Omansky v Tribeca Citizen LLC
2022 NY Slip Op 32883(U)
August 24, 2022
Supreme Court, New York County
Docket Number: Index No. 160658/2021
Judge: William Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. WILLIAM PERRY** **PART** **23**

Justice

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LAWRENCE OMANSKY

Plaintiff,

- v -

TRIBECA CITIZEN LLC. A/K/A TRIBECA TRIB,

Defendant.

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INDEX NO. 160658/2021

MOTION DATE 03/02/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

were read on this motion to/for INQUEST.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

were read on this motion to/for JUDGMENT - DEFAULT.

In this defamation action, pro se plaintiff Lawrence A. Omansky moves, pursuant to CPLR 3215, for a default judgment against defendant Tribeca Citizen LLC. a/k/a Tribeca Trib. Defendant opposes the motion and cross-moves to dismiss the complaint with prejudice pursuant to CPLR 3211 (a) (1), (5) and (7), CPLR 3211 (g) and Civil Rights Law § 76-a and for an award of attorneys' fees, costs and sanctions pursuant to Civil Rights Law § 70-a (a), CPLR 8303-a and Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1.

BACKGROUND

According to the complaint, plaintiff owns and resides in Unit 4 (the Unit) in a cooperative building owned by nonparty 160 Chambers Street Owners Inc. (the Coop) located at 160 Chambers Street, New York, New York (the Building) (NYSCEF Doc No. 9, plaintiff aff, Ex 2, ¶¶ 1 and 5). Plaintiff was a member of the sponsor corporation when the Building was converted into a

cooperative in 1983 and held a 25-year lease for the commercial space in the Building with an option to renew for three 25-year periods (*id.*, ¶ 1). Defendant owns and operates the "Tribeca Trib[,] a local newspaper and now a website tribecacitizen@gmail.com that distributes news and advertisements and articles throughout Tribeca"[1] (*id.*, ¶ 2).

On or about July 2, 2021, defendant published an allegedly "libelous" article (the Article) about plaintiff on its website, which reads as follows:

> "**160 CHAMBERS HELD HOSTAGE BY SPONSOR**
> The Real Deal reports that shareholders at 160 Chambers (seen in one of Gavin Snider's paintings!) – the old firehouse between Greenwich and West Broadway – are suing a fellow tenant, Lawrence Omansky, who converted the building in 1982 and since then has racked up so much debt on his spaces that the building can't get a mortgage or loan to even fix its own roof. 'Omansky first brought unwanted attention to 160 Chambers in 2003 when he reportedly bound and gagged his business partner at knifepoint over a real estate dispute, leaving the partner beneath the floorboards of his duplex in the building. Although an investigation supported the claims of Omansky's partner, who survived, prosecutors ultimately dropped kidnapping charges.' Yipes"

(NYSCEF Doc No. 8, plaintiff aff, Ex 1).

Plaintiff alleges the statements, above, are false (NYSCEF Doc No. 9, ¶ 3). In 2008, plaintiff brought an action against the Coop and its shareholders, individually, captioned *Omansky v 160 Chambers Street Owners Inc.*, Sup Ct, NY County, index No. 603738/2008 (the 2008 Action), for their failure to repair the Building's roof and skylights, which had caused damage to his Unit, and for permission to install an elevator (*id.*, ¶ 5). Plaintiff claims defendant had notice and knowledge of the 2008 Action and that a further investigation would have revealed that he no longer held the lease for the commercial space, which has been returned to the Coop (*id.*, ¶¶ 5 and

[1] Defendant's chief executive officer and sole member, Pamela Frederick (Frederick), avers that defendant publishes the Tribeca Citizen and does not publish the Tribeca Trib, which is a different newspaper (NYSCEF Doc No. 15, Frederick aff, ¶¶ 1 and 18).

