SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

----------X

MANUELE VERDI, individually and in his official capacity as the Assistant Principal of Public School 24 ("P.S. 24"), a public school under the auspices of the New York City Department of Education,

Plaintiff,

-against-

JEFFREY DINOWITZ, both individually and in his official capacities as Assembly Member of the 81st Assembly District,

Defendant.

----------X

DECISION/ORDER
Index No.: 158747/16
Motion Seq.: 021

Present:
Hon. Lynn R. Kotler, J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
N/Motion, Memo of Law	685-722
Aff in opp, N/X-mot, Answer, Memo of Law in opp	742-773
Reply Aff	775-786
Reply Aff	788-792

In this defamation action, plaintiff moves for partial summary judgment establishing as a matter of law that: (a) defendant published false statements about plaintiff as alleged in counts four, five, six, and eight of the amended complaint; (b) defendant was not privileged or authorized to publish these false statements; (c) the statements exposed plaintiff to public contempt, ridicule, aversion, or disgrace, or induced an evil opinion of him "in the minds of right-thinking persons;" and (d) in publishing these statements, defendant acted in a grossly irresponsible manner.

Defendant cross-moves for summary judgment dismissing this action on the grounds of qualified privilege, absence of malice, and failure to show damages.

Plaintiff directs his motion to the amended complaint (AC, NYSCEF 689). Defendant correctly states that the AC is no longer before the court, having been supplanted by the plaintiff's second amended complaint (SAC, NYSCEF 694). In September 2019, plaintiff's motion to file a second amended complaint was granted (*Verdi v Dinowitz,* 2019 WL 4753069

[Sup Ct, NY County, Sept. 25, 2019, Kotler, J., index No. 158747/16]). The allegations in the AC on which plaintiff is moving are repeated in the SAC, and the motion will be determined according to the SAC.

Plaintiff Manuele Verdi, now retired, was an assistant principal at PS 24 in the Riverdale section of Bronx County. Defendant Jeffrey Dinowitz was a New York State Assembly member representing the district in which the school is located. Because of overcrowding, some PS 24 students attended classes in an annex in a nearby cooperative building. The lease for the annex was not renewed and the students had to be relocated to the main building. "Predictably, the local community expressed outrage and looked for people to blame. Led by defendant, the school administrators at PS 24, including plaintiff (the assistant principal), were singled out as responsible for losing the lease" (*Verdi v Dinowitz,* 2017 NY Slip Op 32073[U], **1 [Sup Ct, NY County 2017, *affd as mod* 161 AD3d 413 [1st Dept 2018]). Plaintiff alleges that defendant defamed him by publicly stating that plaintiff was at fault for losing the lease to the annex, although defendant knew full well that plaintiff was not responsible for obtaining or renewing leases and had no authority to negotiate leases or to extend them or even to influence the process. In addition, defendant allegedly defamed plaintiff by stating that plaintiff was responsible for overcrowding at the school because he wrongly enrolled out of zone students. Plaintiff denies this and states that he had no authority or ability to enroll students from out of zone and that the system of enrollment employed certain checks that made such a thing impossible for him. The only out of zone students enrolled at the school were those who, according to Department of Education (DOE) regulations, had the right to attend the school.

Plaintiff alleges that defendant's statements caused him humiliation and anguish. Because of the statements, parents at the school began agitating for plaintiff's removal, and he was unable to obtain a position as assistant principal during the summer of 2016. Plaintiff's access to a computer was taken away. Plaintiff states that when his name is googled, defendant's statements come up (NYSCEF 702, deposition transcript, at 617).

Causes of Action

First cause of action in the SAC (fourth cause of action in the AC) - At a Parents Association (PA) meeting at the school on October 21, 2015, defendant stated that "Mr. Verdi and Principal Connelly are both incompetent" and "derelict in their duties;" that the loss of the lease was "their responsibility," and that "the fault lies with them." Nonparty Donna Connelly was the principal of PS 24 at the relevant time.

Third cause of action in the SAC (fifth cause of action in the AC) – The May 5-11, 2016 edition of the Riverdale Review carried an article in which defendant was quoted as stating that "I specifically told him [Verdi] to pay attention to this, advice he chose to ignore. In my view, he [Verdi] and Ms. Connelly are totally responsible for both the loss of space and the over-enrollment issue."

