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

PRESENT: HON. CAROL EDMEAD Justice PART 35

Index Number : 100023/~~2009~~ 2010
RUBEL, STEVEN M.D.
VS.
DAILY NEWS, LP
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE 6.25.10
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... _____
Answering Affidavits — Exhibits _____
Replying Affidavits _____

FILED
AUG 20 2010
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of the motion by defendants Daily News, L.P. ("Daily News"), Stuart Marques, Kirsten Danis (sued herein as Kristen Danis), Tina Moore, Benjamin Lesser, and Greg B. Smith to dismiss the Complaint of the plaintiff Steven Rubel pursuant to CPLR 3211(a)(1) (documentary evidence), CPLR 3211(a)(7) (failure to state a cause of action) and CPLR 3211(g) (a case involving public petition and participation) is granted solely pursuant to CPLR 3211(a)(1) (documentary evidence), and the Complaint is hereby dismissed; and it is further

ORDERED that the cross-motion by plaintiff for summary judgment is denied; and it is further

ORDERED that the Clerk may enter judgment accordingly; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon plaintiff within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 8.26.10

HON. CAROL EDMEAD J.S.C.

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

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

STEVEN RUBEL, MD,

Plaintiff, Index No. 100023-2010

-against-

DAILY NEWS, LP, THE DAILY NEWS, STUART MARQUES, KRISTEN DANIS, TINA MOORE, BENJAMIN LESSER and GREG B. SMITH,

Defendants.

----------X

HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendants Daily News, L.P. ("Daily News"), Stuart Marques, Kirsten Danis (sued herein as Kristen Danis), Tina Moore, Benjamin Lesser, and Greg B. Smith (collectively the "defendants") move to dismiss the Complaint of the plaintiff Steven Rubel ("plaintiff") pursuant to CPLR 3211(a)(1) (documentary evidence), CPLR 3211(a)(7) (failure to state a cause of action), CPLR 3211(g) (a case involving public petition and participation).

In response, plaintiff cross moves for summary judgment in his favor.

Factual Background

Plaintiff commenced this defamation action against the defendants based on statements in an article published in the *Daily News* on July 27, 2009 (the "article"). The article reports the death of a patient, Esmin Green ("Ms. Green"), in the psychiatric emergency room waiting area at Kings County Hospital Center ("KCH") in June 2008.

According to the report (the "Report") prepared by the City Department of Investigation (the "DOI"), Ms. Green was brought to the KCH psychiatric emergency room at about 6:30 a.m.

on June 18, 2008. After spending the night in the Women's Waiting Area, at about 5:29 a.m. the following day, Ms. Green walked into the Main Waiting Room and sat down in a chair. A few minutes later, at 5:32 a.m., video cameras captured her falling from that chair to the floor. She laid there face down for more than an hour before a nurse noticed her at approximately 6:35 a.m. Nobody came to her aid during that hour notwithstanding that: "(a) the area was continuously monitored by live video display in both the CPEP's Nursing Station and the Security Substation; (b) there were at least three senior nurses, one attending psychiatrist, one nursing aide and two security guards . . . during that time period, several of whom looked into the Main Waiting Room in the direction of where Ms. Green lay face down on the floor; [and] (c) where she was situated on the floor . . . was right under the clear glass window of the Security Substation." It "was not until 6:35am that staff finally checked on Ms. Green and began attending to her. The first staff interaction with Ms. Green was that of a nurse . . . using her foot to push Ms. Green's leg. Thereafter, Ms. Green was found in cardiac arrest. Advanced life support measures then were initiated to no avail."

The Report states that "Nurse Gonzalo admitted to DOI that, shortly after Ms. Green was pronounced dead, she made three false entries in Ms. Green's Progress Notes to make it appear that in the forty five minutes before Nurse Villaroman discovered Ms. Green on the floor, Ms. Green had been under Nurse Gonzalo's observation and in normal physical condition." "Nurse Gonzalo also lied in her two interviews at DOI when she claimed, with respect to her 6:00am and 6:30am Progress Notes entries, that she in fact saw Ms. Green at 5:00am and 5:30am, implying that her false entries were 'only' inaccurate as to the time. The CPEP video directly contradicted these assertions in that nowhere on the video, including at 5:00am, 5:30am, 6:00am and 6:30am,

is action taken by her shown. Nurse Gonzalo also lied to DOI when she testified that the vital signs marked in her 6:40am entry were taken by Nurse Villaroman before the code was called. The CPEP video directly contradicted this testimony in that the video at no time shows Villaroman taking Ms. Green's vital signs."

