

First Manhattan Co. v Sive

2020 NY Slip Op 30303(U)

January 7, 2020

Supreme Court, New York County

Docket Number: 654799/2018

Judge: Kathryn E. Freed

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

PRESENT: HON. KATHRYN E. FREED **PART** **IAS MOTION 2EFM**

Justice

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INDEX NO. 654799/2018

FIRST MANHATTAN CO.

Plaintiff,

MOTION SEQ. NO. 001

- v -

ALAN SIVE,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34

were read on this motion to/for

DISMISS

In this action, plaintiff First Manhattan Co. (First Manhattan or the company) alleges claims of defamation, breach of contract, and tortious interference with contract, and seeks a declaratory judgment and related relief, including compensatory and punitive damages, against defendant Alan H. Sive (Sive). Sive was employed by First Manhattan from 1984 until 2002 and then served as an independent contractor for the company until 2017. First Manhattan alleges that, despite two release agreements between the parties, Sive defamed and disparaged the company by falsely accusing it of discriminating against him based on his sexual orientation and medical condition; tortiously interfered with the company's existing and prospective business relations by publishing his accusations to over 30 people and threatening further publication; and demanded millions of dollars to which he was not entitled.

Sive now moves, pursuant to CPLR 3211 (a) (1) and (a) (7), for dismissal of the complaint.

For the reasons set forth below, Sive's motion to dismiss is granted.

FACTUAL AND PROCEDURAL BACKGROUND

First Manhattan is a “nationally and internationally prominent professional investment management firm” (complaint, ¶ 13). From 1984 until 2002, Sive worked for First Manhattan’s investment business, establishing the company’s real estate portfolio (*id.*, ¶¶ 2, 14). In 2002, First Manhattan terminated Sive (*id.*, ¶ 16). Sive thereafter worked for First Manhattan in a more limited capacity, as an independent contractor, until 2017 (*id.*, ¶¶ 2, 20).

Starting in 2009, Sive began to raise concerns with a few First Manhattan executives about the way he had been treated by David (Sandy) Gottesman (Gottesman), the company’s founder and then-Managing Partner (*id.*, ¶¶ 22-26). Sive claimed that Gottesman caused his termination in 2002 because of “his distaste” for the fact that Sive was HIV-positive, and then refused to give him a reference on the ground that this would be “immoral” (*id.*, ¶ 26).

On May 20, 2014, Sive entered into a letter agreement (the 2014 Agreement) with First Manhattan, printed on the company’s letterhead (*id.*, ¶¶ 32-34; *see* exhibit 1). The 2014 Agreement set forth the terms of Sive’s compensation for his continued consulting work (*id.*). It also contained a release and waiver of any claims that Sive had against First Manhattan or its affiliates. The release and waiver provided that:

“[I]n consideration of the payments set forth above, you knowingly and voluntarily waive and release forever whatever claims you may have or may yet have against FMC, FMREEMC, Frankford, their affiliates, any of their respective present and former partners, shareholders, employees and agents (the ‘Released Parties’), based upon any matter, cause or thing through the effective date of this release and waiver, including all claims relating in any way to your prior employment, business, commercial or consulting relationships with the Released Parties other than claims you may have arising out of this agreement.

This release and waiver includes but is not limited to any rights or claims . . . for wrongful abusive discharge, from breach of any contract, or for discrimination based upon race, color, ethnicity, sex, age, national origin, religion, disability, sexual orientation, or any other unlawful criterion or circumstance”

(2014 Agreement at 3).

The 2014 Agreement contained neither a non-disparagement clause nor a covenant not to sue. Further, it did not restrict Sive from communicating with the company's management about Gottesman's conduct, or asking First Manhattan for additional compensation. Nor did the Agreement restrict either party from seeking a revised agreement. To the contrary, it provided that it could be "changed, modified or amended" by further agreement.

On March 6, 2017, First Manhattan and Sive entered into another letter agreement (the 2017 Agreement), which "amended" and "modified" certain elements of the 2014 Agreement (complaint, ¶¶ 40-42; *see* exhibit 2). Along with adjusting the terms of Sive's compensation, the 2017 Agreement contained another waiver and release that was materially identical to the waiver and release in the 2014 Agreement (*see* 2017 Agreement at 2). The 2017 Agreement also provided that it could be "changed, modified or amended" by further written agreement (*id.*).

Prior to 2018, Sive had only sent emails about his alleged mistreatment to a small number of "Senior Managing Director(s)" and Neal Stearns (Stearns), the company's Chief Legal Officer (*see* Sive aff, exhibits A and B; complaint, ¶¶ 23-26, 36). In an email to Stearns on November 17, 2017, Sive told him that "I am advised that I was under duress" in entering into their previous agreement because it was the only way he could get paid for his work, but Sive stated explicitly that "I do not intend to bring litigation against First Manhattan for any reason" (*see* Sive aff, exhibit B at 1-2).

