

Martin v Daily News, L.P.

2009 NY Slip Op 31603(U)

July 14, 2009

Supreme Court, New York County

Docket Number: 100053/08

Judge: Martin Shulman

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

PRESENT: MARTIN SHULMAN
J.S.C. *Justica*

PART 1

Index Number : 100053/2008
MARTIN, LARRY D.
VS.
DAILY NEWS L.P.
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. 100053/08
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits 1-9
Answering Affidavits — Exhibits A
Replying Affidavits - Exhibits 10-18

PAPERS NUMBERED
1, 2, 3
4
5

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the attached decision and order.

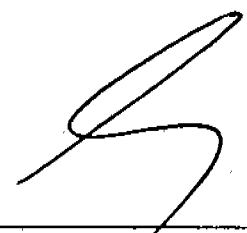
FILED

JUL 20 2009

COUNTY CLERK'S OFFICE
NEW YORK

JUL 14 2009

Dated: _____



MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

-----X

LARRY D. MARTIN,
Plaintiff,

Index No.: 100053/08

-against-

DECISION/ORDER

DAILY NEWS, L.P., ERROL LOUIS and
RAVI BATRA,
Defendants.

FILED

-----X

JUL 20 2009

Martin Shulman, J.

**COUNTY CLERK'S OFFICE
NEW YORK**

Plaintiff Larry D. Martin ("Justice Martin" or "plaintiff"), a Justice of the Supreme Court of the State of New York, County of Kings, filed an unverified complaint alleging six causes of action sounding in defamation against defendants Daily News, L.P. ("Daily News"), Errol Louis ("Louis") and Ravi Batra ("Batra"). Daily News, a Delaware limited partnership with its principal place of business in Manhattan, is the owner, operator and publisher of *The Daily News* newspaper. *The Daily News* has a circulation of over one hundred thousand readers and also publishes an internet edition of the newspaper. Louis is a journalist and columnist for the Daily News. Batra is an attorney licensed to practice law in the State of New York.

The first three causes of action allege defamation and defamation *per se* against defendants Daily News and Louis. Justice Martin seeks compensatory damages in the amount of \$10,000,000, along with punitive damages in the same amount. The fourth, fifth, and sixth causes of action seek the same damages against defendant Batra for his purported role in the publication of allegedly false defamatory statements.

In response to the complaint, defendants Daily News and Louis and defendant Batra, *pro se*, filed separate pre-answer motions to dismiss, which are consolidated herein for disposition. Daily News and Louis assert that the first three causes of action against them should be dismissed pursuant to CPLR 3211(a)(1) and (7). Likewise, Batra seeks an order dismissing the causes of action against him on the same grounds. In addition, Batra seeks costs and attorney's fees pursuant to CPLR §8303-a and 22 NYCRR §130-1.1, as well as financial sanctions against plaintiff and his counsel pursuant to 22 NYCRR §130-1.1 because plaintiff commenced this allegedly frivolous action.

Facts

Two newspaper articles and several blog postings are at the heart of this action. On or about January 28, 2007, Louis and Daily News published an article in the opinion section of *The Daily News*, entitled "This Case Could Topple Legal Titans" (the "First Article"). The First Article was also posted online on or about the same day.

The main theme of the First Article is judicial corruption in Brooklyn. The op-ed piece focuses on defendant Batra and a lawsuit he filed on behalf of his client, Martin Riskin ("Riskin"), against attorney Jerome Karp ("Karp").¹ According to the First Article, Batra's lawsuit alleges that "Karp violated conflict-of-interest rules, and possibly committed a crime, in a sprawling \$20 million dispute between two Brooklyn real estate families - the Riskins and the Singers . . ." Louis/Daily News Motion at Exh. B.

¹ Though unnamed in the First Article, the action referred to is *Riskin v. Karp*, Kings County Index No. 34131/06 (the "Karp Action").

The First Article identifies plaintiff by name in the context of the Riskin/Singer dispute. Specifically, the article reads:

Batra's complaint, filed in Brooklyn Supreme Court, alleges that Karp secretly took payments from a party in the real estate fight, Ted Singer, and provided legal advice and strategy to him - all without disclosing the fact that Karp once represented Supreme Court Justice Larry Martin, the judge hearing the multimillion-dollar case.

In plain English, Batra claims that Karp tried to rig the case by simultaneously representing Singer and the judge hearing his case.

