c. Public figure

i. Contentions

According to Jung, the emailed statements are not actionable because plaintiff was and is a limited-purpose public figure, having acted voluntarily to influence the resolution of a public controversy by managing a campaign for the club presidency, which race was heated and lengthy, and involved "a real dispute of concern to a substantial segment of Republicans, as

evidenced by the hundreds of votes that were cast in the election." Jung also alleges that as plaintiff was and still is a political commentator, he is a limited-purpose public figure within the scope of political controversies that receive press coverage, as did the election for the club presidency. As such, absent allegations of actual or common law malice, Jung maintains that the alleged statements are privileged.

Moreover, as plaintiff was president of the other political club referenced with respect to his invitation to the controversial speaker, Jung asserts that he was a limited-issue public figure at least as to the choice of events and speakers invited. (NYSCEF 33).

Plaintiff maintains that Jung offers no basis for asserting that he is a limited-purpose public figure who had voluntarily entered into a particular public controversy to influence its resolution. He observes that the election was for the presidency of a private club, and that Jung provides no evidence that he used his status as a political commentator to write publicly about the election. Rather, during the relevant time, there was no public controversy and, even if there was, plaintiff denies having done anything to "thrust [himself] to the forefront of [it] in order to influence the resolution of [any] issues involved" whether as a political commentator or otherwise.

Jung's sole support for claiming that the club election was a public controversy, plaintiff claims, is that the election received "media coverage," and he denies Jung's contention that his amended complaint contains any indication that there was media coverage. Absent support for Jung's assertion, plaintiff asserts that Jung mistakenly argues that an essentially private matter becomes a public controversy because it attracts attention. Service as a campaign manager for a candidate for president of a private, "members-only social club," plaintiff claims, does not constitute evidence sufficient to render him a limited-purpose public figure as the outcome of the

election affected club members only. And, even if the election had received media coverage, newsworthiness too is insufficient. Even so, plaintiff denies having thrust himself into the forefront of a controversy as he only managed his friend's campaign and stood to gain nothing from the election, nor did he engage the media in his position as campaign manager. He decries as misleading Jung's effort to equate the election with an election to public office, as the club cannot be equated with a formal political party capable of influencing governmental public policy decisions, and no evidence is offered that he consulted with media or published articles in his capacity as a political commentator relating to the election. Plaintiff claims that at most, Jung identifies disputed issues of fact, which cannot be resolved in his favor on this motion. (NYSCEF 53).

In reply, Jung reiterates plaintiff's status as a limited-purpose public figure, and he attaches two articles which, he alleges, demonstrate that plaintiff commented about the club in the media. (NYSCEF 59-60).

ii. Analysis

Where the plaintiff is a public official, he or she may not recover damages for defamation unless the statement is proven to have been made with "actual malice." (*New York Times Co. v Sullivan*, 376 US 254, 279–80 [1964]). This prohibition has also been extended to "public figures," which are those who "have assumed roles of especial prominence in the affairs of society" or "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes." (*Gertz*, 418 US at 345).

It is undisputed that plaintiff is a private individual, not a public figure, for all purposes. A private individual may be deemed a limited purpose public figure where he has "'thrust [himself] to the forefront of particular public controversies in order to influence the resolution of

the issues involved.'" (*Huggins*, 94 NY2d at 301, quoting *Gertz*, 418 US at 345).

To be a deemed a limited-purpose public figure, generally, a plaintiff must have "(1) successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily injected himself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing access to the media." (*Lerman v Flynt Distrib. Co.*, 745 F2d 123, 136–37 [2d Cir 1984], *cert denied* 471 US 1054 [1985]). The focus of the inquiry is on "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." (*Gertz*, 418 US at 352). Moreover, one is not a limited-purpose public figure solely because the subject matter of the controversy is "newsworthy." (*Krauss v Globe Int'l, Inc.*, 251 AD2d 191, 192 [1st Dept 1998]). Rather, the matter must "be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way." (*Id.*, quoting *Foretich v Capital Cities/ABC, Inc.*, 37 F3d 1541, 1554 [4th Cir 1994]).

