Disp __x___ Dec _____ Seq. Nos. __1-2__ Type __dismiss, amend__

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

———————————————————————X

ABDELNASSER NOFAL, individually and derivatively on behalf of MAS-UNY,

Plaintiff,

Index No. 61639/2021

-against-

DECISION AND ORDER

MOHDJAMIL YOUSEF, individually and as Chairman of the Board of Trustees of MAS-UNY, ALI SALHAB, ABDELWAHAB ABDELGHANY, individually and as a member of the Board of Trustees of MAS-UNY, MAHER ABU-MALLOUH, OSAMA AL-SILWI, individually and as a member of the Board of Trustees of MAS-UNY and KALIF SALIM,

Defendants.

———————————————————————X

The following papers numbered 1 to 6 were read on these motions:

Papers	Numbered
Notice of Motion, Affirmation and Exhibits	1
Memorandum of Law	2
Notice of Cross-Motion, Affirmation and Exhibits	3
Memorandum of Law in Support and in Opposition	4
Reply Memorandum of Law	5
Reply Affirmation and Exhibit	6

Defendants bring their motion seeking to dismiss this defamation action in its entirety, based on documentary evidence,

lack of capacity, lack of standing and/or failure to plead a cause of action. Plaintiff brings his motion seeking (1) an order deeming plaintiff's amended complaint of December 8, 2021 timely filed or granting leave to file such amended complaint; (2) an order permitting plaintiff to serve defendant Abdelwahab Abdelghany via service upon the defendants' attorney or in such other manner as this Court directs; or (3) an order granting additional time to effectuate service on Abdelwahab Abdelghany pursuant to CPLR § 306-b.

Plaintiff was the principal of a private Muslim school in Yonkers called the Andalusia School. The parties do not state any background in any of their papers, such as when plaintiff began to work at this school, what his qualifications are, or how and why the relationship between plaintiff and the named defendant trustees declined. All that is clear is that the relationship did decline at some point, and plaintiff was terminated. Apparently there was an arbitration in 2019-2020 that resulted in plaintiff being reinstated in August 2020. Whatever problems the parties had did not resolve, and the school board decided to terminate plaintiff again, effective June 30, 2021. According to defendants, plaintiff submitted a "mutually-agreed upon resignation letter properly executed and entered into between these parties." Some two months later, plaintiff commenced this action.

Plaintiff initially filed his complaint on August 24, 2021. He then attempted service on defendants Mohdjamil Yousef and Ali Salhab in October 2021. Plaintiff purportedly served them by "nail and mail" service. Approximately one month later, defendants filed their motion to dismiss. Plaintiff then filed affidavits of service on two other defendants, Kalif Salim (served personally) and Osama Al-Silwi (served by serving a person of suitable age and discretion, a 17-year old girl) and an affidavit of attempted service on defendant Abdelwahab Abdelghany. That same day, plaintiff filed an amended complaint,[1] and the next day he filed his cross-motion. In his reply papers, plaintiff attaches an affidavit of attempted service on Maher Abu-Mallouh. Curiously, plaintiff does not seek to serve Abu-Mallouh via alternate service.

The Court begins by addressing the service issues. First, plaintiff is incorrect when he states that "defendants have not adequately preserved their defense of a lack of personal jurisdiction by making no legal arguments as to same in the original moving papers." A review of the moving papers shows that defendants did exactly that, referring to the service on Yousef and Salhab as "purported," and stating that the Court lacks personal jurisdiction over the remaining defendants, as

[1]The request to deem the amended complaint timely filed is granted.

plaintiff had not filed any affidavit of service as to them by the time defendants filed their motion.

There is no basis for the Court to allow substituted service on Abdelghany (or Abu-Mallouh) pursuant to CPLR § 308(5), as plaintiff has not demonstrated that service pursuant to another section is "impracticable." As the Second Department has explained, "CPLR 308(5) vests a court with discretion to direct an alternative method for service of process when it has determined that the methods set forth in CPLR 308(1), (2), and (4) are impracticable. A plaintiff seeking to effect expedient service must make some showing that the other prescribed methods of service could not be made." *JPMorgan Chase Bank v. Kothary*, 178 A.D.3d 791, 794, 113 N.Y.S.3d 738, 741 (2d Dept. 2019). The affidavits of "due diligence" show no such thing. *See Wilmington Sav. Fund Soc'y, FSB v. James*, 174 A.D.3d 835, 838, 106 N.Y.S.3d 106, 109 (2d Dept. 2019). Plaintiff has failed to indicate that he made any serious attempt to locate these defendants – presumably people he knew through his employment and the community, not strangers to him – via any inquiries with the New York State Department of Motor Vehicles, the New York Department of Correctional Services, the New York Board of Elections or the United States Postal Service. Nor did he perform a search of military records, to indicate whether these defendants are on active military duty. Again, since these parties have had a

