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

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JENNIFER SHEPARD-BROOKMAN,

Plaintiff,

-against- Index No.: 160608/15

ROSIE O'DONNELL, DECISION/ORDER

Defendant.

----------X

HON. SHLOMO S. HAGLER, J.S.C:

Defendant Rosie O'Donnell ("defendant" or "Ms. O'Donnell") moves for an Order dismissing the Amended Complaint (the "Amended Complaint") of plaintiff Jennifer Shepard-Brookman ("plaintiff" or "Ms. Brookman") pursuant to CPLR 3211 (a) (7), or, in the alternative, for an Order striking certain allegations of the Amended Complaint, pursuant to CPLR 3024 (b). Plaintiff opposes the motion.

BACKGROUND FACTS

This is an action brought by Ms. Brookman against Ms. O'Donnell for slander per se arising out statements allegedly made by Ms. O'Donnell to and about Ms. Brookman. Unless otherwise noted, the following facts are taken from plaintiff's Amended Complaint and for purposes of this motion to dismiss pursuant to section CPLR 3211, are accepted as true.

From approximately 2001 until March 2015, Ms. Brookman was a producer and then a senior producer of a television program known as "The View" which aired on ABC (the "Show") (Amended Complaint, ¶7). From 2006 through 2007, Ms. O'Donnell worked as a moderator and a co-host of the Show (*Id.*, ¶ 9). In or about July 2014, Ms. O'Donnell returned to the Show as a co-host along with Whoopi Goldberg ("Ms. Goldberg") (*Id.*, ¶ 12). Plaintiff's claims are

essentially based on two statements made by Ms. O'Donnell. The Amended Complaint alleges that "defendant made the subject statements which were of a defamatory nature, to other staffers in their workplace" (*Id.*, ¶ 44). Plaintiff further alleges that defendant's statements "were false, and in making such statements, [d]efendant was solely motivated by and exhibited personal spite and ill will against [p]laintiff, and either knew or showed reckless disregard for the falsity of such statements" (*Id.*, ¶ 45).

Statement by Defendant at a "Hot Topics" Meeting

The first defamatory statement was allegedly made by defendant at a "Hot Topics" meeting in or about January 2015 (the "Hot Topics Meeting") which was attended by defendant Ms. O'Donnell, when she was a co-host of the Show, plaintiff Ms. Brookman, and nonparties Brian Balthazar ("Balthazar") and William Wolff ("Wolff"), who were the executive producers of the Show, co-host Nicolle Wallace, and several staffers as well as two guest co-hosts from outside ABC (Amended Complaint, ¶¶ 12, 21). In the course of the meeting, defendant brought up the subject of "unauthorized and improper leaks of sensitive information about the Show to the media" (*Id.*, ¶ 22). In response, while stating that "[t]he leaks are out of control this year", plaintiff suggested that the issue of leaks should be addressed at a later staff meeting (Amended Complaint, ¶ 23). Plaintiff stated further that nobody in attendance at the meeting was responsible for the leaks (*Id.*). Defendant allegedly responded "Really, you don't think the leak is here" (*Id.*, ¶ 24)?

The Amended Complaint makes the following allegations regarding the exchange that took place, including the allegedly defamatory statement made by defendant:

> • "Ms. O'Donnell further verbally stated to Ms. Brookman and everyone else in attendance at the "Hot Topics" meeting, "Hmm - that's interesting. Then I

would like to know how Radar Online (an entertainment gossip website) managed to write an article that had word-for-word the conversation about the Beverly Johnson interview that happened on a telephone call including me and three other people - you (while she pointed to Mr. Wolff), you (while she pointed to Mr. Balthazar), and you (while she pointed to Ms. Brookman)."[1]

• "In response to Ms. O'Donnell, Ms. Brookman verbally asked her, "Are you saying that one of us is the leak?"

• "Ms. O'Donnell further verbally stated to Ms. Brookman, in a voice audible to everyone else in attendance at the "Hot Topics" meeting, "Maybe one of you told your teenage son, and he leaked it" (*Id.*, ¶¶ 25-27)."