In determining whether plaintiff is a limited-purpose public figure, the controversy that is the subject of the alleged statements must be a matter of public concern. In *Naantaanbuu v Abernathy*, for example, the court considered whether a plaintiff who had hosted Dr. Martin Luther King, Jr. on the night before his murder was a limited-purpose public figure for purposes of adjudicating a libel action she had brought based on a book in which she is alleged to have had an extramarital affair with King that night. (816 F Supp 218 [SD NY 1993]). In holding that she was not a limited-purpose public figure, the court observed that while the plaintiff was well known within her community as a civil rights leader, and that she may have been a limited-purpose public figure for controversies involving "her ability to conduct herself as a civil rights

worker," the controversy at issue was her silence as to what had occurred on the night before King's murder. (*Id.* at 225).

Likewise, in *Krauss*, a television celebrity's former husband brought a libel claim based on a tabloid article in which it was claimed that he had had an extramarital affair. (251 AD2d at 191). The Court rejected the plaintiff's contention that his divorce from his wife was a public controversy, deeming it gossip and observing that the plaintiff had exploited his wife's fame for his own purposes. (*Id.* at 193). In holding that the plaintiff was not a limited-purpose public figure, the Court explained that any interest in the divorce and in his conduct was due to his wife's celebrity status only. (*Id.*).

Here, Jung's statements concern plaintiff's character and allegations of sexual abuse and fraud in the club's election. Assuming, *arguendo*, that the election was a public controversy, plaintiff's alleged conduct and resulting sexual abuse charges are too unrelated to the alleged election fraud to deem plaintiff a limited purpose public figure, especially at this stage of the litigation. His conduct, moreover, does not constitute a public controversy, and there is no evidence that he sought media attention or engaged in any other conduct to make it one.

It is undisputed that the club is private, as are its elections. The articles submitted by Jung address neither the election nor plaintiff's alleged conduct or the charges filed against him. While plaintiff alleges that the articles concern plaintiff and the club, the complaint is silent as to any resulting attention the club or its election received, including plaintiff's involvement in attempting to attract such media attention. Although the election was heated and of great importance to club members, Jung has not satisfied his burden of demonstrating on this motion that the election constituted a public controversy. (*O'Neil v Peekskill Faculty Ass'n*, 120 AD2d 36, 45 [3d Dept 1986], *lv dismissed* 69 NY2d 984 [1987] [although generally question of law,

plaintiff's status as limited-purpose public figure need not be decided where issues of fact remain as to his public conduct]).

In any event, when a statement is directed against a public official or public figure, it may nonetheless be actionable if made with actual malice. (*Huggins*, 94 NY2d at 301). Thus, even if plaintiff was a limited-purpose public figure, his allegations of actual malice are sufficient to withstand a motion to dismiss. (*See infra* at III.A.2.d.ii).

d. Malice

i. Contentions

Jung denies that plaintiff sufficiently alleges that he acted with actual or common-law malice, and that therefore, the statements contained in his email are privileged and nonactionable. He denies that not knowing that something is true is equivalent to knowing with a high degree of probability that something is false, and maintains that spite or ill will must be proven with admissible evidence, as opposed to surmise and conjecture. Additionally, he observes, there is no indication that defendants were aware that their statements were probably false absent clear and convincing proof that they were made with knowledge of their falsity or reckless disregard of whether they were false. Rather, the sole pleading that suggests that he knew that Sherer's allegations were false is a conclusory statement that he was part of a plan.

According to Jung, there is nothing in the complaint to suggest that he had a malicious attitude toward plaintiff before Sherer disclosed the alleged assault, and that other than the email, there is no information in the complaint regarding his state of mind or attitude toward plaintiff that could satisfy the common law malice standard. (NYSCEF 33).

In opposition, plaintiff argues that when Jung sent his email, no charges had yet been lodged against him, and thus, the allegation is false and constitutes evidence of malice. He

maintains that the allegations set forth in his amended complaint and Jung's email establish that Jung falsely called him an attempted rapist and groper who "unapologetically boasted about sexually assaulting [Sherer]" and that Jung repeated Sherer's additional false allegations that he "was accused by three other women" for similar crimes and that criminal complaints were filed in those cases. Having falsely accused plaintiff of committing crimes, plaintiff claims that Jung thereby injured him in his business and profession. That Jung relied on Sherer's allegations in crafting the email is immaterial as Jung was Sherer's close associate and was involved in the plan to discredit and destroy him, and thus, likely knew or should have known that the statements were false or at least unproven, and his only motivation in making such false statements may reasonably be inferred from a desire to injure him. (NYSCEF 53).