On January 14, 2018, about three months after the Harvey Weinstein story was reported, Sive sent an email to "substantially all" of First Manhattan's Senior Managing Directors and Managing Directors (the January 14 Email [attached to Sive aff as exhibit C]) (complaint, ¶ 46),

bringing his report of alleged discrimination by Gottesman to the attention of the rest of the company's management. He wrote:

“Some of you may recall that I worked at First Manhattan from 1984 to 2002. In 2002, I was terminated by Sandy Gottesman who was uncomfortable with my ‘health condition’ as he called it, namely that I was HIV positive. I have no idea what his objection to this was based on – my health was and remains excellent and had no effect on my ability to perform my job – but when I left, I asked him if he would contact on my behalf a well-known real estate developer in New York, who I knew to be a client of his, and he responded angrily that ‘it would be immoral’ to recommend someone with my ‘health condition’ to anyone, and he would give me no reference or recommendation at all, so perhaps he found me or my ‘health condition,’ to be morally offensive. Although it wasn’t clear to me at the time, that meant the end of my career.”

(January 14 Email at 1); *see also* complaint, exhibits 3A, 3B [redacted copies of email]).

Sive also described how he felt that Gottesman had rebuffed his attempts to discuss his conduct, and that he was telling the managing directors about his experiences in the hope of receiving “a strong indication from First Manhattan that the firm itself does not condone, tolerate, accommodate, approve of or enable bigotry in any form, and that Gottesman’s behavior is not deemed in any way acceptable to the members of the firm” (*id.* at 2). “One of the ways in which I have asked for a demonstration that First Manhattan does indeed reject bigotry,” Sive wrote, was for the company to pay his commissions on accounts that he claimed he brought into the company and for which he was never paid (*id.*). Sive further stated that “[f]or people associated with First Manhattan to refuse to hand over my share of the commissions on these accounts, in short, to profit from the circumstances of my termination, with no explanation other than a quite recently disclosed ‘policy’, constitutes quite simply fraud” (*id.*). The email did not seek any specific amount of money.

Sive further wrote that he was “well positioned to share my appalling experience at First Manhattan with a very wide audience,” and he urged them “to discuss this as a firm at the earliest opportunity” (*id.* at 2-3).

Sive and Stearns had multiple follow-up meetings and email exchanges. On February 20, 2018, Stearns noted to Sive that “as a legal matter I believe[] that there [is] no basis for [Sive’s request to be compensated for prior accounts],” but he “agreed in the interest of moving forward to review the fees and commissions matter, determine the amount of money involved, and share that information with you” (*see* Sive aff, exhibit F at 5). Stearns estimated that the gross revenues involved were about \$150,000, but noted that Sive might have a different calculation (*id.*).

Stearns also repeatedly urged Sive to give him a complete demand, telling him that he wanted Sive to “give some thought as to what else it is that you are asking for” and “before we have any further discussion about this aspect, I want to again emphasize that I must have an understanding of what else it is you are looking for” (*id.*). Stearns explained that this was necessary in order “to bring this matter to a final close” (*id.*).

Stearns reiterated this request a month later, emailing Sive that “I have actually given quite a bit of thought to our matter but have not spent as much time conferring with my partners as it would be premature without some idea of what it is you are asking for – that is why I have asked you to give some thought as to what it is that you want. So I would suggest that you give that some thought and perhaps we can speak next week” (*see* Sive aff, exhibit G). Sive responded that “I assume what you’re asking for is some number and I have come up with a number of \$8 million,” which “comes from taking \$300,000 – which was only a little more than

my maximum gross earnings at First Manhattan – for twenty years at an annual return of 2%” (*see* Sive aff, exhibit H at 1).

For months thereafter, Stearns repeatedly expressed an interest in continuing to negotiate with Sive (*see* Sive aff, exhibits I-M). Finally, on September 20, 2018, Sive again emailed Stearns that he would “very much like to reach a resolution” and hoped that they could meet in person shortly (*see id.*, exhibit M). On September 23, 2018, Stearns responded that “suffice to say that of course we can continue,” and “perhaps we should look at some dates/times for an October meet” (*id.*).

However, four days later, on September 23, 2018, First Manhattan filed this lawsuit. Stearns then broke off any further communication with Sive (*see* Sive aff, exhibit N).

The Complaint

Although Sive’s allegations of discrimination by Gottesman are at the heart of First Manhattan’s claim, Gottesman was not named as a defendant. Similarly, while the complaint attaches as exhibits 3 and 4 the emails about which it complains, Gottesman’s name was redacted from those emails. First Manhattan seeks at least \$8 million in damages in its complaint.

In its first cause of action, First Manhattan seeks a declaratory judgment that Sive was lawfully discharged; that he has waived and released all of his claims; that all of his claims are barred by the statute of limitations; and that he forfeited any right to further compensation.

