SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF RICHMOND: PART 23

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ELLEN CHERNY,

Plaintiff,

-against-

FAINA TREYBICH ,

Defendant.

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Index No. 152806/2019

Decision and Order

Ozzi, J.

This matter arises out of an alleged assault which occurred on December 20, 2018. The facts were gleaned from the pleadings and the parties respective motion papers and attached exhibits. In December 2018, Plaintiff, Ellen Cherny, Defendant, Faina Treybich, and Plaintiff's son (Defendant's now-estranged husband) were living together in Staten Island. In her complaint filed on December 16, 2019, Plaintiff alleges that Defendant, while holding her newborn daughter in her left hand, choked Plaintiff with her right hand. On or about April 5, 2019, Plaintiff sent a letter to multiple hospitals and medical agencies, including Defendant's employer, New York City Health and Hospitals Corporation and Coney Island Hospital where Defendant was employed as a physician, that contained numerous allegations against Defendant, including, *inter alia*, allegations of violent and/or criminal activity committed by Defendant against Plaintiff and further accused her of nefarious activities such as recruiting another employee at Coney Island Hospital to act as her bodyguard and intimidate Plaintiff and her son. On August 20, 2020, Plaintiff filed an Answer with Counterclaims, alleging defamation and tortious interference with business relations stemming from the April 5, 2019 letter. Plaintiff moved to dismiss these counterclaims on September 4, 2020 on the grounds of failure to state a cause of action and expiration of the one year statute of limitations for defamation. CPLR 3211(a)(5),(7). Defendant opposes the motion.

When considering a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the Court must accept the facts alleged in the pleading as true, afford the claimant the benefit of every possible favorable inference which may be drawn from the pleading, and determine only whether the facts as alleged fit within any cognizable legal theory. E&D Group, LLC v. Violet, 134 A.D.3d 981 (2d Dep't 2015). The sole issue for the Court's consideration is "whether the pleading states a cause of action" and if the complaint contains factual allegations "which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail." Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977).

Here, accepting the facts as alleged in the pleadings as true and affording Defendant the benefit of every favorable inference that may be drawn from the pleadings, the Court concludes that Defendant has stated cognizable claims for defamation and tortious interference with business relations, thus mandating denial of Plaintiff's motion to dismiss. Under New York law, the elements of a defamation claim are: (1) a false statement; (2) published to a third party without privilege or authorization; (3) with fault amounting to at least negligence; (4) that caused special harm constitutes or defamation per se. See Dillon v. City of New York, 261 A.D.2d 34, 38 (1st Dep't 1999).

In the matter presently before the Court, Defendant alleges that on April 5, 2019, Plaintiff mailed a letter to multiple individuals employed in high-ranking, supervisory, or administrative positions, in various hospitals, medical organizations, and the New York City Department of Health and Mental Hygiene, which Plaintiff expressly acknowledges doing. See Affidavit of Ellen Cherny. The letters contained allegations of violent and/or criminal activity committed by Defendant, specifically that Defendant "attacked me, by severely choking my throat with her right hand while holding my three week old granddaughter…" and that the this incident

ultimately resulted in Plaintiff filing a police report and obtaining an Order of Protection against Defendant from the Richmond County Family Court. In the letter, Plaintiff also addressed Defendant's fitness to practice medicine as well as her mental health, questioning same. See Answer with Counterclaims, Exhibit 1. Defendant alleges that these statements were untrue, that Plaintiff knew her statements were untrue at the time she made them, and that Plaintiff made these statements in an effort to "force, coerce, embarrass, extort and subject the Defendant to emotional trauma as retaliation for filing [for] divorce from Plaintiff's son as well as to cause extensive and irreparable harm to Defendant's professional standing and reputation in the medical community." Defendant further alleges that, as a result of Plaintiff's actions, she suffered professional and reputational harm, including additional oversight and scrutiny when acting in her professional capacity. See Answer With Counterclaims. These allegations are sufficient to give rise to a cause of action for defamation.

Additionally, the Court finds Plaintiff's claim that the letter is merely an expression of pure opinion, which is not actionable under defamation law (see Davis v. Boeheim, 24 N.Y.3d 262, 269 (2014)), to be belied by Plaintiff's own assertion that the allegations in the letter are true and supported by the fact that the Family Court granted an Order of Protection against Defendant as a result of same. The determination of whether a statement expresses fact or opinion is a question of law for the court, to be resolved "on the basis of what the average person hearing or reading the communication would take it to mean." Steinhilber v. Alphonse, 68 N.Y.2d 283, 290 (1986). The Court of Appeals utilizes the following factors in determining whether a statement is one of fact or opinion: "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven 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.'" Gross v. New York Times Co., 82 N.Y.2d 146, 153 (1993), *quoting* Steinhilber v. Alphonse, supra. Moreover, "an opinion that implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it… is a mixed opinion and is actionable." Davis v. Boeheim, supra; *see also* Gross v. New York Times Co., supra.

