SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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JEROME YEISER and AVIS YEISER,

Plaintiffs,

Index No. 152632/2020
[Mot. Seq. Nos. 005 & 006]

-against-

MARIA SCHIAVOCAMPO, TOMMIE PORTER, JOHN GRAVES and CHERYL GRAVES,

Defendants.

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HON. SHLOMO S. HAGLER:

In this action, inter alia, to recover damages for defamation, defendants John Graves and Cheryl Graves (the Graves defendants) move pursuant to CPLR 3211 (a) (3) and (7) to dismiss the amended complaint insofar as asserted against them (Motion Sequence 005), and defendants Maria Schiavocampo and Tommie Porter (the Schiavocampo/Porter defendants) move pursuant to CPLR 3211 (a) (1) and (7) to dismiss the first, second, and third causes of action in the amended complaint insofar as asserted against them (Motion Sequence 006).

BACKGROUND

Plaintiff Jerome Yeiser (Yeiser) owns and operates a construction real estate company. This action arises out of construction contracts he entered into with the Graves defendants and the Schiavocampo/Porter defendants, pursuant to which Yeiser agreed to perform certain renovations to their respective Manhattan properties. Both projects resulted in disagreements between Yeiser and the defendants. According to the amended complaint, defendants thereafter acted with malice in making false and defamatory statements in a Facebook post and to individuals at the Abyssinian Baptist Church (the Church), where Yeiser and his wife, plaintiff Avis Yeiser, were Deacons, prompting plaintiffs to bring this action. The following facts are taken from their amended complaint and attached exhibits.

On April 5, 2019, Yeiser received a letter from the Schiavocampo/Porter defendants' counsel stating that Yeiser held himself out as a licensed general contractor and licensed home improvement contractor, whereas Yeiser did not hold either license in New York State (Ltr [4-5-19], NYSCEF Doc. No. 102). The letter stated that the Schiavocampo/Porter defendants relied on this fraudulent misrepresentation when they entered into the construction contract with Yeiser, agreeing to have Yeiser complete the work at their premises at a cost of approximately $526,880.00. However, delays ensued shortly after the project began and Yeiser nevertheless continued to make demands for payment. According to the letter, the Schiavocampo/Porter defendants made more than $482,341.00 in payments to Yeiser, with $192,758.00 having been paid and unaccounted for. The letter stated: "It appears as though you are attempting to abscond with these funds without finishing the Project. As such, let this correspondence serve as my Client's termination of the Agreement and your employment on the Project, as well as an immediate demand that you return to my Clients the $192,758.00, representing the unaccounted for funds." The letter further informed Yeiser that if he failed to make immediate payment, the Schiavocampo/Porter defendants were prepared to take all necessary action in order to seek rescission of the agreement and a judgment against him. The letter also stated: "my Clients feel they have an ethical duty to warn and inform the community of your fraudulent practices, including the fact that you are not in fact a licensed contractor in the State of New York. Other consumers should not be duped by your misrepresentation."

Yeiser alleges that he never made such fraudulent misrepresentations, nor did he engage in fraudulent practices. He never held himself out as a licensed general contractor or a licensed home improvement contractor. Rather, he oversaw the project and recruited non-party Lion Heart Construction (Lion Heart) to perform the renovation work. The owner of Lion Heart is a

registered general contractor. Yeiser alleges that he informed the Schiavocampo/Porter defendants of these facts during the negotiation of their contract. He never forced them to make payments and any delays were caused by changes requested by them, for which he never received payment.

Yeiser responded to the letter on April 11, 2019, taking issue with the allegations and denying the claims of fraud and any liability (Ltr [4-11-19], NYSCEF Doc. No. 102). He stated in the letter that the Schiavocampo/Porter defendants were well aware that Lion Heart would act as the general contractor, while his company would oversee the project. Yeiser also denied owing any money and proposed either (1) completing the work with adjustment increases made to the budget going forward, (2) receiving just compensation for the percentage of work that he completed, or (3) terminating the contract and mutually agreeing on a settlement. The Schiavocampo/Porter defendants never responded to Yeiser's letter.