With respect to plaintiff, the section of the Report headed "Factual inconsistencies" states that plaintiff and Dr. David Estes "made entries in Ms. Green's Progress Notes that repeated some of the aforementioned false statements made by Nurse Gonzalo in the Progress Notes entries, including that Ms. Green had been seen 'going to the bathroom' at 6:00am, and that normal vital signs had been measured on her at 6:30am and 6:40am. DOI was unable to determine whether Drs. Rubel and Estes repeated these false statements in their entries knowing that they were false, or innocently, by virtue of their reliance on Nurse Gonzalo's account. DOI served subpoenas on both doctors to obtain their testimony on the subject of these Progress Notes entries, but both doctors declined to testify after invoking their 5th Amendment right against self incrimination through their respective attorneys."

The *Daily News* article states as follows:

> The city Department of Investigation found that four doctors on duty that night created records that were contradicted by video. Some of the doctors' notes claimed that they had examined her; the video showed otherwise. A nurse told the DOI she had witnessed one of the doctors the DOI won't say whom remove records from Green's file before the investigation of her death started.
>
> The nurse resigned, and a nursing aid was fired, but all four physicians Drs. Rashed Abedin, Dimitu Magardician, Steven Rubel and David Estes remain employed at Kings County. The Brooklyn district attorney's office is investigating.

In his Compliant, plaintiff alleges that defendants are liable for the "publication of [a]

false, defamatory, malicious, and libelous article"; that he "was cleared of any wrong doing [sic] in that investigation"; that defendants knew that "the findings of that report... included, inter alia, that [plaintiff] was not found guilty of any improprieties"; and that defendants also knew that only three doctors, i.e., Drs. Abedin, Magardician, and Estes, "were suspected of creating fake records," while he himself was not.

In support of dismissal, defendants argue that the statements in the article are not actionable because they are absolutely privileged under New York Civil Rights Law §74 ("CRL §74"), which immunizes from defamation liability statements that reflect "a fair and true report of any judicial... or other official proceeding." The shield of absolute immunity covers reports of official and administrative actions and proceedings. The report need not be a verbatim account of an official proceeding but must be only substantially accurate; the language therein should not be dissected and analyzed with a lexicographer's precision.

Defendants argue that a comparison of the article with the actual contents of the Report shows that the article is a fair, substantially accurate account of the Report. The Report clearly states that DOI found that plaintiff made entries in Ms. Green's medical record that were false, including notes that the patient went to the bathroom at 6:00 a.m. and had her vital signs checked at 6:30 a.m. and 6:40 a.m., when the videotape reflected that, at those times, she was lying face down on the waiting room floor either dying or dead. The Report states that plaintiff might have made the false entries "innocently," simply echoing without first hand knowledge false statements made by a nurse, or he might have made them with full awareness that they were false, in an attempt to cover up the medical neglect of Ms. Green. Plaintiff's complaint is silent in this regard; it neither challenges DOI's version of events nor explains how he came to enter the

false information into Ms. Green's medical record. The Report does not clear plaintiff of any wrongdoing. And, plaintiff's allegation that only "three doctors," excluding himself, "were suspected of creating fake records," is belied by the Report, which clearly finds that four doctors, including plaintiff made entries in Ms. Green's medical records that were clearly at odds with the video surveillance tapes and that plaintiff refused to answer investigators' questions about why he did so. Therefore, the article correctly reports that plaintiff was one of "four doctors on duty that night [who] created records that were contradicted by video," and is a substantially accurate account of an official proceeding. Plaintiff's additional claim that he was "not found guilty of any improprieties" also fails. The Report does not find anyone "guilty" or "not guilty" but as stated therein, "presents DOI's findings regarding ... potential misconduct by KCHC personnel who were responsible for Ms. Green's care" and expresses "no opinion" about "what facts and circumstances, medical or otherwise, caused Ms. Green's death."