The Amended Complaint alleges that defendant, Wolff, Balthazar, and other staffers present knew that of the three people defendant pointed at, only plaintiff had a teenage son. For this reason, plaintiff contends that defendant "implicated Ms. Brookman as the unauthorized 'leak' of sensitive information about the Show to the media" (*Id.*, ¶ 27).[2] The Amended Complaint alleges that "[b]y singling out Ms. Brookman during the above-quoted 'Hot Topics' meeting, Ms. O'Donnell accused Ms. Brookman of being the source of unauthorized and improper 'leaks' about the above-noted Beverly Johnson interview and sensitive information about the Show to the media" (*Id.*, ¶ 29).

Statement by Defendant to Balthazar

The second statement, which is the subject of this defamation action, was allegedly made

[1] Plaintiff alleges that defendant was referring to a story in the media that reported on an internal and confidential conversation involving defendant, Wolff, Balthazar and Ms. Brookman. The conversation related to defendant's complaint to the producers of the Show about which of the Show's co-hosts would interview Beverly Johnson regarding Johnson's "accusation of drugging and attempted sexual abuse against Bill Cosby" (*Id.*, ¶ 25).

[2] In response, Ms. Brookman allegedly stated "[y]ou think I tell my teenage son all about my day at work, and my teenage son picks up a phone and he calls Radar Online[?]" Plaintiff contends that her statement "implies that it was ridiculous for [defendant] to accuse her [plaintiff] of the 'leak' of sensitive information about the Show to her teenage son, and her teenage son of the 'leak' to Radar Online" (*Id.*, ¶ 28).

by defendant to Balthazar. Plaintiff claims that one day following the Hot Topics Meeting, Balthazar met with defendant and told defendant that he wanted to confirm that he was not the source of the leaks of sensitive information about the Show to the media. Defendant allegedly stated "I know it wasn't you. I know it was Jennifer [plaintiff]" (*Id.*, ¶ 33). Plaintiff alleges that this statement implicates plaintiff as the source of the unauthorized leak. "By singling out Ms. Brookman during the above-noted meeting of Ms. O'Donnell and Mr. Balthazar about one day after the Hot Topics [M]eeting, Ms. O'Donnell accused Ms. Brookman of being the source of unauthorized and improper 'leaks' about the above-noted Beverly Johnson interview and sensitive information about the Show to the media" (*Id.*, ¶ 34).

The Amended Complaint states that on or about March 2, 2015, plaintiff was terminated from her employment on the Show by ABC due to defendant's accusations ("Defendant's above-noted statements... led to her termination of employment") (*Id.*, ¶ 46).

Accusations Common to Both Statements

The Amended Complaint alleges that defendant made these accusations at the Hot Topics Meeting and one day later in a conversation with Balthazar with malice. "In making such accusations, Ms. O'Donnell was solely motivated by personal spite and ill will against Ms. Brookman, and knew or had a high degree of awareness of the probable falsity of such accusations" (*Id.*, ¶ 38). The Amended Complaint claims that defendant's personal spite and ill will arose from defendant's "desire to assert control over the Show", and defendant's "high degree of awareness of the probable falsity of her above-noted accusations against defendant is evidenced by her reckless conclusion that because [plaintiff] was one of the participants in an internal and confidential conversation . . . then [plaintiff] was the source of 'leaks' of sensitive

information to the media" (*Id.*, ¶¶ 39-41).

Arguments

In support of her motion to dismiss, defendant argues, among other things, that plaintiff's claim is premised on language that does not amount to a factual assertion necessary to sustain a cause of action for defamation. Defendant maintains that at most defendant's statements at the Hot Topics Meeting were rhetorical hyperbole which is not actionable as defamation and that the statements that defendant allegedly made to Balthazar are non-actionable opinion. Defendant argues further that in any event the subject statements are protected by a qualified immunity and plaintiff has not sufficiently pled malice necessary to overcome the privilege. In opposition, plaintiff argues, among other things, that (1) plaintiff has sufficiently pled that defendant's statements in context constituted an assertion of fact or mixed opinion, and as such, are actionable as defamation; and (2) the Amended Complaint sets forth detailed allegations of malice necessary to overcome any defense of a common interest privilege.

