SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK J.S.C. PART 29
Justice

Index Number : 653497/2011
SAINT DAVID'S SCHOOL
vs.
HUME, BEN
SEQUENCE NUMBER : 001
PREL INJUNCT / TEMP REST ORDER

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross-motion are DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3/22/12

BARBARA R. KAPNICK, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

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SAINT DAVID'S SCHOOL,

Plaintiff,

DECISION/ORDER
Index No. 653497/11
Motion Seq. No. 001

-against-

BEN HUME,

Defendant.

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BARBARA R. KAPNICK, J.:

Plaintiff Saint David's School, located at 12 East 89th Street, New York, New York (the "School"), brought an Order to Show Cause on December 16, 2011 for a preliminary injunction, seeking to preliminarily enjoin defendant Ben Hume ("Hume") from (1) protesting, demonstrating or picketing in the immediate vicinity of the School; and (2) making excessive noise in the immediate vicinity of the School, which was denied on the record on January 3, 2012. Defendant cross-moved to dismiss the Complaint, pursuant to CPLR 3211(a)(7) for failure to state a cause of action. Oral argument on the cross-motion was held on January 20, 2012.

The Complaint[1] contains one cause of action for defamation *per se*, which alleges, *inter alia*, that statements made by Mr. Hume, via placards, at various times since November 2011, are defamatory.

[1] An Amended Complaint was filed on January 27, 2012, after the oral argument.

The placards state the following:

(1) "DONT KILL FOR CLASSROOMS"

(2) "MYRNA IS DEAD/FIND OUT WHY"

(3) "RESPONSIBLE PARENTS DON'T IGNORE ABUSE/PROTECT OUR CHILDREN AND DISABLED ELDERLY"

(4) "INVESTIGATE SAINT DAVID'S/GO TO RESPECTYOURNEIGHBORS.COM"

(5) "RE-READ CLOSESAINTDAVIDS.COM"

(6) "NEGLIGENCE IS VIOLENCE/BE RESPONSIBLE/CALL THE BOARD."

(the "Signs").

The Complaint also alleges that Mr. Hume created a website, "closesaintdavids.com" (the "Website"), which according to the Complaint, "contains a litany of baseless accusations against the School." (Complaint, ¶ 21.)

During the oral argument, this Court denied the cross-motion to dismiss the Complaint, insofar as it alleged that the Website was the basis of the defamation *per se* cause of action. The motion was granted insofar as the Complaint was based upon Signs (2), (4), (5) and (6), as numbered above. The Court reserved decision as to Signs (1) and (3), and now grants defendant's motion as to those also, for the reasons stated below.

Discussion

In support of his cross-motion to dismiss, Hume argues that

the Signs are not actionable as a matter of law because they are rhetorical, hyperbolic and do not convey facts, and even if defamatory, they are absolutely protected from challenge by the First Amendment because they address matters of public concern. *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

Defendant argues that because the "essence of the tort of libel is the publication of a statement about an individual that is both false and defamatory," *Brian v. Richardson*, 87 NY2d 46, 51 (1995), a libel action cannot be maintained here because it is not premised on published assertions of *fact*. *See Milkovich v. Lorain Journal Co.*, 497 US 1, 20 (1990).

Defendant also argues that this Court should apply the factors set forth in *Gross v. New York Times Co.*, 82 NY2d 146, 153 (1993), to distinguish between assertions of fact and non-actionable expressions of opinion, namely

> (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.'" (internal citations omitted).

See also Steinhilber v. Alphonse, 68 NY2d 283, 293 (1986).

The Court of Appeals has held that in applying the third factor set forth in *Gross v. New York Times Co.*:

> the courts must consider the content of the communication as a whole, as well as its tone and apparent purpose. Rather than sifting through a communication for the purpose of isolating and identifying assertions of fact, the court should look to the over-all context in which the assertions were made and determine on that basis 'whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff.' In addition to considering the immediate context in which the disputed words appear, the courts are required to take into consideration the larger context in which the statements were published, including the nature of the particular forum.

Brian v. Richardson, 87 NY2d at 51 (1995) (internal citations omitted).