Defendants also argue they are entitled to dismissal of the action under New York's anti-SLAPP statute because this lawsuit is a SLAPP action (strategic lawsuit against public participation) that lacks any reasonable basis and is solely intended to suppress media reporting on and criticism of the provision of medical care at a public hospital by plaintiff, a licensed physician, in a highly publicized case of enormous public interest that was investigated by a law enforcement agency which detailed its findings in a public report. Under CPLR 3211(g), to avoid dismissal of a SLAPP suit, a plaintiff must establish by clear and convincing evidence a "substantial basis" for his claims. The Court must also grant preference in the hearing of a motion to dismiss a SLAPP suit. Under CRL § 76(a)(2), a plaintiff in a SLAPP suit "is not entitled to recover unless there is clear and convincing evidence that the defendant knowingly

defamed the plaintiff or acted with reckless disregard for the truth or falsity of the statements." In addition, in deciding a motion to dismiss a SLAPP suit, a court may "consider evidence extraneous to the complaint without contravening CPLR 3211(a)(7)."

Defendants argue that this action satisfies both prongs of CRL § 76(a)(1). Plaintiff, a physician with a New York State license to practice medicine, is under continuing obligations to comply with rules, regulations and standards pursuant to which it was granted. Accordingly, plaintiff is a "public permittee" within the meaning of the SLAPP statute. Also, the defamation claim here is "materially related" to defendants' efforts to "report on" the professional conduct of plaintiff; thus, his defamation claim "involve[s] public petition and participation" within the meaning of CRL § 76(a)(l)(a). Courts have repeatedly held that the anti SLAPP statute applies to statements made in the press and elsewhere. The Complaint establishes no purpose other to punish and deter further criticism and scrutiny and must be dismissed under CPLR 3211(g).

Finally, it is argued, because this action is the type of retaliatory litigation that the anti SLAPP statute is intended to deter, and plaintiff's claim is facially infirm pursuant to CRL § 70 a (l)(a)(c), defendants are entitled to recover costs, attorneys fees, and both compensatory and punitive damages.

In opposition and in support of his cross-motion for summary judgment, plaintiff argues that CRL §74 does not provide defendants with immunity because the statements in the article were not actually part of the official proceeding or in the Report. Therefore, there can be no claim of immunity, since immunity only attaches if the newspaper accurately reports a statement of the proceeding which then subsequently turns out to be false. When, as herein, defendants misquote or selectively quote from a hearing or report, there is no immunity. And, while the

newspaper's account does not have to be verbatim, it may not be slanted or one sided to the degree that it conveys an appearance of wrongdoing on behalf of the plaintiff that was not a conclusion of the administrative body.

The Report made clear that plaintiff "repeated some of the aforementioned false statements made to him by a nurse in his chart" and made the distinction between plaintiff repeating false statements supplied to him by a third party, as opposed to himself being the creator and author of those false entries. Since the DOI was unable to determine whether plaintiff innocently repeated false information or actively created false information and could reach no conclusion as to his culpability, defendants should have reported that "no conclusion as to Dr. Rubel's culpability was reached." Defendants ignored the language in the Report, and substituted their own phrase "created false records," leaving the reader with the impression that DOI concluded that plaintiff was a culpable party. The DOI's use of the word "innocently" means that if plaintiff was simply repeating what was relayed to him, his own actions would be deemed innocent. "Innocently repeating information" supplied by an employee is not "falsifying records." Creating the underlying facts that one places into a patient's records is falsifying records. While the DOI was careful to make the distinction, the defendants did not.

No immunity attaches when the published report is not contained in the record of the hearing and in fact presents a slanted one sided account of what was said. PJI §3:31 states as follows: "The protection does not extend to a statement that was not part of the official proceeding itself." Further, PJI 3:31 provides that "An article which is slanted or one sided, or which is inaccurate in a substantial respect is not a fair and true report." CRL §74 provides that the immunity does not attach if matters are added to the record. The privilege also doesn't apply

where the news account of a proceeding is combined with their acts or opinion to imply wrongdoing.

The article adds, that while a nursing aid was fired, the doctors, (including plaintiff) are still employed and the Brooklyn district attorneys are investigating. The implication once again is that plaintiff is guilty of wrongdoing. A complaint in a defamation action cannot be dismissed unless the Court determines that the contested language is incapable of a defamatory meaning as a matter of law. Thus, the motion must be denied.