The First Article concludes with the statement: "Local and federal prosecutors have been alerted" and they "should follow up with Batra immediately and get to the bottom of a case that could make [Clarence] Norman's alleged crimes look like a church picnic." *Id.*

Justice Martin argues that the First Article was false and defamatory in that: 1) it conveys to the reasonable reader that plaintiff was an accomplice in rigging a case by permitting Karp, his former attorney, to represent one of the parties in a case before him; 2) he never presided over such a case; 3) the article also conveys to the reader that plaintiff engaged in criminal acts which should be investigated by the proper authorities; and 4) plaintiff claims he did not commit the acts in question.

On or about February 8, 2007, Louis and Daily News published an article entitled "Weed Out Bad Judges", bearing the subtitle "More Resources Will Help Nail Corrupt Jurists" (the "Second Article"). Like the First Article, the Second Article was in the "Op-Ed" section of *The Daily News* print and online editions. The theme of this article was a call for more resources to bolster the New York Commission on Judicial Conduct (the "Commission"). The Second Article briefly discusses the Commission's regulatory role

and bemoans the fact that the Commission lacks adequate resources to properly monitor and discipline "corrupt jurists". See Complaint, Exh. B. The Commission's lack of resources "helps explain the wave of courthouse scandals in places like Brooklyn, where crooked judges - like pickpockets, burglars and other thieves - have felt free to break the rules, knowing that the [Commission] is underfunded and understaffed and overworked."

The article references two judges who were both removed from the bench by the Commission for improprieties, then turns its attention toward plaintiff. Identifying Justice Martin by name and occupation, the article references prior proceedings before the Commission involving plaintiff:

On at least two occasions - in 1999, and again in 2000 - Martin improperly sent letters on courthouse stationery asking other judges to impose lenient sentences on defendants who happened to be family friends of Martin.²

With this as background, two paragraphs further, the Second Article continues:

Now [Martin] is in the hot seat again. According to a lawsuit filed in November, Martin is hearing a real estate case, *Singer vs. Riskin*, in which *the judge's personal lawyer* - Jerome Karp, who defended Martin before the commission in the letter-writing cases - is representing one of the parties in the case, Ted Singer. (Emphasis in original).

Louis characterizes the situation as "an obvious conflict of interest", admonishes plaintiff for his alleged lack of disclosure and refusal to recuse himself, and suggests that the Commission "will need to spend time and money to sort through the charges."

² Justice Martin's causes of action for defamation are not predicated upon Louis' statements in the Second Article concerning the Commission's determination of prior proceedings brought against Justice Martin. See Plaintiff's Memorandum of Law in Opposition to Defendants' Motions to Dismiss, at p. 14, n. 7.

The Second Article concludes that additional resources for the Commission are necessary to “keep a close eye on judges who consider themselves above the law.”

Plaintiff argues that the Second Article was false and defamatory in that: 1) it conveys to the reader that plaintiff is under investigation by the Commission, when no such investigation was then pending or has ever been brought against plaintiff with respect to this matter; 2) plaintiff did not preside over the action referred to as “Singer vs. Riskin”; 3) Karp was not the attorney of record in *Riskin v. Belinda*, Kings County Index No. 48555/98 (the “Belinda Action”), over which plaintiff did preside; 4) while Karp once represented Justice Martin before the Commission in connection with the letter-writing matter, such representation ceased over five years ago; and 5) the Second Article states and was intended for reasonable readers to infer that plaintiff has engaged in “hidden or subtle corruption” and deems himself “above the law.”

In fact, the complaint steadfastly maintains that plaintiff was not the presiding jurist in the Kings County lawsuit captioned *Singer v. Riskin*. This caption refers to a virtual cornucopia of litigation (approximately eleven different lawsuits, some with different captions) involving the two parties, which Batra metaphorically describes as “a litigation octopus”.³

Plaintiff presided over the related Belinda Action, a foreclosure action against a mortgagor/buyer of one of the properties in which Singer claimed Riskin owed him

³ As Justice Martin summarized in his August 3, 2006 decision and order in the Belinda Action: “Singer sought out distressed properties for the purposes of rehabilitation and resale”, while Riskin “provided the financing and became the title holder and mortgagee in sales to third parties A dispute developed between Singer and Riskin as to the distribution and share of the proceeds of a number of sales of properties acquired under their general agreement.” See Batra Motion at Exh. 4, p. 2. Years of litigation resulted from this dispute.

money. Batra, as Riskin's counsel, appeared before plaintiff in the case. In July 2000, Singer moved to intervene in the Belinda Action. In October 2000, Singer requested that the intervention motion be withdrawn, which Justice Martin granted without prejudice and over Riskin's objection in or about October 2000. At this point, plaintiff's involvement in the Belinda Action did not completely cease as defendant Batra, as Riskin's counsel, filed a motion for sanctions against Singer based on his intervention motion. Singer filed a responsive cross-motion for sanctions against Batra. Both of these sanctions motions lay dormant on the court's docket until August 2005, when they were argued. At that time, Justice Martin denied Riskin's request for Justice Martin to recuse himself on the grounds that the latter had no current relationship with Karp. In August 2006, plaintiff denied both motions.