In its second cause of action, for defamation and commercial disparagement, First Manhattan alleges that 10 specific statements in Sive’s January 14, 2018 email were false and defamatory to the company (complaint, ¶¶ 46-57). In its third cause of action for interference with existing and prospective business relations, First Manhattan alleges that “by reason of the

foregoing” (i.e., the allegations set forth in the defamation cause of action), Sive has tortiously interfered with First Manhattan’s “existing and prospective business relations and has threatened to do so in the future” (complaint, ¶ 82). In its fourth cause of action for breach of contract, First Manhattan alleges that Sive breached the 2014 and 2017 Agreements by (1) “defaming and disparaging First Manhattan and its personnel”; (2) “repudiating the 2014 and 2017 Release Agreements by claiming duress, denying his own waiver and release” and (3) “demanding \$8,000,000 in additional compensation to which he is not entitled” (*id.*, ¶ 87).

LEGAL CONCLUSIONS

Although it is well settled that on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), “the pleading is to be afforded a liberal construction,” and “the facts as alleged in the complaint [are presumed] as true” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]), ““factual claims [that are] either inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration”” (*Mark Hampton, Inc. v Bergreen*, 173 AD2d 220, 220 [1st Dept 1991] [citation omitted]; *see also Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233 [1st Dept 1994]).

In order to prevail on a motion to dismiss based upon documentary evidence, the movant must demonstrate that the evidence submitted conclusively refutes the plaintiff’s claims (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-591 [2005]). In addition, “[f]actual allegations presumed to be true on a motion pursuant to CPLR 3211 may properly be negated by affidavits and documentary evidence” (*Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 269 [1st Dept 2005]). Thus, dismissal is warranted where documentary

evidence establishes that “the allegations of the complaint fail to state a cause of action” (*L.K. Sta. Group, LLC v Quantek Media, LLC*, 62 AD3d 487, 491 [1st Dept 2009]).

Even construing First Manhattan’s claims in a liberal manner, however, this Court nevertheless concludes that Sive’s motion to dismiss must be granted, since each claim is legally deficient on its face and/or is contradicted by clear documentary evidence.

Defamation (Second Cause of Action)

First Manhattan alleges that ten different statements in the January 14 email “defamed and disparaged [it] by falsely asserting that Sive had been discriminated against by reason of his health status and sexual orientation” (complaint, ¶ 46). However, none of these statements contain any defamatory facts about First Manhattan. Most of them are not actionable because they are about Gottesman, not the company, and the remainder constitute non-actionable opinion and rhetorical hyperbole.

A statement is only actionable if it contains a “defamatory statement of fact concerning the plaintiff” (*Celle v Filipino Reporter Enters., Inc.*, 209 F3d 163, 176 [2d Cir 2000]). Thus, a plaintiff must show that the statements at issue are “of and concerning” the plaintiff, meaning “that a person hearing or reading the statement reasonably could have interpreted it as such” (*Three Amigos SJL Rest., Inc. v CBS News Inc.*, 28 NY3d 82, 86 [2016]). “This burden is not a light one, and the question of whether an allegedly defamatory statement could reasonably be interpreted to be ‘of and concerning’ a particular plaintiff is a question of law for the courts to decide” (*id.* at 86-87).

New York courts have repeatedly recognized that statements that refer only to a company’s owner or employee are not “of and concerning” the corporation itself (*see e.g.*

Carlucci v Poughkeepsie Newspapers, Inc., 57 NY2d 883, 885 [1982] [claim failed because the alleged defamatory article “was not of and concerning the corporation” since it “never mentioned the corporation [and] stated that the individual named was the owner of the store and referred only to *his* gambling activity”]; *Afftrex, Ltd. v General Elec. Co.*, 161 AD2d 855, 855-856 [3d Dept 1990] [statement that “Bill Button, the owner of Afftrex, is also an evil man. Because of his being an evil man, he too was fired from his job” was not actionable by Afftrex because the words “reflect directly on Button and his former employment, not upon Afftrex, and [t]herefore, the statement was insufficiently ‘of and concerning’ Afftrex”]). The same principle applies to statements about individual partners within a partnership (Restatement (Second) of Torts § 562, comment b [“language that defames individual partners, even though it may defame all of them, may not reflect upon the partnership as such”]).

For example, in *Arts4All, Ltd. v Hancock* (5 AD3d 106 [1st Dept 2004]), a former employee made statements to a corporation’s board of directors alleging that the CEO “promoted deceptive accounting practices, used Arts4All’s time and resources for personal business without authorization, and provided false information to government agencies and insurance companies” (*id.* at 109-110). The First Department affirmed dismissal of the corporation’s libel claim on “of and concerning” grounds, holding that “only [the CEO] has standing to assert the [libel claim], since the alleged libelous statements are only about him” (*id.* at 110).

Similarly, *Veritas Capital Mgt. L.L.C. v Campbell* (22 Misc 3d 1107[A], 2008 NY Slip Op 52608[U] [Sup Ct, NY County 2008]), involved an investment firm’s libel claim against a terminated employee over the employee’s allegations that the firm’s principal lied about the reasons for his dismissal. The court dismissed the claim, holding that “[t]he statements are about

[the principal], who is not a party to this action. They are not sufficiently of and concerning plaintiffs” (*id.* at *13).