Nor would defendants be entitled to summary judgment because whether a report is fair and accurate is generally a question for the jury. Plaintiff, on the other hand, argues that he is entitled to summary judgment because it is uncontested that on its face, the phrase utilized by the defendants is (a) not contained in the Report and thus cannot enjoy immunity, (b) provides only one side of the story, one possibility of explaining plaintiff's actions which are slanted and one sided, and (c) is defamatory *per se*. Reading the two published accounts, it is evident that the defendants did not accurately report what the DOI concluded. Defendants omitted that the DOI could not conclude whether plaintiff falsely created or innocently repeated information regarding the patient, and such failure defames plaintiff by implication, if not outright. By implying that one has committed a crime or abandoned the oath of their office, the statement becomes defamation, *per se*. Plaintiff is entitled to general damages which are presumed by law as compensation for the general damage to his reputation. No special damages need be proven.

The natural meaning of the word "created" is that the creator was the original source. Accordingly, when defendants published that plaintiff "created" false records, the defendants are in essence accusing plaintiff of a crime and subsequent cover up. Defendants acted with "gross

irresponsibility" because they had the correct information before them which conveyed one message about plaintiff, yet they chose to "create" their own phrase, which infers criminal conduct on behalf of plaintiff, and at the very worst states it outright. Thus, there is no immunity even if the matter is of great public concern.

In reply, defendants argue that plaintiff failed to overcome the defendants' showing that this action must be dismissed. First, the Report nowhere states that the "innocent" scenario would necessarily have involved plaintiff "repeating false statements made to him by a nurse," as plaintiff erroneously quotes it. The Report says that "shortly after Ms. Green was pronounced dead, [Nurse Gonzalo] made three false entries in Ms. Green's progress notes." It later states that "Drs. Rubel and Estes made entries in Ms. Green's Progress Notes that repeated some of the aforementioned false statements made by Nurse Gonzalo in the Progress Notes entries." This accurate rendition of the Report's contents suggests not a physician "[i]nnocently relying in good faith on what a nurse told him," but rather one who entered into his patient's chart, without independent verification, the "facts" already falsely entered in that same chart which he could not possibly have witnessed. Despite DOI's allowance that plaintiff might possibly have acted unknowingly, it is not unreasonable for a newspaper reporter to view critically a doctor who would enter such positive "progress notes" about his patient who had collapsed on the floor, in full view of hospital staff, more than an hour earlier at 5:32 a.m.

Second, plaintiff's repeated insistence that defendants distorted the supposed fundamental message of the Report that he was likely "innocent," or at least that a determination whether he did anything wrong was impossible, is belied by the Report's observation that plaintiff invoked his Fifth Amendment right against self incrimination, thus preventing any final determination of

his state of mind. Where a story subject "takes the Fifth," thereby impeding an official investigation into events of great public interest and concern and actively preventing a resolution of whether he did something blameworthy, a newspaper report on the events can be a fair and accurate account without including an elaborate explanation of a possibility left open by investigators that the subject might not, after all, be culpable. Plaintiff may not now defeat a motion to dismiss on the ground that the Report should have said he might be "innocent."

Third, plaintiff does not address what the article truthfully says: that "four doctors on duty that night created records that were contradicted by video," and that "all four physicians . . . remain employed at Kings County." Also, defendants need not have added that the DOI could not eliminate the chance that his false medical record entries were not knowingly made; it is enough that the substance of the article be substantially accurate. The omission by a publisher of facts favorable to the plaintiff is an exercise in editorial judgment that does not make a report less than true. Thus, adding to the article the fact that DOI could not determine plaintiff's state of mind at the time of his false medical record entries because he invoked his Fifth Amendment rights, would not have had "a different effect on the reader's mind" than the statements which they did publish. Indeed, such an addition would only have added more verbiage, without any corresponding increase in readers' understanding of what happened to Ms. Green or plaintiff's role in the events surrounding her death. Meanwhile, plaintiff's claim that defendants could avoid liability only if the article had said he might have entered the false notes "innocently" without also mentioning that he chose to take the Fifth, is also insupportable under the governing law. And his parsing of defendants' use of the word "created" rather than the word "repeated" to describe his false record entries is the type of dissection and analysis not required to assess

liability.