Riskin v. Belinda is one of the subjects of the Karp Action. Defendant Batra filed this lawsuit on Riskin's behalf alleging *inter alia* that Karp served as illegal "shadow counsel" to Singer in the Belinda Action while actively misrepresenting his role in this regard to Batra. The Karp Action further alleges that Karp improperly failed to disclose his representation of Justice Martin, the presiding justice in the Belinda Action.

With the legal saga of *Singer v. Riskin* as background, the court now turns to the "blog" that, along with the First and Second Articles, forms the subject matter of Justice Martin's defamation claims. Several postings on a blog hosted by *The Daily News* (entitled "The Daily Politics") form additional grounds for Justice Martin's defamation claims. On February 8, 2007, defendant Louis posted an entry entitled "Watching the Judges", which briefly summarized the Second Article and delved deeper into its subject matter. See Complaint, Exh. C. Louis mentions plaintiff's name in the context

of the Belinda Action and *Riskin v. Karp* as a "case in point" of how the Commission's inadequate resources allow some judges "to bend the rules brazenly." The blog reads:

A case in point, provided courtesy of frequent blog-reader Ravi Batra, involves Brooklyn Supreme Court Justice Larry Martin . . .

Martin, who has been in trouble with the commission before, is currently hearing a civil case in which Martin's personal attorney, Jerome Karp, also allegedly represents one party in the dispute, which is a big no-no. (Imagine suing somebody, going to court and then finding out that the other guy's lawyer is also the judge's lawyer).

A hyperlink to the complaint in *Riskin v. Karp* concludes the blog post, along with references to the specific paragraphs in that complaint detailing the alleged conflict of interest.

Finally, Justice Martin's complaint cites further blog postings by Louis and Batra as being defamatory. Specifically, on February 11, 2007, Batra responded to certain readers' comments about claimed mistakes in the Second Article, *viz.*, plaintiff was not the presiding jurist in the cited case, *Singer v. Riskin*, and was never a presiding jurist in any action involving the two parties. Batra vouched for the accuracy of the Second Article in a post that reads:

Before you correct Errol Louis, maybe you want to go to the Supreme Court, Kings County and look at the decision that Justice Martin issued a few months ago in late 2006 on a set of motions that were originally filed and argued in 2001. The facts are the facts, and Errol Louis has it right.

See Complaint, Exh. E.

Louis followed up with his own comment on February 12, 2007:

. . . I posted a link to the whole 20-page complaint that make [sic] clear which one of the 11 lawsuits that make up the Singer/Riskin litigation Justice Martin has been involved in.

It's Riskin v. Belinda, Kings Sct #48555/98 (p.5 of the complaint, footnote #1). Martin was issuing rulings on the case (and refusing to recuse himself) as recently as August 12, 2005 (see p.11, paragraph 33).

It's clear as a bell and you know it.

See Complaint, Exh. D. Shortly thereafter, Batra again chimed in, but in a more formal and verbose manner. In his blog posting designated as a "Reply by Counsel of Record to Martin Riskin" (see Complaint, Exh. F), Batra went to great lengths to explain his version of the background of the Riskin/Singer/Karp/Belinda dispute and to reaffirm the accuracy of the Second Article. Specifically, Batra wrote that "[i]t is a matter of now-documented fact that Justice Larry D. Martin was then-represented by Jerome Karp before NYS Commission on Judicial Conduct, albeit, then an undisclosed and unknown fact."

The Defamation Claims

Plaintiff's first cause of action alleges defamation *per se* in connection with the First and Second Articles. The complaint claims that allegedly false statements concerning Plaintiff are defamatory *per se* because they accuse, or were intended to be understood by reasonable readers as accusing, plaintiff of corruption and criminal conduct which tend to injure him in his profession. Plaintiff claims a cursory review of the public record would have revealed that Karp is not the attorney of record for Singer and that *Singer v. Riskin* was never assigned to plaintiff. Justice Martin alleges that by letter dated March 29, 2007, he wrote to *The Daily News* explaining what he says are the true facts and requesting a retraction. Defendants never issued a response or a retraction.

