THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

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April 09, 2018

FILE COPY

Case Name: **Theodore Gatsas v William Cashin, et al**
Case Number: **216-2017-CV-00492**

You are hereby notified that on April 05, 2018, the following order was entered:

RE: MOTION TO DISMISS FIRST AMENDED COMPLAINT:

See copy of Order attached. (Abramson, J.)

W. Michael Scanlon
Clerk of Court

(923)

C: Richard J. Lehmann, ESQ; Mark L. Mallory, ESQ; William L. Chapman, ESQ; Jeremy D. Eggleton, ESQ

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

Theodore Gatsas

v.

William Cashin and Jon Hopwood

Docket No. 216-2017-CV-00492

ORDER

Plaintiff brought this action alleging a single count of defamation against defendants. On November 14, 2017, the Court granted defendants' motion to dismiss, finding the complaint failed to allege sufficient facts to state a claim, but allowed plaintiff an opportunity to amend. Plaintiff has since amended his complaint, and defendants have filed new motions to dismiss. Upon consideration of the pleadings, arguments, and applicable law, the Court finds and rules as follows.

Factual Background

On June 27, 2017, defendant William Cashin mailed a letter to plaintiff, which was copied to the city clerk and the city attorney. The letter, which had been drafted by defendant Jon Hopwood for Mr. Cashin's signature, made numerous allegations that plaintiff, as mayor of Manchester, violated the city charter by engaging in a cover-up of a rape that occurred at Manchester West High School in 2015.

In his amended complaint, plaintiff added facts demonstrating that defendants are active in the Manchester political scene. The complaint further alleges that a

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number of individuals, including plaintiff's political rivals, were informed of the incident at West High School. Plaintiff thus alleges that any cover-up of the rape would have required the complicity of plaintiff's adversaries, highlighting the absurdity of defendants' claims.

Analysis

In ruling on a motion to dismiss, the Court determines "whether the allegations contained in the pleadings are reasonably susceptible of a construction that would permit recovery." Pesaturo v. Kinne, 161 N.H. 550, 552 (2011). The Court rigorously scrutinizes the facts contained on the face of the complaint to determine whether a cause of action has been asserted. In re Guardianship of Madelyn B., 166 N.H. 453, 457 (2014). The Court may also consider documents attached to the petitioner's pleadings, documents the authenticity of which are not disputed by the parties, and documents sufficiently referred to in the petition. Beane v. Dana S. Beane & Co., 160 N.H. 708, 711 (2010). The Court "assume[s] the truth of the facts alleged by the plaintiff and construe[s] all reasonable inferences in the light most favorable to the plaintiff." Lamb v. Shaker Reg'l Sch. Dist., 168 N.H. 47, 49 (2015). The Court "need not, however, assume the truth of statements that are merely conclusions of law." Id. "If the facts do not constitute a basis for legal relief, [the court will grant] the motion to dismiss." Graves v. Estabrook, 149 N.H. 202, 203 (2003).

In his complaint, plaintiff identifies sixteen[1] sentences from defendants' letter, labeled (a) through (q), that he maintains constitute defamatory statements. While the complaint claims the defamatory statements "include, but are not limited to," the specified sentences, the Court notes that plaintiff in essence calls out the entirety of the

[1] The complaint identifies seventeen sentences, but (d) and (f) identify the same sentence.

letter, omitting only sentences that could under no circumstances be defamatory. Therefore, for all intents and purposes, the identified sentences constitute the entirety of plaintiff's cause of action.

"A plaintiff proves defamation by showing that the defendant failed to exercise reasonable care in publishing a false and defamatory statement of fact about the plaintiff to a third party, assuming no valid privilege applies to the communication." Pierson v. Hubbard, 147 N.H. 760, 763 (2002). A statement of opinion can also be actionable if "it may reasonably be understood to imply the existence of defamatory fact as the basis for the opinion." Tomas v. Telegraph Pub. Co., 155 N.H. 314, 338 (2007). "Whether a given statement can be read as being or implying an actionable statement of fact is a question of law to be determined by the trial court in the first instance, considering the context of the publication as a whole." Id. at 338–39.