Also, plaintiff was not an innocent bystander. And, reporters and editors may, without vitiating the privilege, make reasonable, even if sometimes imperfect, choices about what information to include in news reports about official proceedings. Finally, the issue of whether the privilege applies in the circumstances of this case is not necessarily a jury question. Courts routinely grant pre-discovery dismissals on the ground that the statements are covered by the fair report privilege as a matter of law. Even if this Court should not dismiss this action based on the Section 74 privilege, it should, at the least, dismiss as to Marques and Danis, whom plaintiff misidentifies in his complaint and as to whom he makes not a single allegation in his Complaint.

Defendants also maintain that plaintiff's request for summary judgment, made without benefit of a notice of motion or evidence, fails as plaintiff failed to demonstrate that the challenged statements are false.

Even if plaintiff had shown on the instant motion that the statements at issue are not protected by the Section 74 privilege, which he has not, that would not nearly constitute proof that the underlying statements in the article are false. Should this case proceed to summary judgment or trial, defendants would be entitled to an adverse inference against plaintiff on this very question based on his invocation of the Fifth Amendment. Moreover, plaintiff does not cite a single case holding that a defamation plaintiff can carry his burden of showing the required degree of fault. New York's standard of gross irresponsibility if he is a private figure, the constitutionally mandated standard of actual malice if he is a public figure or official, as a matter of law based on the pleadings alone. Plaintiff's bare, conclusory assertion that defendants were grossly irresponsible in publishing the challenged statements thus does not meet his burden of

proving either which level of fault pertains in this case or that he has met it.

It is undisputed that the anti SLAPP statute applies, and because plaintiff failed to demonstrate that his action "has a substantial basis in law," the anti SLAPP provisions mandate that defendants are at least entitled to recover their costs and attorneys' fees incurred in defending this motion pursuant to CRL § 70 a (l)(a).

Plaintiff, in reply, contends that defendants have the roles in the SLAPP and anti SLAPP statute and case law completely reversed. The seminal cases on SLAPP and anti-SLAPP suits are distinguishable in that the original defendant was an innocent party who was attempting to participate in the public process of petitioning or seeking redress from a governmental or quasi-governmental agency. CRL 70a and 76a were aimed to protect citizen activists from lawsuits brought against them in retaliation for their public advocacy. However, argues plaintiff, defendants do not fit the definition of the defendant in a SLAPP suit. As addressed in his opposition and cross motion for summary judgment, plaintiff is the victim, who filed a defamation claim for the corporate defendants' inaccurate reporting of an investigation.

Even if this Court finds plaintiff's suit to be a SLAPP suit, as long as the plaintiff can show that the information disseminated by defendants was made with knowledge of its falsity and that plaintiff's lawsuit to rehabilitate his reputation, has a substantial basis in fact and law, defendant's motion would have to be denied. Even if this action is construed as a SLAPP suit, attorneys' fees and costs are not automatic and may be recovered only upon a showing that a frivolous claim has been made against defendants, and plaintiff's claim can hardly be seen as frivolous.

Finally, argues plaintiff, his omission of a notice of a cross-motion was due an error on

the part of counsel's office, and said notice is submitted to rectify this omission.

Discussion

When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182; *Foley v D'Agostino*, 21 AD2d 60, 64-65, 248 NYS2d 121)). In considering such a motion, the court must "'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'" (*Nonnon v City of New York*, 9 NY3d 825, 827, 842 NYS2d 756 *quoting Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972)). Here, the complaint adequately pleaded a cause of action sounding in defamation. The elements of a defamation claim 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*" (*Pitcock v Kasowitz, Benson, Torres & Friedman, LLP*, 27 Misc 3d 1238 [Sup Ct, New York County 2010] *citing Dillon v City of New York*, 261 AD2d 34, 37-38 [1st Dept 1999]). Plaintiff alleges that defendants were aware of the Report's findings that he was not found guilty of any improprieties and cleared of any wrongdoing, but that the article accuses him of both professional and criminal misconduct; defendants knew or should have known that the statements in the article were false and untrue, and he has been irreparably injured in his good name, business reputation, and social standing, and has lost the esteem and respect of his friends, acquaintances, business associates, and the public generally. Defendants do not actually contend otherwise, but rather, assert that they have two defenses: the absolute privilege

for "fair and true" reports of judicial proceedings (CRL § 74 and anti-SLAPP suit protection). Therefore, dismissal pursuant to CPLR 3211(a)(7) is unwarranted.