In reply, Jung asserts that his entitlement to the common interest privilege in sending the email is not defeated by plaintiff's claim of malice which is based solely on his alleged lack of good faith or proper purpose. Notwithstanding plaintiff's baseless conspiracy theories, Jung observes that he advances no allegation that could give rise to a conclusion, or even an inference, that he believed that Sherer's allegations were false or that he was solely motivated by a desire to injure plaintiff or by ill will or spite. Consequently, Jung maintains that absent a basis for a claim that he was motivated by common law malice, he is fully protected by the qualified privilege and common interest privilege. He also observes that there is no rule that a cause of action for defamation may not be dismissed based on the common interest affirmative defense, and he contends that a dismissal is appropriate without the need of awaiting a decision on summary judgment absent any disputed facts.

Moreover, Jung denies that there is a basis for plaintiff's claims that he acted with either actual malice or common law malice and asserts that his email cannot be considered as other

than "table-slapping monologue," bereft of any allegations giving rise to an inference of malice. (NYSCEF 59).

ii. Analysis

Malice may be alleged in the form of either common law malice, *i.e.*, "spite or ill will," or actual malice, *i.e.*, "knowledge of the falsehood of a statement or reckless disregard for the truth." Either may overcome the common interest privilege. (*Gottlieb v Wynne*, 159 AD3d 799, 800 [2d Dept 2018]). While conclusory allegations of malice are insufficient (*L.Y.E. Diamonds, Ltd. v Gemological Inst. of Am., Inc.*, 169 AD3d 589, 591 [1st Dept 2019]), a plaintiff need not support his allegation of malice with evidentiary facts on a motion to dismiss pursuant to CPLR 3211 (a) (7) (*Ferrara v Esquire Bank*, 153 AD3d 671, 673 [2d Dept 2017]). That a statement is defamatory *per se* does not obviate the need to allege malice. (*Foster*, 87 NY2d at 751).

Plaintiff alleges that Jung served on Morgan's campaign, knowingly engaged in a coordinated plan to "perpetuate the false sexual assault accusation against [him]" to influence the election, and harbored a "personal animus against [him]" (¶ 40). Affording these allegations a liberal interpretation, as is required on this motion, plaintiff sufficiently alleges malice. (*See e.g. Crime Victims Ctr., Inc. v Logue*, 181 AD3d 556, 557 [2d Dept 2020] [allegation that statements made with knowledge of falsity or, knowing that no reliable evidence or information supported them, with reckless disregard for truth, held sufficient to demonstrate actual malice on motion to dismiss for failure to state cause of action]; *Kamchi v Weissman*, 125 AD3d 142, 159 [2d Dept 2014] [allegations that defamatory statements made to undermine plaintiff's authority as spiritual leader of plaintiff's congregation, to prevent his continued employment, and to damage reputation in community held sufficient to establish common law malice]; *Pezhman v City of New York*, 29 AD3d 164, 169 [1st Dept 2006] [allegation that statements part of campaign of

harassment conducted in retaliation for complaint made by plaintiff held sufficient]).

B. Intentional infliction of emotional distress

1. Contentions

a. Jung (NYSCEF 33)

Jung observes that plaintiff offers no information connecting or linking him to the anonymous calls or that they relate to Sherer's allegations, nor does he provide details about the alleged plan to perpetuate false allegations against him or the time and place they were made. Absent information about his role in Morgan's campaign, Jung argues that plaintiff fails to show that he had a motive to influence the outcome of the election, characterizes plaintiff's theory as "bizarre," and questions the connection between Sherer's allegations and the alleged conspiracy. Nor, he claims, is there a factual basis alleged in the amended complaint for accusing Morgan of ordering the smear campaign against plaintiff.

In the cause of action for intentional infliction of extreme emotional distress, Jung argues that in paragraph 145 of the complaint, plaintiff advances "a jumble of allegations, joined together with a string of hyperbolic theories to the effect that all of the Defendants were banding together to inflict emotional distress on [him]."