Fourth cause of action in the SAC (sixth cause of action in the AC) - Defendant is quoted in the May 9, 2016 Riverdale Press, to wit: Mr. Verdi "alone is responsible for that school not having a principal and this overcrowding crisis would not have happened but for Manny Verdi." The March 30, 2016 edition carried an article with the headline, "Ex-Principal Says She was bullied into Quitting," in which defendant stated that Verdi and ex-principal Connelly "kept parents in the dark, they sat on their hands and they let disaster happen. . . For whatever reasons, he [Verdi] thought it advisable to enroll more and more students as [sic] the school... If the school had empty seats, I would welcome them...But when the school is overcrowded, you can't do that."

Fifth cause of action in the SAC (eighth in the AC) - In a WPIX TV news segment airing May 15, 2016, defendant stated, "Mr. Verdi and Ms. Connolly made it their policy to enroll virtually any student into the school regardless of where they live and regardless of whether or not seats were available."

Effect of Past Decisions

The above quoted 2017 decision addressed defendant's motion to dismiss the AC pursuant to CPLR 3211. The motion was granted in part and denied in part. Justice Bluth stated that the causes of action numbered 4-8 cited multiple statements by defendant made at different times, and that defendant's motion did not address these causes of action individually. Instead, defendant grouped the alleged statements into "Overcrowding Statements" and "Lawsuit Statements." Overcrowding Statements referred to defendant's statements about the lease and enrollment, and Lawsuit Statements referred to the defendant's statements about a lawsuit plaintiff brought against defendant and the DOE, commenced on May 2, 2016. Defendant's motion did not identify which statements were about overcrowding and which were about the lawsuit. Defendant argued that he had both an absolute privilege and a qualified privilege to make the all the statements.

Justice Bluth determined that defendant did not make the defamatory statements in the context of a legislative, official, or governmental function, and that, as a consequence, he did not enjoy the absolute immunity which can be accorded to government or public officials (*Verdi,* 2017 NY Slip Op 32073[U], **3). The decision states that

> "gaining support in the community is not a legislative act subject to absolute privilege. A legislator is charged with introducing, debating and voting on legislation. Here, defendant was performing none of those acts. And this is not a close case, such as if defendant made comments at a town hall discussion he organized. Defendant showed up at the parents' association meeting and gave quotes to publications presumably so he could remain visible"

(*Verdi,* 2017 NY Slip Op 32073[U], **4).

Although defendant had no absolute privilege for any statements, he had a qualified privilege for the Lawsuit Statements. The court decided that defendant had the right to respond to allegations made against him by plaintiff and struck the Lawsuit Statements from the AC. The court denied the motion as to the Overcrowding Statements. Defendant argued that the Overcrowding Statements, except those allegedly uttered at the PA meeting, were also Lawsuit Statements because they appeared in press coverage of plaintiff's complaint against the DOE. The court stated that "[D]efendant's claim that all of the Overcrowding Statements are also

Lawsuit Statements overstates the reach of defendant's qualified privilege." The court did not decide that defendant did not have a qualified privilege as to the Overcrowding Statements. This decision addresses only the Overcrowding Statements.

The 2017 decision found that the Overcrowding Statements were not protected as "mere opinion" and that those statements subjected plaintiff to public ridicule and injured his standing as assistant principal. If false, those statements constituted defamation per se (*Verdi,* 2017 NY Slip Op 32073[U], at **4, 3, 6).

This court rendered a March 5, 2020 decision in connection with defendant's CPLR 3211 motion to dismiss from the SAC plaintiff's second cause of action and paragraph 104 (part of the third cause of action) as time-barred; paragraph 108 (part of the third cause of action) and paragraph 123 (part of the fourth cause of action) as prohibited by the law of the case doctrine and the principle of *res judicata*; and plaintiff's demands for punitive damages. The motion was granted. The court stated that "plaintiff has failed to allege that defendant was solely motivated by a desire to injure plaintiff when he made the allegedly defamatory statements which is fatal to a claim for punitive damages" (*Verdi v Dinowitz,* 2020 NY Slip Op 30737[U], **2 [Sup Ct, NY County 2020], *affd* 188 AD3d 441 [1st Dept 2020]). The First Department noted that "The motion court correctly dismissed claims arising from paragraphs 108 and 123 of the second amended complaint, as the alleged defamatory statements therein had already been stricken as nonactionable 'Lawsuit Statements' in prior orders" (*id.* at 441).