8). He rejects the contention that the Coop could not secure a loan because he had "on two occasions gotten them a private lender to lend the money and they refused to take said loan and refused to make said repairs" (*id.*, ¶ 9). Plaintiff also alleges the statements related to the alleged kidnapping are false, as his "business partner was committed to an insane asylum within one year of said incident" (*id.*, ¶ 10). Plaintiff claims he was in Florida for part of the time, and that his "neighbor … entered my unit … to inspect the premises during said alleged kidnapping, and did not find any evidence of said kidnapping" (*id.*). Plaintiff alleges he sent a response to defendant seeking a retraction of the Article, but defendant failed to print one[2] (*id.*, ¶ 16).

Plaintiff commenced this action by filing a summons and complaint on November 24, 2021 pleading a single cause of action for defamation. Plaintiff now moves for a default judgment based on defendant's failure to answer or appear in the action, and relies on his affidavit, the summons and complaint and an affidavit of service in support. Defendant opposes and cross-moves for dismissal on the ground that the action is a strategic lawsuit against public participation (SLAPP) that is barred by New York's anti-SLAPP statute (Civil Rights Law § 76-a). Defendant proffers an affidavit from Frederick, a copy of the Article from its website, the complaint in the action captioned *160 Chambers St. Owners, Inc. v Coronation Intl. Ltd*., Sup Ct, NY County, index No. 156060/2021 (the Coop Action), and other exhibits.

DISCUSSION

I. The Motion for a Default Judgment

A motion for a default judgment must be supported with "proof of service of the summons and complaint[,] … proof of the facts constituting the claim, [and] the default" (CPLR 3215 [f]; *see also Gordon Law Firm, P.C. v Premier DNA Corp*., 205 AD3d 416, 416 [1st Dept 2022]).

[2] Frederick avers that plaintiff sent his reply to the Tribeca Trib, not the Tribeca Citizen (*id.*, ¶ 18).

"[A] complaint verified by someone or an affidavit executed by a party with personal knowledge of the merits of the claim" satisfies this statutory requirement (*Beltre v Babu*, 32 AD3d 722, 723 [1st Dept 2006]; *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003] [stating that "the affidavit or verified complaint need only allege enough facts to enable a court to determine that a viable cause of action exists"]). The plaintiff must also offer "some proof of liability … to satisfy the court as to the prima facie validity of the uncontested cause of action" (*Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]). "The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts" (*id.*). A party in default "admits all traversable allegations in the complaint, including the basic allegation of liability, but does not admit the plaintiff's conclusion as to damages" (*Rokina Opt. Co. v Camera King*, 63 NY2d 728, 730 [1984]).

"To successfully oppose a motion for leave to enter a default judgment, a defendant must demonstrate a reasonable excuse for the default and a meritorious defense" (*Morrison Cohen LLP v Fink*, 81 AD3d 467, 468 [1st Dept 2011]). It is within the court's discretion to determine what constitutes a reasonable excuse (*see Xiaoyong Zhang v Jong*, 195 AD3d 435, 435 [1st Dept 2021]). Factors to consider include "the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits" (*New Media Holding Co. LLC v Kagalovsky*, 97 AD3d 463, 465 [1st Dept 2012] [internal quotation marks and citation omitted]).

The affidavit of service sworn to on December 10, 2021 reveals that plaintiff served defendant with process by delivering duplicate copies of the summons and complaint to the Secretary of State on December 9, 2021 (NYSCEF Doc No. 10, plaintiff aff, Ex 3). Service of process upon defendant was complete upon service to the Secretary of State (*Darbeau v 136 W. 3rd St., LLC*, 144 AD3d 420, 420 [1st Dept 2016], citing Limited Liability Company Law § 303

[a]). However, plaintiff failed to establish that he served defendant with a notice of electronic filing, as required under Uniform Rules for Trial Courts (22 NYCRR) § 202.5-bb (b) (3) (*see Pollack, Pollack Isaac & De Cicco LLP v Brach*, 2022 NY Slip Op 30755[U], *3 [Sup Ct, NY County 2022] [denying entry of a default judgment where the plaintiff failed to establish that it served a notice advising the recipient of the initiating papers that the action was subject to electronic filing]). Although the rule exempts unrepresented litigants from having to serve and file documents electronically (*see* Unif Rule for Trial Cts [22 NYCRR] § 202.5-bb [e] [1]), plaintiff admits he is an attorney (NYSCEF Doc No. 9, ¶ 1), and the court notes that he filed the present motion on NYSCEF (NYSCEF Doc No. 6).