longstanding professional relationship, there is no basis for concluding that it is "impracticable" to serve them pursuant to one of the other sections. The Court thus denies the request for alternative service.

The Court also denies the request for an extension of time to serve them, pursuant to CPLR § 306-b. This section requires that plaintiff show good cause for the delay, or that the interests of justice require the extension. On this motion, plaintiff does not attempt to allege that he met either standard.

Next, the Court finds that the service on both Yousef and Salhab was deficient. The Second Department "has repeatedly emphasized that the due diligence requirement of CPLR 308(4) must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received. What constitutes due diligence is determined on a case-by-case basis, focusing not on the quantity of the attempts at personal delivery, but on their quality." *McSorley v. Spear*, 50 A.D.3d 652, 653, 854 N.Y.S.2d 759, 760-61 (2d Dept. 2008). "A mere showing of several attempts at service at either a defendant's residence or place of business may not satisfy the due diligence requirement before resort to nail and mail service. However, due diligence may be satisfied with a few visits on different occasions and at different times to the defendant's residence or place of business when the defendant could reasonably be expected

to be found at such location at those times. For the purpose of satisfying the due diligence requirement of CPLR 308(4), it must be shown that the process server made genuine inquiries about the defendant's whereabouts and place of employment." *Est. of Waterman v. Jones*, 46 A.D.3d 63, 66, 843 N.Y.S.2d 462, 464-65 (2d Dept. 2007). Plaintiff made no such showing here. There were only three attempts on each defendant, in one three-day period, one of which was in the middle of the day, one in the morning and one in the early evening – when they "reasonably could be expected to be either at or in transit from work." *Greene Major Holdings, LLC v. Trailside at Hunter, LLC*, 148 A.D.3d 1317, 1321, 49 N.Y.S.3d 769, 774 (2d Dept. 2017). The Court thus finds that service on these two defendants is invalid.

Turning next to the derivative claim, the fifth cause of action, there is no dispute that Not-for-Profit Law § 623 provides that "an action may be brought in the right of a domestic or foreign corporation to procure a judgment in its favor by five percent or more of any class of members or by such percentage of the holders of capital certificates or of the owners of a beneficial interest in the capital certificates of such corporation." It further provides that "In any such action, it shall be made to appear that **each plaintiff** is such a member, holder or owner at the time of bringing the action." (Emphasis added).

The parties dispute, however, whether MAS-UNY is a not-for-profit corporation. Plaintiff contends that MAS-UNY is not a not-for-profit corporation, although in the amended complaint he does allege that it is a religious corporation. Yet religious corporations are, essentially, not-for-profit corporations.[2] Moreover, section 2-b of the Religious Corporation Law expressly states that "The **not-for-profit corporation law applies to every corporation to which this chapter applies**" (with certain limited exceptions, not relevant here). (Emphasis added). Indeed, on the Andalusia School's own website, it states that the "Andalusia Islamic School . . . is a division of MAS-UNY, which is a subchapter of the Muslim American Society." It further explains that "MAS-UNY is a 501(c)(3) non-profit organization that is dedicated to serving the Muslim American community in Yonkers and Westchester County." Even if this website is unreliable, the New York Department of State's website, of which the Court certainly may take judicial notice, *Kingsbrook Jewish Med. Ctr. v. Allstate*

[2] Plaintiff asserts that MAS-UNY is not a 501(c)(3) organization. Yet according to the IRS's publication, *501(c)(3):Tax Guide for Churches & Religious Organizations*: "Churches and religious organizations, like many other charitable organizations, qualify for exemption from federal income tax under IRC Section 501(c)(3) and are generally eligible to receive tax-deductible contributions. To qualify for tax-exempt status, the organization must meet the following requirements. . . : the organization must be organized and operated exclusively for religious, educational, scientific or other charitable purposes; net earnings may not inure to the benefit of any private individual or shareholder; no substantial part of its activity may be attempting to influence legislation; the organization may not intervene in political campaigns; and the organization's purposes and activities may not be illegal or violate fundamental public policy."