In a decision dated February 22, 2021, this court denied plaintiff's motion for leave to file a third amended complaint adding a claim for punitive damages because plaintiff did not sufficiently allege that defendant acted with common law malice (*Verdi v Dinowitz,* 2021 WL 713948 [Sup Ct, NY County 2021, Feb. 22, 2021, Kotler, J., index No. 158747/16], *affd* 204 AD3d 627 [1st Dept 2022]).

The doctrine of law of the case precludes the parties in a case from relitigating an issue in the same case, upon the same proof, which was already determined by a court (*Martin v City*

of Cohoes, 37 NY2d 162, 165 [1975]; *Ruiz v Anderson,* 96 AD3d 691, 692 [1st Dept 2012]). For the duration of the case, the court's decision on the issue is binding on the parties (*id.*). The rule is that the law of the case doctrine is inapplicable where a summary judgment motion follows a motion to dismiss (*Friedman v Connecticut Gen. Life Ins. Co.,* 30 AD3d 349, 349 [1st Dept 2006]). A motion to dismiss for failure to state a cause of action addresses the sufficiency of pleadings, while a motion for summary judgment searches the record and looks to the sufficiency of the underlying evidence (*id.*). In this case, however, there is an exception to the general rule. The 2017 decision addressed the evidence relating to the defendant's defamatory statements. The evidence of defamation per se was complete at that time. The parties' accounts of the statements have not altered. Nor has anything changed in relation to the evidence relating to absolute immunity. Hence, although the 2017 decision addressed a motion to dismiss and this motion addresses the parties' motions for summary judgment, the law of the case doctrine applies.

Plaintiffs seek to establish that the 2017 decision set the following as law of the case: 1) defendant does not enjoy absolute immunity from the consequences of his statements based on his legislative position; 2) said statements are not protected as "mere opinion"; 3) if made, those statements subjected plaintiff to public ridicule; and 4) if made and false, those statements constituted defamation per se (*Verdi,* 2017 NY Slip Op 32073[U], at *4, 3, 6).

Defendant claims that the court would have arrived at different conclusions if certain facts, knowable only through discovery, had been available. However, knowledge of those facts did not depend on discovery. Defendant says that he went to the PA meeting because the parents invited him and that he only spoke up to defend himself after parents blamed him for loss of the annex. Defendant already had this information. Also, this information does not change the fact that defendant made defamatory remarks for which he did not enjoy absolute immunity.

Defendant contends that it is law of the case that plaintiff cannot prove common law malice. This court dismissed plaintiff's demand for punitive damages because he did not properly allege common law malice (*Verdi,* 2020 NY Slip Op 30737[U]). Malice is relevant to the defense of qualified privilege, which defendant claims. A qualified privilege can be defeated when the defamatory remarks were made with malice. While both actual malice and common-law malice must be proven to warrant punitive damages (*Lewis v Newsday, Inc.*, 246 AD2d 434, 437 [1st Dept 1998]), either common law malice or actual malice (also termed constitutional malice) can defeat a qualified privilege to make defamatory statements (*Foster v Churchill*, 87 NY2d 744, 751-752 [1996]; *Themed Rests., Inc v Zagat Survey, LLC,* 4 Misc 3d 974, 976 [Sup Ct, NY County 2004], *affd* 21 AD3d 826 [1st Dept 2005]). The court agrees that it is law of the case that plaintiff has no claim that defendant acted with common law malice. Whether plaintiff can defeat defendant's claim of qualified privilege by showing actual malice is discussed below.

Standard for Summary Judgment

The grant of summary judgment is the procedural equivalent of a trial (*Falk v Goodman*, 7 NY2d 87, 91 [1959]). To be entitled to summary judgment, the proponent of the motion summary judgment must tender sufficient evidence to demonstrate the absence of any material issues of fact (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016]). If the moving party succeeds in making this showing, the party opposing the motion must tender proof in admissible form to demonstrate that there are material issues of fact that require a trial (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). On a summary judgment motion, the evidence is viewed "in the light most favorable to the non-moving party" (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]).