On April 7, 2019, the Schiavocampo/Porter defendants met with the following individuals at the Church: Rev. Calvin Otis Butts, III (the Pastor of the Church), Gerald Barbour (the Chairman of the Deacon Board), Rev. C. Vernon Mason (a Deacon of the Church), and Major Keels (the First Vice Chair). At the meeting, the Schiavocampo/Porter defendants distributed copies of the April 5, 2019 letter and repeated the defamatory statements in the letter to those present. As a result, plaintiffs were suspended from their positions as Deacons of the Church.

Subsequently, on June 2, 2019, plaintiffs had a business meeting with three associates at a restaurant. In the midst of the meeting, defendant Schiavocampo approached their table and stated, "loudly that Plaintiffs were thieves, liars, stole money from me, and can't be trusted," and then proceeded to pour a glass of water over Yeiser's head (Amended Complaint at ¶ ¶ 55-56).

On or about June 12, 2019, defendants published a Facebook post with the heading "CONSUMER ALERT" "POTENTIONAL VICTIMS OF JEROME YEISER" (Facebook Post, NYSCEF Doc. No. 104). The post stated:

> "A growing group of Abyssinian Baptist Church members believe that they may have been financially taken advantage of and duped by former Deacon Jerome Yeiser (Yeiser was removed from his leadership position in April). If you or anyone you know believes you may also be a potential victim, the offices of the New York State Attorney General and Manhattan District Attorney may like to know. Please share your story using the contact information below.
>
> Yeiser has not yet been charged with a crime."

According to Yeiser, the statements in the post are false. He did not take advantage of or dupe any Church members, nor did a growing group of members charge him with doing so. Yeiser alleges on information and belief that the post was published broadly on social media to both members and non-members of the Church.

On or about July 23, 2019, defendants sent a joint letter to the Board of Deacons of the Church (NYSCEF Doc. No. 105). The letter, signed by all four defendants, stated:

> "We are a group of longstanding and devoted members of the Abyssinian Baptist Church. We are writing to formally request an official church inquiry into claims of improper financial conduct by Deacon Jerome Yeiser.
>
> As you know, Yeiser has faced several claims of financial impropriety in his business dealings with church members, resulting in tremendous financial hardship and emotional distress to members of this congregation. Despite this apparent repeated egregious behavior, he has not demonstrated a shred of remorse, accepted any responsibility whatsoever, or made any attempt to foster a resolution. Shockingly, Yeiser has continued to victimize his so-called brothers and sisters in Christ by completely denying these well-documented claims and questioning their honesty and integrity. He has been boldly unrepentant and has seemingly become empowered over time, his alleged misdeeds greatly escalating over the years. We beg you to intercede in the name of protecting the flock.
>
> We believe that light is the best weapon against darkness, and are eager to present our evidence to the board, to once and for all remove all doubt and lingering questions about our claims. It is our sincere hope that this information will empower the board to confidently move forward with the best course of action against Yeiser. We look forward

> to your reply on this matter and eagerly anticipate the opportunity to bring the truth to light."

According to the amended complaint, the letter had no purpose other than to maliciously punish and defame plaintiffs. It was sent "with the sole intent to cause reputational harm and emotional distress to plaintiffs, by bringing the matter to a place of profound spiritual importance to them, where they had enjoyed an excellent reputation and positions of authorities for many years" (Amended Complaint at ¶ 72, NYSCEF Doc. No. 101).

In response to the July 23, 2019 letter, Rev. Butts and a committee of Church members arranged a meeting with plaintiffs and defendants. The meeting took place at the Church on September 11, 2019, during which the Schiavocampo/Porter defendants and defendant John Graves repeated the alleged defamatory statements set forth in the July 23, 2019 letter. In addition, they stated that Avis Yeiser committed fraud by purchasing a home using a government-subsidized program without being eligible for the program.