Furthermore, plaintiff has failed to demonstrate that he served an additional copy of the summons by first class mail upon defendant at its last known address or that it served defendant with notice that the summons and complaint had been served upon it via the Secretary of State. Although CPLR 3215 (g) (4) does not refer to limited liability companies, compliance with this section of the statute when seeking a default judgment against a limited liability company is required (*see Wonder Works Constr. Corp. v RCDolner, LLC*, 44 AD3d 526, 526 [1st Dept 2007] [granting vacatur of the default judgment, in part, where the plaintiff failed to comply with CPLR 3215 (g) (4) (i)]; *Crespo v A.D.A. Mgt.*, 292 AD2d 5, 10 [1st Dept 2002]; *cf. Jian Hua Tan v AB Capstone Dev., LLC*, 163 AD3d 937, 939 [2d Dept 2018]).

In any event, defendant has proffered a reasonable excuse for the delay (*see Siwek v Phillips*, 71 AD3d 469, 469 [1st Dept 2010]). Frederick avers that defendant did not receive the summons and complaint from the Secretary of State until February 18, 2022 (NYSCEF Doc No. 15, ¶ 11), and the Department of State's letter transmitting those documents to defendant is dated February 14, 2022, nearly two months after the December 9, 2021 date of service (NYSCEF Doc

No. 20, Frederick aff, Ex 5). Frederick also refers conversations defendants' attorneys had with plaintiff shortly after defendant received the summons and complaint from the Department of State (NYSCEF Doc No. 15, ¶¶ 13-14 and 16; NYSCEF Doc No. 23, David S. Korzenik affirmation, ¶ 2). Thus, there is no evidence of willfulness on defendant's part (*see M&E 73-75 LLC v 57 Fusion LLC*, 121 AD3d 528, 529 [1st Dept 2014]). Plaintiff also has not alleged suffering any prejudice from the delay (*see Siwek*, 71 AD3d at 469). In addition, as discussed *infra*, defendant has demonstrated the existence of a potentially meritorious defense to the action. Accordingly, plaintiff's motion for a default judgment is denied.

II. The Cross Motion to Dismiss

Defendant moves for dismissal under CPLR 3211 (a) (1), (5) and (7) and 3211 (g).[3] On a motion brought under CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord plaintiff[ ] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Dismissal is warranted where "the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]). Dismissal under CPLR 3211 (a) (1) is appropriate where the documentary evidence utterly refutes the plaintiff's claims and conclusively establishes a defense as a matter of law (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.*, 37 NY3d 169, 175 [2021], *rearg denied* 37 NY3d 1020 [2021]). As is relevant here, "a full copy, transcript, printout, or video of the relevant medium in which the allegedly defamatory statement is contained" must be considered "for the purpose of establishing

[3] Defendant "reserves" its right to move for dismissal predicated on issue preclusion under CPLR 3215 (a) (5) (NYSCEF Doc No. 24, defendant's mem of law at 11).

the *context* in which the allegedly defamatory statement was made" (*Greenberg v Spitzer*, 155 AD3d 27, 44-45 [2d Dept 2017]).

A. Civil Rights Law § 76-a

Civil Rights Law § 76-a (1) (a) provides, in relevant part, that:

> "An 'action involving public petition and participation' is a claim based upon:
> (1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or
> (2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition."

A "'[c]laim" includes any lawsuit, cause of action, cross-claim, counterclaim, or other judicial pleading or filing requesting relief" (Civil Rights Law § 76-a [1] [b]). "Communication" means "any statement, claim, allegation in a proceeding, decision, protest, writing, argument, contention or other expression" (Civil Rights Law § 76-a [1] [c]). The term "'[p]ublic interest' shall be construed broadly, and shall mean any subject other than a purely private matter" (Civil Rights Law § 76-a [1] [d]). To recover damages in a SLAPP suit, the plaintiff must,

> "in addition to all other necessary elements, shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue"

(Civil Rights Law § 76-a [2]).