Defamation

The person alleging defamation must prove that the speaker, having no privilege or authorization, negligently published to a third party a defamatory statement about the person (*Dillon v City of New York,* 261 AD2d 34, 38 [1st Dept 1999]). Defamation is a false factual

statement that "tends to expose a person to public contempt, hatred, ridicule, aversion or disgrace" (*Thomas H. v Paul B.*, 18 NY3d 580, 584 [2012]). "[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" (*Mann v Abel*, 10 NY3d 271, 276 [2008], *cert denied* 555 US 1170 [2009]).

The defamed person must prove that the defamation caused him/her to suffer special damages, unless the defamation constituted defamation per se, in which case damages are presumed (*Liberman v Gelstein*, 80 NY2d 429, 433 [1992]). As relevant in this case, defamation per se consists of statements that injure a person in his/her business or profession (*Harris v Hirsh*, 228 AD2d 206, 208 [1st Dept 1996]).

Plaintiff shows that the statements were false

Through his own and nonparty deposition testimony, plaintiff shows that he had no authority to negotiate leases involving PS 24 or the power to extend such leases or influence the process (NYSCEF 705 at 55, 219-20, 356, Melodie Mashel, district superintendent). Negotiating leases for school premises is handled exclusively by the School Construction Authority ("SCA") or Facilities Department (NYSCEF 717 at 18, Laura Feijoo, Mashel's supervisor). Principals and assistant principals are not empowered to negotiate leases (NYSCEF 717 at 19, 21, 29; NYSCEF 716 at 25-26, 177, Justin Brannan, Department of Education staffer). Nor should principals and assistant principals "rally" the local community in support of renewing a lease (NYSCEF 717 at 22-24; NYSCEF 716 at 177).

Plaintiff alleges that, at the PA meeting, Jeffrey Moerdler, who was president of the tenants' association at the cooperative where the annex was located, addressed the audience and specifically mentioned that the DOE instructed him not to inform administrators at the school that negotiations for renewal of the lease were not going well, as lease negotiations were not within the purview of school administrators (NYSCEF 694, SAC, ¶ 14). Plaintiff testified that the first time he heard anything about lease negotiations was approximately "a week or so

before" the October 21, 2015 PA meeting when he was informed that PS 24 "were squatters in the Annex" (NYSCEF 702 at 521-23). He "was kind of shocked because we didn't have any information prior to that" (NYSCEF 702 at 540-41).

Marvin Shelton, of the District Community Education Counsel, and Steven Schwartz, PS 24 principal after Connelly, testified that plaintiff did not handle enrollment, which was handled by the Office of School Enrollment (NYSCEF 707 at 40-41, 113; NYSCEF 708 at 182-183; NYSCEF 709 at 147). Plaintiff and Feijoo testified that plaintiff never solicited students for enrollment, nor did he ask anyone to solicit students for enrollment (NYSCEF 702 at 484; NYSCEF 717 at 80-81).

Plaintiff explains that there are several legal reasons a child living in another district could attend PS 24, including enrollment in the Gifted and Talented program, enrollment in the special needs program in cases where the child's needs could be addressed at PS 24, enrollment under the No Child Left Behind Act, enrollment as a student from a homeless family, and enrollment allowing a child to attend the same school that a sibling attends (NYSCEF 702 at 486-88, 492, NYSCEF 707 at 86-87; NYSCEF 717 at 79-80). A child could attend PS 24 pursuant to a waiver, if the child's family had moved in with another family member as a displaced family (NYSCEF 702 at 486-87). A person who has a waiver has priority over individuals on the waiting list (NYSCEF 702 at 488). Plaintiff advised staff and parents that anyone seeking a waiver enabling their child to attend PS 24 from outside of the district had to go to the District Office (NYSCEF 702 at 485). School administrators were not allowed to be involved in the waiver process (NYSCEF 702 at 491-92).

As stated above, in the 2017 decision, Justice Bluth determined that if defendant made the alleged statements and the statements are false, defendant engaged in defamation per se. Plaintiff shows that defendant made the statements and that they were false.