Ins. Co., 61 A.D.3d 13, 20, 871 N.Y.S.2d 680, 685 (2d Dept. 2009), states that the "MUSLIM AMERICAN SOCIETY OF UPPER NEW YORK," (MAS-UNY) is a "DOMESTIC NOT-FOR-PROFIT CORPORATION." The Court is thus convinced, as a matter of law, that MAS-UNY, otherwise known as the Muslim American Society of Upper New York, is a religious corporation to which NPL § 623 applies.

This is critically important in this action. In order for plaintiff to bring a derivative action, at least 5% of the holders or owners of MAS-UNY must be named plaintiffs in the action. *Schaefer v. Chautauqua Escapes Ass'n, Inc.*, 158 A.D.3d 1186, 1187, 71 N.Y.S.3d 244, 246 (4th Dept. 2018) ("plaintiffs' attempt to recover damages from the Sponsor on behalf of the Association is a purely derivative claim. Inasmuch as the record establishes that plaintiffs seek to vindicate the Association's rights and recover damages on behalf of the Association, plaintiffs' breach of contract cause of action had to be, but was not, asserted in the context of a derivative action brought by at least 5% of the Association members (*see* N-PCL 623[a])." In this action, there is only one individual plaintiff. In his amended complaint, plaintiff states that he "represents the interests of at least five (5) percent of members of MAS UNY, of which there are approximately 100 members. Specifically, plaintiff represents the interests of the following twenty-four (24) members or twenty-four (24) percent of MAS-UNY," and then lists

the names of various people. This allegation does not satisfy the requirement that "each plaintiff" must be a member of MAS-UNY at the time of the commencement of the action. For this reason alone, the fifth cause of action must be dismissed.

The fifth cause of action also fails because plaintiff does not allege adequately that demand would be futile, as is required by NPL § 623(c).[3] All he alleges is that "A general assembly meeting was held on Zoom on November 22, 2020, during which time actions could have been taken against members of the board of trustees as per the rules and procedures of MAS. However, all members were kept on mute and were not permitted to raise their concerns or initiate a vote to start the removal process of such members, except for a mere span of minutes. No one was allowed to speak on this issue or raise such concerns. As such, this action is the only way the plaintiff may be able to remove such members of the board." Plaintiff does not explain what other efforts he could have made to convene a meeting – especially if he controlled 24% of the membership of MAS-UNY – or why it would have been futile. For this reason as well, the fifth cause of action is dismissed.

The Court next examines the second cause of action, for the intentional infliction of emotional distress. It is well-settled

[3]"In any such action, the complaint shall set forth with particularity the efforts of the plaintiff or plaintiffs to secure the initiation of such action by the board of [sic] the reason for not making such effort." NPL § 623.

that this cause of action "has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress. The first element — outrageous conduct — serves the dual function of filtering out petty and trivial complaints that do not belong in court, and assuring that plaintiff's claim of severe emotional distress is genuine." *Howell v. New York Post Co.*, 81 N.Y.2d 115, 121-22 (1993). The Court of Appeals went on to hold that "the requirements of the rule are rigorous, and difficult to satisfy. Indeed, of the intentional infliction of emotional distress claims considered by this Court, every one has failed because the alleged conduct was not sufficiently outrageous. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.*

In this action, plaintiff alleges that "The manner by which defendants sought to harm Principal Nofal, including the steps described herein via creation of defamatory statements to communicate with the public at large, was so extreme in degree and so outrageous in character that it goes beyond all possible bounds of decency and is intolerable in a civilized society." He