However, under CPLR 3211(a)(1), also cited by defendants, a defense may provide a basis for dismissing a complaint if that defense is founded upon documentary evidence. In this regard, defendants rely on the Report of the DOI to conclusively establish their defense as a matter of law (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 746 NYS2d 858) that the allegedly defamatory statements constituted a "fair and true" report of judicial proceedings within the meaning of Civil Rights Law § 74.

With respect to the Civil Rights Law § 74, such statute provides, in relevant part, that "[a] civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding ... or other official proceeding" (*Palmieri v Thomas,* 29 AD3d 658, 814 NYS2d 717 [2d Dept 2006]; *Hughes Training, Inc., Link Div. v Pegasus Real-Time*, 255 AD2d 729, 730, 680 NYS2d 721 [1998] (CRL § 74 "cloaks those publishing fair and true reports of judicial proceedings with immunity from civil liability")). The Court of Appeals has noted that "[f]or a report to be characterized as 'fair and true' within the meaning of the statute, thus immunizing its publisher from a civil suit sounding in libel, it is enough that the substance of the article be substantially accurate" (*id. citing Holy Spirit Assn. for Unification of World Christianity v New York Times, Co.*, 49 NY2d 63, 67, 424 NYS2d 165 and *McDonald v East Hampton Star*, 10 AD3d 639, 781 NYS2d 694)). Moreover, "a fair and true report admits of some liberality; the exact words of every proceeding need not be given if the substance be substantially stated" (*Palmieri v Thomas, citing Briarcliff Lodge Hotel v Citizen-Sentinel Publs.*, 260 NY 106, 118)).

One of the statements about which plaintiff takes issue is that he was one of "four doctors on duty" during the night of Ms. Green's stay at the KCH "that created records that were contradicted by video." The Report indicates that Nurse Gonzalo made three false entries in Ms. Green's Progress Notes. The Report also states that plaintiff "made entries in Ms. Green's Progress Notes that repeated some of the aforementioned false statements made by Nurse Gonzalo in the Progress Notes entries, including that Ms. Green had been seen "going to the bathroom" at 6:00 a.m., and that normal vital signs had been measured on her at 6:30 a.m. and 6:40 a.m. In other words, the entries "made" by plaintiff himself, repeated some of Nurse Gonzalo's false entries. According to the Report, the video surveillance at no time shows the taking of Ms. Green's vital signs or showed Ms. Green going to the bathroom. The Oxford English Dictionary defines the word "create" as "to produce" or "to make" (Second Edition, The Compact Oxford English Dictionary, Oxford University Press 1998, p. 1134). When said as to a "divine agent" (which plaintiff does not claim to be), it means to "bring into being" or "cause of exist" (*Id.*). Plaintiff cites no authority, legal or otherwise, to support his narrow construction of "created" to mean that the creator was the "original source." Thus, the article's representation that plaintiff created records that were contradicted by the video is more than substantially accurate. That the information contained in his entries on Ms. Green's Progress Notes came from an unreliable source do not make his entries any less "his" or any less "created" by him to the extent that they were made by him and by his own doing. According to the Report, the entries plaintiff made were false, and the article represents that his entries were false. Thus, contrary to plaintiff's contention, the statements in the article are contained in the Report and the article is a fair and true report of the DOI investigation.