CPLR 3211 (g) sets forth the procedure for dismissing a SLAPP suit and provides that a motion brought under CPLR 3211 (a) (7) "shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law" (CPLR 3211 [g]

[1]). The court "shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the action or defense is based" (CPLR 3211 [g] [2]).

The court turns first to the issue of whether the Article concerns a matter of public interest, since only matters of public interest trigger the anti-SLAPP statute (*see Mable Assets, LLC v Rachmanov*, 192 AD3d 998, 1000 [2d Dept 2021] [stating that once the defendant shows an action involves public petition and participation, the plaintiff bears the burden of demonstrating that the claim has a substantial basis in law]). Defendant contends the Article reports on two judicial proceedings involving plaintiff that are, by definition, matters of public interest. Plaintiff contends that he is a private citizen and the matters raised in the Article do not concern the public interest.[4]

"New York courts have generally applied a broad interpretation to what constitutes a matter of public concern" (*Aristocrat Plastic Surgery, P.C. v. Silva*, 206 AD3d 26, 29 [1st Dept 2022]). The court must look at the context of the entire writing, rather than statements in isolation, to determine "whether content is arguably within the sphere of legitimate public concern" (*Huggins v Moore*, 94 NY2d 296, 302 [1999]). Statements concerning "'mere gossip and prurient interest'" are not matters of public concern (*id.*, quoting *Weiner v Doubleday & Co.*, 74 NY2d 586, 595 [1989], *cert denied* 495 US 930 [1990]). Likewise, "publications directed only to a limited, private audience are 'matters of purely private concern'" (*id.* at 303, quoting *Dun & Bradstreet, Inc. v Greenmoss Builders, Inc.*, 472 US 749, 759 [1985]). That said, "[c]ourts, for obvious reasons, are deferential to editors in terms of what is of interest to the public and thus what is newsworthy" (*Reus v ETC Hous. Corp.*, 72 Misc 3d 479, 486 [Sup Ct, Clinton County 2021], *affd* 203 AD3d

[4] The court notes that plaintiff's submission of an affirmation in opposition to the cross motion is improper. As a party to the action, plaintiff is required to submit an affidavit under CPLR 2106 (*see Morrison Cohen LLP v Fink*, 81 AD3d 467, 468 [1st Dept 2011] [stating that the court correctly disregarded the defendant's affirmation in opposition because he was a party to the action]). Additionally, plaintiff failed to adhere to Uniform Rules for Trial Courts [22 NYCRR] § 202.8-b (a), (c), and (d).

1281 [3d Dept 2022], citing *Gaeta v New York News*, 62 NY2d 340, 349 [1984]). Here, Frederick attests that the Tribeca Citizen "reports on news and local events of interest to Tribeca residents and others" (NYSCEF Doc No. 15, ¶ 1), and plaintiff admits in the complaint that the newspaper "covers fast-growing Lower Manhattan, including Tribeca … [and] distributes news and advertisements and articles" (NYSCEF Doc No. 9, ¶ 2).

"[J]udicial proceedings … are matters of legitimate public concern" (*Matter of Hofmann*, 284 AD2d 92, 94 [1st Dept 2001]). Thus, an article describing a judicial proceeding involving a real estate matter in a newspaper reporting on community issues, as is the case here, concerns a matter of legitimate public concern (*see Wehringer v Newman*, 60 AD2d 385, 390 [1st Dept 1978], *lv denied* 44 NY2d 641 [1978] [concluding that an article discussing a judicial proceeding involving a real estate problem published in a newspaper which publishes articles of interest to those in the real estate community involved a matter of public concern]). Furthermore, the communication was made in a public forum (*see Harris v American Accounting Assn*., 2021 WL 5505515, *14, 2021 US Dist LEXIS 226517, *37 n 13 [ND NY, Nov. 24, 2021, No. 5:20-CV-01057 (MAD/ATB)] [finding that a publication in an online and publicly available journal satisfied Civil Rights Law § 76-a (1) (a) (1)]). Consequently, defendant has demonstrated that plaintiff's action triggers Civil Rights Law § 76-a.