After the meeting, Rev. Butts made a statement on February 16, 2020, citing "the serious allegations of financial malfeasance in [Yeiser's] real estate dealings with the Graves and the Porters" and indicated that he took certain steps "to protect the spiritual integrity of the Church Body" by "suspending plaintiffs from their leadership positions in the Church and from the Board of Deacons" (Ltr [2-16-20], NYSCEF Doc. No. 106). Rev. Butts noted, so as not to prejudice any pending lawsuits involving the parties, he did "not believe it . . . advisable to take any further action in these matters at this time." According to plaintiffs, Rev. Butts made this statement with hundreds of parishioners present and over Live-Stream, and that it was later published on-line.

Plaintiffs commenced this action on March 10, 2020. Now before the court is a motion by the Graves defendants, pursuant to CPLR 3211 (a) (3) and (7), to dismiss the amended

complaint insofar as asserted against them (Motion Sequence 005), and a motion by the Schiavocampo/Porter defendants, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the first, second, and third causes of action in the amended complaint insofar as asserted against them (Motion Sequence 006). Accordingly, the motions only seek dismissal of the first, second, and third causes of action, all seeking damages for defamation. The fourth cause of action (assault and battery) and fifth cause of action (breach of contract) are not at issue on these motions.

DISCUSSION

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs 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]). "When, as here, a defendant moves for dismissal of a cause of action under CPLR 3211 (a) (1), their documentary evidence must utterly refute[ ] plaintiff's factual allegations, conclusively establishing a defense as a matter of law. Dismissal under CPLR 3211 (a) (7) is warranted if 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" (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co.*, 37 NY3d 169, 175 [2021] [internal quotations omitted]).

A defamatory statement is "a false statement that tends to expose a person to public contempt, hatred, ridicule, aversion or disgrace" (*Davis v Boeheim*, 24 NY3d 262, 268 [2014][internal quotation marks and citations omitted]). A complaint alleging defamation "must set forth the particular words allegedly constituting defamation (*see* CPLR 3016 [a]), and it must also allege the time when, place where, and manner in which the false statement was made, and

specify to whom it was made" (*Epifani v Johnson*, 65 AD3d 224, 233 [2d Dept 2009][citation omitted]).

The Court of Appeals has stated that "[i]f, upon any reasonable view of the stated facts, plaintiff would be entitled to recovery for defamation, the complaint must be deemed to sufficiently state a cause of action" (*Davis v Boeheim*, 24 NY3d at 268 [internal quotation marks and citations omitted]). Courts apply "this liberal standard fully aware that permitting litigation to proceed to discovery carries the risk of potentially chilling free speech," while also recognizing "a plaintiff's right to seek redress, and not have the courthouse doors closed at the very inception of an action, where the pleading meets [the] minimal standard necessary to resist dismissal of [the] complaint" (*id.* [internal quotation marks and citation omitted]).

First Cause of Action – Defamation against the Schiavocampo/Porter Defendants in connection with the April 5, 2019 Letter and April 7, 2019 Meeting

In the first cause of action, plaintiffs allege that statements made in the April 5, 2019 letter, which were later repeated to third parties at the April 7, 2019 Church meeting, are false and defamatory. Specifically, plaintiffs assert that at the April 7 meeting, the Schiavocampo/ Porter defendants falsely accused Yeiser of making "fraudulent representations" and engaging in "fraudulent practices" when conducting their renovation project and that Yeiser attempted to force them to make payments they were not obligated to make (Amended Complaint at ¶ ¶ 101-102).

The Schiavocampo/Porter defendants argue that this court lacks subject matter jurisdiction over this cause of action because it involves a nonjusticiable controversy under the First Amendment based upon the "ecclesiastical abstention" doctrine. This argument is unavailing.

"The Establishment Clause of the First Amendment of the United States Constitution, which is binding on the states by the Fourteenth Amendment, guarantees religious bodies independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine" (*Matter of Ming Tung v China Buddhist Assn.*, 124 AD3d 13, 18 [1st Dept 2014], *affd* 26 NY3d 1152 [2016][internal quotation marks and citations omitted]). As such, "[t]he First Amendment forbids civil courts from interfering in or determining religious disputes, because there is substantial danger that the state will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrines or beliefs" (*Matter of Congregation Yetev Lev D'Satmar, Inc. v Kahana*, 9 NY3d 282, 286 [2007]). That said, "[c]ivil disputes involving religious parties or institutions may be adjudicated without offending the First Amendment as long as they can be decided solely upon the application of neutral principles of . . . law, without reference to any religious principle" (*id.* [internal quotation marks and citations omitted]). "Only when disputes can be resolved by neutral principles of law may the courts step in" (*Matter of Ming Tung v China Buddhist Assn.*, 124 AD3d at 18).

Here, the defamation claim may be determined by application of neutral principles of law in that the remarks at issue -- that defendants made "fraudulent representations" and engaged in "fraudulent practices" in connection with the construction project -- are capable of being evaluated without reference to religious principles (*see Laguerre v Maurice*, 192 AD3d 44, 48 [2d Dept 2020][rejecting lack of subject matter jurisdiction as a basis for dismissal of plaintiff's defamation claims where plaintiff was not challenging his expulsion from the church and "the allegedly defamatory remarks at issue, i.e., that the plaintiff is a homosexual who viewed gay pornography on the church's computer, [could] be evaluated without reference to religious

principles"]; *Sieger v Union of Orthodox Rabbis of U.S. & Can.*, 1 AD3d 180, 182 [1st Dept 2003]["To the extent plaintiff has alleged defamatory statements which can be evaluated solely by the application of neutral principles of law and do not implicate matters of religious doctrine and practice, . . . they are not barred by the Establishment Clause"]).

The Schiavocampo/Porter defendants argue that the decision to suspend plaintiffs' status as Deacons of the Church was premised upon the Church's religious doctrine. Therefore, "to determine whether Plaintiffs were properly removed -- or suspended -- from their positions as Deacons, the Court would be required to delve into the Church's rationale for this decision, which would involve an assessment of Plaintiffs' fitness and suitability to act as deacons" (Schiavocampo/Porter Defendants' Mem of Law at 6, NYSCEF Doc. No. 115). To support their position, they cite to various cases standing for the proposition that disputes between church factions, standards of membership in a church, or decisions about whether members are in good standing, involve constitutionally protected ecclesiastical matters. However, these cases are inapposite inasmuch as plaintiffs are not asking the court to reverse or amend the determination to suspend them from their positions as Deacons. Rather, they are challenging the statements allegedly made by the Schiavocampo/Porter defendants leading to that decision as false and defamatory. The statements themselves can be evaluated without implicating church doctrine and without delving into the methodology behind, or the propriety of, the Church's investigation or the determination to suspend plaintiffs' status as Deacons of the Church.

Alternatively, the Schiavocampo/Porter defendants argue that the first cause of action should be dismissed because the April 5, 2019 letter was written by their attorney and sent to Yeiser in anticipation of litigation. Thus, they assert, the statements in the letter cannot serve as a basis for liability in that they are protected by the "litigation privilege."

In *Front, Inc. v Khalil* (24 NY3d 713, 719 [2015]) the Court of Appeals explained that

> "[w]hen litigation is anticipated, attorneys and parties should be free to communicate in order to reduce or avoid the need to actually commence litigation. Attorneys often send cease and desist letters to avoid litigation. Applying privilege to such preliminary communication encourages potential defendants to negotiate with potential plaintiffs in order to prevent costly and time-consuming judicial intervention. Communication during this pre-litigation phase should be encouraged and not chilled by the possibility of being the basis for a defamation suit."

Here, the April 5 letter, when initially sent to Yeiser was covered by the litigation privilege. However, plaintiffs are also alleging that the letter was later disseminated to parties unrelated to the litigation at the April 7, 2019 Church meeting (Amended Complaint at ¶ ¶ 101-102). To the extent the Schiavocampo/Porter defendants published the letter to those unrelated third parties, the statements therein are not protected by the litigation privilege.

The Schiavocampo/Porter defendants argue that the allegations in the amended complaint are insufficient in this regard because they fail to identify the person who allegedly informed plaintiffs that the letter was distributed to church officials at the meeting or that such officials even read the letter. They also argue that while plaintiffs allege that some of the statements in the letter were verbalized at the meeting, the complaint does not identify the words allegedly spoken and thus it cannot be determined whether any of these statements were false and defamatory. That is not the case.

Plaintiffs pleaded that the statements at issue were false and made to unrelated parties, including the Rev. Butts, the Chairman of the Deacon Board Gerald Barbour, Deacon Rev. C. Vernon Mason, and First Vice Chair Major Keels. They further allege that the statements were made during the April 7 meeting at the Church and identify the words allegedly spoken at the meeting as accusing plaintiff Yeiser of making "fraudulent representations" and engaging in

"fraudulent practices" when conducting their renovation project. At this stage of the litigation, such allegations are sufficient.

The Schiavocampo/Porter defendants' argument that dismissal is warranted pursuant to the "common interest" privilege is also unavailing. The "common interest" privilege "extends to a communication made by one person to another upon a subject in which both have an interest" (*Liberman v Gelstein*, 80 NY2d 429, 437 [1992] [internal quotation marks omitted]). Courts have applied the privilege to, among other things, "communications carried out in furtherance of a common interest of a religious organization" (*Laguerre v Maurice*, 192 AD3d at 49 [internal quotation marks and citations omitted]).

"In order for the privilege to apply, the relation of the parties should be such as to afford reasonable ground for supposing an innocent motive for giving the information, and to deprive the act of an appearance of officious intermeddling with the affairs of others" (*Silverman v Clark*, 35 AD3d 1, 12 [1st Dept 2006][internal quotation marks and citations omitted]). The "common interest" privilege is a qualified privilege, which may be overcome by a showing of "either common-law malice, i.e., spite or ill will, or . . . actual malice, i.e., knowledge of falsehood of the statement or reckless disregard for the truth" (*Laguerre v Maurice*, 192 AD3d at 49 [internal quotation marks and citations omitted]; *see Liberman v Gelstein*, 80 NY2d at 438-439; *Silverman v Clark*, 25 AD3d at 11).

The Schiavocampo/Porter defendants assert that the privilege is applicable because the allegedly defamatory statements made at the April 7 meeting were made by or among members and officials of the Church based upon the mutual concern and common interest in the character and fitness of Yeiser who, as a Deacon, was a promoter of their faith and a spiritual representative of the Church. However, assuming the common interest privilege applies,

plaintiffs adequately allege that the statements were motivated by malice. First, the allegations in the complaint indicate that a contentious relationship between the parties existed at the time the statements were made (*see Silverman v Clark*, 25 AD3d at 12). In addition, the amended complaint states that the allegedly false statements were made in "bad faith" and for the purpose of evading Schiavocampo's "obligations to pay the full costs under the construction contract" (Amended Complaint at ¶ ¶ 104-105; NYSCEF Doc. No. 101). These allegations, if proven, would overcome the qualified privilege (*see Mihlovan v Grozavu*, 72 NY2d 506, 508-509 [1988]) and contrary to their argument, the allegations with regard to this cause of action involve both of the Schiavocampo/Porter defendants.

Finally, the Schiavocampo/Porter defendants contend that, at the very least, the first cause of action should be dismissed insofar as asserted by plaintiff Avis Yeiser because none of the alleged defamatory statements concern Avis Yeiser. Avis Yeiser is not mentioned in the April 5 letter, all of the allegations concern Jerome Yeiser's business ventures, and plaintiffs do not allege in the amended complaint that Avis Yeiser was involved in such ventures.

Thus, the first cause of action is dismissed only insofar as asserted by Avis Yeiser.

Second Cause of Action – Defamation against defendant Schiavocampo in Connection with the June 2, 2019 Lunch Incident

The second cause of action is asserted against defendant Schiavocampo only. Plaintiffs allege that during the June 2 lunch incident, Schiavocampo defamed them by stating "loudly that Plaintiffs were thieves, liars, stole money from me, and can't be trusted" and then proceeded to pour a glass of water over Yeiser's head (Amended Complaint at ¶ 114). Schiavocampo argues that this claim should be dismissed because the statement does not constitute defamation per se and plaintiffs failed to allege special damages.

A defamation plaintiff must plead and prove that he or she suffered special damages unless the defamation falls into one of four per se categories (*see Epifani v Johnson*, 65 AD3d at 233-234). "When statements fall within one of these categories, the law presumes that damages will result, and they need not be alleged or proven" (*id.* at 234). These categories consist of statements "(i) charging plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that plaintiff has a loathsome disease; or (iv) imputing unchastity to a women" (*Liberman v Gelstein*, 80 NY2d at 435).

Here, the alleged false statement that "Plaintiffs stole money from me" falls within the "serious crime" category so as to constitute defamation per se (*see Liberman v Gelstein*, 80 NY2d at 435; *Epifani v Johnson*, 65 AD3d at 234). As such, the statement is actionable as defamation per se and plaintiffs need not allege special damages.

Moreover, if the court were to reach the issue, it would find that plaintiffs have sufficiently pleaded special damages. Special damages "contemplate the loss of something having economic or pecuniary value" (*Liberman v Gelstein*, 80 NY2d at 434-435 [internal quotation marks and citations omitted]). In this regard, the amended complaint alleges that as a result of the false statements made by Schiavocampo at the business lunch, two non-parties present at the lunch declined to transact business with Yeiser regarding a previously entered into home-selling deal, thereby costing Yeiser a broker commission of more than $120,000.00 (Amended Complaint at ¶ 119). Thus, special damages are alleged.

Schiavocampo argues that even if the court were to find that the statement is actionable as defamation per se, the cause of action must be dismissed insofar as asserted by plaintiff Avis Yeiser because the statement pertains only to Jerome Yeiser. Schiavocampo points out in this

regard that plaintiffs do not allege that Avis Yeiser was involved with Jerome Yeiser's business. Nor does the amended complaint allege that Schiavocampo mentioned Avis Yeiser by name.

The amended complaint alleges that Schiavocampo defamed both plaintiffs in that it alleges that Schiavocampo declared at the lunch that "Plaintiffs were thieves, liars, stole money from me, and can't be trusted." Accepting this allegation as true, Schiavocampo referenced both plaintiffs when she made this statement.

Thus, dismissal of the second cause of action is not warranted.

Third Cause of Action – Defamation against all defendants in connection with June 12, 2019 Facebook Post, the July 23, 2019 Letter, and the September 11, 2019 Meeting

In the third cause of action, asserted against all defendants, plaintiffs allege that the following statement made in the June 12, 2019 Facebook post is false and defamatory:

> "A growing group of Abyssinian Baptist Church members believe they may have been financially taken advantage of and duped by former Deacon Jerome Yeiser (Yeiser was removed from his leadership position in April)"

(Facebook Post, NYSCEF Doc. No. 5; Amended Complaint at ¶ 123).

Among other things, defendants contend that these statements are either true or non-actionable statements of opinion. The court agrees that defendants have proven that the statement "Yeiser was removed from his leadership position" is true because plaintiffs pleaded as much in their amended complaint (*see* Amended Complaint at ¶ ¶ 118, 128). Therefore, this statement is not defamatory.