The Plaintiff has failed to establish that the statements she made in her April 5, 2019 letter did not constitute assertions of fact, or that they amount to non-actionable opinion. The April 5, 2019 letter contained specific statements that were readily understood and are capable of being proved true or false and, in context, the letter could be reasonably understood to proffer assertions of fact. *See* Davis v. Boeheim, 24 N.Y.3d at 271-272; Thomas H. v. Paul B., 18 N.Y.3d 580 (2012). Even if the letter at issue did not convey statements of fact, such statements would qualify as mixed opinion, since a reasonable reader would infer that the Plaintiff had knowledge of facts unknown to the audience, which would support the assertions she made in the letter. Gross v. New York Times, supra at 153-154.

Turning to Plaintiff's assertion of qualified privilege, on a motion to dismiss, the question of qualified privilege has been found to be premature in that the privilege is an "affirmative defense to be raised in defendant's answer. Defendants may then move for summary judgment on any such defense available to them and, upon their making a prima facie showing of … qualified privilege, the burden would shift to plaintiff…" Garcia v. Puccio, 17 A.D.3d 199 (1st Dep't 2005; Clark v. Schuylerville Central School District, 24 A.D. 2d 1162, 1163 (3rd Dep't 2005) see also Chen v. Yu, Index No. 25186/2010 (Supreme Court, Queens Co. 2011);

Beechwood Coram Building Co., LLC. v. Chaikin, Index No. 17767/2006 (Supreme Ct. Suffolk Co. 2008).

In any event, the qualified privilege defense extends only to those communications made by one person to another on a subject in which both have a common interest. Stillman v. Ford, 22 N.Y.2d 48, 53 (1971); *see e.g.,* Hoops v. Sinram, 181 A.D.3d 796 (2d Dep't 2020) (qualified privilege applicable where coworkers allegedly made false written statements to their employer accusing the plaintiff of making verbal threats of violence while at work based on defendants' common interest in maintaining the safety of their work place); Norwood v. City of New York, 203 A.D.2d 147 (1st Dep't 1994) (communications made to a prospective employee who was inquiring about the qualifications of defendant's former employee is subject to a qualified privilege as the parties share a common interest); Skibinski v. Parks, Index No. 404726/2002 (Supreme Ct. N.Y. Co. 2003) (statements of an employer to an employment agency regarding an employee who the agency provided are subject to a qualified privilege). To apply the qualified privilege under these facts, where Plaintiff has no role in Defendant's employment and whose only tenuous-link to Defendant's employment is as an alleged "frequent visitor and patient" to Coney Island Hospital, would provide a proverbial "blank check" to would-be tortfeasors to assert this privilege as cover to an attack on an individual's professional reputation. Qualified privileges are not to swallow the torts to which they apply.

Furthermore, even were the Court to find that the qualified privilege is applicable under the circumstances presented herein, the Defendant can overcome the privilege by demonstrating that the communication was made in bad faith and was motivated solely by malice. Liberman v. Gelstein, 80 N.Y.2d 429 (1992); Shover v. Instant Whip Processors, Inc., 240 A.D.2d 560 (2d Dep't 1997). As the Defendant correctly points out, at the pleading stage of the litigation,

Defendant has "no obligation to show evidentiary facts to support his or her allegations of malice on a motion to dismiss pursuant to CPLR 3211(a)(7)." Colantonio v. Mercy Medical Center 115 A.D.3d 902, 903 (2d Dep't 2014) *citing* Sokol v. Leader, 74 A.D. 3d 1180, 1182 (2d Dep't 2010); Demas v. Levitsky, 291 A.D. 653 (3d Dep't 2002). Therefore, Defendant's allegations set forth in her opposition to Plaintiff's motion, which reveal a toxic relationship between the two fraught with allegations of physical and verbal abuse, in which Defendant alleges Plaintiff threatened on multiple occasions to "destroy [her] medical career", at this early stage in the proceedings, are sufficient to defeat Plaintiff's motion to dismiss. See Affidavit of Faina Treybich p. 1-2.