Plaintiff now bears the burden of demonstrating that his claim has a substantial basis in law (*see* CPLR 3211 [g] [1]; *Sackler v American Broadcasting Cos., Inc.*, 71 Misc 3d 693, 700 [Sup Ct, NY County 2021] [stating that to avoid dismissal, the plaintiff must show with clear and convincing evidence that the action has a substantial basis in fact and law]). Defendant contends that plaintiff cannot.

B. Defamation

Defamation is "the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society" (*Foster v Churchill*, 87 NY2d 744, 751 [1996] [internal quotation marks and citations omitted]). Since falsity is a key element, it follows that truth constitutes a complete defense (*Dillon v City of New Yor*k, 261 AD2d 34, 39 [1st Dept 1999]). Whether a statement is reasonably susceptible of a defamatory connotation is a matter for the court to decide in the first instance (*Weiner*, 74 NY2d a 592). Moreover, a communication, although defamatory, may not be actionable if an absolute or qualified privilege applies (*Stega v New York Downtown Hosp*., 31 NY3d 661, 669-670 [2018]).

Defendant asserts that its conduct falls under the fair reporting privilege found in Civil Rights Law § 74. Civil Rights Law § 74 provides that "[a] civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published." The statute furnishes publishers with an absolute privilege (*Alf v Buffalo News, Inc.*, 21 NY3d 988, 989 [2013]) that shields them from civil liability for defamation "if the gist of the article constitutes a 'fair and true report'" (*Martin v Daily News L.P*., 121 AD3d 90, 100 [1st Dept 2014], lv denied 24 NY3d 908 [2014] [citation omitted]; *Holy Spirit Assn. for Unification of World Christianity v New York Times Co*., 49 NY2d 63, 67 [1979] [reasoning that "the substance of the article be substantially accurate"]). "A statement comes within the privilege and 'is deemed a fair and true report if it is substantially accurate, that is if, despite minor inaccuracies, it does not produce a different effect on a reader than would a report containing the precise truth'" (*Kinsey v New York Times Co*., 991 F3d 171,

178 [2d Cir 2021] [citation omitted]; *Daniel Goldreyer, Ltd. v Van De Wetering*, 217 AD2d 434, 436 [1st Dept 1995] [stating that "[t]he test is whether the published account of the proceeding would have a different effect on the reader's mind than the actual truth, if published"]). "If the published account, along with the rest of the article, suggests more serious conduct than that actually suggested in the official proceeding, then the privilege does not attach, as a matter of law" (*Daniel Goldreyer, Ltd.*, 217 AD2d at 436). The "fair and true report" standard must be interpreted liberally "so as to provide broad protection to news accounts of judicial and other official proceedings" (*Hayt v Newsday, LLC*, 176 AD3d 787, 787 [2d Dept 2019] [internal quotation marks and citation omitted]).

As applied here, the court finds that the challenged statements are covered under the "fair and true report" privilege in Civil Rights Law § 74. To begin, the defendant must establish that the statement concerns a judicial proceeding (*Cholowsky v Civiletti*, 69 AD3d 110, 114 [2d Dept 2009]). "Comments that essentially summarize or restate the allegations of a pleading filed in an action are the type of statements that fall within section 74's privilege" (*Lacher v Engel*, 33 AD3d 10, 17 [1st Dept 2006]). The Article expressly refers to an article published in The Real Deal and contains a hyperlink to that article (NYSCEF Doc No. 16, Frederick aff, Ex 1 at 1). A "hyperlink is the twenty-first century equivalent of the footnote for purposes of attribution in defamation law, because it has become a well-recognized means for an author or the Internet to attribute a source" (*Adelson v Harris*, 973 F Supp 2d 467, 484 [SD NY 2013], *affd* 876 F 3d 413 [2d Cir 2017]). "[H]yperlinking to another article that itself is a fair report of a proceeding signals to the reader that the allegations stem from a proceeding'" (*Cummings v City of New York*, 2020 WL 882335, *19, 2020 US Dist LEXIS 31572, *54 [SD NY, Feb. 24, 2020, No. 19-cv-7723 (CM)(OTW)]). In this case, the hyperlinks appear in light blue in the version of the Article submitted on the cross

motion (NYSCEF Doc No. 16 at 1), and in light gray in the version submitted with plaintiff's opposition (NYSCEF Doc No. 33, plaintiff aff, Ex 5 at 1).