DISCUSSION

Motion to Dismiss

In determining a motion to dismiss a pleading for failure to state a cause of action, 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 into any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Nonnon v City of New York*, 9 NY3d 825 [2007]). In a defamation action, the court must determine if the alleged defamatory statements are not actionable as a matter of law (*Steinhilber v Alphonse*, 68 NY2d 283 [1986]).

Standard for Defamation Action

To establish a cause of action for defamation, plaintiff must demonstrate the following elements:

> 1) a false statement on the part of the defendant concerning the plaintiff;
> 2) published without privilege or authorization to a third party;
> 3) with fault amounting to at least negligence on the part of the defendant; and
> 4) causing damage to plaintiff's reputation by special harm or defamation per se (*see* Restatement [Second] of Torts § 558; *Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]).

CPLR § 3016(a) requires that the alleged false and defamatory words be specified with particularity in the complaint. The complaint must also allege the "time, place and manner of the false statement and to specify to whom it was made" (*Id.* at 38).

"Since falsity is a *sine qua non* of a libel claim and since only assertions of fact are capable of being proven false, we have consistently held that a libel action cannot be maintained unless it is premised on published assertions of fact" (*Brian v Richardson*, 87 NY2d 46, 51 [1995]). "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" (*Mann v Abel*, 10 NY3d 271, 276 [2008]).

Distinction between Assertions of Opinion and Facts

In *Steinhilber v Alphonse* (68 NY2d 283 [1986]), the Court of Appeals articulated the standard for distinguishing between fact and opinion as follows:

> "A 'pure opinion' is a statement of opinion which is accompanied by a recitation of the facts upon which it is based. An opinion not accompanied by such a factual recitation may, nevertheless, be 'pure opinion' if it does not imply that it is based upon undisclosed facts. When, however, the statement of opinion implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, it is a 'mixed opinion' and is actionable. The actionable element of a 'mixed opinion' is not the false opinion itself – it is the implication that the

> speaker knows certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking" (*Id.* at 289-290 [citations and footnote omitted]).

This legal determination is quite a complex balancing act as "even apparent statements of fact may assume the character of statements of opinion, and thus privileged, when made in public debate, heated labor dispute, or other circumstances in which the audience may anticipate [the use] of epithets, fiery rhetoric or hyperbole" (*Steinhilber*, 68 NY2d at 294 [citation and quotation marks omitted].) With this in mind, the proper inquiry is, "whether the reasonable reader would have believed that the challenged statements were conveying facts about the . . . plaintiff" (*Brian v Richardson*, 87 NY2d 46, 51 [1995], quoting *Immuno AG. v Moor-Jankowski*, 77 NY2d 235, 254 [1991]).

To determine what constitutes an opinion or an assertion of fact, the court considers the following factors:

> "(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. It is the last of these factors that lends both depth and difficulty to the analysis" (*Brian v Richardson*, 87 NY2d at 51 [internal quotation marks and citations omitted]).

"[I]n distinguishing between actionable factual assertions and nonactionable opinion, the courts must consider the content of the communication as a whole, as well as its tone and apparent purpose" (*Id.*) The court may not "sift[] through a communication for the purpose of isolating and identifying assertions of fact," but rather, it is required to "look to the over-all context in which the assertions were made and determine on that basis 'whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel

plaintiff.'" (*Id.*) (internal quotation marks and citations omitted). In addition, "the courts are required to take into consideration the larger context in which the statements were published, including the nature of the particular forum" *(Id.*).

Moreover, defamatory communications may not serve as the basis for the imposition of liability in a defamation action if they are subject to an absolute or a qualified privilege (*Rosenberg v MetLife, Inc.*, 8 NY3d 359, 365 [2007]). There exists an absolute privilege, and thus immunity from liability in a defamation action, "when the challenged communication was made by an individual participating in a public function, such as executive, legislative, judicial or quasi-judicial proceedings" (*Frechtman v Gutterman*, 115AD3d 102, 106 [1st Dept 2014] *citing Rosenberg v Metlife, Inc.*, 8 NY3d at 365). The allegedly slanderous statements at issue herein were not made in such a setting and thus are not absolutely privileged. Defendant does not contend otherwise.