Defendant states that, out of 16 non-party deponents, not one recollected the exact statements that he supposedly made at the PA meeting. However, he does not deny that he

made the statements. Defendant argues that he spoke the truth. He does not dispute that plaintiff had no official role in lease negotiations; nonetheless, he asserts that plaintiff was at fault for the loss of the lease. At his deposition, defendant testified that at the PA meeting he blamed plaintiff and principal Connelly for the loss of the lease (NYSCEF 703 at 306-7). Defendant was asked what plaintiff or the principal could have done about the annex lease. Defendant testified that they could call the superintendent to say they heard rumors that the lease might be lost (NYSCEF 748, at 304). The superintendent does not get involved in lease negotiation but that was one thing that could have been done (NYSCEF 748, at 305). A number of people could have been brought into the lease issue, but nothing was done and the lease was lost "well in advance of when it was announced to the parents, who were kept in the dark" (NYSCEF 748, at 305). "No one was ever suggesting that they negotiate a lease; simply to be on top of it, to make sure that negotiations were actually taking place" (NYSCEF 748, at 306). "As far as I know, they did nothing to prevent it, and you see what the result was; we lost 150 or 160 seats at the Whitehall Annex. They knew about it; they knew about it before the night of that PA meeting in October, of 2015" (NYSCEF 748 at 313). Defendant told plaintiff about the annex lease on March 21, 2015, at a public auction to raise money for the school, and the October 2015 meeting was not the first time that plaintiff learned that the lease might not be renewed (NYSCEF 748 at 298-300).

By email dated February 2015, Moerdler informed defendant that SCA was offering less rent than it was already paying and that "[W]e are proceeding with our negotiations with new tenants, and I expect that we'll be drafting a negotiating lease very soon" (NYSCEF 703 at 345). A March 3, 2015 email by Moerdler informed defendant that "we are moving forward with a lease to another tenant having heard radio silence from DCAS," (NYSCEF 703 at 346). Attached to Moerdler's email was an email to Michael Cona of the SCA advising that a lease with another party "is currently being drafted. Please inform me of who to contact to facilitate your timely vacating the space by June 30, 2015" (NYSCEF 703 at 348). Defendant stated that

"it means there was an opportunity for the City to still get the space, if they really moved on it" (NYSCEF 703 at 350, 351-353; NYSCEF 704 at 379-380). He did not know if Verdi or Connelly ever were sent these emails (NYSCEF 703 at 355).

In a January 8, 2017 email, defendant wrote "you know very well that the lease is not negotiated by administrators at P.S. 24" (NYSCEF 704 at 433). He testified "but that does not relieve them from the obligation to fight for the school" (NYSCEF 704 at 434). In an email of January 18, 2016, defendant wrote that the DOE was dragging its feet on negotiating a new lease for the annex and PS 24 administrators knew in advance that lease was in jeopardy and did not take the problem seriously (NYSCEF 704 at 445-446). Defendant said that he called Michael Cona, who essentially told him that defendant had no place involving himself in negotiations over the annex lease (NYSCEF 703 at 308-309).

Defendant testified that he had no proof that plaintiff was enrolling out of zone students regardless of where they lived; he heard so from people and it was common knowledge (NYSCEF 748, at 282; NYSCEF 704 at 459). Randi Martos, defendant's chief of staff, told defendant that plaintiff enrolled out of zone students, and Florence Burns and Francine Rothenberg, PS 24 employees, told Martos (NYSCEF 748 at 280-282). Defendant understood and everyone believed that "Verdi routinely allowed or even encouraged the acceptance of otherwise ineligible out-of-zone students to enroll at P.S. 24" (NYSCEF 748 at 209). "I'm aware of speaking to some parents who admitted to me that they're from out of the school district and were at the school" (NYSCEF 748 at 220).

Defenses to the Defamation Claim

Truth – truth or substantial truth provides a complete defense to an action asserting defamation (*Stepanov v Dow Jones & Co.*, 120 AD3d 28, 34 [1st Dept 2014]). None of the evidence, including defendant's testimony, counters plaintiff's showing that the statements were not true. Defendant says that he believed in the truth of his statements. A declarant's belief that he or she spoke the truth or the declarant's intent in making the statement is not a defense

(43A NY Jur Defamation and Privacy § § 103, 109; Restatement [Second] of Torts, § 581A, Comment *h*; 53 CJS Libel and Slander; Injurious Falsehood § 168). However, an exception to this rule may exist where the declarant enjoys a privilege (*id.*). Defendant's claim of qualified privilege is discussed below.