further asserts that "Defendants' statements as described in paragraph 24 above are extreme and outrageous falsities and were made intentionally with the desire to inflict severe emotional distress upon principal Nofal. Before publishing each of the defamatory statements, defendants knew that the content contained therein created a false impression of plaintiff and nevertheless proceeded to publish the defamatory posts, for the purpose of inflicting severe emotional distress by embarrassing, harassing and humiliating plaintiff." A review of the statements alleged in paragraph 24 shows that while nasty or hurtful, none of them is so shockingly outrageous as to rise to the very high level required for this cause of action. *See, e.g., Borawski v. Abulafia*, 117 A.D.3d 662, 663, 985 N.Y.S.2d 284, 286 (2d Dept. 2014) (plaintiff alleged that she was terminated improperly, and that defamatory statements were made to potential employers regarding her professional conduct; Court held conduct was not "'so outrageous in character, and so extreme in degree' as to qualify as intentional infliction of emotional distress"); *Benjamin v. Assad*, 186 A.D.3d 549, 550, 129 N.Y.S.3d 126, 128 (2d Dept. 2020) (allegations that defendants repeatedly entered and caused damage to property, complained to her employees about their work "and made feigned complaints to various authorities . . . do not satisfy that rigorous standard."); *Yuk Ping Ifantides v. Wisniewski*, 181 A.D.3d 575, 576, 117 N.Y.S.3d 591 (2d Dept.

2020) (referring to plaintiff as a "concubine" and a "mistress" both in a deposition and in a letter to a federal court not sufficiently outrageous); *Leibowitz v. Bank Leumi Tr. Co. of New York*, 152 A.D.2d 169, 182, 548 N.Y.S.2d 513, 521 (2d Dept. 1989) (allegations of a campaign of being denied promotions, denied days off for health reasons and the use of religious and ethnic slurs insufficient because the "conduct alleged "must consist of more than mere insults, indignities, and annoyances" and must "be extreme and outrageous and beyond all possible bounds of decency and utterly intolerable in a civilized community"). Given how "difficult to satisfy" the standard is, according to the Court of Appeals, the Court must dismiss the second cause of action.

The fourth cause of action is for punitive damages. It must be dismissed because under New York law "no separate cause of action for punitive damages lies for pleading purposes." *Crown Fire Supply Co. v. Cronin*, 306 A.D.2d 430, 431, 761 N.Y.S.2d 495, 496 (2d Dept. 2003). As this is not a viable cause of action, the Court must dismiss it.

The remaining two causes of action, the first and third, seek damages for defamation (and defamation per se) and a declaratory judgment that the statements alleged are false. Defendants seek to dismiss these claims on multiple grounds. Among them is CPLR § 3211(a)(11). This section provides for a motion to dismiss where a party is immune from liability pursuant

to NPL § 720-a (qualified immunity for uncompensated officers and directors of a not-for-profit corporation). To invoke this section, movants must demonstrate that the entity at issue is a not-for-profit corporation, which movants here have done. However, defendants must also demonstrate that they are uncompensated. Although defendants' counsel states that defendants are all uncompensated in his affirmation, defendants ignore the phrase in CPLR § 3211(a)(11) that states that "presumptive evidence of uncompensated status of the defendant may consist of an affidavit of the chief financial officer of the corporation, association, organization or trust." They submit no such affidavit. As a result, the Court must deny the motion to dismiss on grounds of CPLR § 3211(a)(11).

Turning to the first cause of action, for defamation, it is well-settled that "The elements of a cause of action to recover damages for defamation are (a) a false statement that tends to expose a person to public contempt, hatred, ridicule, aversion, or disgrace, (b) published without privilege or authorization to a third party, (c) amounting to fault as judged by, at a minimum, a negligence standard, and (d) either causing special harm or constituting defamation per se. An allegedly defamatory statement 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 or her interest is concerned. To defeat this qualified privilege, the plaintiff may show either common-law malice, i.e., spite or ill will, or may show actual malice, i.e., knowledge of falsehood of the statement or reckless disregard for the truth." *Braunstein v. Day*, 195 A.D.3d 589, 144 N.Y.S.3d 624, 625 (2d Dept.), *lv. to app. den.*, 37 N.Y.3d 913 (2021). There is no dispute that this qualified privilege applies in this action, because of the relationship between defendants and plaintiff, as the then-principal of the school.