Plaintiff's second cause of action alleges defamation per se in connection with the February 8, 2007 blog posting. Justice Martin reiterates that he was never assigned to *Singer v. Riskin* and that Karp was not the attorney for either of the parties in that action. The complaint contends that a reasonable reader would interpret this blog article as a news report that plaintiff's current attorney appeared before him as the attorney of record in a civil case, and it was defendants' intention that it be so understood.

Plaintiff's third cause of action relates to Louis' February 12, 2007 blog comment. The complaint alleges that the comment constitutes a reaffirmation of the accuracy of the Second Article, thus rendering it a defamatory statement.

Plaintiff's fourth cause of action, for ordinary defamation alleges that Batra was the source of information for the First and Second Articles. Plaintiff alleges Batra pushed the publication of both articles not only with knowledge of their falsity, but to advance "free publicity" for his pending lawsuit against Karp.

Plaintiff's fifth cause of action for defamation concerns Batra's February 11, 2007 blog comment. Justice Martin alleges that through his unequivocal reaffirmation ("the facts are the facts") of the Second Article's accuracy, Batra is liable for defamation.

Finally, Plaintiff's sixth cause of action concerns Batra's February 12, 2007 blog posting. The lengthy description of the Karp/Martin situation and reaffirmation of the Second Article allegedly constitute defamation.

Defendants' Arguments

In support of their motion to dismiss, Louis and Daily News argue: 1) the statements at issue discussing the *Riskin v. Karp* complaint and the Commission's

admonishment to Justice Martin, which provide substantially accurate descriptions of court proceedings, are protected by the fair report privilege contained in Civil Rights Law ("CRL") §74; 2) although the Second Article incorrectly cites *Singer v. Riskin* rather than *Riskin v. Belinda* as the case plaintiff presided over, the privilege nonetheless applies because the reader would not interpret the Second Article any differently regardless of the case name cited; 3) the statements at issue are protected expressions of opinion; 4) the First Article is not about plaintiff, but rather is about Karp, Batra and the system by which judges are selected in Kings County; 5) the Second Article does not state that the Commission has brought conflict of interest proceedings against Justice Martin; 6) the hyperlink to the complaint in *Riskin v. Karp* makes clear that Karp was not an attorney of record in the Belinda Action; and 6) plaintiff cannot adequately plead actual malice.

Batra's motion reiterates the foregoing arguments, and adds that: 1) his statements were all true; 2) he was not the author or publisher of the First and Second Articles; 3) he is not even mentioned in the Second Article; and 4) his statements were privileged since they were made during a pending judicial proceeding.

Discussion

The elements of a *prima facie* cause of action for defamation 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 (citations omitted)." *Dillon v. City of New York*, 261 A.D.2d 34, 37-38 (1st Dept. 1999). Further, writings which tend to disparage a person in the way of his office, profession or trade are considered defamatory *per se*,

and do not require any allegation or proof of special damage. *Nichols v. Item Publishers, Inc.*, 309 N.Y. 596 (1956); *Four Star Stage Lighting, Inc. v. Merrick*, 56 A.D.2d 767 (1st Dept. 1977)(words are libelous if they affect a person in his profession, trade or business, by imputing to him any kind of fraud, dishonesty, misconduct, incapacity, unfitness or want of any necessary qualification in the exercise thereof); see also, *Herlihy v. Metropolitan Museum of Art*, 214 A.D.2d 250 (1st Dept. 1995). Additionally, Justice Martin, as a public official, is prohibited "from recovering damages for a defamatory falsehood relating to his official conduct unless [he] proves that the statement was made with actual malice – i.e., with knowledge that the statement was false or with reckless disregard of whether it was false or not." *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 379, cert. den. 434 U.S. 969 (1977), citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

The First Article

At the outset, this court finds that the First Article is not defamatory as to Justice Martin. As stated in *Aronson v. Wiersma*, 65 N.Y.2d 592 (1985):

Whether particular words are defamatory presents a legal question to be resolved by the court in the first instance (citations omitted). The words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the 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 (citations omitted).

The First Article begins by alluding to "judicial corruption in Brooklyn". More accurately, its focus is "the secretive, all-powerful screening panel used by Brooklyn Democratic bosses . . . to select candidates for the Supreme Court . . ." *Louis/Daily News Motion at Ex. B*. The First Article speculates that Batra's commencement of the

Karp Action may "expose the inner workings of the Brooklyn judge-making apparatus".
Id.