Likewise, here, First Manhattan cannot state a viable defamation claim with respect to statements that refer only to Gottesman, or any other specific individual. Seven of the ten allegedly defamatory statements are plainly about Gottesman (referred to as “First Manhattan’s Founder,” or “The Founder”), and, in one instance, Danny Rosenbloom, another executive (referred to as “a Senior Managing Director/Portfolio Manager”):

“(a) I was terminated by [First Manhattan’s Founder] who was uncomfortable with my ‘health condition’ as he called it. . .”

(complaint, ¶ 47).

“(b) When I left I asked him [Gottesman] if he could contact on my behalf a well-known real estate developer in New York, who I knew to be a client of his, and he responded angrily that ‘it would be immoral’ to recommend someone with my ‘health condition’ to anyone, and he would give me no reference or recommendation at all, so perhaps he found me or my ‘health condition’ to be morally offensive”

(*id.*, ¶ 48).

“(c) [The Founder] had used a deeply personal and intimate piece of information about me as grounds for terminating me, and I was not comfortable divulging this very widely”

(*id.*, ¶ 50).

“(d) [The Founder] has destroyed everything I had hoped and expected to achieve, and life has become extraordinarily hard in numerous ways. It is an astounding betrayal of truth that after giving him eighteen years of loyalty and the benefit of some pretty refined skills he had no reservations about throwing me out because he was offended by my ‘health condition.’ His actions were both illegal and immoral”

(*id.*, ¶ 51).

“(e) The process of terminating me involved a truly nasty campaign of harassment, executed with high handed arrogance and impetuosity, characteristic of a man who sees no adverse consequences to himself because he

believes he is surrounded by people who perceive their own interests served by protecting him. He had apparently developed such distaste for me that he couldn't find it within himself to show even slightest consideration or generosity”

(*id.*, ¶ 52).

“(f) Working with [a Senior Managing Director/Portfolio Manager] was a hideous ordeal, which proved also to be a corrosive and distracting experience . . . so harrowing and abusive was the ordeal that it is only since the sale of the property closed a year ago that I have been able to focus on how profound the harm inflicted on me has actually been and to try to find a way forward”

(*id.*, ¶ 53).

“(j) We are living in an age where is no longer possible for abuse to be concealed, even when the abuser is a rich and prominent man. The case of Harvey Weinstein, and others, should stand as an important lesson . . . I am well-positioned to share my appalling experience at First Manhattan with a very wide audience”

(*id.*, ¶ 57).

These statements are not actionable in defamation because they are not defamatory statements of fact about First Manhattan. Rather, they are statements about the conduct of its managing partner, not the company. Under New York law, it is clear that First Manhattan cannot state a viable defamation claim with respect to statements that refer only to Gottesman, or any other specific individual, and the defamation claim must thus be dismissed with respect to these seven statements (*see e.g. Arts4All, Ltd. v Hancock* (5 AD3d at 110; *Veritas Capital Mgt. L.L.C. v Campbell*, 22 Misc 3d 1107[A], 2008 NY Slip Op 52608[U] at *13).

The three remaining statements are not defamatory, and the defamation claim with respect to these statements must be dismissed as well.

“To prove a claim for defamation, a plaintiff must show: (1) a false statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm” (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014]).

Defamation law has long recognized that insults and “rhetorical hyperbole” are not actionable (*Greenbelt Coop. Publishing Assn. v Bresler*, 398 US 6, 14 [1970]). Accordingly, “[l]oose, figurative, or hyperbolic statements, even if deprecating the plaintiff, are not actionable” (*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]). For that reason, New York courts have “held that assertions that a person is guilty of ‘blackmail,’ ‘fraud,’ ‘bribery,’ and ‘corruption’ could, in certain contexts, be understood as mere, nonactionable ‘rhetorical hyperbole’ or ‘vigorous epithet[s]’” (*Gross v New York Times Co.*, 82 NY2d 146, 155 [1993]; see e.g. *Sabharwal & Finkel, LLC v Sorrell*, 117 AD3d 437, 437-438 [1st Dept 2014] [allegation of “extortion” not actionable because “a reasonable reader would conclude that they constituted hyperbole and convey non-actionable opinions about the merits of the lawsuit and the motivation of NDTV’s attorney’s, rather than statements of fact”]).

Similarly, “[e]xpressions 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], cert denied 555 US 1170 [2009]; see also *Sandals Resorts Intl. Ltd. v Google, Inc.*, 86 AD3d 32, 39-40 [1st Dept 2011]). That is because “falsity is a sine qua non of a libel claim . . . and only assertions of fact are capable of being proven false” (*Brian v Richardson*, 87 NY2d 46, 51 [1995]). Whether a particular statement is one of opinion or fact is a question of law for the court to decide (see *id.* at 50-54). In making that determination, courts should consider three 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”

(*Gross*, 82 NY2d at 153 [citation and internal quotation marks omitted]).

The third factor of the above formula, context, is a significant part of the analysis (*see Brian v Richardson*, 87 NY2d at 51-53). Thus, with any statement challenged as defamatory, the context must be examined in order to determine whether a reasonable reader would have believed that the communication was fact, not opinion (*Davis v Boehem*, 24 NY3d 262, 270 [2014]; *see also Brian*, 87 NY2d at 51 [“in 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]). “In addition to considering the immediate context in which the disputed words appear, the courts are required to take into consideration the larger context in which the statements were published, including the nature of the particular forum” (*Brian*, 87 NY2d at 51).