Defendants rely heavily on Pease v. Telegraph Pub. Co., Inc., 121 N.H. 62 (1981). In that case, the defendant published an editorial written by Philip Grandmaison, a public figure who was responding to a negative article written by one of the defendant's employees. In the editorial, Grandmaison made a reference to "what in [his] mind was the worst single example of a journalistic smear," by which he meant prior coverage of an unrelated event written by the plaintiff, R. Warren Pease. Grandmaison also referred to Mr. Pease as "journalistic scum of the earth," prompting Mr. Pease to file suit.

On appeal, the New Hampshire Supreme Court concluded that the statements in the editorial "could not reasonably be understood as assertions of fact," noting Grandmaison had prefaced two of his assertions with language such as "I do feel." Id.

at 65. The plaintiff argued the statements were libelous even if considered to be opinions, as "the facts upon which the opinions were based were neither disclosed nor assumed." Id. at 66. The Court disagreed, finding that "[t]he letter to the editor fully disclosed the factual basis upon which Grandmaison formed his opinion," that is, the articles authored by Mr. Pease to which Grandmaison referred. Id. "The series of articles by the plaintiff was in the public domain, and anybody with sufficient interest could have reviewed it in order to determine whether they agreed with Grandmaison's opinion that the series constituted a smear campaign." Id. "Thus, the 'facts' upon which Grandmaison formed his opinion were disclosed and the opinion does not imply other facts." Id.

Here, defendants' letter begins with the following sentence: "News reports about the September 30, 2015 West Side High School rape containing statements from city officials including Mayor Theodore Gatsas strongly indicate that the mayor engineered a cover-up of the rape during a mayoral race in which crime was a top issue." This sets the stage for the remainder of the letter, as all subsequent statements are premised on the existence of the alleged cover-up. Unlike in Pease, this sentence does not contain any opinion phrases, nor does it constitute obvious hyperbole. Moreover, the news articles referenced in defendants' letter, while public record, do not contain any reference to a cover-up, nor do they suggest a cover-up took place.

The Court finds this first statement is not one of opinion, but of fact. "[C]ases are likely to protect a statement as 'opinion' where it involves expressions of personal judgment, especially as the judgments become more vague and subjective in character." Grey v. St. Martin's Press, Inc., 221 F.3d 243, 248 (1st Cir. 2000). In

Pease, the alleged defamatory statement was an attack on the quality and integrity of the plaintiff's journalism. Here, on the other hand, defendants have alleged very specific factual conduct, i.e., that plaintiff engaged in a cover-up of a rape in order to secure a political victory. Therefore, taking all inferences in plaintiff's favor, the Court finds the letter, considered as a whole, constitutes a statement of fact that does not fall within the scope of Pease.

Notwithstanding the foregoing, public figures must establish that the false publication was made with "actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964). "Reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." St. Amant v. Thompson, 390 U.S. 727, 731 (1968). "There must be sufficient evidence to permit the conclusion that defendant in fact entertained serious doubts as to the truth of his publication." Id.; see also Edwards v. Com., 76 N.E.3d 248, 257 (Mass. 2017) ("That information was available which would cause a reasonably prudent man to entertain serious doubts is not sufficient. In order to negate the privilege, the jury must find such doubts were in fact entertained by the defendant."); Attorney Grievance Comm'n of Maryland v. Stanalonis, 126 A.3d 6, 14 (Md. 2015) ("The subjective test thus focuses on what the defendant personally knew and thought."). "The plaintiff may show that the defendant had such serious doubts about the truth of the statement inferentially, by proof that the defendant had a high degree of awareness of the statement's probable falsity." Competitive Enter. Inst. v. Mann, 150 A.3d 1213, 1252 (D.C. 2016).

Here, plaintiff alleges in his amended complaint that defendants are involved in the Manchester political scene, and are therefore familiar with both the people and processes at play. Plaintiff further alleges that many of the members of the Board of School Committee were political rivals that were not afraid to speak against him, as evidenced by a vote of no confidence taken against him in August 2015. Plaintiff cites this factor as one highlighting the absurdity of defendants' claims, in that a cover-up would require the complicity of these political adversaries who would presumably have no motive to cooperate.