Plaintiff is referenced only once in the First Article, which primarily discusses attorneys Karp and Batra, both of whom are or were members of the subject judicial screening panel. In fact, the First Article exclusively cites Karp's alleged wrong-doing, without any reference to misconduct on Justice Martin's part. For example, Louis writes that "Karp violated conflict-of-interest rules, and possibly committed a crime . . .", failed to disclose his relationship with plaintiff and "tried to rig the [Belinda Action] . . ."

Construed as a whole, this court cannot conclude, as Justice Martin suggests, that the First Article conveys to the average reader that plaintiff was an accomplice in rigging a case and/or engaged in criminal acts which should be investigated by the proper authorities. See *Aronson, supra*. In addition to only containing a single passing reference to Justice Martin and focusing on Karp's alleged professional shortcomings, the First Article states that Karp "**tried** to rig" a case before Justice Martin, not that he was successful in his alleged efforts (emphasis added). Further, the allegation that Karp "**secretly** took payments from . . . Ted Singer . . . and provided legal advice and strategy to him . . ." impliedly refutes any claim of complicity by Justice Martin in Karp's alleged malfeasance (emphasis added). More simply stated, the First Article states that Karp acted "secretly" but nowhere implies that Justice Martin was aware of Karp's alleged secret acts.

For the foregoing reasons, this court finds that the First Article is not reasonably susceptible of a defamatory meaning as to plaintiff. Accordingly, the portions of the first and fourth causes of action which are based upon the First Article are dismissed. In

light of the foregoing, it is unnecessary for the court to address the parties' remaining arguments concerning whether the First Article's statements were in any way privileged.

The Second Article

At the heart of Justice Martin's claims regarding the Second Article is Louis' admitted mistake in identifying the name of the case Justice Martin presided over in the Singer/Riskin litigation. As previously stated, plaintiff presided over the Belinda Action, not the *Riskin v Singer* matters as the Second Article incorrectly reports. Louis subsequently corrected this error in a later blog posting (discussed, *infra*). Justice Martin's complaint cites other alleged falsities in the Second Article, including its implications that: the Commission was investigating plaintiff in connection with the conflict of interest claims, when in fact it was not; Karp was then currently representing plaintiff, when in fact he represented plaintiff in 2001-2002; and Karp was the attorney of record in the Belinda Action when the complaint in the Karp Action alleges that he was "shadow counsel."

Defamatory Meaning

The court's first inquiry is to determine if the statements at issue are reasonably susceptible of the defamatory meaning plaintiff ascribes to them. *Aronson v. Wiersma*, *supra*. At the outset, this court rejects Justice Martin's contention that the Second Article's citation to an incorrect case name defamed plaintiff. As more fully discussed below, the statements which potentially defame Justice Martin are those implying corruption due to an alleged conflict of interest based upon plaintiff's relationship with Karp. The case in which the alleged corrupt act(s) occurred is of no import since the

average reader's interpretation of the conflict of interest and corruption allegations would be the same regardless of the case in which it occurred.

While the Second Article briefly refers to the complaint in the Karp Action, in its larger context it pertains to judicial corruption and calls for further resources to be allocated to the Commission in order to prevent and/or punish the alleged abuses such as those (Justice Martin's included) detailed therein. In one breath, the Second Article comments that "corruption can be hidden or subtle", thus "requiring intensive investigation" by the Commission. In the very next breath, the reader is pointed to "the case of Justice Larry Martin", followed by accounts of his prior admonishment by the Commission, which is not the subject of this defamation action and his refusal to recuse himself in the Belinda Action.

Here, construed in the context of the entire article as a whole, the average reader might conclude that plaintiff is a corrupt jurist and that the Commission is investigating his role in the Belinda Action. Such an interpretation "would expose plaintiff to public contempt, ridicule, aversion or disgrace . . . and would affect plaintiff in his business by imputing fraud, dishonesty, misconduct or unfitness." *Russo v. Padovano*, 84 A.D.2d 925, 926 (4th Dept. 1981); *Rinaldi, supra*, at 367 ("to falsely state that a Judge is incompetent and corrupt, especially where, as here, there are strong undertones of illegality, is to hold him up to disgrace and contempt."). As such, this court agrees that the Second Article, as a whole, is susceptible of a defamatory meaning and contains allegations which are libelous *per se*.

In light of the foregoing, in order to prevail on the instant motions, defendants must establish a defense of justification or privilege. The court now addresses

defendants' claims that various privileges apply to the Second Article's claims and insulate them from liability.