The article published in The Real Deal on July 1, 2021 bears the title "A Tribeca co-op's struggle with the man who created it" (the TRD Article) (NYSCEF Doc No. 17, Frederick aff, Ex 2 at 1). The TRD Article plainly and unambiguously discusses a lawsuit brought by the Coop related to millions of dollars of debt plaintiff had taken on using the commercial space as collateral (*id.* at 1-2). The TRD Article reports that "Omanksy's dealings have so tarnished the credit of the building, 160 Chambers Street, that it cannot obtain a loan to repair the roof, which has long leaked into Omanksy's top-floor apartment, the co-op claims in a lawsuit" (*id.* at 2). The TRD Article further reports that "'[t]hese mortgages and financing statements currently encumber the building,' the co-op said in its suit filed last week. It asked the court to remove the mortgages from City records 'so that it can obtain a commercial loan and mortgage'" (*id.*). The TRD Article reports that, "according to the building's complaint," plaintiff had "sponsored the building's conversion in 1982, securing for himself the top-floor apartment and a 'sweetheart lease' on the ground-floor commercial unit lasting 25 years with rent 'substantially below market' value" (*id*. at 2).

A review of the complaint filed in the Coop Action reveals that the action relates to loans totaling approximately $5.8 million that plaintiff or his corporate alter ego had obtained which were then secured by mortgages on the commercial space that he had leased (NYSCEF Doc No. 19, Frederick aff, Ex 4, ¶¶ 9-10). The complaint identifies plaintiff as the sponsor on the Building's conversion into a cooperative (*id.*, ¶ 8). The complaint alleges that "[t]hese mortgages and financing statements currently encumber the Subject Building, and relate to the expired commercial Lease at the Subject Building" (*id.*, ¶ 10). The complaint further alleges the Coop seeks a judgment declaring that the mortgages and financing statements have no force or effect

due to the expiration of the leasehold in the commercial space and must be removed or discharged from the records maintained by the Office of the City Register (*id.*, ¶ 34).

The Article published by defendant discusses the Coop Action (NYSCEF Doc No. 16 at 1). The Article identifies plaintiff as the Building's sponsor and reports that the Coop could not obtain a loan or mortgage to fix the roof because of the debt on plaintiff's spaces in the Building (*id.*). Thus, the Article is a substantially accurate report of the complaint in the Coop Action (*see Nix v Major League Baseball*, 189 AD3d 547, 548 [1st Dept 2020]). Although the Article erroneously states that the Coop's shareholders "are suing a fellow tenant"[5] (*id.*), this inaccuracy is "not so egregious as to remove the article from the protection of Civil Rights Law § 74" (*Saleh v New York Post*, 78 AD3d 1149, 1152 [2d Dept 2010]; *see also Highland Capital Mgt., L.P. v Dow Jones & Co., Inc.*, 178 AD3d 572, 573 [1st Dept 2019] [concluding that an article which erroneously stated that an arbitration award had been rendered against the plaintiff was a substantially accurate report because "[i]t is unlikely that a reader knowing the actual truth would have had a more favorable impression of plaintiff than that created by the article"]). Critically, the Article does not suggest more serious conduct on plaintiff's part than that alleged in the Coop's complaint (*see Daniel Goldreyer, Ltd.*, 217 AD2d at 436). That the Coop did not sue plaintiff would not produce a different effect on the reader's mind than if it had been reported that he was a party to the Coop Action. The gist of the Article remains that the Coop commenced a judicial proceeding because it could not obtain a loan or mortgage because of plaintiff's loans, and the Article accurately summarizes those allegations in the Coop's complaint. The fact that defendant obtained the information for the Article from the TRD Article is immaterial (*Cholowsky*, 69 AD3d

[5] The TRD Article states that "Omansky … is not named as party in the [Coop's] lawsuit" (NYSCEF Doc No. 17 at 3).

at 115 [stating that Civil Rights Law § 74 applied even though the defendant obtained the information from secondary sources]).