A qualified common interest privilege exists where the communications relevant to a slander or defamation claim concern a subject matter in which both parties have an interest (*Frechtman v Gutterman*, 115 AD3d at 107, *citing Shapiro v Health Ins. Plan of Greater N.Y.*, 7 NY2d 56, 60 [1959]). The qualified common interest privilege has been applied to employees of an organization (*see, e.g., Liberman v Gelstein*, 80 NY2d 429, 437 [1992] citing *Loughry v Lincoln First Bank,* 67 NY2d 369, 376 [1986] ["[s]tatements among employees in furtherance of the common interest of the employer, made at a confidential meeting, may well fall within the ambit of a qualified or conditional privilege"]; *O'Neill v N.Y. Univ.*, 97 AD3d 199, 213 [1st Dept 2012] [communications regarding work related common interest fall within qualified privilege]). However, the defense of a qualified privilege will be defeated by a demonstration that

defendant's "motivation for making such statements was spite or ill will (common-law malice) or where the statements [were] made with [a] high degree of awareness of their probable falsity (constitutional malice)" (*Foster v Churchill*, 87 NY2d 744, 752 [1996] [internal citation and quotation marks omitted]; *see also Liberman v Gelstein*, 80 NY2d at 437-438; *Loughry v Gelstein*,, 67 NY2d at 376).

Statement by Defendant at the Hot Topics Meeting

At the Hot Topics Meeting, plaintiff stated that leaks were "out of control" but that nobody at the meeting was responsible for the leaks. In response, defendant remarked "Really. You don't think the leak is here?" Defendant countered plaintiff's assertion that nobody at the subject meeting was responsible for the leak by asserting that the media reported on a confidential telephone conversation involving plaintiff, Wolff and Balthazar (who were at the meeting) about the Beverly Johnson interview. Plaintiff responded with the statement "are you saying one of us is the leak?" whereupon defendant stated "*maybe* one of you told your teenage son, and he leaked it [emphasis supplied]" (*Id.*, ¶ 27).

The allegations in the Amended Complaint concerning defendant's statements at the Hot Topics Meeting lack an assertion that plaintiff herself leaked confidential information to the media. "In evaluating whether a cause of action for defamation is successfully pleaded, 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 reasonable susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction. Courts will not strain to find defamation where none exists" (*Dillon v City of New York*, 261 AD2d 34 at 38 [internal citations and quotations omitted]). In fact, it was plaintiff in a routine

office exchange who escalated the discussion into a confrontation by stating "are you [defendant] saying one of us is the leak" (Amended Complaint, ¶ 26)?

The statement by defendant which plaintiff alleges singles out plaintiff as the source of the leak is defendant's statement that "*maybe* one of you told your teenage son, and he leaked it" (*Id.*, ¶ 27) [emphasis supplied]. Plaintiff alleges that given that plaintiff was the only one participating in the confidential telephone conversation who had a teenage son, defendant thereby implicated plaintiff as the source of the leak (*Id.*). Plaintiff argues therefore that the subject statement constitutes at the very least defamation by implication, meaning that in the context of the entire statement, a reasonable listener could have believed that the words used by defendant were conveying a factual assertion that plaintiff's son, or plaintiff was leaking confidential information.

Here, the use of the work "maybe" makes it clear that any reasonable listener would regard defendant's statement as non-factual. At most, defendant's statement constitutes rhetorical hyperbole which cannot form the basis of a claim for defamation. "Loose, figurative or hyperbolic statements, even if deprecating the plaintiff are not actionable" (*Dillon v City of New York*, 261 AD2d at 38 citing *Gross v New York Times Co.*, 82 NY2d 146, 152 [1993] and *Immuno AG. v Moor-Jankowski*, 77 NY2d at 244.

In fact, there are other allegations in the Amended Complaint which make it evident that the Amended Complaint lacks factual allegations that a reasonable person would understand defendant's words in the entire context of the surrounding circumstances to single out plaintiff. Even plaintiff herself was not certain about the meaning of defendant's statements so asked defendant whether defendant was accusing "one of us" [those participating in the confidential

telephone call]. In addition, Balthazar later approached defendant to confirm that he was not the source of the leaks. If defendant's words left Balthazar the impression that he was responsible for the leaks, then he had not understood that defendant was singling out plaintiff.

