Sagaille v Carrega
2019 NY Slip Op 32660(U)
September 3, 2019
Supreme Court, New York County
Docket Number: 154010/2018
Judge: Francis A. Kahn, III
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III — PART IAS MOTION 14

Acting Justice

---X

CHRISMY SAGAILLE,

Plaintiff,

- v -

CHRISTINA CARREGA, NEW YORK DAILY NEWS COMPANY, DAILY NEWS, L.P.

Defendants.

---X

INDEX NO. 154010/2018

MOTION DATE 04/16/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 18, 21-34, 36-44, 47 were read on this motion to/for DISMISS THE AMENDED COMPLAINT.

This action arises out of an encounter between Plaintiff Chrismy Sagaille ("Sagaille") and Defendant Christina Carrega ("Carrega") which began at a mutual friend's baby shower on April 30, 2017. After the party, Carrega agreed to give Sagaille a ride home in her car. During that drive home, Carrega asserts Sagaille kissed her twice and touched her left breast above her clothes without her consent. Sagaille posits that all contact among the parties was consensual. Carrega reported the encounter to both her brother and the New York City Police Department ("NYPD"). At the time, Plaintiff was employed as an assistant district attorney with the Office of the Kings County District Attorney and Carrega was employed as a reporter for the Defendant Daily News, LP ("Daily News").

In his amended pleading, Plaintiff alleges that Carrega went to the 84th Precinct of the NYPD and made the following false allegations in writing (*see* NYSCEF Document #18, page 2, paragraph 15 a-g):

a. Plaintiff said "You know what time it is right?"
b. Plaintiff "grabs my face and shoves tongue in my mouth"
c. Plaintiff said "Your mouth taste good. I like you"
d. At another red light…left breast grabs"
e. Plaintiff said "he was not getting out until I gave him a kiss"
f. Plaintiff said "if I [g]ave him a kiss on cheek that he would get out"
g. Plaintiff "licked my face"

Plaintiff also pleads Carrega communicated her allegations about Plaintiff's behavior to her brother (*see* NYSCEF Document #18, page 3, paragraph 19; page 5, paragraphs 35-36) and that she testified to these claims during the underlying criminal trial (*see* NYSCEF Document #18, page 3, paragraph 19). Plaintiff asserts Carrega's statement to the NYPD was false, deliberately inflammatory and was made with reckless disregard of the truth (*see* NYSCEF

Document #18, page 3, paragraph 16, 18). Plaintiff stated that Carrega made false allegations against him to further her career by creating a false sex crimes story against an assistant district attorney whose job it was to prosecute sex crimes (*see* NYSCEF Document #18, page 4, paragraph 26). Plaintiff claims Carrega acted with actual malice since she was aware her statements about Plaintiff to the NYPD were untrue and Carrega caused damage to Plaintiff's reputation and furthered her career with the false allegations (*see* NYSCEF Document #18, page 5, paragraph 39). Plaintiff further avers in the complaint that Carrega used her position at the Daily News to cause it to publish false allegations on May 4, 2017 and that Carrega "fed" the Daily News a second article, published on July 20, 2017, which reported that the felony charge against Sagaille was dropped (*see* NYSCEF Document #18, page 4, paragraph 32).

Both Plaintiff and Defendants attach the articles at issue to the moving and opposition papers (*see* NYSCEF Document ##25, 26, 38, 39). The article dated May 4, 2017 is titled, "Brooklyn Prosecutor sexually assaulted woman in car, police say" (*see* NYSCEF Document ##25 and 38). The article reads as follows:

> "A Brooklyn sex crimes prosecutor, already suspended for a DWI bust, was arrested Wednesday for sexually assaulting a woman as she drove him home from a party. Chrismy Sagaille, 32, surrendered at NYPD's Special Victims Unit in Harlem over the Sunday night attack in which he allegedly groped the victim's breast and forced his tongue into her mouth.
>
> The assistant district attorney, his hands cuffed behind his back, remained silent as he walked out of the building between two detectives. He wore a blue hoodie, a puffy gray vest and jeans as cops led him away.
>
> The prosecutor initially grabbed the woman's face and began aggressively kissing her as she fought off his unwanted advances, sources said.
>
> In the car, Sagaille told her she "makes him feel different," and said, "I really like you" and "you know what time it is," according to prosecutors.
>
> She screamed at Sagaille and pulled away, but he went after the woman a second time. The attorney, while forcing himself on the woman, grabbed at her breast during the second incident, prosecutors said at his arraignment.
>
> The driver then stopped the car and screamed at the passenger to get out, Sagaille said that he would leave – but only if the woman agreed to give him a kiss, which she did on his cheek, according to a criminal complaint.
>
> "This is a serious allegation that will be handled by a special prosecutor," said Oren Yanly, spokesman for Acting Brooklyn District Attorney Eric Gonzalez. "This employee has been on suspension without pay since August 6, 2016, following his arrest on charges of driving while intoxicated."

