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SCANNED ON 9/8/2008

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

PRESENT: EMILY JANE GOODMAN PART 17

Index Number : 104432/2007

WALSH, GERALD

vs

SERGEANTS BENEVOLENT ASSN.,

Sequence Number : 001

DISMISS ACTION

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 as decided per

FILED

SEP 08 2008

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 9/2/08

EMILY JANE GOODMAN J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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GERALD W. WALSH,

Plaintiff,

-against- Index No.: 104432-2007

SERGEANTS BENEVOLENT ASSOCIATION, INC., EDWARD MULLINS, INDIVIDUALLY AND AS PRESIDENT OF SERGEANTS BENEVOLENT ASSOCIATION, AND JOHN DOE, HOST, SERGEANTS BENEVOLENT ASSOCIATION WEBSITE (SBANYC.ORG),

Defendants.

EMILY JANE GOODMAN, J.S.C.:

In this action, plaintiff Gerald W. Walsh (Walsh) sues defendants Sergeants Benevolent Association, Inc. (SBA) and Edward Mullins (Mullins), individually and as president of SBA, alleging that defendants committed acts of libel and libel per se against plaintiff. Defendants filed a motion to dismiss the action, pursuant to CPLR 3211 (a) (7), on the basis that the complaint fails to state a cause of action. For the reasons set forth herein, defendants' motion for dismissal is granted as to defendants SBA and Mullins, in his capacity as president of the SBA, but is denied with leave to renew as to defendant Mullins, in his individual capacity.

Background

Plaintiff is a SBA member and one of the directors of SBA's Board of Directors, as well as the only director for the Brooklyn

North division. SBA is an association comprised of approximately 10,000 active and retired sergeants of the New York City Police Department. SBA serves as the collective bargaining unit and advocate for its members. SBA's services to its members include, among other things, the provision of legal representation to member-sergeants who become involved in shootings within the scope of their official duties. In such regard and in connection with the fulfillment of its myriad obligations to its members, SBA publishes various articles in its official newsletter, the Frontline, as well as on its website, www.sbanyc.org.

The article at issue in this litigation was published by the SBA in Volume 5, No. 1 of its April 2006 newsletter, and was entitled "SBA Response To Sergeant Involved Shootings" (the Article). The Article stated, in relevant part, that: "[i]n response to several shooting incidents in Brooklyn North where SBA attorneys or board officers were not called in a timely fashion - if at all - the SBA directed its legal firm ... to prepare clear and unequivocal directives to be followed at all shootings involving its members." The Article further stated that: "[b]ecause it is the duty of this union to protect all members and their families - and not take them down the wrong path - it is incumbent upon every sergeant to understand that they are entitled to union representation during these unfortunate instances." A copy of the Article is annexed as

"Exhibit B" to the affidavit of Stephen Younger, attorney for defendants, in support of the motion to dismiss.

In his complaint, plaintiff alleges that "[i]f any reader had any doubt as to whom these publications were referring, all that was necessary for the reader to do to find out, was to flip over, or scroll down to page 6 of the [newsletter,] where Gerald Walsh is clearly listed as the only Director of Brooklyn North." Complaint, ¶ 5. The Article was printed on page 3 of the subject newsletter. Plaintiff also alleges that "the only inference from [the statements in the Article] is that the Plaintiff is not doing his duty, and is in fact, endangering the union members and their families. These statements are necessarily injurious to the plaintiff and are libelous per se." *Id.* The complaint's first and second causes of action are "based upon defamation," and are against the SBA and Mullins, respectively.

Discussion

In considering a CPLR 3211 (a) (7) motion to dismiss, the court is to determine whether plaintiff's pleadings state a cause of action. "The motion must be denied if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law [internal quotation marks omitted]." *Richbell Info. Services, Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 289 (1st Dept 2003), quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98

NY2d 144, 151-152 (2002). The pleadings are to be afforded a "liberal construction," and the court is to "accord plaintiffs the benefit of every possible favorable inference." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994).

On the other hand, while factual allegations contained in a complaint should be accorded a "favorable inference," bare legal conclusions and inherently incredible facts are not entitled to preferential consideration. *Sud v Sud*, 211 AD2d 423, 424 (1st Dept 1995). Moreover, "[w]hen the moving party [seeks dismissal and] offers evidentiary material, the court is required to determine whether the proponent of the pleading has a cause of action, not whether [he or] she has stated one". *Asgahar v Tringali Realty, Inc.*, 18 AD3d 408, 409 (2nd Dept 2005).

