To commence the 30-day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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NTC COLLISION SERVICES, INC., d/b/a NTC AUTOBODY, and EDWARD BAECHER,

Plaintiffs,

-against-

MICHAEL E. ARCHER,

Defendants.

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DECISION AND ORDER

Index No.: 2018-51992

ACKER, J.S.C.

The following papers, numbered 1 to 13, were read on the following motions: (1) Defendant Michael E. Archer's ("Defendant") motion to dismiss the Complaint based on improper service, motion to dismiss for failure to state a cause of action and to disqualify Plaintiff's counsel and (2) cross-motion of Plaintiffs NTC Collision Services, Inc. d/b/a NTC Autobody and Edward Baecher (hereinafter collectively referred to as "Plaintiffs" or "NTC" and "Baecher" individually) to amend their Complaint:

Plaintiffs commenced this action on or about July 6, 2018, with the filing of a Summons and Complaint. Plaintiffs assert two causes of action against Defendant alleging that a statement made on Facebook on or about May 17, 2018 constituted libel per se and/or that said statement is false, defamatory and constitutes libel innuendo. Defendant submitted an Answer dated August 8, 2018, which asserted ten (10) affirmative defenses, including improper service (Ninth).

In support of his motion, Defendant submits his own affidavit and the Pleadings. His Notice of Motion indicates that he is seeking the following relief: (1) dismissing the matter for failure to effectuate proper service upon him or in the alternative scheduling a Traverse hearing on the issue of service of process; (2) Dismissing the cause of action with prejudice as the allegations set forth in the Complaint are grounded on the Defendant's pure opinion; and (3) disqualifying Plaintiff's counsel Kenneth Stenger, Esq. and his firm from representing the Plaintiffs in violation of the New York Rules of Professional Conduct. Plaintiffs have opposed Defendant's motion and cross-moved for leave to amend their Complaint.

In his Answer, Defendant asserted an affirmative defense that Plaintiffs did not properly serve him. Although not specifically denominated as such, Defendant sufficiently plead an affirmative defense alleging lack of personal jurisdiction pursuant to CPLR §3211(a)(8). Pursuant to CPLR §3211(e), "an objection that the summons and complaint…was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship." Defendant's Answer herein was dated August 8, 2018 and was electronically filed on August 20, 2018. Accordingly, the latest date by which Defendant could move on the basis of lack of personal jurisdiction was 60 days after August

20, 2018, or by October 19, 2018. Defendant's Notice of Motion was dated and electronically filed on December 19, 2018. As such, the motion was filed 121 days after the Answer was filed, more than 60 days past the deadline. Having failed to move to dismiss within 60 days after serving his answer, Defendant waived the defense of lack of personal jurisdiction. *Dimond v. Verdon*, 5 AD3d 718, 719 [2d Dept. 2004]. Moreover, Defendant's motion was "not supported by an adequate showing of undue hardship that prevented him from making the motion within the required 60–day period." *Warsowe Acquisition Corp. v. DeNoble*, 116 AD3d 949, 950 [2d Dept. 2014]. As such, his jurisdictional objection is waived and his motion to dismiss on this basis is denied.[1] *Id.*

Defendant also moves to dismiss the Complaint as he claims that the statements alleged in this action are based upon pure opinion and are not actionable. As such, Plaintiff is moving to dismiss the Complaint for failure to state a cause of action. "On a motion pursuant to CPLR 3211(a)(7) to dismiss for failure to state a cause of action, the court must afford the complaint a liberal construction, accept all facts as alleged in the complaint to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Yu Chen v. Kupoint (USA) Corp.*, 160 AD3d 787, 788 [2d Dept. 2018].

The Complaint alleges that the following statement was allegedly posted on the Facebook page of Loretta Adams on May 17, 2018:

> "Fishkill needs to beware of a corrupt place called NTC AUTOBODY and Edward Baecher who would steal whatever isn't locked down"

[1] As noted by Plaintiffs, other than indicating in the Notice of Motion that Defendant was moving based upon improper service, Defendant failed to provide any substantive argument related to Plaintiffs' alleged failure to serve him with the Summons and Complaint.