> Sagaille was arraigned late Wednesday on charges of sex abuse, forcible compulsion and forcible touching tied to the incidents inside the car.
>
> He was released on $10,000 bond and an order of protection was issued against him. Sagaille maintains that everything that happened was consensual, his lawyer said.
>
> He walked out of Brooklyn Criminal Court accompanied by his father, mother and another woman who put her arm around him. None responded to questions before getting into awaiting car.
>
> The Staten Island District Attorney will handle the case to avoid any conflict of interest.
>
> The prosecutor was arrested last summer for drunken driving after cops watched him run a red light in Canarsie around 4 a.m. He was driving a 2012 Nissan Maxima when cops pulled him over at E. 85th St. and Flatlands Ave.
>
> Sagaille reeked of liquor and his eyes were bloodshot, according to cops. He was arrested after refusing to take a Breathalyzer test.
>
> He had two additional prior arrests that were sealed.
>
> The prosecutor was earning an annual salary of $63,654 when the DA benched him following the DWI charge. He had been a prosecutor in Brooklyn since 2013."

The July 20, 2017 article is titled, "Brooklyn prosecutor avoids felony charge in sex assault case, but faces misdemeanors" (*see* NYSCEF Document ##26, 39). The article reads:

> "The top sexual assault charge against a Brooklyn sex crimes prosecutor was dropped Wednesday.
>
> Prosecutor Chrismy Sagaille – already suspended from work after a DWI bust – will no longer face a first-degree felony charge after allegedly sexually assaulting a woman who was giving him a ride home from a party. He faces two misdemeanor charges of forcible touching and forcible compulsion. He has pleaded not guilty.
>
> Oren Yanly, a spokesman for the Brooklyn District Attorney's office, said Sagaille remains suspended without pay pending the outcome of his case. Sagaille was suspended in 2016 after his DWI arrest."

Plaintiff accuses the Daily News of acting with "actual malice because they were highly aware that Carrega was using her position as a reporter at the Daily News to continue to spread her false publications against Plaintiff" (*see* NYSCEF Document #18, page 5, paragraph 40).

Plaintiff also claims that the Daily News acted in a "grossly irresponsible" manner by permitting Carrega to publish articles in furtherance of a personal agenda (*see* NYSCEF Document #18, page 5, paragraph 42). Because of Defendants' actions, Plaintiff claims that he lost his job as an assistant district attorney and his ability to practice law and retain clients is forever hindered (*see* NYSCEF Document 18, page 3 paragraph 24 and page 4, paragraph 27).

Based on the foregoing allegations, Plaintiff asserts four causes of action: libel *per se* (against all Defendants), defamation to a public official (against all Defendants), injurious falsehood (against Carrega only) and *prima facie* tort (against Carrega only).

Discussion

Defendants Carrega and Daily News move to dismiss Plaintiff's amended complaint pursuant to CPLR §3211[a][1] and [7]. On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211[a][7], the allegations contained in the complaint must be presumed to be true, liberally construed and a plaintiff must be accorded every possible favorable inference (*see e.g. Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46 [2016]). In determining such a motion, "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

In certain situations, however, the presumption falls away when bare legal conclusions and factual claims contained in the complaint are flatly contradicted by evidence submitted by the defendant (*see Guggenheimer*, supra; *Kantrowitz & Goldhamer, P.C. v Geller*, 265 AD2d 529 [2d Dept 1999]). When in the uncommon circumstance the evidence reaches this threshold (*see Lawrence v Miller*, 11 NY3d 588, 595 [2008]), the court "must determine whether the proponent of the pleading has a cause of action, not whether she has stated one" (*Kantrowitz & Goldhamer, P.C. v Geller*, supra; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]). Stated differently, "[w]here the facts are not in dispute, the mere iteration of a cause of action is insufficient to sustain a complaint where such facts demonstrate the absence of a viable cause of action" (*Allen v Gordon*, 86 AD2d 514, 515 [1st Dept 1982]).

