61 Crown St., LLC v Kingston Uptown Bus. Men's Assn., Inc.
2020 NY Slip Op 33347(U)
October 13, 2020
Supreme Court, New York County
Docket Number: 152437/2020
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 12EFM

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61 CROWN STREET, LLC, 311 WALL STREET, LLC, 317 WALL STREET, LLC, 323 WALL STREET OWNERS, LLC, 63 NORTH FRONT STREET, LLC, 314 WALL STREET, LLC, 328 WALL STREET, LLC, WILLIAM GOTTLIEB MANAGEMENT CO., LLC,

Plaintiffs,

- v -

KINGSTON UPTOWN BUSINESS MEN'S ASSOCIATION, INC. D/B/A KINGSTON UPTOWN BUSINESS ASSOCIATION, ELENI LOIZOU, JOHN PERRY, JULIE JORDAN, BETTINA MUSUMECI, PHILIP BENDER-TYMON, ROB FRITZ GASTON, BRIDGET SMITH BRUHN, ANDI TURCO- LEVIN, BRIAN BENDER-TYMON, BRIDGET RICKS MILLER, DON BREWER, FREDDY TAMPASIS, JEFF RINDLER, KEVIN QUILTY, NAN POTTER, ROBERT TONNER, STEPHANIE EARL, THOMAS JACOBI,

Defendants.

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INDEX NO. 152437/2020

MOTION DATE _____

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11-23, 25, 26, 33, 34

were read on this motion to dismiss.

In this action for defamation, defendants move pursuant to CPLR 3211(a) (1) and (7) for an order dismissing this action or. in alternative, pursuant to CPLR 510(3) for an order transferring it to Ulster County.

I. PERTINENT BACKGROUND

On December 16, 2019, the City of Kingston Planning Board, pursuant to regulations pertaining to the State Environmental Quality Review Act of the New York State Environmental

Conservation Law, issued a notice and negative declaration, embodying its determination that a proposed redevelopment project would not have a significant effect on the environment. (NYSCEF 19).

On or about February 20, 2020, plaintiffs 61 Crown Street, 311 Wall Street, 317 Wall Street, LLC, 323 Wall Street, 323 Wall Street Owners, LLC, 63 North Front Street, LLC, 314 Wall Street, LLC, and 328 Wall Street, LLC sought to intervene in a CPLR article 78 proceeding brought to annul the Planning Board's determination, claiming that it "failed to identify the relevant areas of environmental concern and failed to take the required 'hard look' at the areas of concern." (NYSCEF 18). For several reasons, plaintiffs asserted that they will be injured by the redevelopment project due to its impact on the enjoyment of their properties within the **district. (*Id.*).** ~~*(id.).*~~

II. COMPLAINT (NYSCEF 13)

The seven LLC plaintiffs (related LLCs) own properties in Kingston, New York, each of which is managed by plaintiff William Gottlieb Management Co., LLC (WGM). The properties are all located either within or in close proximity to the Kingston Stockade Historic District (KSHD) and were purchased by plaintiffs "as part of a coordinated plan to develop and improve Kingston and the KSHD" and to increase their value and the rental revenues they generate.

Defendant Kingston Uptown Business Association (KUBA) is a New York State domestic not-for-profit corporation which represents businesses in uptown Kingston. Defendant Loizou is KUBA's president. The other individual defendants are natural persons who live in Ulster County and are members of KUBA's board of directors.