Applying these principles, both the United States Supreme Court and New York courts have emphasized that “intemperate, abusive or insulting language” used “in the particular social setting of a labor dispute” is especially unlikely to be treated as assertions of literal fact (*Steinhilber v Alphonse*, 68 NY2d 283, 291 [1986] [citation omitted]). Likewise, statements made for the purpose of advocacy are unlikely to be understood as stating literal facts (*see e.g. 600 W. 115th St. Corp. v Von Gurfeld*, 80 NY2d 130, 141 [1992] [noting that accusations of fraud and illegality were “more likely to be the product of passionate advocacy than careful, logically developed reason”]; *Silvercorp Metals, Inc. v Anthion Mgt. LLC*, 36 Misc 3d 1231[A], 2012 NY Slip Op 51569[U], *11 [Sup Ct, NY County 2012] [allegations of “massive accounting fraud” would be understood as opinion because the purpose of defendant’s letter was to encourage “an independent investigation”]; *Renco Group, Inc. v Workers World Party, Inc.*, 13 Misc 3d 1213[A], 2006 NY Slip Op 51809[U], *4 [Sup Ct, NY County 2006] [claim that company “robbed the pension fund” not actionable considering the article’s “impassioned” language, and

“the advocacy purpose” for which it was published]). The same is true of statements framed as value judgments from the author’s subjective perspective (*see e.g. Chalpin v Amordian Press, Inc.*, 128 AD2d 81, 85 [1st Dept 1987]). Moreover, a defendant’s disclosure of his self-interest also “indicates to the reader that the author is expressing his opinion” (*Silvercorp Metals*, 36 Misc 3d 1231[A] at *10; *see also Bellavia Blatt & Crossett, P.C. v Kel & Partners, LLC*, 151 F Supp 3d 287, 296 [ED NY 2015], *affd* 670 F Appx 731 [2d Cir 2016]).

For example, in *Penn Warranty Corp. v DiGiovanni* (10 Misc 3d 998 [Sup Ct, NY County 2005]), the defendant created a website accusing the plaintiff company of a long list of misdeeds, including “ripping off its contract holders,” “running scams,” and “committing fraud on a grand scale” (*id.* at 1002). The court dismissed the claim, finding that “the Web site, when viewed in its full context, reveals that defendant is a disgruntled customer and that his statements reflect his personal opinion based upon his personal dealing with plaintiff” (*id.* at 1005). The court held that the plaintiff’s accusations of “fraud” and other malfeasance were nothing more than non-actionable opinion, because they were “subjective expressions of consumer dissatisfaction with plaintiff” (*id.*).

Likewise, here, it is clear that the few statements in the January 14 Email which arguably do refer to the company reflected Sive’s “subjective expressions of dissatisfaction” with First Manhattan “based on his personal dealing” with it. “The full context” of Sive’s email makes it obvious that he was advocating for himself in the midst of an employment dispute, using strong language to urge First Manhattan’s management to fully investigate and adequately respond to the allegations he raised – allegations in which Sive clearly had a self-interest. Both the email as a whole, and the specific statements of which First Manhattan complains, contain the type of language that courts hold to be obvious signals of rhetorical hyperbole and opinion – including

hyperbolic language like references to Gottesman as “soulless” and “singularly and preternaturally deficient in humanity,” and qualifiers like “tacitly” and “apparently.”

Indeed, the entire point of Sive’s email regarding the First Manhattan as a whole is explicitly framed as conditional, not as an actual statement of fact – “if this is truly the case, it is astounding” (January 14 Email at 2). Read as whole, the “full context” of the email expresses Sive’s hope that the company would not engage in what he would view as improper conduct, rather than stating that it has done so. The email makes clear that “I have no desire whatsoever to harm First Manhattan Co.” and “there are people there for whom I have great respect and affection.” Sive stated that he was sending the email because he hoped that, if all the company’s managers were aware of the issue, he would receive “a strong indication from First Manhattan that the firm itself does not condone, tolerate, accommodate, approve of or enable bigotry in any form” (*id.* at 2-3).

Within that context, none of the three remaining statements about which First Manhattan complains assert specific statements of actionable, defamatory facts:

“(g) Although until now only a few members of the firm knew about this matter, I have not had any signs of support from any of them, and this is deeply distressing to me. It is one thing for a soulless man to destroy another’s life. It is quite another for his firm, under the aegis of which this took place, to stand by quietly and tacitly support their founder regardless of his behavior.”

(complaint, ¶ 54).

To the extent that this statement refers to any actual allegations of fact, it again only refers to Gottesman as a “soulless man”. Otherwise, this statement is nothing more than classic opinion and rhetorical hyperbole. It is apparent that Sive is conveying his view that, up to that point, the few members of the firm he has dealt with have not adequately responded to his allegations of mistreatment. His language about the company’s “tacit support” lacks any

“precise meaning” (*Gross*, 82 NY2d at 153), and signals that Sive is expressing his subjective impression of the situation. Moreover, the broader context of the email makes clear that Sive expresses the hope that the firm as a whole would not support the discrimination that he says occurred – rather than concluding that it does.