Plaintiff's contention that the article provides only one side of the story is inaccurate, and in any event, does not deprive defendants of the immunity afforded by CRL § 74. First, the Report indicates that DOI was unable to determine whether plaintiff repeated the false statements in his entries "knowing that they were false, or innocently, by virtue of their reliance on Nurse Gonzalo's account." In other words, DOI was unable to determine the intent of plaintiff in making his false entries; however, the entries, nonetheless, were found to be false by DOI and the article merely recounts the fact that his entries were false. The article does not indicate, one way or the other, whether plaintiff made the false entries intentionally or innocently. If, as plaintiff alleges, only one side of story was depicted, that one side is the fact that the entries made by plaintiff were false, as shown by the video surveillance tapes. And, DOI's ability to declare plaintiff's innocence, if at all, was compromised by plaintiff's own decision to plead the Fifth Amendment. Nor is there a requirement that reporters depict all sides of any one story; there is "no requirement that [a] publication report the plaintiff's side of the controversy" (*Cholowsky v Civiletti*, 69 AD3d 110, 115, 887 NYS2d 592 [2009]).

Further, the allegations in plaintiff's Complaint are flatly contradicted by the Report. Plaintiff's allegation that the DOI investigation cleared him of any wrongdoing is wholly inaccurate. Indeed, the DOI was unable to reach any conclusion as to plaintiff's intent in making the false entries, in large part due to the fact that plaintiff refused to be interviewed. And, contrary to plaintiff's contention, there is no reference in the Report to any finding that plaintiff was not guilty of any improprieties. Nor does the Report indicate that only three doctors, *i.e.*, Drs. Abedin, Magardician, and Estes, "were suspected of creating fake records," while plaintiff was not. The Report clearly states that "DOI's investigation revealed factual inconsistencies in

several entries made by Drs. Abedin, Magardician, *Rubel* and Estes in Ms. Green's record."

As to the other statement about which plaintiff takes issue, *to wit*: that the Brooklyn district attorney's office is investigating, such statement is neither defamatory *per se* or actionable Even if the general allegation that plaintiff is being investigated would be interpreted by the average reader as imputing unlawful behavior, it is incapable of conveying that a serious crime has been committed (*see e.g.*, *Stephan v Cawley*, 24 Misc 3d 1204, 890 NYS2d 371 [Sup Ct, New York County 2009] ("To be actionable as slander per se, words imputing the commission of a crime must be of the level of an indictable offense upon conviction of which punishment may be inflicted. Merely stating that there is a complaint against someone does not satisfy this requirement.")). Here, the general statement that plaintiff is being investigated fails to identify any indictable offence that was imputed by the article. "While the average reader may or may not pay close attention to the differences between being investigated, being indicted, and being convicted of a crime . . . a statement that there is an investigation does not automatically imply guilt. Rather, such a statement implies that guilt has not been established; an investigation may result in charges, or no charges. Even upon indictment, the average reader should understand that "in our system of law, a person is presumed innocent until proven guilty") (*Stephan v Cawley*, *citing Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 390, 397 NYS2d 943, cert denied 434 US 969, 98 SCt 514 (1977)). The Report indicates that DOI has forwarded the Report to the Office of the Kings County District Attorney, and plaintiff has not contested the statement that such Office was "investigating." Likewise, the failure to report that the DOI could not conclude whether plaintiff falsely created or innocently repeated information regarding the patient, does not defame plaintiff by implication.

In accordance with the provisions of CRL § 74, defendants have shown that the published statements in the article were fair and true reports of the DOI proceedings which were the bases and focus of said statements and, as such, no civil action may be brought against these defendants for such publication. Accordingly, the complaint herein, with its single cause of action sounding in defamation, cannot be maintained and must be dismissed based pursuant to CPLR 3211(a)(1) (documentary evidence).

Turning to whether the anti SLAPP statute applies so as to bar this action, CRL § 76-a was enacted as a means of protecting citizens who object to certain government actions from "strategic lawsuits against public participation" brought by public applicants or permittees (see CRL § 76-a) (*Cholowsky v Civiletti*, 16 Misc 3d 1138, 851 NYS2d 57 [Sup Ct, Suffolk County 2007], *affd* 69 AD3d 110, 887 NYS2d 592 [2d Dept 2009]). CPLR 3211(g) of the anti-SLAPP law governs motions to dismiss" (*Duane Reade, Inc. v Clark, supra*). It incorporates CPLR 3211(a)(7) by reference, under which "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... the pleading fails to state a cause of action." However, CPLR 3211(g) amends prior law so that on a motion to dismiss a "SLAPP" action, the burden is upon the plaintiff to establish that its claim has the requisite "substantial basis" (*Duane Reade, Inc. v Clark, supra*). In order to avoid dismissal of its SLAPP suit complaint under CPLR 3211(g), unlike defending a CPLR 3211(a)(7) motion, plaintiff must establish by clear and convincing evidence a "substantial basis" in fact and law for its claim (*Duane Reade, Inc. v Clark, supra*). The Legislature viewed "substantial" as a more stringent standard than the "reasonable" standard that would otherwise apply (*Duane Reade, Inc. v Clark, supra* citing Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR

C3211:73)).