Plaintiffs allege that on February 17, 2020, Loizou wrote a defamatory letter on behalf of KUBA to Kingston's mayor, and, on information and belief, she sent copies to Kingston's

alderwoman-at-large and a reporter for a local daily newspaper. An email to plaintiffs' counsel by which the reporter sought a comment on the letter, therein reproduced, is attached to the complaint:

> [KUBA] would like to voice our concerns and displeasure over recent efforts by an out of town real estate investor to slow down or prevent progress of the proposed Kingstonian Development project by engaging in frivolous legal challenges. We have serious concerns over what his ultimate personal agenda may be as many of his current building[s] are noted for their vacant storefronts. While the business community has joined together in an effort to ensure the economic vitality of Kingston this individual continuously appears to be attempting to singlehandily [sic] destroy the market, and to what end? Is he trying to drive property values down? Force businesses out? KUBA has worked tirelessly with the past administrations to replace much needed municipal parking structures located at the corner of North Front and Fair Streets. Through your efforts, along with those of the Common Council, an RFQ was put forth in search of a project that would both replace the parking garage and add vital daily consumers to the business district. This project does that and so much more by adding apartments, hotel rooms, commercial space and a public plaza gathering space along with parking spaces we are in need of with zero impact on the taxpayers. Simply put, this KUBA would like to encourage the City to look at these underutilized properties to determine if these owners could be encouraged to actively participate and create a renaissance. I would gladly offer KUBA's participation along with the City's, obviously in hosting and/or partaking in such activities and discussions. We realize that this challenge is likely occurring city-wide and this communication is in no way targeted at any specific entity or entities. Our goal is simply to bring this issue to the City's attention as properties seemingly warehoused by investors do nothing to help our neighborhood or the City of Kingston. We look forward to guidance from your office.

The newspaper printed an article referencing and quoting from the letter. (NYSCEF 16).

Plaintiffs contend that KUBA defamed them by claiming that the buildings they owned were "noted for their vacant storefronts," and that plaintiffs were "attempting to destroy the market in Kingston, drive property values down and drive out businesses" by "warehousing the properties and doing nothing to help uptown Kingston." They argue that Loizou knew or should have known that the statements she made in the letter were false, that they would cause injury to plaintiffs and their reputations, and that they were made with an evil intent or motive and exposed plaintiffs to public contempt. Moreover, in sending the letter to the newspaper,

defendants sought to maximize the dissemination of their false statements and the injury caused to plaintiffs.

All but one of the properties are leased, allege plaintiffs, and WGM is presently negotiating to lease that property. To the extent that there have been vacancies, plaintiffs maintain that they consistently tried to sell them by retaining a licensed real estate broker and listing them on an internet service. They also claim that the related LLCs dedicated substantial resources to marketing the properties.

According to plaintiffs, the false assertion that they are trying to "slow down or prevent progress of the proposed Kingston development project by engaging in frivolous legal challenges" is traceable to them as they are the parties responsible for filing the motion to intervene in the pending article 78 proceeding, which plaintiffs deny is frivolous, given the allegation that the Planning Board had failed to comply with the law with respect to the project.

Then, by letter dated February 26, 2020, plaintiffs advised defendants that the statements in the letter were false, with an explanation of the status of the properties and a demand for a retraction. Defendants ignored the letter.

Plaintiffs maintain that the false statements were knowingly and deliberately and/or recklessly advanced by defendants with malice and spite, causing them special damages by adversely impacting their real estate business and economic interests in Kingston, the surrounding areas, and in New York City. In sending the letter to the mayor and alderwoman, plaintiffs assert that defendants maliciously intended to damage their ability to work with the City of Kingston, which is essential to developing the properties. And, in sending the letter to the newspaper, plaintiffs contend that defendants also intended to limit their prospects for obtaining a favorable standing in the Kingston community. The false statements are claimed by plaintiffs

to be actionable without proof of special damages given the injury to them in their trade or business.

Based on the foregoing, plaintiffs advance a cause of action for defamation *per se*.

III. DISCUSSION

Pursuant to CPLR 3211(a)(1), a party may move for an order dismissing a pleading on the ground that it has a defense based on documentary evidence. Such a motion may be granted where factual allegations in the complaint are flatly contradicted by documentary evidence. (*Kaisman v Hernandez*, 61 AD3d 565, 566 [1st Dept 2009]; *Kliebert v McKoan*, 228 AD2d 232, 232 [1st Dept 1996], *lv denied* 89 NY2d 802 [1996]).