In addition to these factors, plaintiff asserts that the Court must also consider the "mixed opinion" doctrine, which stands for the principle that:

> . . . even in cases where a statement falls within the protective shield of expressions of opinion, such opinions will lose their protection and become actionable where the 'statement of opinion implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it.

Guerrero v. Carva, 10 AD3d 105, 112 (1st Dep't 2004) (internal citations omitted). Plaintiff urges that even if the Signs are

expressions of opinion, they are still actionable as "mixed opinion," because they imply a basis of undisclosed, defamatory fact underlying the opinion.

The Court must first determine whether the Signs, which contain the statements "DONT KILL FOR CLASSROOMS" and "RESPONSIBLE PARENTS DON'T IGNORE ABUSE/PROTECT OUR CHILDREN AND DISABLED ELDERLY," "would be understood by the reasonable reader as assertions of fact." *Gross, supra* at 154. "Under either Federal or State law, . . . whether a reasonable [reader] . . . could have concluded that [defendant] was conveying facts about the plaintiff . . . is a question for the Court in the first instance." *600 W. 115th St. Corp. v. Von Gutfeld*, 80 NY2d 130, 139 (1992) (internal citations omitted).

Applying the factors set out in *Gross v. New York Times Co.*, the statements at issue here are too vague to constitute concrete accusations of criminality, and even if they did involve direct accusations, they nevertheless do not convey *facts* that are capable of being proven true or false. *See Gross v. New York Times Co., supra* at 154-55.

Even if the Signs did convey facts, the circumstances in which the statements are made do not support a finding that they are

actionable. Here, the statements are conveyed via placards that defendant wears around his neck, while standing on the sidewalk outside of the School's entrance. These circumstances are unlike those, for example, in *Gross v. New York Times Co.*, where the defendants' statements were held to be actionable assertions of fact because they appeared in the news section of the newspaper, where a reader would expect to find factual accounts. *Brian*, *supra* at 52 (*quoting Gross*, *supra* at 156). Here, the context in which the challenged statements were made are more akin to those in *600 W. 115th St. Corp.*, where the Court of Appeals reasoned that because the challenged remarks were made at a public hearing, a reasonable listener would expect to hear expressions of public opinion and would not interpret the remarks, concerning fraud or bribery, to be factual. *600 W. 115th St.*, *supra* at 143. This Court finds that the same is true here, where the statements were made via placards on a public sidewalk.

With respect to the "mixed opinion" doctrine, plaintiff urges that because defendant wears these Signs outside of the School, it "necessarily implies that facts exist implicating the School in a person's death," and "that facts exist concerning the involvement of the School in the abuse of children and disabled seniors." (Pls.' Mem. in Opp. at 8.)

This Court finds plaintiff's view of the "mixed opinion" doctrine to be far broader than what the cases dictate. In *Gross v. New York Times Co.*, the Court of Appeals distinguishes between:

> a statement of opinion that implies a basis in facts which are not disclosed to the reader or listener, and a statement of opinion that is accompanied by a recitation of the facts on which it is based or one that does not imply the existence of undisclosed underlying facts. The former 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].' In contrast, the latter are not actionable because, as was noted by the dissenting opinion in *Milkovich v. Lorain Journal Co.*, a proffered hypothesis that is offered after a full recitation of the facts on which it is based is readily understood by the audience as conjecture.

Gross, supra at 153-54 (internal citations omitted). In *Guerrero*, the Appellate Division, First Department found that the statements were "mixed opinion" because defendant's flyers "clearly impl[ied] undisclosed facts," by inviting the reader to call a specific individual to find out more information. 10 AD3d at 114. Here, the Signs at issue clearly do not imply that they are based on some undisclosed facts. At best, the fact that the defendant wears the Signs while standing outside the School, implies that his Signs are referring to the School; however, unlike in *Guerrero*, this implication is not sufficient to imply that his Signs are based in fact.

Based on the papers submitted and the oral argument held on the record on January 20, 2012, the motion to dismiss is granted insofar as the Complaint is based upon Signs (1), and (3).

This constitutes the decision and order of this Court.

Dated: March 22 2012

BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.