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

PRESENT: JAFFE BARBARA JAFFE J.S.C. PART 5

Justice

Index Number : 401863/2010

RIVERS, DARNEY

VS.

SHANAHAN, MICHAEL

SEQUENCE NUMBER : 002

DISMISS ACTION

CAL # 98

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED

JUN 03 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/31/11
MAY 31 2011

BARBARA JAFFE J.S.C.
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

----------x

DARNEY RIVERS,

Plaintiff,

-against

MICHAEL SHANAHAN, *et al.*,

Defendants.

----------x

Index No. 101834/10

Motion date: 3/22/11
Motion Seq. Nos.: 002,

DECISION & ORDER

BARBARA JAFFE, JSC:

For plaintiff:
Philip M. Hines, Esq.
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Brooklyn, NY 11234
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For City defendants:
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For defendant DA:
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Cyrus R. Vance, Jr.
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For defendant Shanahan:
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By pre-answer notice of motion dated October 15, 2010, defendant Shanahan moves pursuant to CPLR 3211(a)(7) for an order dismissing the third, fourth, and fifth causes of action in the amended complaint for failure to state a cause of action. Plaintiff opposes the motion, and defendants City, the New York City Police Department (NYPD), and the City of New York Department of Correction (Correction) (collectively, City defendants) oppose Shanahan's motion only as to the third and fourth causes of action.

By pre-answer notice of motion dated October 18, 2010, defendant New York County District Attorney's Office (DANY) moves pursuant to CPLR 3211(a)(7) and (8) for an order

dismissing the complaint against it. Plaintiff opposes the motion.

By notice of cross motion dated November 11, 2010, plaintiff moves pursuant to CPLR 3025(b) for an order granting him to leave to amend the complaint. DANY opposes the motion.

The motions are consolidated herein for decision.

I. BACKGROUND

In his amended verified complaint, plaintiff alleges that on August 7, 2009, Shanahan invited him to Shanahan's residence and served him two drinks containing illegal narcotics or drugs, resulting in his becoming light-headed, weak, confused, and unconscious, and that Shanahan then raped and sodomized him. When plaintiff regained consciousness, he went to the hospital for medical treatment, and NYPD was notified of the incident by plaintiff and/or hospital staff, who also collected a rape kit from plaintiff. On August 8, 2009, an NYPD officer interviewed plaintiff and plaintiff filed a criminal complaint against Shanahan. (Affirmation of Paul S. Hugel, Esq., dated Oct. 15, 2010 [Hugel Aff.], Exh. A).

Plaintiff also alleges that on or about August 11, 2009, NYPD Detective "John" Gonzalez asked him about his complaint against Shanahan, and that during the interview, plaintiff learned that Shanahan had filed a criminal complaint against him, alleging that he had stolen his watch and ring. Plaintiff was then arrested, initially confined for 36 hours, and then arraigned and held on $3,500 bail. A grand jury voted no true bill and the complaint against Shanahan was dismissed with prejudice. Shanahan was never charged with the crimes he allegedly committed against plaintiff. (*Id.*).

The criminal complaint filed against petitioner charged him with one count of grand larceny in the third degree (Penal Law 155.35), based on Shanahan's allegations that several of

his watches went missing while plaintiff was in his apartment and that he confronted plaintiff and retrieved from him four of the watches but plaintiff fled with a watch and ring. (Affirmation of Philip M. Hines, Esq., dated Nov. 11, 2010 [Hines Aff.], Exh. A).

In an NYPD complaint - Follow Up Informational Report dated August 7, 2009, it is reflected that Shanahan told an officer that he met plaintiff through Craigslist, that he invited plaintiff to his apartment and fixed him a drink, that the two of them watched an adult movie, and that plaintiff kept walking around the apartment. Shanahan became suspicious upon discovering that several of his watches were missing, and confronted plaintiff and retrieved the watches from him. Plaintiff then pushed him and attempted to leave the apartment but Shanahan locked the door and would not let him leave. After the two of them wrestled for a few minutes, plaintiff pushed Shanahan and fled the apartment, whereupon Shanahan discovered that one of his watches was missing. (*Id.*).