A motion to dismiss pursuant to CPLR §3211[a][1] may only be granted where "documentary evidence" submitted decisively refutes plaintiff's allegations (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-91 [2005]) or "conclusively establishes a defense to the asserted claims as a matter of law" (*Held v Kaufman*, 91 NY2d 425, 430-431 [1998]; *see also Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]). The scope of evidence that is statutorily "documentary" is exceedingly narrow and "[m]ost evidence" does not qualify (*see* Higgitt, *CPLR 3211[a][1] and [7] Dismissal Motions—Pitfalls and Pointers,* 83 New York State Bar Journal 32, 34-35 [2011]).

Causes of Action Against Defendant Daily News

By their motion, Defendants argue that Plaintiff's claims are barred by application of New York Civil Rights Law §74. That section prohibits the prosecution of any civil action against any person or entity for the publication of a fair and true report of any judicial

proceeding. Relying on the criminal pleadings and court transcripts attached to their motion, Defendants argue that they fairly and truly reported the criminal proceedings. They further assert that Plaintiff was a public official and failed to plead "actual malice" sufficiently as against the Daily News. In addition, Defendants claim that Plaintiff fails to identify in his pleading a false or defamatory statement in the second article.

New York Civil Rights Law §74 reads:

> "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, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published.
> This section does not apply to a libel contained in any other matter added by any person concerned in the publication; or in the report of anything said or done at the time and place of such a proceeding which was not a part thereof."

The statutory standard is satisfied and absolute immunity attaches when a report is "substantially accurate" (*Holy Spirit Assn. for Unification of World Christianity v New York Times Co.,* 49 NY2d 63, 67 [1979]). 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" (*Briarcliff Lodge Hotel v Citizen-Sentinel Publishers*, 260 NY 106, 118 [1932]). The protection afforded by the statute is so broad that "[e]ven news articles containing false factual statements capable of defamatory interpretation will be protected by the absolute privilege afforded by Civil Rights Law § 74 if the gist of the articles constitutes a 'fair and true report'" (*Martin v Daily News L.P.,* 121 AD3d 90, 100 [1st Dept 2014]).

Specifically, as pled, Plaintiff claimed that the following was falsely reported in the first article:

> "The prosecutor initially grabbed the woman's face and began aggressively kissing her as she fought off his unwanted advances, sources said. In the car, [Plaintiff] told her she "makes him feel different," and said "I really like you" and "you know what time it is," according to prosecutors. She screamed at [Plaintiff] and pulled away, but he went after the woman a second time" (*see* NYSCEF Document #18, page 4, paragraph 30).

In support of the motion, Defendants attached to the motion to dismiss, *inter alia,* copies of the two articles (Exhibits B & C; NYSCEF Document ##25, 26), a copy of the criminal complaint (Exhibit D; NYSCEF Document #27), a copy of the arraignment transcript (Exhibit E; NYSCEF Document #28), copies of excerpts from the criminal trial on June 4, 5 and 13, 2018 (Exhibit G; NYSCEF Document #30). These materials are unambiguous, are of undisputed authenticity and can be considered for purposes of a motion to dismiss (*see* CPLR §3211 [a][1]; *VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]).

These documents demonstrate that the articles published accurately reflected what was contained in the criminal complaint and the transcripts of court proceedings. As such, the article

fairly and truly reported court proceedings and is subject to absolute protection under New York Civil Rights Law §74 (*see Alf v Buffalo News, Inc.,* 21 NY3d 988 [2013]; *Gillings v New York Post*, 166 AD3d 584 [2d Dept 2018]; *Rodriguez v Daily News, L.P.*, 142 AD3d 1062 [2d Dept 2016]; *McRedmond v Sutton Place Rest. & Bar, Inc.,* 48 AD3d 258 [1st Dept 2008]). Although information gained from sources other than official records are not protected under the statute (*see* Civil Rights Law §74; *Freeze Right Refrigeration & Air Conditioning Services, Inc. v New York*, 101 AD2d 175, 183 [1st Dept 1984]), the attribution of one of the statements in the first article to "sources" rather than the above documentation is of no moment. That statement accurately reflected information in the official proceeding and, overall, the article did not constitute an attempt to "back in" to the information in the official proceedings (*cf. Corporate Training Unlimited v NBC*, 868 F Supp 501, 509 [EDNY 1994]). Further, any inaccuracies noted by the Plaintiff in the article were not egregious enough to remove the article from the protection of the statute (*see e.g. Saleh v New York Post*, 78 AD3d 1149, 1152 [2d Dept 2010]).