A pleading may also be dismissed for failure to state a cause of action. (CPLR 3211[a][7]). In deciding the motion, the court must liberally construe the pleading, "accept the alleged facts as true, accord [the non-moving party] the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable theory." (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). However, "[f]actual allegations presumed to be true on a motion pursuant to CPLR 3211 may be properly negated by affidavits and documentary evidence." (*Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 269 [1st Dept 2005], quoting *Biondi v Beekman Hill House Apt., Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]).

A. "Of and concerning"

To establish a *prima facie* case of defamation, "plaintiffs must show that the matter published is 'of and concerning' them." (*Three Amigos SJL Rest., Inc. v CBS News Inc.*, 28 NY3d 82, 86–87 [2016], quoting *Julian v American Bus. Consultants,* 2 NY2d 1, 17 [1956]). Although the plaintiffs need not be named in the allegedly defamatory publication, they "must

plead and prove that the statement referred to them and that a person hearing or reading the statement reasonably could have interpreted it as such." (*Three Amigos*, 28 NY3d at 86). "This burden is not a light one, and the question of whether an allegedly defamatory statement could reasonably be interpreted to be 'of and concerning' a particular plaintiff is a question of law for the courts to decide." (*Id*. At 86-87).

The context of the statement must be considered in determining whether it is of and concerning the plaintiff. (*See Van Ingen v Mail & Express Pub. Co.*, 156 N Y 376, 386 [1898] [seems well settled that where libel does not name plaintiff, he may give evidence of all surrounding circumstances and other extraneous facts which explain and point out person to whom allusion applies]; *Cole Fischer Rogow, Inc. v Carl Ally, Inc.,* 29 AD2d 423, 426 [1st Dept 1968], *affd sub nom. Cole Fisher Rogow, Inc. v Carl Ally, Inc.*, 25 NY2d 943 [1969]; *Cohen v Broad Green Pictures LLC*, 59 Misc 3d 1205[A] [Sup Ct, NY County 2017], *affd* 160 AD3d 569 [1st Dept 2018]).

1. Defendants' contentions (NYSCEF 12, 20)

Defendants allege that the email relied on by plaintiffs and attached to their complaint is inaccurate, as the reporter had apparently combined two letters into one. They attach photographs of the two letters. (NYSCEF 14, 15).

According to defendants, plaintiffs fail to state a cause of action for defamation as the alleged defamatory statements are "of and concerning" only the unnamed real estate investor, not the related LLCs, and they maintain that an allegedly defamatory statement about an individual who is a principal, shareholder, or investor of a limited liability company or corporation, is not "of and concerning" the limited liability company or corporation. To the extent that the related LLCs are referenced by mention of the motion they brought to intervene in the article 78

proceeding, defendants argue that the reference is otherwise nonactionable and observe that as KUBA expressly states that the communication is not targeted at a specific entity or entities, the statements are not of and concerning plaintiffs.

2. Plaintiffs' contentions (NYSCEF 33)

In opposition, plaintiffs assert that the two letters offered by defendants, "if authentic," fall short of constituting documentary evidence, absent proof that they are unambiguous, undisputedly authentic, and essentially undeniable, and maintain that they appear to be photographs of computer printouts which plaintiffs had not seen before this motion. According to them, the letters differ significantly in content from their understanding of them, as the newspaper reporter had indicated in his email that there was only one letter. Thus, they argue, the form and content of the statements demonstrate that the letters are neither of "undisputed authenticity" nor "essentially undeniable," and they dispute their meaning and impact, rendering the letters ambiguous. Nor, plaintiffs maintain, can the letters alone "conclusively address all aspects of a defamation claim, such as the veracity of the statements they contain, the parties to whom they were sent, the parties the statements concern, the effect on anyone who reads them," and the extent of their damages.

Although plaintiffs acknowledge that the related LLCs and WGM are not explicitly named in the statements, they maintain that the brief reference to the investor is insignificant as the "crux" of the statements references them. They moreover allege that the letters "speak to" their business practices, whereas the investor is neither a party to any of the pertinent legal proceedings nor an owner or manager of the properties of the related LLCs. Additionally, the related LLCs are petitioners in the article 78 proceeding, and with WGM, own and/or operate the properties and conduct the business criticized in the statements which, when read as a whole,

reference them. They argue that where a statement refers to the operation of a business, it is reasonably inferred that the actual owners or operators are referenced, even if not named, in light of the surrounding circumstances and extraneous facts.

Plaintiffs also claim that it is relevant whether those to whom the statement was published had any special knowledge that would support an inference that the actual owners or operators are referenced. As the statements were published to the mayor and alderwoman who are presumably aware of the pending litigation over the project and, in the case of the mayor, communicated with plaintiffs' representatives regarding the pertinent development activity, both the mayor and the alderwoman would have been aware that plaintiffs, and not just the individual investor, are referenced in the defamatory statements.

3. Defendants' reply (NYSCEF 34)

Defendants assert that contrary to plaintiffs' contention that the investor is only briefly mentioned in the statements, the investor is mainly referenced and upon an analysis of the entirety of the statements, it is fairly concluded that he is the sole subject of the statements, and they take issue with plaintiffs' assertion that the statements "speak to" their business practices. While they acknowledge that plaintiffs need not be actually identified in the publication, they contend that the allusion to them must be apparent to be actionable, and assert that the statements are reasonably read solely as referencing the investor and not plaintiffs, and that it is nowhere mentioned therein that the related LLCs participated in the litigation concerning the project. Rather, the statements "clearly refer to the 'efforts' on the part of an unnamed natural person who is not named as a plaintiff in this action."

Defendants deny that any letter is addressed or was copied to the newspaper, and thus, plaintiffs' allegation that the statements were also sent to the newspaper has no basis.

4. Analysis

Whether the photographs of the two letters offered by defendants constitute documentary evidence need not be addressed as the latter of the two contains the allegedly defamatory statements included within the letter allegedly reproduced with the email attached to the complaint. Thus, defendants' motion pursuant to CPLR 3211(a)(7) is solely addressed.

The letter within the email commences with a reference to "recent efforts" of "an out of town real estate investor" to "slow down or prevent progress of the proposed project by engaging in frivolous legal challenges." While the investor alone is referenced, a reasonable reader with some knowledge of the project, like the mayor and alderwoman to whom the letter was directly addressed, were likely aware that the related LLCs, not the investor, had sought to intervene in the article 78 proceeding, and that the actions and motives of the investor and plaintiffs were one and the same. Absent a sufficient basis for inferring otherwise, defendants fail to demonstrate that the statement is not of and concerning plaintiffs. (*Compare DeBlasio v N. Shore Univ. Hosp.*, 213 AD2d 584, 584–85 [2d Dept 1995] [reasonable reader could interpret statement about hospital "personnel" that treated patients with certain technique of and concerning plaintiff-doctor, as complaint identifies him as one of few who used technique and was fired from hospital two months before press release], *with Lihong Dong v Ming Hai*, 108 AD3d 599, 599–600 [2d Dept 2013] [statements not of and concerning plaintiffs absent identification of them by name, and statement contained details substantially different from those about transaction in issue]).

While KUBA's statement that properties are being warehoused does not explicitly reference plaintiffs, and although KUBA disclaims that the letter is not targeted at a specific entity, given the rational inferences drawn therefrom, defendants fail to sustain their burden of demonstrating that this statement is not also of and concerning plaintiffs.

B. Defamation

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, and that 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 v The Daily Holdings, Inc.*, 135 AD3d 87, 91 [1st Dept 2015]). A statement is defamatory *per se* if, it consists of statements which, in pertinent part "tend to injure another in his or her trade, business or profession . . ." (*Liberman v Gelstein*, 80 NY2d 429, 435 [1992]).

"On a motion to dismiss a defamation claim, the court must decide whether the statements, considered in the context of the entire publication, are reasonably susceptible of a defamatory connotation, such that the issue is worthy of submission to a jury." (*Stepanov*, 120 AD3d at 34 [citation and internal quotation marks omitted]).

Here, it is not disputed that the statements were published to third parties. Thus, it need only be determined whether the statements are false, made without privilege or authorization, and caused harm, unless they are defamatory *per se*.

1. Falsity

Defendants argue that even if the statements concerning the investor's attempt "to slow down or prevent progress" of the project is "of and concerning" plaintiffs, it is "demonstrably true," as it cannot be denied that annulling the approval for the project will necessarily slow or prevent its progress. (NYSCEF 20).

Plaintiffs allege that as all but one of the properties are leased, the allegations concerning the use of commercial vacancies were false when made. They reject defendants' characterization

of the article 78 litigation as frivolous and the description of their motivations for bringing it, offering in support reasons for finding that the litigation is neither frivolous nor intended to thwart the project or destroy the market. (NYSCEF 33).

In reply, defendants reiterate that the statement is true, and observe that plaintiffs' argument that the litigation is not frivolous does not overcome the privilege attached to their opinion that the litigation is frivolous. (NYSCEF 34).

In light of plaintiffs' denial of any vacancies and attempts to destroy the market, drive down property values, and force out businesses, which defendants do not address in their reply, defendants do not sustain their burden on this motion of showing that those statements are true. Moreover, on a motion to dismiss for failure to state a claim, the alleged facts are assumed to be true. (*Leon*, 84 NY2d at 87). As litigation intended to halt a project emanates from an effort to slow or impede its progress, that statement is true and nonactionable. (*See Birkenfeld v UBS AG*, 172 AD3d 566 [1st Dept 2019] [truth is complete defense to defamation]).

2. 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 Alphonse*, 68 NY2d 283, 289 [1986], and *Gertz v Robert Welch, Inc.*, 418 US 323, 339-340 [1974]). Thus, it is 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 v Abel*, 10 NY3d 271, 276 [2008]; *see Steinhilber*, 68 NY2d at 289; *Martin v Daily News L.P.*, 121 AD3d 90, 100 [1st Dept 2014], *lv denied* 24 NY3d 908 [2014]). Moreover, an opinion cannot be proved false. (*Mann*, 10 NY3d at 276).

An asserted fact, by contrast, has a precise, readily understood meaning that is capable of

being proven true or false 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 v New York Times Co.*, 82 NY2d 146, 153 [1993]; *Steinhilber*, 68 NY2d at 292). Words are "imprecise" when "indefinite and ambiguous" (*Parks v Steinbrenner*, 131 AD2d 60, 63 [1st Dept 1987], citing *Ollman v Evans*, 750 F 2d 970, 983 [DC Cir 1984], *cert denied* 471 US 1127 [1985]), "may mean different things to different people," and cannot be proven true or false because of their "subjective, relative meanings" (*Live Face on Web, LLC v Five Boro Mold Specialist Inc.*, 2016 WL 1717218, *2 [SD NY 2016]).

Some statements seem on their face to be capable of being proven true or false, such as in *Davis*, where the defendant stated that the plaintiffs had falsely accused a coach of sexual abuse in order to obtain money from him, and that one of the plaintiffs had done so in the past. (24 NY3d at 271; *see also Kamchi v Weissman*, 125 AD3d 142, 157-58 [2d Dept 2014] [statements that plaintiff failed to appear for morning services, perform outreach, use traditional prayer book, and lead holiday services, etc., found "thoroughly capable of being proven true or false"]).

And then there are statements of apparent fact that "may assume the character of statements of opinion, and thus be privileged, when made in public debate, heated labor dispute, or other circumstances in which an 'audience may anticipate [the use] of epithets, fiery rhetoric or hyperbole.'" (*Steinhilber*, 68 NY2d at 294, quoting *Information Control Corp. v Genesis One Computer Corp.*, 611 F2d 781, 784 [9th Cir 1980]). Again, context is key in determining whether a reasonable reader would believe that a fact, not an opinion, was communicated. (*Davis*, 24 NY3d at 270, quoting *Brian*, 87 NY2d at 51). The court's consideration of the "content of the communication as a whole, as well as its tone and apparent purpose" prohibits it from picking

apart the challenged communication to isolate and identify factual assertions. (*Brian*, 87 NY2d at 51).

Opinions are either accompanied by the facts on which they are based, or do not imply that they are based on undisclosed facts. (*Gross*, 82 NY2d at 153-54). "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). And "if the predicate facts are disclosed but are false, such that the disparity between the stated facts and the truth would cause a reader to question the opinion's validity," the statement may be actionable as a "defamatory opinion" (*Enigma Software Grp. USA, LLC v Bleeping Computer LLC*, 194 F Supp 3d 263, 281 [SD NY 2016], citing *Silsdorf v Levine*, 59 NY2d 8, 15-16 [1983], *cert denied* 464 US 831 [1983]; *see also Parks*, 131 AD2d at 62-63).

a. Defendants' contentions (NYSCEF 20)

Defendants allege that their position that some of the plaintiffs engaged in frivolous litigation in moving to intervene in the article 78 proceeding constitutes an expression of opinion and they take issue with the probative value of plaintiffs' assertion that the motion to intervene was motivated by laudable purposes. In support, they ask that judicial notice be taken of proposed state legislation imposing a commercial vacancy tax as an explanation for their position that vacant storefronts are an important issue for public debate.

b. Plaintiffs' contentions (NYSCEF 33)

Plaintiffs assert that the statements pertaining to the warehousing of buildings as part of a scheme to destroy the market, lower property values, and force out businesses, are clear and capable of being proven true or false, and that the context of the statements warrants an inference that they are factual and defamatory. Plaintiffs accuse KUBA of using the statements to disparage them and destroy their relationship with the community. The full context of the statements, they claim, permits the inference that the opinions set forth therein constitute at the very least, mixed opinions, which a reader may presume are based on facts, relying on the words which, they claim, "speak to" their alleged goal of ruining the local economy for their benefit. Absent any facts disclosed in the statement on which to base such an accusation, plaintiffs insist that it is reasonably inferred that defendants had gained knowledge of their alleged business plans. Thus, to the extent that defendants' statements are opinions, they constitute actionable mixed opinions.

Moreover, plaintiffs argue, defendants' assertion that the statements are speculative does not preclude a finding that they are defamatory given their potential impact on the audience, and observe that no matter how skillfully a defamatory content may be veiled, the content remains defamatory "[w]here questions concerning illicit activity can convey that a party acted in a certain way." Thus, a statement in the form of a question does not preclude a finding that the statement is actionable, and defendants' community status reinforces a finding that the letters imply the existence of facts, as KUBA "is more likely than the average party to have learned about local businesses' activities, dealings, or plans," readers "could assume that they were privy to information" unknown by ordinary citizens. They thus ask that defendants' motion to dismiss be denied as the context and ordinary meaning of the statements render them susceptible to a

defamatory connotation.

c. Defendants' reply (NYSCEF 34)

Defendants allege that the opinions set forth in the statements are based on facts disclosed therein. Those statements, that "this individual appears to be attempting to single-handily destroy the market, and to what end? Is he trying to drive the property values down? Force businesses out?" are based on the disclosed facts that the investor opposed the project and left some of his stores vacant. They deny that anything in the statement suggests a reliance on undisclosed facts and that a reasonable reader could not conclude that they knew of some underlying business plan or were relying on any other undisclosed facts.

d. Analysis

The alleged defamatory statement that plaintiffs were warehousing buildings is readily understood and capable of being proven true or false. Moreover, its full context, namely, a letter in which KUBA sought to persuade municipal officials of certain conditions, indicates to readers that it likely conveys fact, not opinion, a proposition insufficiently met by defendants on this motion.

In contrast, the accusations that plaintiffs sought to destroy the market, lower property values, and force businesses out characterize plaintiffs' motivations, and thus, are not capable of being proven true or false and thus constitute opinion. As they are based on the alleged warehousing of buildings and the motion to intervene, they are pure, not mixed, opinion. (*See Steinhilber*, 68 NY2d at 289 [pure opinion accompanied by recitation of the facts on which it is based]; *see e.g. McGill v Parker*, 179 AD2d 98, 110–11 [1st Dept 1992] [reasonable reader would recognize that statements made by animal rights activists criticizing conditions under which carriage horses maintained were "partisan expressions of opinions," part of ongoing

controversy and designed primarily to persuade]).

Absent any opposition to defendants' position that stating that the article 78 litigation is frivolous constitutes an expression of an opinion, and given the merit of defendants' position in that regard (*see Pecile v Titan Capital Grp., LLC*, 96 AD3d 543, 544 [1st Dept 2012], *lv denied* 20 NY3d 856 [2013] [statement that plaintiffs' suit meritless constituted mere opinion]), defendants sustain their burden with respect to that statement.

Given this result, there is no need to take judicial notice as requested by defendants.

3. Defamation *per se*

While a business entity may maintain a cause of action for defamation, it may do so only under limited circumstances, such as where a statement impugns the basic integrity or creditworthiness of a business. (*Ruder & Finn Inc. v Seaboard Sur. Co.*, 52 NY2d 663, 670 [1981]; *Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 48 [1st Dept 2009], *lv dismissed and denied* 14 NY3d 736 [2010]). "Where, however, the statement is confined to denigrating the quality of the business' goods or services, it could support an action for disparagement, but will do so only if malice and special damages are proven." (*Ruder & Finn*, 52 NY2d at 670-71 [citations omitted]).

That plaintiffs warehouse buildings does not constitute a comment on goods or services. Rather, the statement essentially attacks plaintiffs' integrity, and thus, defendants fail to demonstrate that the statement is not defamatory *per se*.

C. Motion to change venue

1. Contentions

In support of their request for alternative relief, defendants ask that venue be transferred to Ulster County, as both the mayor and alderwoman will be material witnesses on the issue of

damages, and as the distance between Kingston and 60 Centre Street, New York, New York, is approximately 100 miles, with travel time of as much as two-and-a-half hours each way during rush hours, and three-and-a-half hours by public transportation. Thus, they assert, each witness would be inconvenienced by having to attend the trial in New York County, as they confirmed to counsel by telephone. They claim that special consideration should be given to the mayor's convenience, as local government officials ought not be unnecessarily kept from their duties, and they observe that the events giving rise to this action occurred in Ulster County, the location of the related LLCs' sole assets. While WGM is based in New York County, defendants maintain that the dispositive factor is that the alleged defamation originated in Ulster County. (NYSCEF 12, 20).

Plaintiffs oppose, alleging that as WGM is a resident of New York County, it may commence an action here, and they deny that Ulster County is the presumably preferred venue. They also argue that defendants fail to sufficiently set forth the names, addresses, and occupations of witnesses whose convenience will be impacted. Moreover, to the extent that the potential witnesses are identified, plaintiffs observe that defendants do not indicate that they would be willing or available to testify and that their testimony is necessary and material. They argue that the need to travel to another county is not, in and of itself, evidence of inconvenience. Moreover, as they were defamed to local officials and in a local newspaper about a subject that may be perceived as impacting the community's economic interests, plaintiffs contend that potential jurors may be biased. (NYSCEF 33).

2. Analysis

Pursuant to CPLR 503(a) and (c), the place of trial of an action "shall be in the county in which one of the parties resided when [the action] was commenced" or "the county in which a

substantial part of the events or omissions giving rise to the claim occurred," and if a party is a domestic or foreign corporation, then the party will be "deemed a resident of the county in which its principal office is located." As it is undisputed that WGM is a resident of New York County, venue is proper here.

Nevertheless, even if commenced in a proper venue, pursuant to CPLR 510(2) and (3), upon motion, an action may be moved to a different venue when "there is reason to believe that an impartial trial cannot be had in the proper county," or "the convenience of material witnesses and the ends of justice will be promoted by the change." The movant bears the burden of demonstrating that "the convenience of material witnesses would be better served by the change of venue." (*T.D.M. v Pipala*, 223 AD2d 419, 419 [1st Dept 1996]).