On or about November 6, 2009, plaintiff served City with a notice of claim against it, the NYPD, Correction, and DANY. (*Id.*, Exh. B). On or about March 12, 2010, plaintiff commenced this action in Supreme Court, Bronx County, and it was then transferred to this court. (Affirmation of Anne Schwartz, ADA, dated Oct. 18, 2010, Exh. A).

On or about September 23, 2010, plaintiff served on defendants an amended complaint in which he asserts the following causes of action against Shanahan: (1) assault, (2) battery, (3) false arrest, (4) false imprisonment, and (5) slander based on Shanahan making the following statements during a criminal court proceeding and to City defendants and DANY:

(a) plaintiff assaulted and robbed Shanahan of several watches, rings, cufflinks, and other jewelry ranging in value from several hundred dollars to several thousand dollars;

(b) plaintiff brought cocaine into Shanahan's apartment;
© "[plaintiff] reached into his pocket and pulled out a bag of what turned out to be cocaine;"
(d) "[plaintiff] proceeded to do a little bit of cocaine;"
(e) "[plaintiff] had taken four or five watches;"
(f) "[plaintiff] gave up, suddenly, a gold Rolex watch, my most expensive watch that I didn't even realize was missing yet;"
(g) "[plaintiff] shoved me. I have some bruise marks, one [on the inside of my forearm and knuckle] and one on my neck;" and
(h) "I had just been assaulted and robbed [by plaintiff]."

(*Id.*, Exh. B). Plaintiff also asserts a claim against Shanahan for intentional and negligent infliction of emotional distress. (*Id.*). Against DANY, plaintiff asserts claims for deprivation of his civil rights, false arrest, false imprisonment, intentional and reckless behavior, negligent hiring, retention, and supervision, abuse of process, abuse of authority, and malicious prosecution. (*Id.*).

II. APPLICABLE LAW

Pursuant to CPLR 3211(a)(7), a party may move at any time for an order dismissing a cause of action asserted against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference. (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Posner v Lewis*, 80 AD3d 308 [1st Dept 2010]). The court need only determine whether the alleged facts fit within any cognizable legal theory. (*Id.*; *Harris v IG Greenpoint Corp.*, 72 AD3d 608 [1st Dept 2010]).

III. SHANAHAN'S MOTION TO DISMISS

A. Contentions

Shanahan alleges that as the statements allegedly made by him as set forth in the amended

complaint were uttered during a criminal court proceeding, they are privileged and plaintiff's slander claim thus fails as a matter of law. He also contends that plaintiff's false arrest and false imprisonment claims against him must be dismissed as a matter of law as a civilian-complainant accusing another citizen of a crime may not held liable for these torts, and to the extent that plaintiff claims that Shanahan falsely imprisoned him by preventing him from leaving Shanahan's apartment, such a claim fails absent any allegation that the imprisonment was done by the unlawful use of force or restraint. (Hugel Aff.).

Plaintiff maintains that he properly pleaded claims for false arrest and false imprisonment against Shanahan as he alleges that Shanahan knowingly and intentionally made false statements to the NYPD, thereby inducing his arrest, and that he gave false statements to the NYPD and DANY in an effort to induce them to continue plaintiff's imprisonment and prosecution, and that Shanahan prevented him from leaving his apartment, observing that Shanahan admitted to locking his apartment door to prevent plaintiff from leaving. Plaintiff argues that he properly pleaded a slander claim against Shanahan as he alleges that Shanahan made knowingly false and malicious statements with the intent to injure him, thereby negating any absolute privilege attached to them, and that in any event, Shanahan's motion is premature absent discovery. He also alleges that Shanahan made the same slanderous statements to the NYPD and DANY and that the statements would only be entitled to a qualified privilege, which is likewise inapplicable as Shanahan uttered them falsely and with the intent to injure plaintiff. To the extent that he failed to state specifically what statements made by Shanahan were slanderous, plaintiff seeks leave to file an amended complaint to do so. (Hines Aff.).