In addition, the Article contains a substantially accurate report of a judicial proceeding related to the alleged kidnapping of plaintiff's former business partner, Lawrence Schlosser (Schlosser). The Article quotes the following directly from the TRD Article: "Omansky first brought unwanted attention to 160 Chambers in 2003 when he reportedly bound and gagged his business partner at knifepoint over a real estate dispute, leaving the partner beneath the floorboards of his duplex in the building. Although an investigation supported the claims of Omansky's partner, who survived, prosecutors ultimately dropped kidnapping charges" (NYSCEF Doc No. 16 at 1-2; NYSCEF Doc No. 17 at 2). The TRD Article contains hyperlinks to an article published in the New York Times on April 18, 2003 titled "Gothic Ordeal for Investor Kept 28 Hours Under Floor" and an undated Associated Press article titled "Kidnapping Charge Against Lawyer Dropped," both of which discussed Schlosser's alleged kidnapping by plaintiff and the criminal charges against him (NYSCEF Doc No. 18, Frederick aff, Ex 3 at 3). In particular, the New York Times article reads, "[a]ccording to the criminal complaint filed against Mr. Omansky, he punched Mr. Schlosser and hurled him on the bed. He put a knife against his neck, Mr. Schlosser told the police, and threatened to kill him … [and that plaintiff] forced him, gagged and bound, into the crawl space and locked the door" (*id*. at 2). The article also states that "[Omanksy] was arraigned yesterday in Criminal Court in Manhattan on kidnapping and coercion charges, and sent to jail" (*id*. at 3). The Associated Press article reads, in part, that "[a]n investigation tended to support the allegations, prosecutor Elizabeth Nochlin told the judge," but a state Supreme Court justice dismissed the kidnapping charge "after a prosecutor said she would be unable to prove kidnapping" (*id*. at 4). Plaintiff admits in the complaint that the criminal case against him was dismissed

(NYSCEF Doc No. 9, ¶ 10). Thus, the Article is a substantially accurate report of a judicial criminal proceeding involving plaintiff.

Plaintiff, in opposition, fails to show that the defamation claim has a substantial basis in law. Not only is his affirmation inadmissible (*Morrison Cohen LLP*, 81 AD3d at 468), he fails to adequately address the absolute privilege afforded to defendant under Civil Rights Law § 74. He complains that defendant refused to publish his response to the Article, which purports to put forth his side of the story, but "there was no requirement that the publication report the plaintiff's side of the controversy" (*Cholowsky*, 69 AD3d at 115).

Even if Civil Rights Law § 74 did not apply, defendant has demonstrated that plaintiff has failed to plead actual malice. The anti-SLAPP statute imposes a heightened standard of proof upon the plaintiff in an action for defamation and requires the plaintiff to furnish clear and convincing evidence that the defendant acted with actual malice (*Guerrero v Carva*, 10 AD3d 105, 116 [1st Dept 2004], citing Civil Rights § 76-a [2]). "[A] statement is made with actual malice when it is made 'with knowledge that it was false or with reckless disregard of whether it was false or not'" (*id*. at 115, quoting *New York Times Co. v Sullivan*, 376 US 254, 280 [1964]). Here, the complaint fails to plead any facts sufficient to show that defendant published the Article with actual malice (*see Rivera v Time Warner, Inc.*, 56 AD3d 298, 298 [1st Dept 2008] [granting dismissal where the complaint failed to "plead actual malice either explicitly or through facts from which actual malice can be inferred"]; *Reus*, 72 Misc 3d at 487 ["Plaintiffs cite to no facts which would argue in favor of the conclusion that Defendant published a news article with knowledge of its falsity or reckless disregard thereof"]). Additionally, the "[actual malice] standard is a subjective one, focusing on the speaker's state of mind" (*Hoesten v Best*, 34 AD3d 143, 155 [1st Dept 2006]). The complaint herein fails to plead any facts alleging that defendant was "highly aware" that the statements in the

Article were probably false (*id*.) or any facts from which it can be inferred that defendant "harbored an intent to avoid the truth" (*Sweeney v Prisoners' Legal Servs. of N.Y.*, 84 NY2d 786, 793 [1995]).