Rumors - Repetition of rumors is not a defense to defamation. Rumor is defined as "a flying or popular report,--the common talk * * * not the remarks of a single person" (*Stukuls v State of New York*, 42 NY2d 272, 281 n 6 [1977] [internal quotation marks and citation omitted]; *see also James v Degrandis*, 138 F Supp 2d 402, 419 [WD NY 2001]). The publication of a rumor is actionable where a reasonable person would have understood the publication as an assertion of provable fact, even if it was couched in qualifying or cautionary language (*Alianza Dominicana Inc. v Luna*, 229 AD2d 328, 329 [1st Dept 1996]; *see also Flamm v American Assoc. of Univ. Women,* 201 F3d 144, 152 [2d Cir 2000]). In addition, "the fact that a particular accusation originated with a different source does not automatically furnish a license for others to repeat or publish it without regard to its accuracy or defamatory character" (*Thomas H. v Paul B.*, 18 NY3d 580, 586 [2012] [internal quotation marks and citation omitted]; *Weiner v Doubleday & Co.,* 74 NY2d 586, 594 [1989]; 14 NY Prac., New York Law of Torts § 1:54).

While a qualified privilege may protect a declarant who spoke defamatory rumors knowing that the rumors were false, provided that the statements were described as rumor or suspicion and not as fact (Restatement [Second] of Torts, § 602), defendant did not couch his statements in a manner that would allow speakers to conclude that he spoke only rumors. His statements were made as fact. "The plaintiff has the burden of proving that the statements were reasonably understood by listeners in the sense that would make them defamatory" (Restatement [Second] of Torts, § 613, comment *c*). Plaintiff has met that burden and defendant has not shown the contrary.

Opinion and Hyperbole - Defendant states that the PA meeting was a heated, contentious, and ugly exchange, with a lot of yelling and finger pointing about losing the annex

lease. After one parent blamed elected and school officials, defendant spoke in his own defense, placing the blame on plaintiff and the principal. Defendant claims that his statements were opinions made in the context of a heated public hearing on a matter of public concern.

That defendant's words about the annex lease or out of zone pupils did not constitute opinion is already determined. "Defendant did not qualify these statements in any way, such as stating 'In my opinion, plaintiff is responsible' or 'It looks like plaintiff is the reason the lease was not renewed.' Instead, defendant affirmatively stated a conclusion" (*Verdi*, 2017 NY Slip Op 32073[U], **5). The determination whether a statement is opinion or objective fact is a question of law for the court to decide (*Gottwald v Sebert*, 193 AD3d 573, 581 [1st Dept 2021]).

While "[l]oose, figurative, or hyperbolic statements, even if deprecating the plaintiff, are not actionable" (*Dillon v City of New York*, 261 AD2d at 38), defendant's statements are not in that category. Defendant's statements were not loose or figurative; he plainly charged plaintiff with misconduct (*see Gottwald,* 193 AD3d at 581 [assertion of a literal event that allegedly occurred is not nonactionable hyperbole]).

Defense of Privilege

A privileged communication is one which, but for the occasion on which it is uttered, would be defamatory and actionable (*Park Knoll Assocs. v Schmidt*, 59 NY2d 205, 208 [1983]). For reasons of public policy, certain defamatory communications are privileged, so that they fall outside the general rules imposing liability for defamation (*Liberman,* 80 NY2d at 437; *Toker v Pollack*, 44 NY2d 211, 218-219 [1978]). Absolute privilege confers immunity from liability without regard to motivation. Qualified privilege confers immunity unless the defamation was made with malice (*Toker,* 44 NY2d at 219).

Defamation is subject to a qualified privilege when "it is fairly made by a person in the discharge of some public or private duty, legal or moral, or in the conduct of his own affairs, in a matter where his interest is concerned" (*id.* [internal quotation marks and citation omitted]). Defendant claims that he "spoke about matters of public concern 'in the discharge of some

public or private duty, legal or moral' where his professional and personal interests were concerned" (NYSCEF 743, defendant's memorandum of law, at 13). That defendant is not entitled to a privilege based on his governmental function has been determined. Defendant does not put forth any other personal or professional interest or duty, besides legislative, that would give him a qualified privilege.