City defendants assert that a private individual who instigates or persuades the police to

arrest another individual may be liable for false arrest or false imprisonment if he or she provides false information, and as plaintiff alleges in his complaint that Shanahan provided false information to the police by filing a fraudulent criminal complaint and testifying falsely at the grand jury proceeding, he has stated a cause of action for false arrest and false imprisonment. They also observe that discovery has not yet commenced and allege that Shanahan's motion is thus premature. (Affirmation of Anthony Bila, ACC, dated Nov. 3, 2010).

In reply, Shanahan argues that his alleged defamatory statements are absolutely privileged as he made them while testifying as a witness in a criminal proceeding, and that in order to hold him liable for false arrest or false imprisonment, plaintiff must show that Shanahan directed or induced plaintiff's arrest and prosecution, and Shanahan denies that he did anything other than report plaintiff's alleged crime to the police. He also denies physically restraining plaintiff by locking his apartment door. (Reply Affirmation of Paul Hugel, Esq., dated Dec. 10, 2010).

B. Analysis

1. False arrest and false imprisonment

The elements of a false arrest or false imprisonment claim are that: (1) the defendant intended to confine the plaintiff; (2) the plaintiff was conscious of the confinement; (3) the plaintiff did not consent to the confinement; and (4) the confinement was not otherwise privileged. (*Rivera v City of New York*, 40 AD3d 334, 341 [1st Dept 2007]; 59 NY Jur 2d, False Imprisonment § 128 [2010]).

A person who "instigates, causes, or directs an arrest without a warrant is liable if it results in false imprisonment because no crime has been committed or the person arrested is innocent." (59 NY Jur 2d, False Imprisonment § 36). However, one who allegedly instigates or

causes an arrest must do more than simply provide information to the police. Rather, the informant must affirmatively induce the police to act, such as by actively participating in the arrest and causing it to be made, or showing active, officious, and undue zeal to the point whereby the officer is induced to act involuntarily. (*Id.*; *see also Rivera v County of Nassau*, 83 AD3d 1032 [2d Dept 2011] [plaintiff must establish that defendant-civilian "did not merely report a crime to the police and participate in the prosecution, but actively importuned the police to make an arrest" without reasonable cause to believe plaintiff was guilty]).

Here, absent discovery, and as neither Shanahan nor any police officers have been deposed, the extent of Shanahan's involvement with plaintiff's arrest and prosecution has not yet been determined. Consequently, Shanahan has failed to establish, as a matter of law, that plaintiff's complaint fails to state a cause of action against him for false arrest or false imprisonment. (*Compare Brown v Nassau County*, 306 AD2d 303 [2d Dept 2003] [rejecting defendant-civilian complainant's claim that she could not be liable for false arrest as there were triable issues as to whether she intentionally provided false information to police resulting in plaintiff's arrest and prosecution]; *Lowmack v Eckerd Corp.*, 303 AD2d 998 [4th Dept 2003] [denying summary judgment as triable issues of fact remained as to whether plaintiff's arrest was instigated or procured by defendant's employees with intent that plaintiff be confined]; *Warner v Druckier*, 266 AD2d 2 [1st Dept 1999] [plaintiff adequately stated claim for false arrest and/or imprisonment by alleging that defendant instigated his arrest knowing that there was no lawful basis therefor and took active role in plaintiff's prosecution]; *Kent v Drought*, 2010 WL 4320334 [WD NY] [denying motion to dismiss for failure to state cause of action as plaintiff alleged in complaint that defendants instigated arrest by contacting police, falsely reporting that plaintiff

had stolen property, and providing supporting affidavits, which sufficiently stated false arrest claim], *with Slatkin v Lancer Litho Packaging Corp.*, 33 AD3d 421 [1st Dept 2006] [dismissing false arrest claim as investigating officer testified that allegedly false information supplied by defendant did not influence officer's decision to arrest plaintiff]; *Wasilewicz v Village of Monroe Police Dept.*, 3 AD3d 561 [2d Dept 2004] [granting motion for summary judgment as defendant only made complaint to police and no evidence offered that he participated in plaintiff's arrest or gave advice or encouragement to authorities]).