The second article requires little discussion. In addition to being absolutely privileged under the statute, Plaintiff failed to identify in his complaint and opposition papers anything reported in the second article was false. Regardless of whether or not Carrega was the author, as constituted, the second article merely relayed information regarding the status of the Plaintiff's underlying criminal case and was not defamatory (*see generally James v Gannett Co.,* 40 NY2d 415 [1976]).

Accordingly, based on the foregoing, the causes of action against Defendant Daily News are dismissed. To the extent Plaintiff's first and second cause of action makes claims against Carrega in her capacity as a reporter for the Daily News and participating in the reporting of these stories, those claims are similarly barred.

Causes of Action Against Defendant Carrega Individually

Plaintiff's first and second causes of action for libel *per se* and defamation to a public official as against Defendant Carrega pertain to her statements made to the NYPD about her encounter with Plaintiff. Defendants assert Carrega's statements to the NYPD are entitled to an absolute privilege in keeping with public policy to encourage victims of sex crimes to come forward. In the alternative, if only afforded a qualified privilege, Defendant's argue the claims against Carrega still fail since Plaintiff he failed to adequately plead the existence of malice by either "ill will" or "knowing or reckless disregard of a statement's falsity. Plaintiff acknowledges Defendant Carrega's statements to the NYPD are entitled to a qualified privilege, but claims the privilege is "dissolved" because malice on her part is properly pled.

As to the claim of a privilege absolutely immunizing Carrega for her statements to the NYPD, the court could find no statutory or appellate case law supporting the existence of such a principle. At issue is the tension between the need for protecting society's interest in encouraging a crime victim to report wrongdoing to the police and an aggrieved party's right to protect his or her good reputation and standing in society. "Courts have long recognized that the public interest is served by shielding certain communications, though possibly defamatory, from litigation, rather than risk stifling them altogether" (*Liberman v Gelstein,* 80 NY2d 429, 437 [1992] *citing Bingham v Gaynor,* 203 NY 27, 31 [1911]).

The case most analogous containing an analysis of this balancing test is *Toker v Pollak*, 44 NY2d 211 [1978]. In *Toker*, Plaintiff brought causes of action in libel and slander against two individuals who accused him of taking a bribe while an assistant corporation counsel for the City of New York (*Toker v Pollak*, 44 NY2 at 217). On the underlying criminal accusation, the District Attorney found that there was no legal evidence of Toker's wrongdoing and ultimately "concluded that presentment to the grand jury was unnecessary" (*id.*, at 217). At issue were oral and written statements made by Stern, one of the Defendants, to the District Attorney's Office and to the Department of Investigation (*id.*, at 218). After the trial court denied Stern's motion for summary judgment, the Appellate Division modified the order and dismissed the libel cause of action, finding that Stern's affidavit to the District Attorney was in lieu of his grand jury testimony and therefore was entitled to absolute privilege (*id.*). It affirmed the balance of the trial court's decision, holding that Stern's "oral statements to the Department of Investigation were only qualifiedly privileged" (*id.*).

On appeal, the Court of Appeals held that Stern's written and oral statement to the District Attorney's Office as well as his oral statement to the Department of Investigation were only to be afforded a qualified privilege (*see Toker*, 44 NY2d at 218). Finding that communications made as part of a judicial function warrant absolute protection from civil liability, the Court of Appeals made a distinction as to those statements made to a policeman as being "from removed from a judicial proceeding," and therefore, only entitled to a qualified privilege rather than absolute immunity (*id.*, at 219-220). Analogizing the function of the District Attorney in *Toker* to that of the policeman, the Court held,

> "A qualified privilege is sufficient to foster the public purpose of encouraging citizens to come forth with information concerning criminal activity. If the information is given in good faith by an individual who believes the information to be true, he is protected against the imposition of liability in a defamation action, notwithstanding that another, perhaps possessed of greater wisdom, would not have reported the information" (*id.*, at 221 *citing Pecue v West*, 233 NY 316, 322 [1922]).