Plaintiffs allege that this statement constitutes libel per se and/or that said statement is false, defamatory and constitutes libel innuendo.

Notably, Defendant does not deny being the author of this alleged posting, nor does he contest the accuracy of the statement as set forth in the Complaint at paragraph 5. Instead, Defendant argues that the statement is not actionable as it is pure opinion. In support of this argument, Defendant asserts that the statement fits squarely within the four corners of a test for pure opinion. Specifically, Defendant argues that the use of the word "would" steal, rather than "did" steal, characterizes the rest of the statement as pure opinion. Further, Defendant argues that what he thinks Plaintiffs "would" do remains Defendant's opinion and is incapable of being proven false, which warrants the dismissal of the instant action.

In order to state a cause of action to recover damages for defamation, a plaintiff must allege that the defendant published a false statement, without privilege or authorization, to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se. *Ferrara v. Esquire Bank*, 153 AD3d 671, 672–73 [2d Dept. 2017], *quoting Rodriguez v Daily News, L.P.*, 142 AD3d 1062 [2d Dept 2016]. In determining the sufficiency of a defamation pleading, a court must consider "whether the contested statements are reasonably susceptible of a defamatory connotation [citation omitted]." *Davis v. Boeheim*, 24 N.Y.3d 262, 268 [2014]. If, 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. *Id.*

"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]. 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*, *supra*. Three factors are applied in determining whether a reasonable reader would consider the statement as fact or nonactionable opinion: "(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." *Id.*, *quoting Mann*, *supra*.

Applying these factors to the statement at issue herein, the Court finds that Plaintiffs have pled a cause of action sounding in libel sufficient to survive this motion to dismiss. Although Defendant argues that the use of the word "would" transforms the statement into pure opinion, the Court disagrees. First, this argument ignores the unqualified language contained in the statement warning the reader to beware of a "corrupt place" called NTC Autobody. This portion of the statement has a meaning that is readily understood and can arguably be proven true or false. Moreover, given that the statement is the only information that was provided in the Facebook post, a reasonable reader could have believed that the challenged statements were conveying facts about the Plaintiffs. *Davis*, *supra*, at 270.

The same analysis is true for the remainder of the statement that "Edward Baecher who would steal whatever isn't locked down." Defendant asserts that the use of the word "would"

renders the statement one of pure opinion. However, this portion of the statement cannot be taken out of context with the first portion of the statement that indicates that NTC Autobody is a corrupt place. The use of the word "would" "is insufficient to transform his statements into nonactionable pure opinion, because in context, a reasonable reader could view [Defendant's] statements as supported by undisclosed facts." *Id.* at 272–73. As such, at this early stage of the litigation, on this pre-answer motion to dismiss and on the record before the Court, it cannot be stated as a matter of law that the statements are pure opinion and Defendant's motion on this ground is denied. *Id.* at 274.

Finally, Defendant has also moved to disqualify Plaintiffs' counsel Kenneth Stenger and his firm from representing Plaintiffs in this matter. Defendant alleges that he is a former client of Mr. Stenger and that Rule 1.9 of the Rules of Professional Conduct requires said disqualification. Defendant asserts that he had an attorney-client relationship with Mr. Stenger, as well as with an unnamed former partner and a current associate of Mr. Stenger's firm.

"A party seeking disqualification of its adversary's counsel based on counsel's purported prior representation of that party must establish (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse [citations omitted]." *Janczewski v. Janczewski*, 169 AD3d 773, 774 [2d Dept. 2019]. "'The disqualification of an attorney is a matter that rests within the sound discretion of the court' [citation omitted]." *Gjoni v. Swan Club, Inc.*, 134 AD3d 896, 897 [2d Dept. 2015]. "A party's entitlement to

be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted, and the movant bears the burden on the motion." *Janczewski, supra.*

Initially, the Court notes that Defendant has not identified the former partner or current associate by name in his motion to disqualify. As such, Defendant has failed to carry his burden of establishing a prior attorney-client relationship with these unnamed individuals.[2] Nevertheless, it is clear that there was a prior attorney-client relationship between Defendant and Mr. Stenger in 2006-2007. Mr. Stenger has provided documents to the Court *in camera* (with copies to Defendant), which establish that Mr. Stenger corresponded on behalf of Defendant with counsel for Plaintiff in the matter of Hudson Valley Credit Union v. Archer, Supreme Court, Dutchess County, Index No. 4893/2006. This is sufficient to establish a prior attorney-client relationship between Defendant and Mr. Stenger.[3] Moreover, the parties cannot dispute that the interests of Mr. Stenger's former client (Defendant) and his present client (Plaintiffs) are materially adverse.