Plaintiff's allegation that Shanahan falsely imprisoned him by locking his apartment door and/or physically preventing plaintiff from leaving the apartment sufficiently states a cause of action for false imprisonment. (*See Barrett v Watkins*, 82 AD3d 1569 [3d Dept 2011] [triable issues as to unlawful imprisonment claim where defendant allegedly prevented plaintiff from exiting property by blocking access road with truck and refusing to move it]; *Peters v Rome City School Dist.*, 298 AD2d 864 [4th Dept 2002] [although room in which child was kept was not locked, defendant's employee held door closed if child tried to leave room]; *Reese v Julia Sport Wear*, 260 AD 263 [3d Dept 1940] [plaintiff sufficiently stated false imprisonment claim by alleging that she was not permitted to leave store and store doors were locked]).

2. Slander

Defamation is an injury to a person's reputation resulting from the making of a "false statement which tends to expose the person to public contempt, ridicule, aversion, or disgrace, or induce an evil opinion of the person in the minds of right-thinking persons, and to deprive him or her of their friendly intercourse in society." (43A NY Jur 2d, Defamation and Privacy § 1 [2011]). If the statement is orally made, it constitutes slander, which is "the uttering of

defamatory words which tend to injure another in his or her reputation, office, trade, and the like." (*Id.*).

To prevail on a claim for defamation or slander, the plaintiff must prove: (1) a false statement; (2) publication without authorization or privilege to a third party; (3) by at least a negligent standard of fault; and (4) that the statement either caused damages or constitutes defamation per se. (*Id.*). A statement is slanderous per se if, as pertinent here, it contains an allegation that the plaintiff committed a crime. (43A NY Jur 2d, Defamation and Privacy § 8). A false statement accusing another of assault, possession of an illegal drug, or theft constitutes slander per se. (43A NY Jur 2d, Defamation and Privacy §§ 25, 26). In pleading a claim for slander, a plaintiff must plead the allegedly defamatory statements with particularity by setting forth the precise words spoken or published. (CPLR 3016[a]).

However, a slanderous statement may not be actionable if it was uttered during a privileged communication, and whether or not a statement is privileged is a defense that must be pleaded and proved. (43A NY Jur 2d, Defamation and Privacy § 117). An absolutely privileged communication is one which "by reason of the occasion on which, or the matter in reference to which, it is made, no remedy can be had" regardless of the speaker's motivation and even if the communication is false and made maliciously (43A NY Jur 2d, Defamation and Privacy § 118), and statements made during the course of a judicial proceeding are absolutely privileged, regardless of the speaker's motive, which privilege extends to parties and witnesses (43A NY Jur 2d, Defamation and Privacy § 133).

A qualified privilege arises when "circumstances exist, or are reasonably believed by the defendant to exist, which cast on him or her the duty of making a communication to a certain

other person to whom he or she makes the communication in the performance of such duty, or whenever the defendant is so situated that it becomes right in the interests of society that he or she should tell third persons certain facts, which the defendant proceeds in good faith to do." (43A NY Jur 2d, Defamation and Privacy § 120). A person who asserts a qualified privilege as a defense must establish that he or she acted in good faith, under a sense of duty, and with an honest belief that the statements made were true. To demonstrate good faith, it must be shown that ordinary care was taken to determine whether the statements were true or false, and whether good faith has been established is a jury question. (43A NY Jur 2d, Defamation and Privacy § 122).