Opinion

It is well settled that expressions of opinion, whether "false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions, provided that the facts supporting the opinions are set forth (citation omitted)." *Rinaldi*, *id.* at 380. An exception to this rule is an accusation of criminal activity which, even in the form of opinion, is not constitutionally protected. *Hoffman v. Landers*, 146 A.D.2d 744, 746 (2d Dept. 1989).

In *Mann v. Abel*, 10 N.Y.3d 271, 276 (2008), *cert. den.* 129 S.Ct. 1315 (2009), the Court of Appeals stated:

Whether a particular statement constitutes an opinion or an objective fact is a question of law (*see Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 381 [1977], *cert denied* 434 US 969 [1977]). 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 (*see Weiner v Doubleday & Co.*, 74 NY2d 586, 593 [1989], *cert denied* 495 US 930 [1990], citing *Steinhilber v Alphonse*, 68 NY2d 283 [1986]). Distinguishing between opinion and fact has "proved a difficult task," but this Court, in furtherance of that endeavor, has set out the following factors to be considered:

"(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" *Brian v Richardson*, 87 NY2d 46, 51 [1995], quoting *Gross v New York Times Co.*, 82 NY2d 146, 153 [1993], quoting *Steinhilber*, 68 NY2d at 292 [internal quotation marks omitted]).

It is apparent from the Second Article's title and contents, taken as a whole, that it primarily voices Louis' opinion that the Commission requires additional funding in order to function effectively. That it appeared in *The Daily News'* op-ed section indicates that it is likely an opinion piece. *Brian v. Richardson*, 87 N.Y.2d 46, 53 (1995)(op-ed section "is a forum traditionally reserved for the airing of ideas on matters of public concern."). However, this is not dispositive of whether it is protected opinion. *Id.* at 52; see also, *Mann v. Abel*, *supra*, at 276-277.

Here, Louis' statements regarding Justice Martin are presented as one of the facts supporting his assertions regarding the Commission's need for additional funding. Arguably, a reasonable reader may interpret Louis' conclusions that plaintiff has a conflict of interest and should have recused himself from hearing the Belinda Action as facts, especially in light of the Second Article's implication that charges have been brought against Justice Martin and that the Commission is investigating him. Justice Martin denies, and defendants do not refute, that any disciplinary action has been commenced against him in connection with this alleged conflict of interest.

Further, the Second Article may be understood as imputing criminal conduct to plaintiff. Whether an accusation of criminal activity is defamatory is a question of law unless the accusation is susceptible of more than one meaning, in which case it is a question for a jury. *Hoffman v. Landers*, *supra*.

Under these circumstances, and in the context of the Second Article as a whole, "there are . . . actionable charges made in the [Second Article] . . . that, although couched in the language of hypothesis or conclusion, actually would be understood by the reasonable reader as assertions of fact." *Gross v. New York Times Co.*, 82 N.Y.2d

146, 154 (1993), citing *Rinaldi, supra*. Accordingly, this court cannot conclude as a matter of law that the Second Article is privileged as a protected expression of opinion which cannot be the subject of an action for defamation.

Civil Rights Law §74

As stated in *Mulder v. Donaldson, Lufkin & Jenrette*, 161 Misc.2d 698, 704-705, 611 N.Y.S.2d 1019 (Sup. Ct., NY Co., 1994), *aff'd* 208 A.D.2d 301 (1st Dept. 1995):

Under Section 74 of the Civil Rights Law, it is a defense to a libel action that the press article in question was a fair and true report of a judicial proceeding. The statute also applies to quasi-judicial proceedings (citation omitted). Section 74 will apply so long as the report is a "substantially accurate" account of what took place in the proceeding (citations omitted). The statute covers not only the press but also, for example, attorneys who make statements to the press regarding pending litigation (citation omitted). Moreover, where the statements are within the purview of Section 74, they are covered by an absolute privilege even if maliciously made (citations omitted).

The term "substantially accurate" is "interpreted liberally":

The test is whether the published account of the proceeding would have a different effect on the reader's mind than the actual truth, if published (citation omitted). If the published account, along with the rest of the article, suggests more serious conduct than that actually suggested in the official proceeding, then the privilege does not attach, as a matter of law (citation omitted).

Daniel Goldreyer, Ltd. v. Van de Wetering, 217 A.D.2d 434, 435-436 (1st Dept. 1995).