The phrase "a growing group of Abyssinian Baptist Church members believe that they may have been financially taken advantage of and duped by former Deacon Jerome Yeiser," does not constitute a nonactionable opinion. "Generally, only statements of fact can be defamatory because statements of pure opinion cannot be proven untrue" (*Thomas H. v Paul B.*, 18 NY3d 580, 584 [2012]). "Expressions 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][internal citations omitted]). "Distinguishing between fact and opinion is a question of law for the courts, to be decided based on what the average person hearing or reading the communication would take it to mean" (*Davis v Boeheim*, 24 NY3d at 269 [internal quotation marks and citations omitted]). The inquiry "is whether a reasonable [reader] could have concluded that [the statements were] conveying facts about the plaintiff" (*id.* at 269-270 [internal quotation marks and citations omitted]).

"While a pure opinion cannot be the subject of a defamation claim, 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" (*id.* at 269 [internal quotation marks and citations omitted]). Mixed opinions are actionable "not because they convey false opinions but rather because a reasonable listener or reader would infer that the speaker [or writer] knows certain facts, unknown to [the] audience, which support [the] opinion and are detrimental to the person [toward] whom [the communication is directed]" (*Gross v New York Times Co.*, 82 NY2d 146, 153-154 [1993][internal quotation marks and citations omitted]; *Steinhilber v Alphonse*, 68 NY2d 283, 289 [1986]["A 'pure opinion' is a statement of opinion which is accompanied by a recitation of the facts upon which it is based"]).

In deciding whether statements are mixed opinions as opposed to nonactionable expressions of opinion, the court must consider:

> "(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"

(*Davis v Boeheim,* 24 NY3d at 270 [quotation marks and citations omitted]). "The essential task is to decide whether the words complained of, considered in the context of the entire communication and of the circumstances in which they were spoken or written, may be reasonably understood as implying the assertion of undisclosed facts justifying the opinion" (*Steinhilber v Alphonse*, 68 NY2d at 290).

Here, the challenged statement is actionable in the overall context of the Facebook post. The post, entitled "Consumer Alert," is directed towards "potential victims of Jerome Yeiser" and states that "Yeiser has not yet been charged with a crime" (Facebook Post, NYSCEF Doc. No. 5). In this context, a reasonable reader could understand the challenged statement -- "a growing group of Abyssinian Baptist Church members believe that they may have been financially taken advantage of and duped by former Deacon Jerome Yeiser" -- as implying Yeiser's possible participation in a crime. "[A]ccusations of criminality [can] be regarded as mere hypothesis and therefore not actionable *if the facts on which they are based are fully and accurately set forth*" *(Gross v New York Times Co.*, 82 NY2d 146, 155 [1993][emphasis added]). However, that is not the case here. The post, read as a whole, implies that the writer had an undisclosed basis for the statement, unknown to the audience, which support the assertions he or she made.

Defendants further argue that dismissal is warranted because plaintiffs allege that "all Defendants took part in posting," without specifying the person actually responsible for publishing the post (Amended Complaint at ¶ 123). However, this is not a fatal defect (*see Fletcher v Dakota, Inc.*, 99 AD3d 43, 55 [1st Dept 2012]["While some of these allegations do not specify exactly which of the defendants made a particular statement, that is not a fatal defect"]).

Defendants also contend that a claim for defamation arising out of the Facebook post is inadequately pleaded in that plaintiffs fail to allege the specific persons to whom the post was published. Defendants are correct that in order to comply with the pleading requirements of CPLR 3016(a), a plaintiff must identify the persons to whom the alleged defamatory statements were made (*see Starr v Akdeniz*, 162 AD3d 948, 950 [2d Dept 2018]; *Simon v 160 W. End Ave. Corp.*, 7 AD3d 318, 320 [1st Dept 2004]). However, here plaintiffs allege that the post was published to members of the Church on social media (Amended Complaint at ¶ 62). At this stage of the litigation, this is sufficient to state a cause of action. Nevertheless, the Facebook post is not "of and concerning" plaintiff Avis Yeiser and, therefore, the branch of the third cause of action must be dismissed insofar as asserted by Avis Yeiser.