Moreover, if it is claimed that a qualified privilege exists, there is a presumption that the communication was not made out of malice, which presumption may be overcome by a showing that the communication was motivated by malice, in which case the qualified privilege is negated and the speaker may be held liable. Thus, where the qualified privilege defense is asserted, the plaintiff has the burden of proving actual malice, which is defined as personal spite, ill will, or culpable recklessness or negligence, and must do so by presenting evidentiary facts from which it may be reasonably inferred that the defendant was motivated by spite or ill will or that a statement was made with a high degree of awareness of its probable falsity. (43A NY Jur 2d, Defamation and Privacy §§ 124, 125). If it appears that the person who made the statement knew it was false, did not believe it true, or did not have probable cause to believe it true, sufficient evidence of malice has been established. (43A NY Jur 2d, Defamation and Privacy § 126).

However, on a motion to dismiss for failure to state a cause of action, a plaintiff is not required to submit evidentiary proof of malice or to rebut a defendant's claim of qualified

privilege. (*Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]; *see Dunn v Gelardi*, 59 AD3d 385 [2d Dept 2009] [denying motion to dismiss defamation claim; "the allegation that the defendant made the statements with knowledge that they were not true is a sufficient allegation of malice to overcome any qualified privilege to which the defendant might be entitled"]; *Pezhman v City of New York*, 29 AD3d 164 [1st Dept 2006] [on motion to dismiss defamation claim, plaintiff not required to submit evidence to support allegation of malice]).

Here, absent any dispute that Shanahan made the allegedly slanderous statements while testifying before the grand jury proceeding, they are absolutely privileged, regardless of whether the statements were false or motivated by malice. (*See Toker v Pollak*, 44 NY2d 211 [1978] [statement made by witness at grand jury proceeding absolutely privileged]; *Kilkenny v Law Office of Cushner & Garvey, LLP*, 76 AD3d 512 [2d Dept 2010] [statements made by parties or witnesses during judicial proceedings absolutely privileged, regardless of motive]; *Matter of Gaeta v Inc. Vil. of Garden City*, 72 AD3d 683 [2d Dept 2010], *lv denied* 15 NY3d 711 [slander claim meritless as statements were made during testimony at criminal trial]; *Friedman v JP Morgan Chase Manhattan Bank*, 20 Misc 3d 1125[A], 2008 NY Slip Op 51626[U] [Sup Ct, New York County 2008] [dismissing slander claim as statements made by witness during criminal trial against plaintiff]).

However, plaintiff also alleges in his complaint that Shanahan made the allegedly defamatory statements to the NYPD and DANY while pursuing a criminal complaint and prosecution against plaintiff. Such statements are protected by a qualified privilege, and as plaintiff alleges that Shanahan knew that the statements were false and that he was motivated by malice, plaintiff has stated a claim for slander based on these statements. (*See Toker*, 44 NY2d at

220 [1978] [finding that statements made by defendant to District Attorney accusing plaintiff of possible commission of crime subject to qualified, not absolute privilege, and observing that statement made to police officer also subject to qualified privilege]; *Light v Light*, 64 AD3d 633 [2d Dept 2009] [as complaint alleged that defendants filed false police report accusing plaintiff of crime, it stated valid claim for slander per se]; *Strader v Ashley*, 61 AD3d 1244 [3d Dept 2009], *lv denied* 13 NY3d 756 [statements given by defendants to police accusing plaintiff of larceny, which led to plaintiff's criminal prosecution, constituted *prima facie* defamation]; *Present v Avon Prods., Inc.*, 253 AD2d 183 [1st Dept 1999], *lv denied* 93 NY2d 1032 [qualified privilege applies to reports made to police or District Attorney's office about person's alleged crimes]).

As the specific words allegedly published by Shanahan to the NYPD and DANY are set forth in the complaint, plaintiff has complied with CPLR 3106(a). (*Sokol*, 74 AD3d at 1183).

IV. DANY'S MOTION TO DISMISS

A. Contentions

DANY argues that plaintiff has failed to state a claim against it, absent service on it of a notice of claim, that it cannot be sued, that it is absolutely immune from liability for acts committed while prosecuting a criminal action, and that the complaint does not state with specificity any valid claim against it. (Affirmation of Anne Schwartz, ADA, dated Oct. 18, 2010).