Defendants Louis and Daily News contend that the Second Article is absolutely privileged under CRL §74 because it is an accurate account of the pending Karp Action. This court cannot find that the privilege applies as a matter of law. The Second Article contains only a brief reference to the allegations in the Karp Action. However, a review of that complaint reveals that it details Karp's alleged misconduct with only scant references to Justice Martin and no claim of his complicity with Karp. As to Justice

Martin, the Karp complaint alleges, at worse, that he refused to recuse himself. Under this factual scenario, the court cannot conclude that the Second Article's reference to the Karp Action is a substantially accurate report of a judicial proceeding. Indeed, the Second Article, as a whole, may be interpreted as suggesting Justice Martin's alleged conflict of interest is far more serious than the limited references to him in the Karp Action complaint. See *Daniel Goldreyer, Ltd. v. Van de Wetering, supra*. Accordingly, this court cannot conclude as a matter of law that the Second Article is privileged under CRL §74.

Malice

Finally, this court disagrees with defendants' arguments that plaintiff cannot adequately plead actual malice. Whether Justice Martin, a public figure, will be able to sustain his burden of proving actual malice at trial cannot be determined at this pre-discovery stage of the litigation. See *People v. Grasso*, 21 A.D.3d 851, 853 (1st Dept. 2005); *Arts4All, Ltd. v. Hancock*, 5 A.D.3d 106, 109 (1st Dept. 2004) (plaintiffs have "no obligation to show evidentiary facts to support [their] allegations of malice on [this] motion to dismiss [the] complaint").

Unlike the First Article, the Second Article contains no mention of Batra. Nonetheless, the fourth cause of action summarily concludes that "Batra is liable for participating in the publication of the defamatory statements set forth in the . . . Second Article . . ."

As to Batra, no cause of action is stated with respect to the Second Article and the fourth cause of action against him must be dismissed. 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 specify to whom it was made. *Arsenault v Forquer*, 197 A.D.2d 554 (2d Dept. 1993); *Vardi v Mutual Life Ins. Co. of New York*, 136 A.D.2d 453 (1st Dept. 1988). Here, the complaint fails to delineate the specific words Batra allegedly used to Louis and also fails to allege the time, place and manner of any alleged false statements. See, e.g., *Coyle v. 203 West 102nd St. Apt. Corp.*, 293 A.D.2d 377, 378 (1st Dept. 2002).

Finally, even assuming Batra was the source of any potentially defamatory allegations, there is no allegation or other indication that he had any control over the publication of the Second Article. See *Hoffman v. Landers*, *supra*, at 747 ("One who makes a defamatory statement is not responsible for its recommunication without his authority by another over whom he has no control"). Accordingly, the Daily News and Louis' motion to dismiss the first cause of action is denied to the extent that it is based upon the Second Article, and Batra's motion to dismiss is granted to the extent that the fourth cause of action is dismissed.

Louis' February 8, 2007 Blog Posting

In his February 8, 2007 blog entry, Louis further comments on the Second Article and includes a reference to the numbered paragraphs of the complaint in the Karp Action claimed to support his conclusion that plaintiff has a conflict of interest. See Complaint, Exh. C. Compared to the Second Article, the February 8, 2007 blog is considerably more measured in tone and not susceptible of a defamatory meaning.

Unlike the Second Article, this blog entry as a whole does not imply that charges are pending before the Commission against plaintiff as a result of his alleged conflict of interest. Further, the blog lacks the Second Article's underlying tone of criminality, with

its references to "crooks" and "pick-pockets, burglars and other thieves". Accordingly, the second cause of action is dismissed.

Louis' February 12, 2007 Blog Posting

Justice Martin's third cause of action is based upon Louis' February 12, 2007 blog posting which allegedly reaffirmed the accuracy of the Second Article. As with his prior blog entry, this court finds that the February 12, 2007 blog posting is not defamatory (see Complaint, Exh. D). Here, Louis merely clarified the facts pertaining to plaintiff's alleged conflict of interest. The statement that the conflict "is clear as a bell" is mere hyperbole. For the foregoing reason, the third cause of action is dismissed.

Batra's February 11, 2007 Blog Posting

The fifth cause of action characterizes Batra's February 11, 2007 blog comment as vouching for the Second Article's accuracy when he knew its statements to be false. Batra's posting responds to prior blog postings by other readers commenting that the Second Article inaccurately states that plaintiff presided in *Singer v. Riskin*. Responding to these commentaries, Batra refers readers to Justice Martin's 2006 decision in the Belinda Action and the underlying motion papers filed in 2001, concluding that "[t]he facts are the facts, and Errol Louis has it right."