Defendant argues that he has a qualified interest based on plaintiff's status as a limited purpose public figure. Plaintiff denies that he was such a figure. A limited purpose public figure is one who voluntarily thrusts himself or herself into a particular public controversy with a view toward influencing it (*Naantaanbuu v Abernathy*, 816 F Supp 218, 222 [SD NY 1993]). Such a person holds public status only for the particular controversy that the person thrusts themselves into (*James v Gannet Co.*, 40 NY2d 415, 423 [1976]), "The individual must attempt to have, or can be expected to have, a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants" (*Gottwald*, 193 AD3d at 577; *Perez v Violence Intervention Program,* 116 AD3d 601, 601 [1st Dept 2014]). To decide if a person alleging defamation is a limited purpose public figure, the court asks if said person: (1) successfully invited public attention to his/her views in an effort to influence others before the incident that is the subject of litigation; (2) voluntarily injected himself/herself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) kept up a regular and continuing access to the media (*Gottwald*, 193 AD3d at 577). The unilateral acts of another cannot transform a person into a public figure (*id.*).

Defendant states that emails from plaintiff and his attorney to media outlets evidence that they proactively and regularly contacted multiple members of the press and urged them to run stories on plaintiff's lawsuits. However, there is no evidence that plaintiff reached out to the media before the October 2015 meeting at which he was first defamed. His interest in the controversy, assuming that there was a controversy, arose after the defamation. Defendant

does not produce any evidence to show that plaintiff sought to become a prominent personality in the issue of school overcrowding before the defamation.

Public concern qualified privilege - Defendant contends that he made the defamatory statements pursuant to the qualified privilege of fair comment and criticism applicable to expressions of matters of public interest, concern, or controversy (*see Braunstein v Day*, 195 AD3d 589, 590 [2d Dept 2021]). The court agrees that the overcrowding at PS 24, or any public school, is a matter of public concern and that a qualified privilege exists to comment on it. The issue affects students, parents, and administrators and conceivably could affect other schools and even taxpayers.

The next question is whether defendant negated his privilege through abuse. Each party argues for a different standard by which abuse of the privilege may be determined. Defendant contends that only actual malice can defeat the public concern privilege (*Foster*, 87 NY2d at 751-752), and that plaintiff cannot meet that standard because plaintiff cannot prove that defendant was "highly aware" that his statements were false or that he "entertained serious doubts as to" the truth of those statements (*Liberman*, 80 NY2d at 438 [defining actual malice]). The malice standard is subjective, focusing on the declarant's state of mind (*Hoesten v Best*, 34 AD3d 143, 155 [1st Dept 2006]). Defendant contends that the extensive record shows that he did not entertain serious doubts as to plaintiff's culpability in losing the annex and admitting out of zone students.

Plaintiff argues that gross irresponsibility is sufficient to defeat the public concern privilege. The gross irresponsibility standard is more lenient than the actual malice standard (*Rainbow v WPIX, Inc.*, 179 AD3d 561, 562 [1st Dept 2020]). Gross irresponsibility, which is based on an objective standard that is not dependent on the defendant's state of mind (*Gaeta v New York News,* 62 NY2d 340 [1984]), derives from *Chapadeau v Utica Observer-Dispatch* (38 NY2d 196, 199 [1975]). The defendant in *Chapaedeau* was a media outlet that published an article within the sphere of legitimate public concern about a private person. *Chapadeau* held

that a defamed party could recover only by showing "that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." Post-*Chapadeau* cases have applied the gross irresponsibility standard to nonmedia defendants commenting on matters of public concern. Nonmedia defendants who utilized a public medium for the publication of allegedly defamatory matter that concerned an issue of public concern and were about a private nonpublic individual have been accorded the same constitutional privilege as the medium itself (*Pollnow v Poughkeepsie Newspapers,* 107 AD2d 10, 16 [2d Dept 1985], *affd* 67 NY2d 778 [1986] [plaintiff defamed by letters to the editor written by nonmedia defendant published in a newspaper]; *see also Colon v City of Rochester*, 307 AD2d 742, 743 [4th Dept 2003] [private plaintiff defamed by photograph supplied by nonmedia defendant to media outlet]; *Mahoney v State of New York*, 236 AD2d 37, 39 [3d Dept 1997] [private plaintiff defamed by nonmedia defendant's investigatory report which was published in media]).