Apart from his email, however, Jung observes, plaintiff offers no evidence that he did anything that would constitute the intentional infliction of emotional distress, nor is it alleged that what he did could cause emotional distress to the extent required. Allegations that he acted in concert or was involved in a conspiracy to inflict on him emotional distress intentionally, Jung claims, lack a factual or legal basis, and while tort liability may be premised on allegations connecting nonactors with the tortious acts of coconspirators, more than conclusory allegations are required. Thus, absent independent culpable conduct on Jung's part, the cause of action is

insufficient as against him. That Jung interacted with other defendants, moreover Jung claims, reflects innocuous conduct and is insufficient, he argues, and the complaint is bereft of allegations based on identifiable words or actions that he engaged in independent culpable behavior in this allegedly well-coordinated and targeted campaign or overt acts in furtherance of a conspiracy to inflict emotional distress upon plaintiff.

b. Plaintiff (NYSCEF 53)

Plaintiff asserts that Jung, along with the other defendants, as alleged in the amended complaint, were united in their goal of harming him from December 17, 2018 until at least August 17, 2019, with Jung engaging in at least one overt act in furtherance of the conspiracy and is otherwise alleged to have been involved in the composition and delivery of the anonymous letter to his employer and in the tweet. Thus, plaintiff states that it is reasonably inferred that Jung participated in the scheme to inflict emotional distress intentionally on him.

c. Jung's reply (NYSCEF 59)

In addressing the cause of action for intentional infliction of emotional address, Jung reiterates everything from his initial motion.

2. Analysis

A cause of action for intentional infliction of emotional distress requires allegations of extreme and outrageous conduct intended to and successful in causing severe emotional distress. (*Chanko v Am. Broad. Companies Inc.*, 27 NY3d 46, 56 [2016]). To be sufficiently outrageous, the alleged conduct must be "beyond all possible bounds of decency" and be "utterly intolerable in a civilized community." (*Marmelstein v Kehillat New Hempstead*, 11 NY3d 15, 23 [2008], quoting *Murphy v Am. Home Prod. Corp.*, 58 NY2d 293, 303 [1983]; *see also Chanko*, 27 NY3d at 57, quoting *Howell v New York Post Co.*, 81 NY2d 115, 122 [1993] [standard for

outrageousness so strict that of every claim considered by Court of Appeals, each has failed as alleged conduct insufficiently outrageous]).

Although an individual act may be insufficient to state a claim, "a longstanding campaign of deliberate, systematic and malicious harassment of the plaintiff" may be actionable (*Seltzer v Bayer*, 272 AD2d 263, 264-65 [1st Dept 2000]), and the rigorous standard applied to individual acts, does not apply to such a campaign (*Scollar v City of New York*, 160 AD3d 140, 146 [1st Dept 2018]). Moreover, while there is no independent tort for civil conspiracy, a plaintiff may "connect the actions of separate defendants with an otherwise actionable tort" (*Alexander & Alexander of New York, Inc. v Fritzen*, 68 NY2d 968, 969 [1986]), by alleging an underlying tort and an agreement between parties, an overt act in furtherance of it, the parties' intentional participation in advancing a plan or purpose, and resulting damage or injury (*Cohen Bros. Realty Corp. v Mapes*, 181 AD3d 401, 404 [1st Dept 2020]).

False accusations and charges of sexual assault, anonymous phone calls to him and his grandmother, defamatory statements to club members, and a threatening letter to his employer, when viewed together as a single, deliberate campaign against plaintiff, are sufficiently outrageous to state a claim for intentional infliction of emotional distress. (*See e.g. Gill Farms Inc. v Darrow*, 256 AD2d 995, 997 [3d Dept 1998] [campaign of harassing telephone calls sufficient to state cause of action for intentional infliction of emotional distress]; *Green v Fischbein, Olivieri, Rozenholc & Badillo*, 135 AD2d 415, 419 [1st Dept 1987] [allegations that defendants instituted baseless lawsuits against plaintiff and interfered with his mail and apartment services sufficiently outrageous]). And Jung is alleged to have acted overtly in furtherance of this conspiracy to inflict emotional distress by defaming plaintiff, making the anonymous calls to him and his grandmother, and sending the letter to plaintiff's employer.

Whether Jung is later exonerated of these acts or involvement in the alleged conspiracy is immaterial at this stage of the litigation. (*See Cohen Bros. Realty Corp.*, 181 AD3d at 404–05 [claim of conspiracy to commit fraud sufficiently alleged, absent disclosure, where plaintiff pleaded underlying fraud and that defendants acted in concert to defraud plaintiff]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Jung's motion to dismiss is denied as set forth herein; it is further

ORDERED, that defendant Jung serve his answer on plaintiff within 20 days of the date of this order; and it is further

ORDERED, that the parties either enter into a stipulation encompassing their preliminary conference on or before December 9, 2020, or appear for a preliminary conference in room 341, 60 Centre Street, New York, New York, on December 9, 2020.

10/7/2020
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE