SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------X
JONATHAN REICH,

Index No. 156787/16

Plaintiff,

- against -

CHARLES C. HALE, WARREN ST. JOHN, JESSICA L. SAWYER, DMEP CORPORATION d/b/a HALE GLOBAL, PLANCK, LLC d/b/a PATCH MEDIA and PATCH MEDIA CORP.

Defendants.

----------X

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT AND FOR SANCTIONS

ARCHER & GREINER, P.C.
Joel G. MacMull
44 Wall Street, Suite 1285
New York, NY 10005
Telephone: (201) 342-6000
Facsimile: (201) 342-6611
jmacmull@archerlaw.com

Attorneys for Defendants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Rules

Regulations

PRELIMINARY STATEMENT

Defendants, Charles C. Hale, Warren St. John, Jessica L. Sawyer, DMEP Corporation D/B/A Hale Global, Planck, LLC d/b/a Patch Media, Patch Media Corp. (collectively, "defendants"), by and through their attorneys, Archer & Greiner, P.C., respectfully submit this memorandum of law in support of defendants' motion seeking an order: (i) that the Complaint on behalf of plaintiff Jonathan Reich ("Plaintiff" or "Reich") be dismissed in its entirety pursuant to CPLR § 3211; and (ii) granting defendants such other and further relief as to the Court may deem just and proper, including, but not limited to, the imposition of costs and reasonable attorneys' fees in connection with the instant motion.

The Complaint's scattershot approach to this litigation betrays a fundamental misunderstanding of established principles requiring the dismissal of plaintiff's claims. The statements plaintiff identifies, albeit only generally and devoid of their context, are barred from being actionable under New York law for several reasons, not the least of which is that they are clearly time barred. Based on the reasons and authority presented below, each of the Complaint's four causes action for libel *per se*, defamation, injunctive relief and "inciting religious discrimination" fails to satisfy the requirements of CPLR § 3211(a)(7). It should therefore be dismissed with prejudice.

But plaintiff has also flatly refused to engage with defendants when the fatal defects within his Complaint were brought to his attention on September 1, 2016. Indeed, as demonstrated in the accompanying affirmation of Joel G. MacMull, Esq. dated September 22, 2016, with exhibits annexed thereto ("MacMull Affm."), Plaintiff has for weeks engaged in a pattern of contumacious conduct that, at its core, has been designed to impose nothing more than additional cost and unnecessary delay in the resolution of this dispute.

STATEMENT OF FACTS

The Court is respectfully referred to the MacMull Affm. and the exhibits annexed thereto for a complete statement of the facts and background relevant to this motion. For the convenience of the Court, defined terms used in the MacMull Affm. are also utilized herein.

ARGUMENT

POINT I

STANDARD OF REVIEW

It is well settled that on a motion to dismiss pursuant to CPLR § 3211, the Court will accept as true the facts "alleged in the complaint and submissions in opposition to the motion, and accord plaintiffs the benefit of every possible favorable inference," determining only "whether the facts as alleged fit within any cognizable legal theory." *Sokoloff v. Harriman Estates Development Corp.*, 96 N.Y.2d 409, 414, 729 N.Y.S.2d 425, 428 (2001); *see also AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co.*, 5 N.Y.3d 582, 591, 808 N.Y.S.2d 573, 577-78 (2005); *Leon v. Martinez*, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 974 (1991). However, a complaint pervaded with legal conclusions, and devoid of any factual allegations of underlying wrongful conduct, for which a plaintiff seeks to hold defendants liable, is not entitled to the benefit of favorable inferences usually accorded on a pre-answer motion to dismiss. *See Kamhi v. Tay*, 244 A.D.2d 266, 664 N.Y.S.2d 288, 290 (1st Dept. 1997); *see also Lutz v. Caracappa*, 35 A.D.3d 673, 828 N.Y.S.2d 426 (2d Dept. 2006); *Matter of Loukoumi, Inc.*, 285 A.D.2d 595, 728 N.Y.S.2d 383 (2d Dept. 2001).

POINT II

PLAINTIFF FAILS TO STATE A CAUSE OF ACTION AGAINST DEFENDANTS HALE, ST. JOHN AND SAWYER IN THEIR INDIVIDUAL CAPACITIES

While the Complaint purports to include Hale, St. John, and Sawyer in their individual capacities as defendants, the Complaint by virtue of its allegations makes clear that the individual defendants were acting in their official capacities at the time the statements were published. (MacMull Affm., Ex. A. (hereinafter "Compl."), ¶¶ 2-4 (identifying the individual defendants "at all relevant times" as "President and CEO", "Editor-in-Chief" and "local editor," respectively).)

Therefore, because plaintiff's claims are based upon the individual defendants serving in their official capacities, even if plaintiff had otherwise stated a valid claim, plaintiff clearly fails to state any cause of action against Hale, St. John, or Sawyer individually. *See Saez v. City of New York*, 270 A.D.2d 55, 55, 704 N.Y.S.2d 243 (1st Dept. 2000) (held, that allegedly defamatory statements published in defendant's official capacity, and made by and to persons with corresponding interests in the statements' subject matter, were qualifiedly privileged and that plaintiffs had failed to meet their burden to raise a triable issue as to whether the statements had been made with common-law or constitutional malice). Further, nowhere does plaintiff allege — nor can he — that any of the individual defendants acted in a manner contrary to the best interests of corporate defendants.

While allegations of intentional tortious conduct may serve to impugn individuals who act on behalf of a corporation, plaintiff's reliance on this theory without additional factual detail to support such a conclusion is fatal. Allegations seeking to pierce the corporate veil must be supported "by particularized statements detailing fraud or other corporate misconduct," which are not alleged here. *See, e.g., Sheinberg v 177 East 77, Inc.*, 248 A.D.2d 176, 177, 670 N.Y.S.2d

19, 21 (1st Dept. 1998). Here, merely obliquely referring to the individual defendants' purported involvement without setting forth any factual details that give rise to a cause of action is inadequate. *See id.*

Accordingly, under the standards of CPLR §3211 set forth above, the Complaint's causes of action directed toward the individual defendants should be dismissed with prejudice against defendants Hale, St. John and Sawyer on this ground alone.

POINT III

PLAINTIFF'S FIRST AND SECOND CAUSES OF ACTION FOR LIBEL *PER SE* AND DEFAMATION ARE CLEARLY TIME BARRED

Section 215(3) of the CPLR provides that intentional torts such as "assault, battery, false imprisonment, malicious prosecution, libel, slander, [and] false words causing special damages" are limited by a one-year statute of limitations. *See Bridgers v Wagner*, 80 A.D.3d 528, 528, 915 N.Y.S.2d 265, 266 (1st Dept. 2011); *Shepko v. New York City Health & Hosps. Corp*., 1995 U.S. Dist. LEXIS 17929, at *3 n. 1 (S.D.N.Y. Nov. 30, 1995).

Plaintiff filed his Complaint on August 13, 2016. To be timely under a one-year statute of limitations period, these claims must have accrued no earlier than August 13, 2015. Yet, the events upon which plaintiff bases his libel *per se* and defamation claims allegedly occurred in May and December 2013. (Compl., ¶¶ 10-12, 14-16, 18-21.) Thus, even under the most generous of computations, plaintiff needed to file his claims for defamation on or before December 26, 2014 — one year subsequent to the latest date plaintiff mentions in the Complaint — to ensure timeliness. (Compl., ¶¶ 10(g), 21.)

Furthermore, while the Complaint alleges that "[t]hese particular stories were put into hateful discussion about the Plaintiff over the past three years over many social media platforms and the Internet" (Compl., ¶ 10), New York's "single publication" rule, which is applicable to

Internet publications, provides that the accessing of an article on the Internet after its initial publication does not restart the limitations period. *See Firth v. State*, 98 N.Y.2d 365, 370 747 N.Y.S.2d 69, 72 (2002) (rejecting argument that "each 'hit' or viewing of the report should be considered a new publication that retriggers the statute of limitations"). Since plaintiff filed his Complaint on August 13, 2016 (NYSCEF Dkt. No. 1), these claims have long been time-barred, and must be dismissed.[1]

POINT IV

PLAINTIFF HAS FAILED TO ALLEGE THE EXACT WORDS THAT PURPORTEDLY GIVE RISE TO A CLAIM FOR DEFAMATION

Even assuming *arguendo* plaintiff were able to hurdle the insurmountable time bar discussed above —which he cannot — his claims still fail. Section 3106(a) of the CPLR requires that a claim for libel or slander be pled with particularity. The Complaint fails to plead with specificity the allegedly defamatory statements. (*See generally*, Compl.)

New York law makes clear that dismissal is appropriate where, as here, a claimant fails to set forth the specific statements that are allegedly defamatory. *See, e.g., BCRE 230 Riverside LLC v. Fuchs*, 59 A.D.3d 282, 283, 874 N.Y.S.2d 34, 36 (1st Dept. 2009) (defendant's defamation counterclaim alleging that "plaintiff and/or their agents or attorneys" made defamatory "words to the effect" that defendant had been tossing urine from terrace of his apartment onto to construction workers below failed to state with particularity what the allegedly false statements were and who made them); *Hausch v. Clarke*, 298 A.D.2d 429, 430, 748 N.Y.S.2d 264, 265 (2d Dept. 2002) (plaintiff's attachment to complaint to allegedly defamatory newspaper article insufficient to meet specificity requirements of CPLR §3016(a)).

[1] The Complaint includes separate causes of action for libel *per se* and defamation. (Compl., ¶¶ 27-35.) As libel is a species of defamation, these claims are duplicative of one another and not addressed separately. *See Kavanagh v. Zwilling*, 997 F. Supp. 2d 241, 247 n.6 (S.D.N.Y. 2014), citing *Church of Scientology Int'l v. Behar*, 238 F.3d 168, 173 (2d Cir. 2001).

Here, the Complaint's allegations are entirely amorphous, and include such unactionable allegations as "[t]he article published on 5/22/2013 claimed that Plaintiff made '**threatening calls**' to the Chief Medical Examiner" and the "statement falsely claims as a factual mater that Mr. Reich '**harassed**' Dr. Carver." (Compl. ¶¶ 12, 14 (emphasis added)). Critically, however, the presence of well-pled facts undergirding these characterizations are nowhere to be found in the Complaint. Accordingly, dismissal of the first and second causes of action is appropriate for this reason too.

POINT V

PLAINTIFF'S THIRD CAUSE OF ACTION FOR INJUNCTIVE RELIEF SHOULD BE DISMISSED BECAUSE IT IS DUPLICATIVE OF HIS DEFAMATION CLAIM AND BECAUSE HE HAS AN ADEQUATE REMEDY AT LAW

Because plaintiff's claim for injunctive relief is duplicative of his defamation claims, it too is subject to dismissal. New York courts have "kept a watchful eye for claims sounding in defamation that have been disguised as other causes of action." *Lesesne v. Brimecome*, 918 F.Supp.2d 221, 224 (S.D.N.Y. 2013); *Sweeney v. Prisoners' Legal Servs.*, 146 A.D. 2d 1, 7 538 N.Y.S.2d 370, 374 (3rd Dept. 1989). New York law "considers claims sounding in tort to be defamation claims, not only where those causes of action seek damages only for injury to reputation ... but also where the entire injury complained of by plaintiff flows from the effect on his reputation." *Jain v. Sec. Indus. and Fin. Mkts Ass'n*, Case No. 08-cv-6463, 2009 U.S. Dist. LEXIS 91206, at *25 (S.D.N.Y. Sept. 28, 2009) (citing cases). Thus, when claims are based on the same allegedly false statements that also form the basis of a plaintiff's defamation claim, New York law does not permit a plaintiff to circumvent the strict one-year limitation period for defamation by pleading what is essentially a time-barred defamation claim under a different name. *See Lesesne*, 918 F.Supp.2d at 224-25.

Plaintiff's third cause of action seeking to enjoin defendants unequivocally sounds in defamation. (Compl., ¶¶ 36-38.) The third cause of action relies on the same facts alleged in support of the first and second causes of action. (*Id.*)

Moreover, for each of his claims for libel *per se*, defamation, injunctive relief, and "inciting religious discrimination", plaintiff seeks to recover under the same theory – namely, for injury and losses to his reputation resulting from the disclosing of allegedly false information. (Compl., ¶¶ 28 (libel *per se*); 31, 35 (defamation); 37-38 (injunctive relief); and 45 ("inciting religious discrimination"). Regardless of how they are pled, the gravamen of plaintiff's claims, and the recovery he seeks through them, is that defendants' false statements injured him by damaging his professional reputation and preventing him from, *inter alia*, obtaining employment opportunities, making them quintessential claims for defamation. (Compl., ¶ 35). *See Lesesne*, 918 F.Supp.2d at 225 (noting that claims that allege economic harm, but which are based on facts sounding in defamation, are not distinguishable from defamation claims alleging only harm to professional reputation).

Additionally, "[i]njunctive relief will be afforded only in those extraordinary situations where plaintiff has no adequate remedy at law and such relief is necessary to avert irreparable injury." *Chicago Research & Trading v New York Futures & Exch.*, 84 A.D.2d 413, 416, 446 N.Y.S.2d 280 (1st Dept. 1982). Here, however, the Complaint by virtue of its first and second causes of action clearly establishes that defendants could obtain sufficient relief in the form of damages. (*See generally*, Compl.) Accordingly, dismissal on this basis too is appropriate. *See Fariello v Checkmate Holdings, LLC*, 2013 N.Y. Misc. LEXIS 121, at *18, 2013 NY Slip Op 30046(U), at *13 (N.Y. Sup. Ct., N.Y. Cty. Jan. 11, 2013) (dismissing defendants' counterclaim for injunctive relief where other counterclaims demonstrated recovery could be attained at law).

Because the conduct complained of in plaintiff's third cause of action falls entirely within the scope of his defamation claim, and his alleged damages flow from an alleged effect of the defamatory statements on his reputation, including his alleged inability to find employment, the third cause of action is also ripe for dismissal. *See Sweeney*, 146 A.D. 2d at 7; *Jain*, 2009 U.S. Dist. LEXIS 91206, at *25-26.

POINT VI

PLAINTIFF'S REQUEST FOR A PERMANENT INJUNCTION MUST BE DISMISSED BECAUSE THE COMPLAINT FAILS TO STATE A COGNIZABLE CLAIM

Absent a sufficiently pleaded Complaint and causes of action upon which relief could be granted, plaintiff's request for a permanent injunction, as set forth in the third cause of action and "wherefore clause" is subject to dismissal. (Compl., ¶ 38.) Under New York law, the standard for granting a permanent injunction requires "that the moving party must demonstrate actual, rather than likely, success on the merits of its claim." *Roman Catholic Archdiocese of New York v. Sebelius*, 987 F.Supp.2d 232, 258 (E.D.N.Y. 2013). In the Complaint, plaintiff seeks relief in the form of a permanent injunction "[d]efendants must immediately remove such statements from all websites … and … must be enjoined from continuing to issue libelous and defamatory statements about the Plaintiff.'" (Compl., ¶ 38.) Because the Complaint does not allege facts establishing liability on the part of any of the defendants, dismissal is warranted as to each of plaintiff's causes of action. As a direct result, plaintiff cannot, and will not, satisfy the necessary elements of a request for permanent injunction, which include "(1) success on the merits; (2) whether the movant will suffer irreparable injury absent an injunction; (3) the balance of hardships between the parties; and (4) whether the public interest supports granting the requested

injunction."[2] *Id.* As plaintiff cannot establish success on the merits of his claims, dismissal of plaintiff's claim for a permanent injunction is warranted.