“(h) For people associated with First Manhattan to refuse to hand over my share of the fees and commissions on these accounts, in short, to profit from the circumstances of my termination, with no explanation other than a quite recently disclosed ‘policy,’ constitutes quite simply fraud”

(complaint, ¶ 55).

Here, too, no reasonable reader would believe that Sive is accusing the company of literally engaging in fraud. Rather, Sive is using hyperbolic language to express his opinion that he has been treated unfairly for compensation purposes. Courts have routinely dismissed claims like this one arising out of complaints about “fraud,” especially made in the context of heated disputes, exactly on that basis (*see 600 W. 115th St. Corp.*, 80 NY2d at 135 [statement that lease “is as fraudulent as you can get”]; *Bellavia Blatt & Crossett*, 151 F Supp 3d at 290 [statement that plaintiffs were responsible for “fraudulent litigation”]; *Silvercorp Metals*, 36 Misc 3d 1231[A] at *9-10 [statement that plaintiff engaged in “massive accounting fraud”]).

“(i) . . . offering me no support and maintaining dead silence on the question of whether [the Founder] had acted ethically in terminating me, refusing to pay me the money that I would have received with no question had I not been terminated sends the unequivocal message that First Manhattan not only tolerates bigotry and discrimination, but accommodates and enables it”

(complaint, ¶ 56).

Similar to statement (h), when read in the context of Sive’s employment dispute, this statement clearly expresses Sive’s opinion about what “message” the firm would be sending if it refuses to pay him the compensation that he believed it should. In any event, what “message” may or may not be discerned from this situation, or from what might or might not transpire, is a

classic example of opinion because how a person perceives another's "message" cannot ever be proven to be "true" or "false."

Accordingly, because First Manhattan fails to allege any statements in the email that convey defamatory allegations of fact about it, the second cause of action is dismissed.

Tortious Interference (Third Cause of Action)

First Manhattan alleges that Sive "has tortiously interfered with [its] existing and prospective business relations and has threatened to do so in the future, and his conduct was for the sole purpose of harming [the company]" (complaint, ¶ 82).

A claim for tortious interference will be dismissed as duplicative where it is "based on the same substantive facts pleaded with respect to [a] defamation cause of action" (*Ripka v County of Madison*, 162 AD3d 1371, 1373 [3d Dept 2018]; see e.g. *Phillips v Carter*, 58 AD3d 528, 528 [1st Dept 2009] [dismissing tortious interference claim because underlying defamation claim failed to state a cause of action]; *Dobies v Brefka*, 273 AD2d 776, 778 [3d Dept 2000] ["we decline to reinstate the claim for tortious interference with economic advantage in the absence of an alleged act of interference with a contract or business relationship distinct from the general declaration of injury to reputation included in plaintiff's defamation claims"]).

Here, First Manhattan's tortious interference claim arises from the January 14 Email – exactly the "same substantive facts" pleaded in connection with its defamation claim (see complaint, ¶ 81 ["By reason of the foregoing (i.e., the allegations made in defamation cause of action), Sive has tortiously interfered with First Manhattan's existing and prospective business relations"]). Thus, dismissal of the defamation claim also requires dismissal of the tortious interference claim, since the alleged defamation is the basis for the allegation that defendant's

conduct was accomplished by wrongful means (*Sabharwal & Finkel, LLC v Sorrell*, 117 AD3d at 438; *Phillips v Carter*, 58 AD3d at 528; *see also Perez v Violence Intervention Program*, 116 AD3d 601, 602 [1st Dept 2014] [dismissing tortious interference claim as “duplicative of the defamation claim, as [it alleges] no new facts and seek[s] no distinct damages from the defamation claim”]).

Breach of Contract

First Manhattan alleges that Sive breached the release provisions of the 2014 and 2017 Agreements by defaming and disparaging it; repudiating the agreements by claiming duress; and demanding \$8,000,000 of additional compensation (complaint, ¶ 87).

Unlike a covenant not to sue, a release immediately discharges whatever obligation may be released, and so the releasor “performs” all of its contractual obligations the moment the release is executed (*Colton v New York Hosp.*, 98 Misc 2d 957, 965 [Sup Ct, NY County 1979] [while a covenant not to sue imposes “continuous” obligations, “a release is an executed agreement. No further performance is necessary”]). Thus, a release cannot be breached because complete performance is tendered when the release is effectuated (*see Collins & Aikman Prods. Co. v Sermatech Engineering Grp., Inc.*, 297 AD2d 248, 249 [1st Dept 2002] [because the contracts at issue did not contain a covenant not to sue, “the waiver provisions are unambiguously defensive in nature and do not support an affirmative claim for damages”]; *McMahan & Co. v Bass*, 250 AD2d 460, 461 [1st Dept 1998] [dismissing breach of contract claim arising out of alleged breach of release because “[t]he provisions at issue do not speak to the future,” and “[a]bsent a covenant not to sue, there exists no implicit agreement by defendants

to pay the attorneys' fees [sought as damages], as would result from breach of a covenant not to sue").