When seeking to change venue for the convenience of witnesses pursuant to CPLR 510(3), the movants must set forth:

> (1) the identity of the proposed witnesses, (2) the manner in which they will be inconvenienced by a trial in the county in which the action was commenced, (3) that the witnesses have been contacted and are available and willing to testify for the movant, (4) the nature of the anticipated testimony, and (5) the manner in which the anticipated testimony is material to the issues raised in the case.

(*Rodriguez-Lebron v Sunoco, Inc.*, 18 AD3d 275, 276 [1st Dept 2005], quoting *Cardona v Aggressive Heating Inc.*, 180 AD2d 572, 572 [1st Dept 1992]).

Defendants demonstrate that they identified and contacted the mayor and alderwoman, who have each confirmed that they would be inconvenienced by having to give testimony in New York County. As the allegedly defamatory statements were addressed directly to them, their testimony is material to the determination of whether plaintiffs have a cause of action.

Moreover, as each defendant and the related LLC properties are in Ulster County, and as the alleged defamation was published there, a change of venue is appropriate. (*See Ryan v Great*

Atl. & Pac. Tea Co., 30 AD2d 549, 549 [2d Dept 1968], citing *Condon v Schwenk*, 10 AD2d 822, 822 [1st Dept 1960] [rule changing venue to county where cause of action arose particularly applicable in defamation cases, especially where genesis and effect of defamation local).

When seeking to change venue pursuant to CPLR 510(2), the movant must "produce admissible factual evidence demonstrating a strong possibility that an impartial trial cannot be obtained in the county where venue was properly placed." (*Pruitt v Patsalos*, 96 AD3d 924 [2d Dept 2012]). Conclusory allegations, beliefs, and mere suspicion are insufficient. (*United States Fid. & Guar. Co. v Am. Re-Ins. Co.*, 145 AD.3d 600, 601 [1st Dept 2016]). In *Pruitt*, for example, the defendant was a retired judge who had presided in the county where the action was commenced for more than two decades and had relatives who worked for the courts in that county. To avoid even the potential appearance of impropriety, venue was changed. (*Pruitt*, 96 AD3d at 924).

That this matter, by contrast, presents issues that may be of interest to the residents and prospective jurors of Ulster County does not implicate the interest in maintaining the appearance of propriety in issue in *Pruitt* and plaintiffs do not demonstrate potential impropriety in reposing venue in Ulster County. Juror bias may be discerned in *voir dire* and the use of jury questionnaires. (*See e.g. Blaine v Int'l Bus. Machines Corp.*, 91 AD3d 1175, 1176 [3d Dept 2012] [that prospective jury pool contained thousands of defendant's former employees and many of plaintiffs' relatives did not warrant change of venue, as potential biases could be addressed during jury selection]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion to dismiss is denied as set forth herein; it is further

ORDERED, that the motion for a change of venue is granted and venue of this action is changed from this Court to the Supreme Court, County of Ulster; it is further

ORDERED, that the Clerk of this Court shall transfer the file in this action to the Clerk of the Supreme Court, County of Ulster and shall mark his records to reflect such transfer; it is further

ORDERED, that within 30 days from entry of this order, counsel for movant shall serve a copy of this order with notice of entry upon the Clerk of this Court, shall pay the appropriate transfer fee, if any, and shall contact the staff of the Clerk of this Court and cooperate in effectuating the transfer; it is further

ORDERED, that the Clerk of the Court shall coordinate the transfer of the file in this action with the Clerk of the Supreme Court, Ulster County, so as to ensure an efficient transfer and minimize insofar as practical the reproduction of documents, including with regard to any documents that may be in digital format; and it is further

ORDERED, that such service upon the Clerk of this Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

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10/13/2020
DATE

BARBARA JAFFE, J.S.C.

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