POINT VII

PLAINTIFF'S FOURTH CAUSE OF ACTION FOR INCITING RELIGIOUS DISCRIMINATION SHOULD BE DISMISSED

Plaintiff contends that defendants have "incited religious discrimination" because articles dated May 23 and 24, 2013 refer to Reich as being Jewish. (Compl., ¶¶ 41-42.)

A mere cursory review of plaintiff's fourth cause of action, however, shows plaintiff's claim for "inciting religious discrimination" is time-barred for precisely the same reasons as set forth above. Once again, the injuries plaintiff complains of purportedly lie with reputational harms (Compl., ¶45), and thus are merely restyled defamation claims in disguise.

But even if this were not the case, the statute upon which plaintiff relies does not provide him with a private cause of action on these facts. Simply put, nothing in the Complaint falls within the ambit of the statute's protections, *i.e.*, "to eliminate and prevent discrimination in employment, in places of public accommodation, resort or amusement, in educational institutions, in public services, in housing accommodations, in commercial space and in credit transactions and to take other actions against discrimination as herein provided…." N.Y. C.L.S. Exec. §§290(3), 292. Therefore, dismissal of plaintiff's fourth cause of action is also warranted.

[2] As to this factor, New York law is precisely to the contrary. In the absence of extraordinary circumstances, a New York court will not issue an injunctive order restraining libel. *See Rombom v. Weberman*, 309 A.D.2d 844, 845, 766 N.Y.S.2d 88, 89 (2d Dept. 2003). In fact, in situations involving media defendants such as here, the Constitution absolutely precludes enjoining libel. *See New York Times Co. v. United States,* 403 U.S. 713, 715 (1971) (per curium).

POINT VIII

DEFENDANTS SHOULD BE AWARDED THEIR COSTS AND ATTORNEYS' FEES FOR BEING FORCED TO BRING THIS NEEDLESS MOTION

As set forth in the accompanying MacMull Affm., plaintiff repeatedly disregarded defendants' timely and proper demand that he withdraw his Complaint. (*See* MacMull Affm., ¶¶ 3-11, Ex. C.) Plaintiff did this even after he was fully apprised of defendants' position and justification for their withdrawal demand, thus needlessly forcing this motion, and its attendant costs and fees. (*Id.*, ¶¶ 8-11, Ex. C.)

Indeed, defendants explicitly warned plaintiff that if he forced defendants to pursue this motion, defendants would request their costs and fees incurred in having to do so. (*Id.*, Ex. C at 2.) Simply put, defendants should not be required to bear the expense of bringing this entirely preventable motion where, as here, they made no less than **five separate attempts** to contact plaintiff via telephone, email and overnight delivery, not one of which was met with a response.[3] Plaintiff's conduct with respect to this dispute justifies an additional award of sanctions.

On this record, defendants respectfully request that this Court exercise its discretion and award them their costs and attorneys' fees incurred herein. *See* 22 N.Y.C.R.R. §130-1.1(a); *Horn v. Weintraub*, 6 A.D.3d 579, 580, 774 N.Y.S.2d 796, 796 (2d Dept. 2004) (pursuant to Uniform Rules for Trial Courts, court may impose financial sanctions upon party or attorney who engages in frivolous conduct, resulting in expenditure of considerable time and wasted judicial resources); *Gallo v Albert*, 2014 N.Y. Misc. LEXIS 154, at *14, 2014 NY Slip Op 30107(U), at

[3] It also bears mentioning that plaintiff's counsel's repeated refusal to communicate with defendants is violative of the New York Code of Professional Responsibility. *See* Opinion 833 (12/15/2009), citing N.Y. State 407 (1975) ("The consistent failure of a lawyer to respond to telephone calls and correspondence from fellow **attorneys** is in violation of the Code. A lawyer is obligated to return telephone calls and inquiries from **fellow members of the Bar**, as well as from clients.") (initial emphasis in original). (A copy of the aforementioned ethics opinion is attached to the MacMull Affm. as Exhibit F.)