Plaintiff denies that he was required to serve a notice of claim on DANY as his claims against it arise from violations of his civil rights, which need not be pleaded in a notice of claim. He argues that he sufficiently stated causes of action for malicious prosecution and false

imprisonment against DANY, and that DANY is not entitled to absolute immunity as he has alleged that it acted with malice and bad faith in prosecuting him. To the extent that DANY cannot be sued, plaintiff seeks to amend his complaint to add as defendants the former and current New York County District Attorneys and the assistant district attorneys who prosecuted his case. (Hines Aff.).

In reply, DANY maintains that plaintiff sets forth no facts from which it may be inferred that it acted maliciously or in bad faith in prosecuting plaintiff, and that in any event, its motives are irrelevant as it is absolutely immune from liability. (Affirmation of Eva Marie Dowdell, ADA, dated Dec. 9, 2010).

B. Analysis

A prosecutor is cloaked with absolutely immunity for his or her acts committed while engaged in the performance of official functions, including investigation, presentation of evidence to a grand jury, and prosecution. (59 NY Jur 2d, False Imprisonment § 108). Such immunity applies even if it is alleged that the prosecutor acted maliciously and without probable cause. (*Id.*).

Here, plaintiff also fails to allege that DANY or the assistance district attorneys who prosecuted his case committed any acts outside of their official prosecutorial functions. Thus, DANY is immune from liability for plaintiff's false imprisonment and malicious prosecution, notwithstanding the allegation that DANY acted maliciously. (*See Smith v City of New York*, 49 AD3d 400 [1st Dept 2008] [malicious prosecution claim may not be maintained against assistant district attorney where actions complained of involved prosecutorial function and thus protected by absolute immunity]; *Arzeno v Mack*, 39 AD3d 341 [1st Dept 2007] [dismissing malicious

prosecution claims against assistant district attorneys as they were entitled to absolute immunity as they were acting within scope of official duties in initiating and pursuing criminal prosecution]; *Shapiro v Town of Clarkstown*, 238 AD2d 498 [2d Dept 1997], *lv denied* 90 NY2d 807 [as criminal charges had already been filed against plaintiff, decision by prosecutor to continue case entitled to immunity]; *Minicozzi v City of Glen Cove*, 97 AD2d 815 [2d Dept 1983] [allegations that prosecutor failed to investigate sufficiently and delayed dismissal of criminal charges insufficient to impose liability as prosecutor was absolutely immune]).

In light of this result, I need not address DANY's other grounds for dismissal.

V. PLAINTIFF'S MOTION TO AMEND

Plaintiff seeks to amend his complaint to add claims for abuse of process and malicious prosecution against Shanahan. (Hines Aff., Exh. C). As these claims are premised on the same factual allegations set forth in plaintiff's current complaint, as discovery has not yet commenced, and as Shanahan did not oppose the motion, it is granted. I do not consider plaintiff's motion to amend to the extent is seeks to add as defendants the New York County District County and assistant district attorneys given the above. (IV.B.).

VI. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Shanahan's motion to dismiss is granted solely to the extent of dismissing plaintiff's slander claim based on statements allegedly made by him while testifying during the criminal proceeding; it is further

ORDERED, that defendant New York County District Attorney's Office's motion to dismiss the complaint is granted and the complaint is hereby severed and dismissed in its entirety

as against the New York County District Attorney's Office, with costs and disbursements to the New York County District Attorney's Office, as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of the New York County District Attorney's Office; and it is further

ORDERED, that plaintiff's motion for leave to amend his complaint is granted and plaintiff is directed to file and serve a copy of his amended complaint within 30 days of the date of this order, after removing any reference to the New York County District Attorney's Office and to his slander claim against Shanahan based on statements which I have dismissed.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: May 31, 2011
New York, New York

MAY 31 2011

FILED

JUN 03 2011

NEW YORK
COUNTY CLERK'S OFFICE