Plaintiff's opposition fails to furnish clear and convincing evidence of actual malice. He contends that had defendant reviewed the documents filed in the 2008 Action, it would have learned that plaintiff's leasehold interest in the commercial space ended in June 2008 (*see Omansky v 160 Chambers Street Owners, Inc*., 155 AD3d 460, 461 [1st Dept 2017]), and at least one entity had indicated a willingness to loan the Coop funds (NYSCEF Doc No. 40, plaintiff affirmation, Ex 12, ¶¶ 3-4]). However, "the failure to investigate its truth, standing alone, is not enough to prove actual malice even if a prudent person would have investigated before publishing the statement" (*Sweeney*, 84 NY2d at 793). As discussed earlier, the Article presents a substantially accurate report about two judicial proceedings involving plaintiff. Finally, as defendant points out, malice or bad faith cannot defeat the absolute privilege afforded by Civil Rights Law § 74 (*Kinsey*, 991 F3d at 176). Accordingly, defendant's cross motion to dismiss the complaint is granted as plaintiff has failed to furnish clear and convincing evidence that his claim has a substantial basis in law. The court need not address the other arguments raised by defendant in support of dismissal.

C. Civil Rights Law § 70-a (1)

Civil Rights Law § 70-a (1) states, in part:

> "A defendant in an action involving public petition and participation, as defined in paragraph (a) of subdivision one of section seventy-six-a of this article, may maintain an action, claim, cross claim or counterclaim to recover damages, including costs and attorney's fees, from any person who commenced or continued such action; provided that:
> (a) costs and attorney's fees shall be recovered upon a demonstration, including an adjudication pursuant to subdivision (g) of rule thirty-two hundred eleven or subdivision (h) of rule thirty-two hundred twelve of the civil practice law and rules, that the action

> involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law."

Because plaintiff has failed to demonstrate that the claim has a substantial basis in law and cannot be supported by a substantial argument for an extension, modification or reversal of existing law, defendant is entitled to recover its costs and attorney's fees (*see Aristocrat Plastic Surgery, P.C.*, 206 AD3d at 32 [reinstating a request for attorney's fees under Civil Rights Law §§ 70-a and 76-a made in the defendant's pre-answer motion to dismiss]; *Reus*, 72 Misc 3d at 487-488).

The court declines to impose sanctions pursuant to Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1 and CPLR 8303-a.

Accordingly, it is

ORDERED that the motion brought by plaintiff Lawrence A. Omansky for a default judgment against defendant Tribeca Citizen LLC. a/k/a Tribeca Trib (motion sequence no. 001) is denied; and it is further

ORDERED that the cross motion brought by defendant Tribeca Citizen LLC. a/k/a Tribeca Trib to dismiss the complaint with prejudice (motion sequence no. 001) is granted, and the complaint against said defendant is dismissed with prejudice; and it is further

ORDERED that within ten (10) days from the entry of this order, defendant Tribeca Citizen LLC. a/k/a Tribeca Trib shall file and serve on all parties an itemized bill fully detailing their actual costs and attorneys' fees associated with this action; the truthfulness and accuracy of which shall be affirmed by an attorney of said firm who is fully familiar with the facts and circumstances of the instant matter; and it is further

ORDERED that if plaintiff Lawrence A. Omansky disputes the accuracy or reasonableness of the costs and attorneys' fees incurred by defendant Tribeca Citizen LLC. a/k/a Tribeca Trib,

within ten (10) days from service of the itemized bill referenced above, plaintiff must file and serve on all parties a sworn statement setting forth his basis for disputing the accuracy or reasonableness of said costs and fees.

8/24/2022
DATE

WILLIAM PERRY, J.S.C.

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