*14 (N.Y. Sup. Ct., N.Y. Cty. Jan 16, 2016) (awarding third-party defendants sanctions in the amount of $2,500.00 for attorneys' fees and expenses where claimant's "persistence unduly expanded and hence prolonged the third party action after the lack of both a factual and a legal basis for the relief sought was brought to their attention").[4]

Plaintiff's frivolous behavior with regard to this dispute warrants the award of costs and attorneys' fees in bringing the instant motion. New York courts are within their discretion to grant a party costs and fees as reimbursement for actual expenses that the party incurred as a result of another party's frivolous conduct. *See* 22 N.Y.C.R.R. §130-1.1(a). A court may determine that conduct is frivolous based upon the following criteria:

> (c) For purposes of this Part, conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false. Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party....

22 N.Y.C.R.R. §130-1.1(c). Here, defendants repeatedly attempted to resolve this dispute. (MacMull Affm., ¶¶ 3-11.) Plaintiff failed to take any action in response to urgings to review the matter and comply with defendants' request that plaintiff withdraw his Complaint. (*Id.*, ¶¶ 8, 11.)

Plaintiff's deliberate behavior of first failing to file a well-pled Complaint, and thereafter ignoring defendants repeated efforts that he withdraw his claims, is without merit in the law, has prolonged the resolution of this litigation and has cost defendants' significant time and expense.

[4] Upon direction from this Court, defendants will submit affidavits on the issue of the appropriate amount of sanctions and costs.

This behavior justifies this Court's award of defendants' costs and fees for bringing this motion. *See, e.g., Levy v Carol Management Corp.*, 260 A.D.2d 27, 34, 698 N.Y.S.2d 226 (1st Dept. 1999)) (In awarding sanctions for filing a frivolous motion to object to a late answer, the court held: "[W]hat remedy [to impose for frivolous conduct] is dictated by considerations of fairness and equity … . Sanctions are retributive in that they punish past conduct. They are also goal oriented, in that they are useful in deterring future frivolous conduct ... . The goals include preventing the waste of judicial resources, and deterring vexatious litigation and dilatory or malicious litigation tactics").

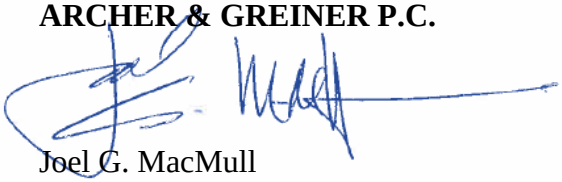
Under the Uniform Rules for Trial Courts and New York State law, plaintiff's conduct here has clearly been frivolous and this Court should award defendants their costs and fees resulting from plaintiff's failure to respond to defendants' proposal to resolve this dispute. (MacMull Affm., ¶¶ 3-12.)

CONCLUSION

For the reasons set forth above and in the accompanying MacMull Affm., defendants respectfully request that the Court issue an order: (i) dismissing each of the four causes of action in the Complaint in their entirety and with prejudice; and (ii) granting defendants such other and further relief as the Court may deem just and proper, including, but not limited to, awarding defendants all costs, fees and expenses, including their reasonable attorneys' fees incurred in connection with this motion.

Dated: New York, New York
September 22, 2016

Respectfully submitted,
ARCHER & GREINER P.C.



Joel G. MacMull
44 Wall Street, Suite 1285
New York, NY 10005
Telephone: (201) 342-6000
Facsimile: (201) 342-6611
jmacmull@archerlaw.com

Attorneys for Defendants