In the Second Circuit, where the plaintiff is a private figure and the defamatory statements relate to a matter of legitimate public concern, and the speaker is a private nonmedia figure, the gross irresponsibility standard, rather than the malice standard, applies (*Konikoff v Prudential Ins. Co. of Am.*, 234 F3d 92, 102 [2d Cir 2000] [report of outside investigator disseminated to defendant's shareholders and to the public at large]; *Moraes v White*, 571 F Supp 3d 77, 98 [SD NY 2021] [posts on social networking site, and cease-and-desist letter posted on plaintiff's door]; *Goldman v Reddington*, 417 F Supp 3d 163, 173 [ED NY 2019] [social media posts]; *Enigma Software Group: USA, LLC v Bleeping Computer LLC,* 194 F Supp 3d 263, 287 (SD NY 2016)] [comments posted on defendant's online user forum]). Expert opinion is that New York generally applies the gross irresponsibility standard to nonmedia defendants (NY PJI 3:23A; 14 N.Y.Prac., New York Law of Torts § 1:47; 1 Law of Defamation § 3:36).

The First Department which sets the precedent for this court has at times followed *Chapadeau* (*McGill v Parker*, 179 AD2d 98, 107-08 [1st Dept 1992]; *Ortiz v Valdescastilla*, 102 AD2d 513, 518 [1st Dept 1984]). Most recently, however, the court decided that

> "Plaintiffs are not required and, even assuming this were a matter of public concern would not be required, to show that Kesha acted in a "grossly irresponsible" manner, since Kesha is not a media publication, broadcaster or journalist responsible for observing "the standards of information gathering and dissemination ordinarily followed by responsible parties" (*Chapadeau v Utica Observer—Dispatch*, 38 NY2d 196, 199 [1975]; *see Huggins v Moore*, 94 NY2d 296, 302 [1999]). The gross irresponsibility standard focuses on the journalist's satisfaction of objective professional standards (*Kahn v New York Times Co.*, 269 AD2d 74, 76 [1st Dept 2000]). *Chapadeau* dealt with news media publishing and is applicable to media publications and journalists (*Gottwald,* 193 AD3d at 579-580).

The *Gottwald* complainant was a private person who alleged that defendant's defamatory comments were disseminated to media outlets. The comments related to a matter of public concern and the defendant was a nonmedia person and not a media outlet. The same conditions exist in this case, except that the first defamatory statements were made at a meeting rather than a media outlet.

Thus, following *Gottwald*, the gross irresponsibility standard is not applicable and actual malice must be proven to defeat defendant's qualified privilege. Contrary to defendant's argument, a fact finder could properly infer from the evidence in this case that defendant's "statements were made with [a] high degree of awareness of their probable falsity" (*Liberman,* 80 NY2d at 438 [internal quotation marks and citation omitted]). Whether actual malice exists in this case must be determined by the fact finder.

The parties disagree over whether the defamation caused plaintiff to sustain any damages. Where defamation per se is present, the law presumes that damages will result, and special damages need not be alleged or proven (*id.* at 435). While compensatory damages are presumed, the quantum of such damages is not, and the party who made the defamatory statement is permitted to rebut the presumption and disprove the amount of damages sought by the complainant (*Gatz v Otis Ford,* 274 AD2d 449, 450 [2d Dept 2000]). In addition, nominal

damages may be awarded where the plaintiff fails to establish actual damages (*id.*). It will be for a jury to say what damages the plaintiff is entitled to (*Hinsdale v Orange County Publs.*, 17 NY2d 284, 291 [1966]).

In conclusion, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted to the extent that it is found that defendant published false statements about plaintiff as alleged in counts one, three, four and five of the second amended complaint and it is found that the statements exposed plaintiff to public contempt, ridicule, aversion, or disgrace, or induced an evil opinion of him "in the minds of right-thinking persons"; and it is further

ORDERED that plaintiff's motion is otherwise denied; and it is further

ORDERED that defendant's cross motion is denied.

Any requested relief not expressly addressed herein has nonetheless been considered and this constitutes the decision and order of the court.

Dated: New York, New York
1/27/23

So Ordered:

Hon. Lynn R. Kotler, J.S.C.