The Complaint Should Be Dismissed

In support of the motion seeking dismissal of the complaint, defendants argue that (1) plaintiff has failed to allege that the libel complained of was authorized or ratified by SBA members; (2) plaintiff has failed to allege a cause of action of libel per se; (3) the libel claim should be dismissed for failure to plead special damages;[1] (4) as a public figure, plaintiff is required, but has failed, to allege facts showing malice; and (5) the libel

[1] In his brief opposing the motion to dismiss, plaintiff consents to the dismissal of the libel claim, as the complaint does not plead special damages. Plaintiff's Brief, p. 6. *James v Gannett Co. Inc.*, 40 NY2d 415 (1976)(special damages must be pleaded and proven if alleged defamation is not libel per se).

and libel per se claims should be dismissed because the allegedly defamatory statements are not "of and concerning" plaintiff.

Authorization or Ratification by Union Members

The Court of Appeals ruled, in the seminal case of *Martin v Curran* (303 NY 276 [1951]), that a libel claim against a labor union and its officers in their representative capacities should be dismissed, where the complaint did not state facts showing that the members of the union had authorized or ratified the alleged libel. Following the rule of law stated in *Martin*, subsequent cases have dismissed claims against unions and their representatives where the complaint failed to plead that union members had authorized or ratified the allegedly wrongful act. *See e.g., Salemeh v Toussaint*, 25 AD3d 411 (1st Dept 2006) (affirming dismissal of claims against the union and its president because plaintiff failed to plead that union members had authorized or ratified the intentional tort); *Duane Reade, Inc. v Local 338 Retail, Wholesale, Department Store Union*, 17 AD3d 277, 278 (1st Dept 2005) ("[d]ismissal of the claims against Local 338 was required because plaintiff failed to plead that each individual union member authorized or ratified the unlawful action").

Plaintiff does not dispute *Martin's* rule of law, but argues, without factual or legal support, that the law is inapplicable to this case because the SBA "is not a labor union, nor is it an

unincorporated association." Plaintiff's Brief, p. 4. Such argument is without merit. Under New York Labor Law § 701-5, a "labor organization" or union is an organization "which exists and is constituted for the purpose, in whole or in part, of collective bargaining, or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection ... ." In turn, the Constitution of the SBA provides, in relevant part, that "[t]he Association shall act as representative and bargaining agent on behalf of all active and retired Sergeants of the Police Department - City of New York," and that the SBA "is organized to promote the general welfare of its membership ... and to establish and maintain benefit programs and funds as provided for in this Constitution and By-Laws." Http://www.sbanyc.org/about/constitution.htm. Further, plaintiff does not dispute that the SBA serves as the representative of its members in negotiating labor contracts with the City of New York.

Because the complaint fails to plead or show that the members of SBA have authorized or ratified the purportedly defamatory statements contained in the Article, the claims against the SBA and Mullins, in his capacity as president of the SBA, should be dismissed.

"Of and Concerning" Plaintiff

Plaintiff does not dispute the fact that the Article, which was printed on page 3 of the newsletter, did not identify him or

mention his name. However, plaintiff notes that the Article referred to shooting incidents in Brooklyn North and he is the only director in Brooklyn North, which fact is noted on page 6 of the newsletter. Because Plaintiff maintains that he is the "primary responder" to sergeant-involved shootings in Brooklyn North, the Article was "of and concerning" him. Plaintiff's Brief, p. 2 and 9. Plaintiff also notes that the newsletter's audience are NYPD sergeants, "many of whom will have no need to flip to page 6 [of the newsletter,] as they will know to whom the publication is referring". Id. at p. 8.

Plaintiff's burden of proving that statements are "of and concerning" him "is not a light one." *Chicherchia v Cleary*, 207 AD2d 855 (2d Dept 1994). Although the plaintiff need not be named in the publication, and may show that he or she was the subject of the statements by indirect or extrinsic facts, where extrinsic facts are relied upon "it must be reasonable to conclude that the publication refers to him or her and the extrinsic facts . . . were known to those who read or heard the publication". *Id.* at 856.