In addition to the Facebook post, the third cause of action is based upon the July 23, 2019 joint letter to the Board of Deacons of the Church, in which defendants allegedly falsely accused plaintiff Yeiser of "improper financial conduct" in connection with his business and states that "he has continued to victimize his so-called brothers and sisters in Christ by completely denying these well-documented claims," that "[h]e has been boldly unrepentant," with his "alleged misdeeds greatly escalating over the years."

Defendants assert that these statements were made in the context of an internal church investigation, which is an ecclesiastical matter and therefore the court lacks subject matter jurisdiction over the claim. As discussed in the context of the first cause of action, the court can evaluate whether the statements constitute actionable defamation under New York law without implicating church doctrine or delving into the propriety of the Church's investigation.

Defendants further contend that the claim must be dismissed because the statements at issue are protected by the common interest privilege and plaintiffs fail to adequately plead that

they were made with malice. Dismissal is not warranted on this basis. The amended complaint states that the July 23 letter, the contents of which were repeated by defendants at the September 11, 2019 meeting, "had no purpose other than to maliciously punish and defame Plaintiffs" and that it was sent "with the sole intent to cause reputational harm and emotional distress to the plaintiffs, by bringing the matter to a place of profound spiritual importance to them, where they had enjoyed an excellent reputation and positions of authority for many years" (Amended Complaint at ¶ ¶ 69,72). At this juncture, these allegations are sufficient to overcome the common interest privilege (*see Colantonio v Mercy Med. Ctr.*, 115 AD3d 902, 903 [2d Dept 2014]["a plaintiff 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)"][internal quotation marks and citations omitted]).

Nevertheless, this claim is not of or concerning plaintiff Avis Yeiser. While under this cause of action, the amended complaint also alleges that at the September 11 meeting, defendants falsely accused her of misusing a government-subsidized program to purchase a home, it fails to allege "the precise words allegedly giving rise to defamation" (*Khan v Duane Reade*, 7 AD3d 311, 312 [1st Dept 2004]). Thus, the third cause of action is dismissed insofar as asserted by plaintiff Avis Yeiser.

As a final matter, the Graves defendants also move to dismiss the third cause of action on the basis of CPLR 3211 (a) (3). They argue that when Yeiser filed for Chapter 7 bankruptcy in August 2019, he did not list his defamation claim against them as an asset, thereby depriving him of the legal capacity to sue on those claims (*see generally Potruch & Daab, LLC v Abraham*, 97 AD3d 646, 647 [2d Dept 2012]). In opposition, plaintiffs contend that there is no extant bankruptcy matter depriving Yeiser of standing and that he was granted a discharge from

bankruptcy under 11 USC § 727 on January 5, 2021. In their reply papers the Graves defendants do not challenge plaintiff's contention and no longer mention CPLR 3211 (a) (3) as a basis for dismissal. As such, they appear to have abandoned the argument. In any event, it is the Graves defendants' burden on this motion to establish, prima facie, Yeiser's lack of standing (*see Golden Jubilee Realty v Castro*, 196 AD3d 680, 682 [2d Dept 2021]; *Brunner v Estate of Lax*, 137 AD3d 553, 553 [1st Dept 2016]). The conclusory statements set forth in their memorandum of law are insufficient to meet that burden. As such, the court declines to dismiss the third cause of action pursuant to CPLR 3211 (a) (3).

CONCLUSION

On the basis of the foregoing, it is

ORDERED that the motion by defendants John Graves and Cheryl Graves to dismiss the amended complaint insofar as asserted against them is granted only to the extent that the third cause of action in the amended complaint is dismissed insofar as asserted by plaintiff Avis Yeiser, and the motion is otherwise denied (Motion Sequence 005); and it is further

ORDERED that the motion by defendants Maria Schiavocampo and Tommie Porter to dismiss the first, second, and third causes of action in the amended complaint insofar as asserted against them is granted only to the extent that the first and third causes of action in the amended complaint are dismissed insofar as asserted by plaintiff Avis Yeiser, and the motion is otherwise denied (Motion Sequence 006).

This constitutes the decision and order of the court.

11/20/2023
DATE

SHLOMO S. HAGLER, 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