However, Defendant has failed to establish that the matters involved in both representations are substantially related. The action in which Mr. Stenger represented Defendant was a consumer credit transaction from 13 years ago, which is completely unrelated to the instant matter sounding in defamation. Plaintiffs herein were not parties to that prior action and Defendant has not provided the Court with any evidence that these

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[2] Defendant indicated in his Reply Affidavit dated January 23, 2019 that he would provide an "*In Camera Affidavit*" as to the representation by Mr. Stenger's former partner and current associate, however, no such affidavit was submitted.

[3] The Court notes that Mr. Stenger has affirmed that no retainer agreement was entered into with Defendant and that there is no record that Defendant was billed for services or that Defendant made any payment to the firm. Defendant has not contested this statement.

two cases are related in any way, let alone that they are substantially related. Defendant's claim that Mr. Stenger represented him in a financial matter and the instant action seeks to recover money damages is wholly inadequate to establish any relation between the cases. As such, Defendant has failed to establish that he is entitled to have Plaintiffs' counsel disqualified and his motion is denied.

Plaintiffs' Cross-Motion to Amend

Plaintiffs have cross-moved to amend their Complaint to add another instance of alleged libel, based upon statements contained in Defendant's December 19, 2018 Affidavit in Support of his motion. The statements at issue are contained in paragraphs 1 and 2 of Defendant's Affidavit and are identified by Plaintiffs' counsel as follows:

(1) "Plaintiff EDWARD BAECHER, is an elected official. He is a member of the Town of Fishkill/Dutchess County Republican Committee, as such he is an elected official" and

(2) "He [Baecher] joined the committee, despite not being a resident for the sole purpose of wielding influence over elected officials, strong arming them, and steering business to his company NTC COLLISION SERVICE, INC., d/b/a NTC AUTO BODY."

It is well settled that "an absolute privilege is accorded statements made at all stages of a judicial proceeding in communications among the parties, witnesses, counsel, and the court, provided that the statements may be considered in some way 'pertinent' to the issue in the proceeding." *Brady v. Gaudelli*, 137 AD3d 951, 951–52 [2d Dept. 2016]. The test of whether the statements are pertinent to the litigation is extremely liberal and embraces anything that may possibly or plausibly be relevant or pertinent. *Id.* This

privilege applies to all statements made in or out of court and regardless of the motive for which they were made. *Id.*

It is uncontested that the identified statements were made in the context of this judicial proceeding. Plaintiffs argue that the statements "go far beyond the scope and subject matter of this action and should not be subject to the privilege." However, as noted above, the test of whether such statements are pertinent or relevant to the litigation is extremely liberal. In the instant matter, *pro se* Defendant's statements, taken in the full context of his Affidavit are relevant to the issues of the proceeding. Defendant's statements address his perception of Plaintiffs' motive in bringing the instant lawsuit against him. Accordingly, the subject statements are absolutely privileged as a matter of law and cannot be the basis for a defamation action. *Id.* at 952. Therefore, Plaintiffs' motion to amend their Complaint is denied.

The Court has considered the additional contentions of the parties not specifically addressed herein and finds them unavailing. To the extent any relief requested by either party was not addressed by the Court, it is hereby denied. Accordingly, it is hereby

ORDERED that Defendant's motion is DENIED in its entirety; and it is further

ORDERED that Plaintiffs' motion to amend the Complaint is DENIED.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York
May 7, 2019

Christi J. Acker

CHRISTI J. ACKER, J.S.C.

To: All parties via ECF