Defendants maintain that even if the target audience knew that plaintiff was the only director of Brooklyn North, the Article does not focus only on directors but also on SBA delegates. The Article states, in relevant part, that "[i]n all instances in which a Sergeant is involved in a shooting incident,

a delegate or director should immediately notify [SBA's designated law firm]" and that "[u]pon responding to a shooting scene, the SBA delegate or director should immediately instruct the involved Sergeant ....".

This issue cannot be decided by the court, as a matter of law. In *DeBlasio v North Shore Univ. Hosp.* (213 AD2d 584 [2d Dept 1995]), a press release alleged that "persons involved" were relieved of patient care duties after three patients received brachytherapy treatment with radiation dosages above the standard range. Plaintiff doctor's libel per se claim was not dismissed for failure to demonstrate that the statements were "of and concerning" him where his complaint stated that he was terminated from the hospital staff prior to the press release and was "one of a handful of doctors" prescribing brachytherapy treatment. Accordingly, the court cannot determine that the statements were not "of and concerning" plaintiff merely because plaintiff is among a handful of individuals (delegates and directors) whose duties entail following union notification procedures, especially in light of the fact that Brooklyn North was singled out as the reason for implementing the change.

Libel Per Se

A defamatory statement is libelous per se, and special damages need not be shown, "if it imputes fraud, dishonesty, misconduct, or unfitness in conducting one's profession".

Gjonlekaj v Sot, 308 AD2d 471, 473-474 (2d Dept 2003). In this case, plaintiff argues that the statements in the Article are libelous per se, because they "clearly suggest" that "the person responsible for responding to shootings involving members of the SBA is not doing his job," and that he is "unfit in conducting his profession," such that "the SBA had to have the lawyers prepare clear and unequivocal directives." Plaintiff's Brief, p. 5. Defendants contend that the alleged statements, at most, suggest that plaintiff made a "mistake" by failing to call the SBA in a timely manner to bring the shooting to its attention.

"Whether particular words are defamatory presents a legal question to be resolved by the court in the first instance." *Aronson v Wiersman*, 65 NY2d 592, 593 (1985). The words at issue "must be construed in the context of the entire statement or publication as a whole, tested against the understanding of its average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction." *Id.* at 594.

Defendants, relying on *Aronson*, maintain that the statements made here were like those in *Aronson*, where the Court of Appeals held that a letter written by the defendant president of the city council (and circulated to several council members) was not libelous per se because it merely expressed defendant's "unhappiness with plaintiff's fulfilling her duties as a

legislative assistant." *Id.*

Aronson appears to be based on the fact that the statements were made about plaintiff regarding her duties as a legislative assistant, which had no relation to her profession as a writer/researcher. Thus, the Court of Appeals stressed "[w]hether or not plaintiff fails "to hand in time sheets" or "is neglectful" is no reflection upon her performance as a linguist or her ability to be a good writer or researcher." *Id.*; *see also Mihalakis v Committee of Interns and Residents*, 162 AD2d 371 (1st Dept 1990) (plaintiff's reputation as a physician was not impugned by alleged libelous statements made in connection with her union organizing). Here, neither party has addressed whether plaintiff's profession is that of a police sergeant or a union director. If plaintiff's profession is that of a police sergeant, he has not explained how any failure to fulfill his duties as a union officer establishes unfitness in his profession as a police sergeant.

Accordingly, this part of the motion to dismiss is denied with leave to renew. Upon renewal both plaintiff and defendant shall address the issues raised herein.[2]

Accordingly, it is

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[2] Upon renewal the court will also address, if necessary, whether plaintiff may be deemed a "public figure" and whether he is required to show that the defendants acted with "malice."

ORDERED that the motion to dismiss by defendants Sergeants Benevolent Association, Inc. and Edward Mullins, as President of Sergeants Benevolent Association, Inc., is granted and the Clerk is directed to enter judgment in their favor dismissing plaintiff's complaint; and it is further

ORDERED that complaint is severed as to the remaining defendant Edward Mullins, individually, and the motion to dismiss is denied with leave to renew in accordance with the terms herein.

This constitutes the Decision and Order of the court.

Dated: September 2, 2008

ENTER:

J.S.C.

EMILY JANE GOODMAN