The law "focuses on retaliatory litigation commenced or maintained for the purpose of intimidating persons who have voiced opinions in public meetings or discussions inimical to those of the person controlling the litigation" and is designed to deter such abuses (id. at 8 Weinstein Korn Miller, N.Y. Civ Prac 3211.51, *supra*). It facilitates the early dismissal of the "SLAPP" suit, by tightening the legal substantive requirements imposed upon plaintiffs in order to prevail in such a suit and by lowering the procedural hurdles that the defendant in such a suit must clear in order to obtain dismissal of the suit.

Defendants are not entitled to use the protections of CRL § 76-a (*Cholowsky v Civiletti*, 16 Misc 3d 1138, 851 NYS2d 57 [Sup Ct, Suffolk County 2007] *affd* 69 AD3d 110, 887 NYS2d 592 [2d Dept 2009]). It was noted in *Cholowsky v Civiletti*, that since this law took effect in 1993, there has never been a case in which a newspaper successfully came under the umbrella protection of this statute for articles or stories generated by its writers (*Cholowsky v Civiletti*, 16 Misc 3d 1138, *supra*). The intent behind the statute was and is to protect citizen activists - not the media - who are at a disadvantage in defending lawsuits brought by financially able public applicants or permittees who seek to quell opposition to their applications by private individuals or non-profit groups who cannot afford to defend such suits (*Cholowsky v Civiletti*, citing *Guerrero v Carva*, 10 AD3d 105, 116, 779 N.Y.S.2d 12, 21 [1st Dept 2004]).

Defendants' reliance on *Adelphi University v Committee to Save Adelphi* (2/6/97 NYLJ 33) for the proposition that the anti SLAPP statute protects their statements is misplaced. In *Adelphi*, Adelphi University ("University") sued the Committee of Save Adelphi ("Committee") from alleged defamatory statements that the University committed educational mismanagement

and financial misconduct. The Committee counterclaimed, alleging that its statements were protected under the anti SLAPP statute. The Court held that "As long as the statements" were "materially related" to the "opponent's [Committee's] efforts to 'comment on' or 'challenge' the public permit in issue, they fall within the SLAPP Statute, whether they were made to the government or the news media." Thus, the SLAPP counterclaim "may not be dismissed on the ground that Plaintiffs' defamation action involves statements only to the press and public." The case is silent as to whether the alleged defamatory statements are protected when made *by* the press. Defendants' reliance on *Duane Reade* (2004 WL 690191, at *6) for the same proposition also fails, in that the statements therein were found in an advertisement placed and paid for by a local citizen, Patrick Clark, who openly criticized and challenged Duane Reade's attempt to place a certain billboard on its store.

Accordingly, the arguments and damages sought based upon CRL § 76-a will not be considered on this motion and neither will the related grounds found in CPLR 3211(g).

In light of the above finding that defendants are entitled to dismissal of this action, the cross-motion by plaintiff for summary judgment in his favor is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of the motion by defendants Daily News, L.P. ("Daily News"), Stuart Marques, Kirsten Danis (sued herein as Kristen Danis), Tina Moore, Benjamin Lesser, and Greg B. Smith to dismiss the Complaint of the plaintiff Steven Rubel pursuant to CPLR 3211(a)(1) (documentary evidence), CPLR 3211(a)(7) (failure to state a cause of action) and CPLR 3211(g) (a case involving public petition and participation) is granted solely pursuant

to CPLR 3211(a)(1) (documentary evidence), and the Complaint is hereby dismissed; and it is further

ORDERED that the cross-motion by plaintiff for summary judgment is denied; and it is further

ORDERED that the Clerk may enter judgment accordingly; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon plaintiff within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: August 26, 2010

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

FILED
AUG 26 2010
COUNTY CLERK'S OFFICE
NEW YORK