Defendant's second counterclaim sounds in tortious interference with business relations. To prevail on this cause of action, a claimant must demonstrate that he or she had a business relationship with a third party, that the opposing party knew of the relationship and intentionally interfered with it, that the opposing party's actions were motivated solely by malice or otherwise constituted illegal means, and that the opposing party's interference caused injury to the claimant's relationship with the third party. Tri-Star Lighting Corp. v. Goldstein, 151 A.D.3d 1102 (2d Dep't 2017). Here, the pleadings, together with Defendant's affidavit, sufficiently states a claim for tortious interference with business relations. Specifically, Defendant alleges that Plaintiff's letter containing knowingly false statements and allegations , and that Plaintiff published it to various individuals including, *inter alia*, the CEO and Chief Medical Officer of the New York City Health and Hospitals Corporation, the organization in which Defendant was employed as a physician at Coney Island Hospital, individuals employed by Coney Island Hospital, and the New York City Health Commissioner for the purpose of causing the Defendant emotional and reputational harm, having been forced to address the claims contained in the letter

with supervisors at work and involve them in her personal matters, specifically her divorce proceedings. See Affidavit of Faina Treybich p. 2.

As for Plaintiff's contention that Defendant's counterclaims were filed after the expiration of the one year statute of limitations for defamation claims, the Court finds this argument to be without merit. Both parties agree that Defendant's cause of action accrued when Plaintiff sent the allegedly defamatory letter on April 5, 2019. However, the New York State Legislature enacted Executive Law Section 29-a to provide the Governor with the authority to suspend laws and issue directives in response to an emergency event. Specifically, the statute provides that "…the governor may by executive order temporarily suspend specific provisions of any statute, local law, ordinance, or orders, rules or regulations… of any agency during a state disaster emergency, if compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster."

Pursuant to Executive Law Section 29-a, and in response to the COVID-19 pandemic, on March 20, 2020, Governor Andrew Cuomo issued Executive Order 202.8, tolling New York's statute of limitations and other procedural deadlines until April 19, 2020:

> … [A]ny specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby tolled from the date of this executive order until April 19, 2020.

Subsequent Executive Orders further extended the initial toll of the statute of limitations that Governor Cuomo signed at the beginning of the COVID-19 pandemic. See Executive Orders 202.14 (extending toll of statute of limitations until May 7, 2020), 202.28 (extending toll of statute of limitations through June 6, 2020), 202.38 (extending toll of statute of limitations through July 6, 2020), 202.48 (extending toll of statute of limitations through August 5, 2020), 202.55 and 202.55.1 (extending toll of statute of limitations through September 4, 2020), 202.60

(extending toll of statute of limitations through October 4, 2020), and 202.67(extending toll of statute of limitations through November 3, 2020).

When interpreting a statutory provision, it is fundamental that a court should "attempt to effectuate the intent of the legislature," the best indication of which is the language of the statute itself, "giving rise to the plaint meaning thereof." Majewski v. Broadalbin-Perth Central School District, 91 N.Y.2d 577, 583 (1998), *quoting* Patrolmen's Benevolent Association v. New York, 41 N.Y.2d 205, 208 (1976). It has long been held that courts should focus on "the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add or take away that meaning." Tompkins v. Hunter, 149 N.Y. 117 (1896).

Contrary to Plaintiff's contention, Executive Law Section 29-a as well as the Executive Orders cited above are completely devoid of any language that would indicate the Governor's intent to carve out an exception to the tolling of Statutes of Limitation for those cases that are subject to e-filing. While the Governor could have included such exclusionary language, as has done in prior Executive Orders, he did not do so. As previously stated, the Court must look to the language of the Executive Order discern the intent of same. In this instance, the absence of words that would qualify or diminish the application of the tolling of Statutes of Limitations speaks volumes as to the Governor's intent when drafting Executive Order 202.8— it tolled Statutes of Limitations for all cases, not just those not subject to e-filing. Consequently, as the Statute of Limitations was tolled for all civil cases from March 20, 2020 until at least November 3, 2020[1], Plaintiff's argument that Defendant's counterclaim is barred by the Statute of

[1] On November 3, 2020, Governor Cuomo issued Executive Order 202.72, which effectively ended the tolling of the Statutes of Limitation for any civil case as November 4, 2020.

Limitations is unavailing and Defendant's August 20, 2020 filing of her counterclaims was timely.

Consequently, for the foregoing reasons, Plaintiff's motion to dismiss Defendant's counterclaims is denied. This constitutes the decision and Order of the Court.

ENTER

Dated: January 5, 2021

HON. WAYNE M. OZZI, J.S.C.