Statement made by O'Donnell to Balthazar

The second statement which forms the basis of plaintiff's claim for defamation, is a statement allegedly made by defendant to Balthazar one day after the Hot Topics Meeting. Balthazar met with defendant and told her that he wanted to confirm with her that he was not the source of the leak of sensitive information to the media that defendant had discussed in the Hot Topics Meeting (Amended Complaint, ¶ 32). The Amended Complaint alleges that in response, defendant stated to Balthazar, "I know it wasn't you (Mr. Balthazar). I know it was Jennifer (Ms. Brookman)" (*Id.*, ¶ 33).

In this case, plaintiff's argument that defendant's statement constitutes defamation as it was an assertion of fact, or a mixed opinion based upon undisclosed facts known only to defendant is without merit. A court must consider the "full context of the communication in which the statement appears or the broader social context and surrounding circumstances" when determining whether a reasonable reader or listener could have regarded the allegedly defamatory statement as opinion (*Davis v Boeheim*, 24 NY3d 262, 270 [2014]). "Expressions of opinion, as opposed to assertions of fact" are not actionable as defamation (*Mann v Abel*, 10 NY3d 271, 276 [2008]) on the basis that only "assertions of fact are capable of being proved false" (*Brian v Richardson*, 87 NY2d 46, 51 [1995]). Here, although not accompanied by a factual recitation, defendant's statement to Balthazar, does not imply that it was based on an undisclosed fact (*Steinhilber v Alphonse*, 68 NY2d at 289-290). To the contrary, plaintiff's own allegations

demonstrate that both defendant and Balthazar had a shared understanding of the facts which formed the basis for defendant's opinion about the source of the leak. The Amended Complaint specifically pleads that both defendant and Balthazar participated both in the confidential phone call that was the subject of the purported leak and in the Hot Topics Meeting where defendant expressed her concerns about how information from the phone call had been leaked to the media. In fact, the Amended Complaint also pleads that Balthazar met with defendant as he wanted to confirm with her the source of the leaks that had been discussed at the Hot Topics Meeting (Amended Complaint, ¶ 32). Given this shared understanding, the statement by defendant to Balthazar was "pure opinion" and thereby non-actionable as defamation (*Steinhilber v Alphonse*, 68 NY2d at 283, 286); (*Dillon v City of New York*, 261 AD2d at 41 ["the statement conveyed only nonactionable opinion based on facts known to both the declarant and the listener"]).

Common Interest Privilege

Regardless of whether or not defendant's statements are defamatory, plaintiff's claim would be barred by a "conditional or qualified privilege" over "communications made by one person to another upon a subject in which both have an interest" (*Liberman v Gelstein*, 80 NY2d at 437 [internal citation and quotation marks omitted]). Here, the subject communications were between co-workers in a work setting regarding issues in the workplace (*O'Neill v New York Univ.*, 97 AD3d 199, 213 [1st Dept 2012] [communications regarding a work related common interest fall within the qualified privilege]; *Dillon v City of New York*, 261 AD2d at 40 [internal citations omitted] ["statements among fellow employees about an employee in an employment context...are qualifiedly privileged as having been made by one person to another upon a subject

in which they have a common interest"]).[3]

Thus, the question remaining is whether or not plaintiff has borne the burden of proving, to a degree sufficient to survive a motion to dismiss her claims, that the statements were made with either common-law malice, *i.e.*, spite or ill will, or constitutional malice, *i.e.*, a high degree of awareness of probable falsity, or a reckless disregard for the truth (*Sborgi v Green*, 281 AD2d 230, 230 [1st Dept 2001]). Common law malice means that "spite and ill will" ... was the one and only cause for the publication" (*Liberman v Gelstein*, 80 NY2d 429, 439 [1992]).[4]

With respect to the allegations in the Amended Complaint of common law malice, plaintiff alleges the following:

> "At the time she committed her slander per se, by falsely accusing Ms. Brookman of betraying professional and personal confidences and leaking certain sensitive information to the media - an accusation which Ms. Brookman completely denies - Ms. O'Donnell was solely motivated by and exhibited personal spite and ill will against Ms. Brookman, and either knew or showed reckless disregard for the falsity of her accusations" (Amended Complaint, ¶ 2).
>
> "At the time that Ms. O'Donnell made her above-noted accusations against Ms. Brookman, first at the "Hot Topics" meeting and then about one day later, she acted with malice. In making such accusations, Ms. O'Donnell was solely motivated by personal spite and ill will against Ms. Brookman, and knew or had a high degree of awareness of the probably falsity of such accusations against Ms. Brookman" (Amended Complaint, ¶ 38).
>
> "Ms. O'Donnell's personal spite and ill will against Ms. Brookman arose from Ms. O'Donnell['s] desire to assert control over the Show and to reclaim the role

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[3]In opposition, plaintiff does not dispute that the common interest privilege applies to the subject communications, but rather argues that plaintiff has pled malice sufficiently to overcome such privilege.

[4]Plaintiff fails to differentiate between common law and constitutional malice. Further to support her allegations of malice, in a section of the Amended Complaint entitled "Introductory Facts", plaintiff sets forth summaries of extraneous unidentified negative stories about defendant purportedly appearing in the media. These "Introductory Facts" are irrelevant to the claims alleged herein and cannot cure plaintiff's conclusory allegations of malice.

> as the moderator, a role then held by Ms. Goldberg, and Ms. O'Donnell's belief that Ms. Brookman, as the only long-serving senior production staffer of the Show, had teamed with Ms. Goldberg to undermine Ms. O'Donnell" (Amended Complaint, ¶ 39).

These allegations fail to show that defendant was motivated by common spite or ill will at the time defendant made those statements (*Liberman v Gelstein*, 80 NY2d at 439 ["spite or ill will refers not to defendant's general feelings about plaintiff, but to the speaker's motivation for making the defamatory statements"]). "If the defendant's statements were made to further the interest protected by the privilege, it matters not that defendant *also* despised plaintiff" (*Id.* [emphasis in original]). The Amended Complaint does not allege that defendant made the statements for any reason other than her concerns about breaches of confidentiality. In fact, it was plaintiff who made the initial statement that the leaks were "out of control", to which defendant responded. In addition, defendant's statement to Balthazar about plaintiff was only made in response to Balthazar's reaching out to defendant to confirm that he was not the source of the leaks. In these circumstances, it belies common sense to infer that "malice was the one and only cause for the publication" (*Id.*).

With respect to plaintiff's allegations of constitutional malice, the Amended Complaint alleges:

> "Ms O'Donnell's knowledge of the falsity of her above-noted accusations against Ms. Brookman is evidenced by her knowledge that Ms. Brookman was not the "leak" of sensitive information to the media, and that she herself may have been the "leak" of sensitive information to the media" (Amended Complaint, ¶ 40).
>
> "Ms. O'Donnell's high degree of awareness of the probable falsity of her above-noted accusations against Ms. Brookman is evidenced by her reckless conclusion that because M[s.] Brookman was one of the participants in an internal and confidential conversation involving Ms. O'Donnell, Mr. Wolff, Mr. Balthazar, and Ms. Brookman, regarding Ms. O'Donnell's complaint to the

> Show's producers about which of the Show's co-hosts would interview Beverly Johnson on the Show in regard to her accusation of drugging and attempted sexual abuse against Bill Cosby, then Ms. Brookman was the source of "leaks" of sensitive information to the media" (Amended Complaint, ¶ 41).

The Amended Complaint pleads wholly conclusory allegations of constitutional malice. The pleadings are inadequate to show that defendant's statements [were] made with "[a] high degree of awareness of their probable falsity" or that "defendant in fact entertained serious doubts as to the truth of [the] publication" (*Liberman v Gelstein*, 80 NY2d at 438 [internal citation and quotation marks omitted).

Accordingly, it is hereby

ORDERED, that defendant Rosie O'Donnell's motion to dismiss the Amended Complaint is granted; and it is further

ORDERED, defendant Rosie's O'Donnell's motion for an Order striking certain allegations of the Amended Complaint, pursuant to CPLR 3024 (b) is denied as moot.

Dated: November 16, 2017

ENTER:

J.S.C.

SHLOMO HAGLER
J.S.C.