Plaintiff alleges that various statements made by different defendants "were made with reckless disregard for their truth or falsity, or with knowledge of their falsity and with wanton and willful disregard for the reputation and rights of Plaintiff," that these "statements were made with malice," and were "published to third parties, without privilege or authorization, by virtue of being made available to the public via the Internet or cellular phone." Plaintiff further alleges that these statements "are defamatory on their face, as they suggest improper performance of one's professional duties or unprofessional conduct on the part of Principal Abdelnasser Nofal," and that these "false statements defame and otherwise impugn Plaintiff's character, integrity, ability, and reputation." He further alleges that these statements "charge Plaintiff with impropriety in connection with serving as

principal, allegations that go to the heart of Plaintiff's profession, trade, and/or business. Such actions are defamatory per se."

The Court disagrees. First, most, if not all, of these statements are expressions of opinion, not fact. "Since falsity is a requirement of a defamation claim and only factual assertions are capable of being proven false, defamation actions can only be premised on assertions of fact, not opinion. Whether a particular statement constitutes a factual assertion or nonactionable expression of opinion is a question of law for the court to resolve, with consideration to be given to (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." *Gentile v. Grand St. Med. Assocs.*, 79 A.D.3d 1351, 1352-53, 911 N.Y.S.2d 743, 745 (3d Dept. 2010). Given the ongoing battle between the parties (which they allude to, but never explain to the Court), statements which might appear to be factual if heard without context may be taken as opinion: "Even apparent statements of fact may assume the character of statements of opinion, and thus be privileged, when

made in circumstances in which an audience may anticipate the use of epithets, fiery rhetoric or hyperbole." *Id.* *See also Ott v. Automatic Connector, Inc.*, 193 A.D.2d 657, 658, 598 N.Y.S.2d 10, 11 (2d Dept. 1993) ("a defamation cause of action does not lie based on the allegations in the plaintiff's papers, as the unfavorable assessment of his work performance in the letter amounted to a nonactionable expression of opinion.").

As stated, the Court finds that many of these statements are opinion, such as "Plaintiff has 'stone walled the school,'" and "Plaintiff is not a good principal." Some may be considered assertions of fact, such as "Plaintiff committed fraud and corruption" and "Plaintiff is incapable of running a school." Despite some of these statements being factual, they are still not actionable because plaintiff has failed to allege "the time, place and manner of the false statement and to specify to whom it was made." *Dillon v. City of New York,* 261 A.D.2d 34, 38, 704 N.Y.S.2d 1, 5 (2d Dept. 1999).

"It is well-settled law that a cause of action sounding in defamation which fails to comply with the special pleading requirements contained in CPLR 3016(a) that the complaint set forth the particular words complained of, mandates dismissal. Failure to state the particular person or persons to whom the allegedly defamatory comments were made also warrants dismissal." *Gill v. Pathmark Stores, Inc.*, 237 A.D.2d 563, 564, 655 N.Y.S.2d

623, 625 (2d Dept. 1997). The Second Department has held that the complaint must "provide the time, place and manner of the purported defamation," which plaintiff here fails to do. *Buffolino v. Long Island Sav. Bank, FSB*, 126 A.D.2d 508, 510, 510 N.Y.S.2d 628, 631 (2d Dept. 1987). A review of the amended complaint shows that plaintiff states either the speaker, the date, the place of the statement or to whom the statement was addressed, but never all of these things. This is an unacceptable lack of specificity. *Petrisko v. Animal Med. Ctr.*, 187 A.D.3d 553, 135 N.Y.S.3d 2, 4 (1st Dept. 2020) ("The remaining defamation claims were correctly dismissed as statements of opinion or lacking the requisite temporal and factual specificity."). The first cause of action is dismissed.

The third cause of action states

> Defendants [sic] defamatory statements described in paragraph 24 contain false and defamatory information concerning plaintiff, disseminated by defendants through the internet, email and cellular phone, and are viewable and were viewed by many third parties. Defendants knowingly published false matters derogatory to the plaintiff in a manner calculated to destroy plaintiff's reputation and goodwill. The published statements were made with the intent to harm plaintiff with actual malice. Because defendants have placed plaintiff's character, reputation and professional competency and propriety at issue, plaintiff is entitled to a declaratory judgment that the defendants' statements are false.

The Court finds this cause of action to be another way of seeking redress for the alleged defamation. However, as stated, plaintiff has failed to meet the pleading requirements

for defamation. The Court thus dismisses this cause of action as well.

All other requests for relief are denied. The amended complaint is dismissed in its entirety.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
February 7, 2022

HON. LINDA S. JAMIESON
Justice of the Supreme Court

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