Contrary to plaintiff's interpretation, Batra's February 11, 2007 blog entry only vouches for the accuracy of the general proposition that Justice Martin did indeed preside over the Belinda Action. Although Batra's blog entry does not identify the Belinda Action by name, it is referenced in Louis' February 11, 2007 blog posting as well as in the reader comments Batra's posting addresses. Plaintiff does not dispute that the Belinda Action did at one point encompass a dispute between Riskin and non-

party Singer. This objective fact is readily established by documentary evidence consisting of the file in the Belinda Action, specifically, Justice Martin's 2006 decision on Singer's and Riskin's motions that were filed and argued in 2001. As Batra's February 11, 2007 blog posting does not contain any false statement, the court finds that it is not susceptible of a defamatory meaning and the fifth cause of action must be dismissed.

Batra's February 12, 2007 Blog Posting

Plaintiff's sixth cause of action against Batra is based upon Batra's lengthy February 12, 2007 blog entry, designated by Batra as a "Reply by Counsel of Record to Martin Riskin" (see Complaint, Exh. F). Like his February 11, 2007 blog entry, Batra's February 12, 2007 blog posting is directed to the blog readers who commented regarding the Second Article's inaccurate statement that plaintiff presided over *Singer v. Riskin*. The complaint characterizes this posting as reaffirming the Second Article's accuracy when Batra allegedly knew the statements therein to be false. Justice Martin specifically takes issue with Batra's allegedly false statement that in presiding over *Singer v. Riskin*, "[i]t is a matter of now-documented fact that Justice Larry D. Martin was then-represented by Jerome Karp before NYS Commission on Judicial Conduct, albeit, then an undisclosed and unknown fact."

This court finds that Batra's February 12, 2007 blog entry is not subject to a defamatory meaning in that it summarizes the proceedings in the Belinda Action from the point when Singer attempted to intervene until plaintiff determined the sanctions motions. This piece contains no accusations of alleged misconduct as to Justice Martin. Moreover, plaintiff does not assert that any particular statement in this blog

posting is false. Rather, plaintiff concedes that Karp represented him before the Commission from the period October 2000 through June 2002 when the Commission rendered its final determination. Singer's and Riskin's motions in the Belinda Action were in fact pending during at least a portion of that time period. These objective facts are true. Nowhere in the February 12, 2007 blog entry does Batra state that Justice Martin has a conflict of interest or engaged in any criminal or other misconduct. Accordingly, the sixth cause of action against Batra is dismissed.

Sanctions and Costs

Batra's motion for the imposition of sanctions pursuant to 22 NYCRR 130.1-1 is also denied. A court, in its discretion, may impose financial sanctions upon any party or attorney who engages in frivolous conduct in a civil action (22 NYCRR 130-1.1). Conduct is frivolous if it is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law or if it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another (22 NYCRR 130-1.1 [c] [1] and [2]). Plaintiff's filing of the complaint against Batra does not warrant the imposition of sanctions for frivolous conduct. Nothing in this record indicates that plaintiff commenced the action against Batra to harass or maliciously injure him, nor can it be said that the complaint was completely without merit in law or fact. For the same reasons, plaintiff's commencement of this action against Batra is not frivolous under CPLR §8303-a. Accordingly, the court declines to award sanctions pursuant to 22 NYCRR 130.1-1 and costs pursuant to CPLR §8303-a.

For all of the foregoing reasons it is hereby

ORDERED that the motion to dismiss the complaint as against Batra is granted and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the portion of Batra's motion seeking sanctions is denied; and it is further

ORDERED that the second and third causes of action are dismissed as against defendants Louis and Daily News; and it is further

ORDERED that the first cause of action is dismissed against defendants Louis and Daily News solely to the extent that it is based upon the First Article; and it is further

ORDERED that Louis' and the Daily News' motion to dismiss the first cause of action is denied to the extent that it is predicated upon the Second Article; and it is further


ORDERED that the action is severed and continued as to defendants Daily News and Louis; and it is further

ORDERED that defendants Louis and Daily News are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

Counsel for plaintiff and defendants Daily News and Louis are directed to appear for a preliminary conference on August 11, 2009 at 9:30 a.m. at 111 Centre Street, Room 1127B, New York, New York.

This constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

DATED: New York, New York
July 14, 2009



HON. MARTIN SHULMAN, J.S.C.

FILED
JUL 20 2009
COUNTY CLERK'S OFFICE
NEW YORK