STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

MARK KOWALCZYK,

Plaintiff,

-against-

DECISION and ORDER
RJI NO.: 0106085762
INDEX NO.:2106-06

BONNIE L. MCCULLOUGH, RANDY MCCULLOUGH, AND, NEW YORK STATE FUNERAL DIRECTORS ASSOCIATION, INC.,

Defendants.

Albany County Supreme County All Purpose Term, August 15, 2007
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Defendants separately move for summary judgment dismissing the plaintiffs claims in all respects. Plaintiff opposes the motions.

After fully reviewing the record, this Court grants the defendant's motions in all respects.

On April 1, 2005, Defendant, Bonnie McCullough, who was employed as the New York State Funeral Directors Association's Executive Director provided the members of the Association's Executive Committee with a three page letter complaining that Plaintiff, Mark Kowalczyk, a member of the Board of Directors, had continually harassed her for almost a year regarding their prior sexual relationship, her employment and her new marriage. Specifically defendant stated in her letter that plaintiff : harassed, abused and terrorized her, threatened her job and quality of life and that plaintiff for some time had a very unhealthy and obsesive fixation on her. Plaintiff also alleges that defendant Randy McCullough made the statement in a police report that plaintiff was volatile and a mean drunk. Plaintiff was subsequently removed as a member of the Board of Directors on May 1, 2006 via a special board meeting for reason of his having harassed Ms. McCullough and has brought the above action alleging that statements by the McCullough s'and members of the Executive Committee amounted to libel and defamation.

"Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue" (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept 1996]). The court's main function in granting summary judgment is issue identification, rather than issue determination (See Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395 [1957]). The party seeking summary judgment has the burden of establishing its entitlement thereto as a matter of law (See Wingrad v. New York University Medical Center, 64 NY2d 851 [1985]). The party opposing the motion will be given the benefit of every reasonable inference (See Boyce v. Vazquez, 249 AD2d 724; see also Dykestra v. Winridge Condominium One, 175 AD2d 482 [3d Dept 1991]).

After a full review of this record this court finds that no triable issues of fact exist

sufficient to defeat the defendant's motion in regard to the cause of action for defamation per se, defamation or intentional infliction of emotional harm .

Defamation has long been recognized to arise from "the making of a false statement which tends to 'expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society' " Dillon v. City of New York 261 A.D. 2d 34 (!st Dept 1999) The elements are a false statement, published 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 (Restatement of Torts, Second § 558). CPLR 3016(a) requires that in a defamation action, "the particular words complained of ... be set forth in the complaint." The complaint also must allege the time, place and manner of the false statement and to specify to whom it was made (*Arsenault v. Forquer,* 197 A.D.2d 554, 602 N.Y.S.2d 653; *Vardi v. Mutual Life Insurance Co. of New York,* 136 A.D.2d 453, 523 N.Y.S.2d 95).

Defamation per se is limited to statements that allege (1) commission of a crime; (2) loathsome disease; (3) unchaste behavior in women; (4) Homosexual behavior or (5) tend to injure the reputation of plaintiff in his trade, occupation or profession . Liberman v. Gelstein, 80 N.Y. 2d 429(1992)

Initially the court notes that the plaintiff is limited to the statements set forth in his amended complaint and additional allegations are not properly before this court on this motion. This court finds upon this record that Plaintiff has failed to establish defamation per se . Despite his conclusions to the contrary the court finds that defendants statements neither accuse plaintiff of a serious crime (See Hassig v. Fitzrandolph 930 A.D. 3d (3rd Dept 2004)) or injure him in his

trade business or profession. (See Liberman v. Gelstein, 80 N.Y.2d 429 1992).

As the court has found that plaintiffs has failed to establish defamation per se or defamation the court need not address the many affirmative defenses raised by defendants regarding the allegations. If the court were to reach these issues the court would find that Mr. McCullough's statements were protected as opinion, and that Mrs McCullough statements were protected under both the Qualified Privilege and the Common Interest Doctrine. (See Clark v. Schuylerville Central School District., 24 A.D.3d 1162(3d Dept 2005) and Bisso v. Defreest., 251 A.D. 2d 674(3rd Dept 1998)

Therefore plaintiff is required to establish special damages if his defamation claim is to survive. Plaintiff alleges that his special damages are attorneys fees incurred by him to protect himself at the special board meeting called to address his alleged harassment. This argument has been rejected by the Third Department in Tourge v. City of Albany, 285 A.D.2d 785 (2001) and this court finds that plaintiff has failed to establish special damages.

Lastly this court finds that plaintiffs cause of action for intentional infliction of emotional harm must also be dismissed . As held in Demas v. Levitsky 291 A.D. 2d (3rd Dept 2002) a cause of action for intentional infliction of emotional distress should be dismissed "where the conduct complained of falls within the ambit of other traditional tort liability". Plaintiffs allegations here fall squarely within the ambit of his defamation and defamation per se claims mandating dismissal. The court further finds that the conduct alleged does not rise to the level required to maintain a cause of action for intentional infliction of emotional harm. (See Freihofer v. Hearst Corp., 65 N.Y.2d 135(1985)

As a result of the above and in light of the fact that plaintiff has failed to establish any separate culpability on the part of defendant New York State Funeral Home Association , this

Court grants the defendants separate motions and the plaintiffs complaint is dismissed in all respects.

All papers, including this Decision and Order, are being returned to the attorney for the Plaintiff. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED!

Dated: November 29 2007

Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Defendants' McCulloughs' Notice of Motion, dated July 9, 2007.
2. Affirmation of Meredith H. Savitt dated July 9, 2007 with Attached Exhibits A-DD.
3. Defendants' New York State Funeral Directors Association, Inc., Notice of Motion dated July 10, 2007 with affidavits of Gordon Terry dated June 14, 2007, Affidavit of Richard Hazzard dated June 14, 2007, Affidavit of Thomas L. Keatrns III dated July 3, 2007, Affidavit of Scott Anthony dated July 6, 2007 and Affirmation of Sanjeeve K. DeSoyza, Esq. Dated July 10, 2007 with attached Exhibits A-JJ.
4. Affirmation and Affidavit of Kevin A. Luibrand in Opposition to Defendants's Motions with Attached Exhibits A-JJ.
5. Defendant New York State Funeral Directors Association Reply, dated August 15, 2007 .