As an initial matter, the Court finds this latter argument appears to misconstrue defendants' letter. The letter does not allege any action that would require the complicity of the Board of School Committee members. Instead, the letter alleges that plaintiff himself withheld information from the committee, which prevented it from taking appropriate action in the wake of the West High School rape. Specifically, the letter alleges that plaintiff failed to inform the committee and the Board of Mayor and Aldermen about the "true nature" of the crime. In context of the articles attached to the amended complaint, the Court understands this to mean that plaintiff was aware that a rape had occurred, whereas everyone else had only been notified of an undefined "sexual assault." (See Compl., Ex. 4 & 5.) Therefore, the Court finds the presence of political rivals on the Board of School Committee is not relevant to the determination of whether defendants published the letter with actual malice.

Nor does the Court find defendants' degree of political knowledge or involvement to be particularly relevant in this case. It is hardly an absurd proposition that a politician would lie or employ deceptive techniques to secure a political advantage. With respect

to plaintiff, the articles attached to the amended complaint contain the following relevant statements:

> In an interview on Thursday, Mayor Ted Gatsas said "we were not told a rape took place at West." But after Police Chief Nick Willard told a reporter that he informed Gatsas at least twice, Gatsas said the discussion revolved around locking the hallway doors after an unspecified "incident."
>
> "I didn't know the severity of it," Gatsas said.
>
> . . . .
>
> [Gatsas] said Assistant Superintended David Ryan had sent an email about the West High School incident to the school board.

(Compl. Ex. 4 at 3–4.)

> School board members, including Gatsas, were notified the day of the attack in an email.
>
> . . . .
>
> Ryan said he spoke to Gatsas shortly after the West High School principal informed him about the rape allegations.
>
> . . . .
>
> Last week, Gatsas, Hogan and Willard addressed their reasons for not releasing information sooner.
>
> In part, Gatsas said he wasn't aware of the severity of the attack and was never told it was a rape.
>
> Ryan said he used the word "rape" when he spoke to Gatsas about the attack.
>
> . . . .
>
> Former Superintendent Dr. Debra Livingston said "I'm pretty sure I used that word (rape)" when she spoke to Gatsas about the assault. She said she definitely conveyed the serious nature of the assault.
>
> . . . .
>
> Gatsas noted that emails that Ryan wrote about the matter used the term "sexual assault."
>
> "My recall was pretty clear," Gatsas said, "why didn't they tell the Board of School Committee it was rape?"
>
> . . . .
>
> "I think this board needs to be given information," said Ward 1 school board member Sarah Ambrogi. "I don't think we should have been kept in the dark. I can speculate as to the reasons why, but I think it's completely inappropriate given the magnitude of this case."

(Compl. Ex. 5 at 2–4.) The email to the Board of School Committee referenced in the article read: "This is to inform you that a female student has alleged being the victim of a sexual assault at West High School today. School administration and the Police Department are investigating and as it is an open investigation, details are not being released yet." (Compl. Ex. 6.)

From the foregoing, it can readily be inferred that plaintiff was aware of certain information that was not shared with the Board of School Committee. It can also be inferred that plaintiff was attempting to downplay his knowledge of the circumstances surrounding the rape. Finally, given that the rape and its subsequent public disclosure both occurred during election years, it can be inferred that whatever actions plaintiff did take were made with political considerations in mind. While at no point does either article suggest any malfeasance on plaintiff's part or speculate as to his motives, neither forecloses the possibility of an intentional failure to keep the committee informed. Therefore, under the circumstances of this case, the Court finds plaintiff has failed to allege facts indicating defendants harbored serious doubts about the truth of their allegations. Accordingly, as plaintiff has failed to sufficiently plead actual malice, defendants' motions to dismiss are GRANTED.

SO ORDERED.

4/5/18
Date

Gillian L. Abramson
Presiding Justice