The cases relied upon by Defendant in support of her claim for an absolute privilege, *Rosenberg v Metlife, Inc.*, 8 NY3d 359 [2007] and *Weiner v Weintraub*, 22 NY2d 331 [1968], are not persuasive. In *Rosenberg*, the Court of Appeals considered whether the statements made by an employer on a National Association of Securities Dealers (NASD) employee termination notice, filed as required per NASD By-laws, were subject to an absolute privilege (*Rosenburg v Metlife*, 8 NY3 at 362). Recognizing NASD as the largest self-regulatory organization subject to US Securities and Exchange Commission (SEC) oversight, the Court found the mandatory termination notice played a significant role in the NASD self-regulatory process that not only led to quasi-judicial action but was also an invaluable resource used by its members to hire potential employees (*id.* at 367-368). Thus, the Court held that "[t]he [employee termination notice] form's compulsory nature and its role in the NASD's quasi-judicial process, together with the protection of public interests, lead us to conclude that statements made by an employer on the form should be subject to an absolute privilege" (*id.*, at 368).

Similarly in the libel action in *Weiner*, Plaintiff accused Defendants of falsely and maliciously charging him, in a letter addressed to the Grievance Committee of the Association of the Bar of the City of New York, with dishonesty and fraud (*Weiner v Weintraub*, 22 NY2d at 331). The Court of Appeals found that petitions charging professional misconduct of an attorney that are investigated and acted upon by the bar association's grievance committee are done so as a quasi-judicial body and, as an arm of the Appellate Division, the filing the complaint initiated a "judicial proceeding" (*id.*, at 331-332). As such, the Defendants' communication to the Grievance Committee was absolutely privileged (*id.*, at 332).

However, the *Weiner* Court noted as to the filing of a false and malicious complaints, the accused were safeguarded (*Weiner v Weintraub*, 22 NY2d at 332). The Court observed, "[a] lawyer against whom an unwarranted complaint has been lodged will surely not suffer injury to his reputation among the members of the Grievance Committee since it is their function to determine whether or not the charges are supportable. Any other risk of prejudice is eliminated by the provision of the Judiciary Law (§ 90, subd. 10) which declares that "all papers ... upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney ... shall ... be deemed private and confidential" (*id.*).

In the case at bar, the statements made by Carrega to a NYPD detective are protected by a qualified privilege which Plaintiff acknowledges (*see Stega v New York Downtown Hosp.*, 31 NY3d 661 [2018]). Unlike the declarants in *Rosenberg* who complied with the mandatory reporting requirements of NASD, a self-regulatory agency, Carrega was not legally required to file a report. As well, unlike the case in *Weiner*, where the accused was protected against unwarranted injury to his reputation, the Plaintiff in this case was afforded no similar protection. Overall, since Carrega did not make her statements to the NYPD in an official capacity while discharging a governmental duty, nor in a judicial, quasi-judicial or administrative hearing, she is not afforded absolute immunity (*see Herlihy v Metropolitan Museum of Art*, 214 AD2d 250, 258 *citing Missick v Big V Supermarkets*, 115 AD2d 808 [3d Dept 1985]).

While Carrega is entitled to a qualified privilege for her statements to the NYPD, this privilege is "conditioned on its proper exercise, and cannot shelter statements published with malice or with knowledge of their falsity or reckless disregard as to their truth or falsity" (*Loughry v Lincoln First Bank*, 69 NY2d 369, 376 [1986]). Common-law malice has been defined as "personal spite or ill will, or culpable recklessness or negligence" (see *Pezhman v City of New York*, 29 AD3d 164,168 [1st Dept 2006] *quoting Stuklus v State of New York*, 42 NY2d 272, 279 [1977]). The constitutional actual malice standard requires that statements be made with knowledge of their falsity or with reckless disregard of whether they were true or false (*see Hoesten v Best*, 34 AD3d 143, 155 [1st Dept 2006] *citing New York Times v Sullivan*, 376 US 254, 279-280 [1964]).

While movants are correct that mere surmise and conjecture are insufficient to support allegations of malice, in this procedural context, evidentiary facts are not required to be proffered to support allegations of malice (*see Arts4All, Ltd. v Hancock*, 5 AD3d 106, 109 [1st Dept 2004]). Here, Plaintiff accuses Carrega of falsely pressing criminal charges against him by reporting to the police that he sexual attacked her (*see* NYSCEF Document #18, page 3, paragraphs 16, 18). From such accusations of reprehensible criminal conduct, common-law

malice and constitutional actual malice may be inferred (*see Pezhman, v City of New York*, supra at 168; *Herlihy v Metropolitan Museum of Art*, supra at 260-261 [An inference of malice is warranted from a statement that is so extravagant in its denunciations or so vituperative in its character]; *see also LaBarge v Holmes*, 30 AD3d 1087 [4th Dept 2006]). In any event, in the amended complaint, Plaintiff set forth Carrega's purported motivation for doing so, to wit that Carrega made false allegations against the him, because she saw an opportunity to further her career by creating a false sex crimes story against an assistant district attorney whose job it was to prosecute sex crimes (*see generally Liberman v Gelstein*, 80 NY2d 429, 439 [1977][Malice refers to the speaker's motivation for making the defamatory statements]). Further, where the parties offer radially divergent versions of the underlying salient facts, the claims typically present credibility issues best left to the trier of fact (*see Rabushka v Marks*, 229 AD2d 899, 901 [3d Dept 1996]).

The cases cited by Defendants to demonstrate Plaintiff's failure to plead malice are inapposite to the case at bar. All three cases – *Red Cap Valet, Ltd. v Hotel Nikko (USA), Inc*, 273 AD2d 289 [2d Dept 2000], *Hanlin v Sternlicht*, 6 AD3d 334 [1st Dept 2004] and *Weitz v Bruderman*, 14 AD3d 354 [1st Dept 2005]) – involve conversations held between Defendants and their co-workers regarding each Plaintiff's quality of work and the statements in each case warranted a qualified privilege under the theory of common interest. In those cases, the challenged statements were deemed to be uttered to third parties for the betterment of the workplace and from which no malice could be inferred. Unlike those cases, Carrega accused Plaintiff of wrongdoing that resulted in the issuance of a felony indictment against him. There can be no dispute that if the alleged statements to the NYPD were false, a trier of fact could determine they were made solely to harm Plaintiff (*see Herlihy v Metropolitan Museum of Art*, supra at 260).

Accordingly, based on the foregoing, Plaintiff has sufficiently pled malice for his libel *per se* and defamation to a public official causes of action so to avoid dismissal.

Concerning the viability of the first and second causes of action based upon Carrega's purported statements to her brother, Plaintiff makes the conclusory claims in the complaint that on the night in question Carrega "immediately went home after the alleged incident and confided in her brother [Brian]…" and that Carrega "knew the statements made to Brian were false and deliberately inflammatory when she made them" (*see* NYSCEF Document #18, page 3, paragraph 19 and page 5, paragraph 36). By not setting forth neither the specific words complained of nor making an allegation of an actual injury resulting from this conduct, this claim is insufficiently pled (*see* CPLR §3016[a]; *Rubin v Napoli Bern Ripka Shkolnik, LLP*, 151 AD3d 603 [1st Dept 2017]).

Plaintiff's third and fourth causes of action alleging injurious falsehood and *prima facie* tort fail as duplicative of his libel *per se* and defamation causes of action since they are based on the same operative facts and allege no distinct damages (*see Matthaus v Hadjedj*, 148 AD3d 425 [1st Dept 2017]; *see also Curiano v Suozzi*, 63 NY2d 113, 117 [1984]).

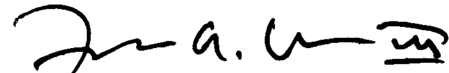
Based upon the foregoing, it is

ORDERED that Defendants' motion is granted to the extent that Plaintiff's first and second causes of action alleging libel per se and defamation to a public official are dismissed against Defendant Daily News, L.P.; and it is further

ORDERED that Defendants' motion is granted only to the extent that Plaintiff's first and second causes of action alleging libel *per se* and defamation to a public official are dismissed against Defendant Christina Carrega as it concerns her participation in preparation of the subject articles published in the Daily News and based upon any statements to her brother, otherwise that branch of the motion to dismiss the first and second causes of action against Carrega based upon her statements to the NYPD is denied; and it is further

ORDERED that Defendants' motion is granted and Plaintiff's third and fourth causes of action alleging injurious falsehood and *prima facie* tort are dismissed, and it is

ORDERED, that all remaining parties will appear for a preliminary conference on **October 1, 2019 at 9:30 a.m.** in IAS Part 14, Courtroom 1045, located at 111 Centre Street.



9/3/2019	FRANCIS A. KAHN, III, A.J.S.C.
DATE	HON. FRANCIS A. KAHN III J.S.C.

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION			
	[ ] GRANTED	[ ] DENIED	[X] GRANTED IN PART		[ ] OTHER	
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER			
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT		[ ] REFERENCE	