Rather than imposing any obligation of continuous performance, once it is executed, "a valid release constitutes a complete bar to an action on a claim which is the subject of the release" (*Littman v Magee*, 54 AD3d 14, 17 [1st Dept 2008] [citation omitted]). A release or waiver is therefore purely defensive. While, if valid, it would provide an affirmative defense to a lawsuit over the released claims, it cannot support a breach of contract claim (*see Collins*, 297 AD2d at 249; *McMahan & Co.*, 250 AD3d at 461).

Applying these principles to First Manhattan's breach of contract claim, it is clear that none of the actions it points to breached any provisions of the 2014 and 2017 Agreements.

First Manhattan alleges that Sive breached the Agreements by "defaming and disparaging First Manhattan and its personnel" (complaint, ¶ 87). However, the Agreements do not contain a non-disparagement clause.

Further, First Manhattan contends that Sive breached the Agreements by "repudiating the 2014 and 2017 Release Agreements by claiming duress, denying his own waiver and release" (*id.*). However, expressing the opinion that a release may be invalid on the grounds of duress does not give rise to a breach of the release. Rather, a release simply provides the released party with an affirmative defense if a lawsuit were ever actually filed by the releasing party (*see Schwartz v Epstein*, 155 AD2d 524, 525 [2d Dept 1989] [in lawsuit filed by releasing party, court found question of fact as to whether release was obtained by duress]).

Finally, First Manhattan claims that Sive breached or repudiated the release provisions of the 2014 and 2017 Agreements by "demanding \$8,000,000 of additional consideration to which he is not entitled" (complaint, ¶ 87). However, nothing in the agreements prevents the parties

from negotiating an increase in Sive's compensation. Moreover, the Agreements expressly contemplate that either party may seek modification of any of their terms.

Stripped to its essentials, Sive did only what the Agreements expressly permit, which is to seek new financial terms (*IDT Corp. v Tyco Grp. S.A.R.L.*, 54 AD3d 273, 275 [1st Dept 2008] [finding no breach because "(n)othing in the settlement agreement prohibited defendants or plaintiff from merely proposing terms that were inconsistent with the settlement agreement"], *aff'd* 13 NY3d 209 [2009]).

In opposition to the motion, First Manhattan argues that it has stated a claim for breach of contract because the release could also be construed as a covenant not to sue (opposition memorandum at 20). Although a covenant not to sue, rather than a release, can, in some circumstances give rise to a claim for breach of contract (*see Collins*, 297 AD2d at 249; *McMahan & Co.*, 250 AD2d at 461), Sive has not sued First Manhattan. In any event, even if the release could be so construed, New York law is clear that one cannot breach a covenant not to sue simply by threatening a lawsuit (*see e.g. International Bus. Machines Corp. v Simon*, 376 F Supp 3d 292, 303 [SD NY 2019] [rejecting argument "that a party breaches a covenant not to sue by merely *threatening* a lawsuit," and dismissing claim related to threatened litigation]). Thus, First Manhattan's argument that Sive's statements must be construed as an "implicit threat to sue" is irrelevant. Moreover, Sive expressly told First Manhattan that he had no intention of suing it "for any reason" (*see Sive aff*, exhibit B, at 2).

First Manhattan also contends that, even if there were not a breach of contract, the complaint alternatively states a claim for breach of the implied covenant of good faith and fair dealing which underlies every contract (opposition memorandum at 22). According to First Manhattan, "Sive's pocketing of large sums of money in exchange for two separate written

releases, then pursuing \$8,000,000 for meritless, waived and release, and time-barred claims by means of extortion,” (*id.* at 23) constitutes a breach of the implied covenant.

However, the complaint never alleges a breach of the implied covenant of good faith and fair dealing. This alone requires dismissal of this claim (*see e.g. 767 Third Ave. LLC v Greble & Finger, LLP*, 8 AD3d 75, 75 [1st Dept 2004] [affirming dismissal where “plaintiff failed to plead a violation of the covenant of good faith and fair dealing, and failed to allege any facts regarding defendants’ bad faith or unfair dealing”]).

Moreover, a claim for breach of the covenant of good faith and fair dealing will be dismissed as duplicative where, as here, it “arise[s] from the same facts” as a breach of contract claim (*MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 297 [1st Dept 2011]; *see also Brook v Peconic Bay Med. Ctr.*, 152 AD3d 436, 438 [1st Dept 2017] [“the cause of action for breach of the covenant of good faith and fair dealing was properly dismissed as it merely restates the breach of contract claim”]; *Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [1st Dept], *lv denied* 15 NY3d 704 [2010] [dismissing implied covenant claims as duplicative where they “arise from the same facts” and “seek the identical damages for each alleged breach” as plaintiffs’ breach of contract claims]). Courts have applied this rule to reject claims for breach of the implied covenant of good faith and fair dealing that really just allege breach of a supposed covenant not to sue, which is how First Manhattan has recast its contract claim (*see Kamfar v New World Restaurant Grp., Inc.*, 347 F Supp 2d 38, 52 [SD NY 2004]; *Sauer v Xerox Corp.*, 95 F Supp2d 125, 131-132 [W d NY 2000], *affd* 5 Fed Appx 52 [2d Cir 2001]). Accordingly, the breach of contract claim is dismissed.

Declaratory Judgment

“The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation as to either present or prospective obligations. No limitation has been placed, or attempted to be placed, upon its use, and yet this main purpose underlies the exercise of discretion” (*James v Alderton Dock Yards*, 256 NY 298, 305 [1931] [internal citations omitted]; *see also Parry v County of Onondaga*, 25 Misc 3d 1236[A], 2009 NY Slip Op. 52431[U], * 4 [Sup Ct, Onondaga County 2009] [“If the issuance of a declaration of rights in a particular case will serve the interests of convenience of the parties or the public ... or if the court is satisfied that a grant of a declaratory judgment will serve some useful function, then the court should exercise its discretion and render declarations that detail and define interests and rights”]).

Under CPLR 3001, “[t]he Supreme Court may render a declaratory judgment having the effect of final judgment as to the rights and other legal relations of the parties to a justiciable controversy.” It is well-settled that “[t]he declaratory judgment procedure is intended to deal with actual problems and not with remote possibilities which may never eventuate” (*Shui Fong Loo v HSBC Mtge. Corp. (US)*, 36 Misc 3d 1223[A], 2012 NY Slip Op 51455[U], *4 [Sup Ct, Suffolk County 2012] [citation omitted]; *see also Thome v Alexander & Louise Calder Found.*, 70 AD3d 88, 99 [1st Dept 2009]). Accordingly, declaratory judgments are inappropriate unless there is “a genuine, concrete dispute between adverse parties, not merely the possibility of hypothetical, contingent or remote prejudice to the plaintiff” (*Premier Restorations of N.Y. Corp. v New York State Dept. of Motor Veh.*, 127 AD3d 1049, 1049 [2d Dept 2015]; *see also Waterways Dev. Corp. v Lavalley*, 28 AD3d 539, 540 [2d Dept 2006] [to maintain an action for a declaratory judgment, “the dispute must be real, definite, substantial and sufficiently matured to

as to be ripe for judicial determination”]). A declaratory judgment action, therefore, “may not be used as ‘a vehicle for an advisory opinion’” (*Long Is. Light. Co. Allianz Underwriters Ins. Co.*, 35 AD3d 253, 253 [1st Dept 2006] [citation omitted]).

Here, First Manhattan has not presented a justiciable controversy. First Manhattan alleges that it is entitled to declaratory relief because Sive tried to feloniously “extort” money from the firm (complaint, ¶¶ 66-71). However, First Manhattan does not seek a declaration that Sive is guilty of that crime. Rather, First Manhattan wants this court to issue a declaration that its version of the facts is correct with respect to what happened during Sive’s employment dispute over twenty years ago. Thus, First Manhattan alleges that it is entitled to a declaration that:

- “a. Sive was discharged for entirely lawful, non-discriminatory reasons;
- b. Sive has waived and released any claims relating in any way to his employment, business, commercial or consulting relationships with First Manhattan and its affiliates as provided for in the Release Agreement;
- c. Any claims relating in any way to Sive’s employment with First Manhattan and its affiliates are barred by the applicable statutes of limitations; and
- d. Sive has either already been paid or has forfeited any right to any compensation for any work performed as an employee or as a consultant to First Manhattan under the 2014 and 2017 Release Agreements, and the Release Agreements are valid and enforceable in accordance with their terms”

(complaint, ¶ 73).

Given that First Manhattan’s premise for seeking declaratory relief is completely unrelated to the actual relief it seeks, there is no concrete dispute between the parties that can be resolved by a declaratory judgment.

With respect to subsection (a), First Manhattan essentially requests that this Court adjudicate the factual merits of a 20-year old employment dispute. However, “the point and the

purpose of [declaratory] relief is to declare the respective legal rights of the parties based on a given set of facts, not to declare findings of fact” (*Thome*, 70 AD3d at 100).

With respect to subsections (b) and (d), given the fact that releases are fully performed immediately on their execution, the validity of the agreements could only give rise to a concrete dispute if, hypothetically, Sive were to sue First Manhattan and the company were to plead the release as an affirmative defense. Rendering advisory opinions about such theoretical contingencies cannot be the basis of a declaratory judgment action.

With respect to subsection (c), First Manhattan seeks a declaration that, if Sive were to sue for employment discrimination, such suit would be barred by the statute of limitations. This request, too, seeks an advisory opinion about a purely hypothetical dispute. Thus, the declaratory judgment cause of action is also dismissed.

This Court has considered the parties’ remaining arguments and finds them to be without merit or unnecessary to address given the findings above.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendant Alan H. Sive to dismiss the complaint is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that this constitutes the decision and order of the court.

1/7/2020

DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE