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. 151718/2019

DEREK DEFREITAS, LINDA DEFREITAS,

Plaintiff,

MOTION SEQ. NO. 001

- v -

NYP HOLDINGS, INC., D/B/A NEW YORK POST, JULIA MARSH, and CAROLINE SPIVACK,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 32, 33, 34, 35, 36

were read on this motion to/for DISMISS.

In this defamation action commenced by plaintiff Derek DeFreitas and his wife, plaintiff Linda Defreitas ("Linda")(collectively "plaintiffs"), defendants NYP Holdings, Inc. d/b/a New York Post ("the Post"), Julia Marsh ("Marsh"), in her personal and professional capacities, and Caroline Spivack ("Spivack"), in her personal and professional capacities, move, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the complaint, as well as for costs and attorneys' fees. Plaintiffs oppose the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff was a full-time registered nurse at Bellevue Hospital ("Bellevue") in Manhattan for thirty-seven years. Doc. 1. Beginning in the 1960s, Bellevue provided dormitory rooms for its nurses at the Brookdale Residence Hall ("Brookdale") at Hunter College ("Hunter") in Manhattan. Doc. 1. Plaintiff, who lived in Orange County, New York, north of New York City, paid rent to live in various dorm rooms at Hunter from 1980 until or about November 14, 2017. Doc. 1.

On or about August 31, 2017, Hunter notified plaintiff that it was terminating his month-to-month tenancy and that he had to vacate the premises. Doc. 13.

Plaintiff vacated his room in November of 2017 and, in December 2017, turned in his key and left a note for the dormitory manager. Doc. 1. Inexplicably, Hunter was not notified that plaintiff had vacated the room, and proceeded to commence an ejectment action against him in this Court under Index Number 151484/18 on February 16, 2018 ("the ejectment action"). Doc. 13. Plaintiff removed all of his belongings from the room before the commencement of the ejectment action. Doc. 1.

At or about the time of the commencement the ejectment action, a reporter for the Post contacted plaintiff to question him about his living arrangement at

Hunter. Doc. 1. Plaintiff advised the reporter that he had been permitted to maintain a nurse's residence at Brookdale and that he had vacated the dorm room several weeks earlier. Doc. 1.

On February 16, 2018, the Post published an article ("the 2/16/18 article"), written by Marsh and Spivack, stating, in its entirety, as follows:

> A 67-year-old man has been crashing in a Hunter College dorm room — among comely coeds — for nearly four decades, according to a new lawsuit by the university. Derek DeFreitas has a permanent residence in Orange County. Yet he's "maintained a dormitory room 'crash pad' at the Brookdale Residence Hall on East 25th Street and First Avenue" since 1980, a lawyer for Hunter says in the suit for his ouster. The 14-story brick building was once a part of the Bellevue School of Nursing, but Hunter — which is associated with The City University of New York — now controls the property. "DeFreitas refuses to leave his dormitory originally provided to him and others under a long-discontinued program dating to the 1960s that reserved a certain number of rooms for active Bellevue nurses," the suit says. DeFreitas has called Room 6104 a second home since he started working at Bellevue. He paid just $50 a month when he first moved in to the 100-square- foot space. Now his rent is $694. When Hunter sent DeFreitas, who is also an attorney, an eviction notice in August he claimed to have a "contractual right to stay in his dorm room indefinitely." He refused "to make way for students enrolled at Hunter College who are awaiting housing, thus depriving them of much-needed space," the suit says. Meanwhile, male and female undergraduates "are forced to share common areas and bathroom facilities with DeFreitas," the suit says. And he's also encouraged other nurses to stay put. But one of his colleagues, 61-year-old Clayton Barone, says dorm life is lonely for a sexagenarian. "One nurse had to leave and move to the Bronx. She was my best friend, I

> was really sad," Barone said, adding that he says hello to the students but they mostly keep to themselves. Hunter, which claims the right to terminate DeFreitas' month-to-month occupancy agreement with just 30 days notice, has been able to clear 21 of 30 nurses from the rooms. College officials are asking a judge to issue an order directing a city sheriff to "eject DeFreitas from the dorm room." But DeFreitas claims he moved out within the last few weeks and retired from his job. "Hunter made me feel terrible when I had to leave. I wouldn't have retired if I could have stayed," DeFreitas said. He said he kept the dorm room as a pied-a-terre because his commute home to upstate New York could take up to three hours. "I looked into what it would cost to rent an apartment and it would cost me $3,500 when I only paid a few hundred," he explained. Hunter's attorney, Eric D. Sherman, declined to comment.

Doc. 2; https://nypost.com/2018/02/16/hosoital-worker-kept-crash-pad-in-college-dorm-fordecades-suit/.

On the same day that the article was published, Spivack was allegedly in the dorm and was shown by the dorm superintendent that plaintiff's room had been emptied of all of its contents. Doc. 1.

On February 28, 2018, the Post published an article ("the 2/28/18 article") written by Marsh and another reporter about a student who refused to vacate her dorm room. Doc. 1. The very end of the article mentioned plaintiff stating, in pertinent part, that:

> The college wants to boot a total of nine nurses who were given rooms in various wings of the E. 25th Street building when it was

> owned by Bellevue Hospital. The resident nurses include 67-year-old Derek DeFreitas who kept a dormitory room "crash pad" at the address for decades.

Doc. 16; https://nypost.com/2018/02/28/college-dropout-refuses-to-leave-her-dormroom/utm_sourcemmail_sitebutton&utm_medium=site%20buttons&utm_campaign=site%.

Plaintiffs commenced the captioned action by filing a summons and verified complaint on February 15, 2019. Doc. 1. In their complaint, plaintiffs alleged that the 2/16/18 article was defamatory per se because it had a "devastating and irreparable effect on [plaintiff's] personal and professional reputation." They further alleged that the article was defamatory by implication since it suggested that plaintiff "was a sexual deviant, an illegal holdover tenant, and had acted (and was continuing to act) dishonestly and wrongfully, and for his own personal amusement and sexual gratification." Doc. 1 at pars. 69-70. The plaintiff sought monetary damages, a judgment declaring that the articles were defamatory, and demanded that this Court order the Post to retract the articles. Doc. 1. Further, Linda asserted a claim for loss of consortium. Doc. 1.

On April 26, 2019, plaintiffs amended their complaint to allege that the 2/28/18 article was also defamatory. Doc. 3. The amended complaint otherwise substantially reiterated the claims in the initial complaint. Doc. 3.

The Post, Marsh, and Spivack now move, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the complaint, as well as for costs and attorneys' fees. In support of the motion, defendants argue, inter alia, that the subject matter of the articles was protected by Civil Rights Law section 74, which permits reporting on court proceedings. Defendants further assert that, even if the content were not protected by Civil Rights Law section 74, the content of the articles was not defamatory per se. Additionally, argue defendants, any claim based on the 2/28/18 article is time-barred.

In opposition, plaintiffs argue that the motion must be denied because the articles are defamatory per se given that they impugned plaintiff's professional reputation. They further assert that Civil Rights Law section 74 is inapplicable herein and that the claim based on the 2/28/18 article is not time barred.

In reply, defendants argue that the articles are not defamatory, that any material in the articles is protected by Civil Rights Law section 74, that the claim arising from the 2/28/18 article is time barred, and that Linda's loss of consortium claim has no merit and must be dismissed.

LEGAL CONCLUSIONS:

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction." *Leon v Martinez*, 84 NY2d 83, 87 (1994). "[The

court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory." *id.* at 87-88. "[W]here . . . the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration." *Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 (1st Dept 1994).

> Defamation is the making of a false statement about a person that "tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him [or her] in the minds of right-thinking persons, and to deprive him [or her] of their friendly intercourse in society" (*Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 379 [1977], *cert denied* 434 US 969 [1977]). "The elements are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se" (*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]). A statement is defamatory on its face when it suggests improper performance of one's professional duties or unprofessional conduct (*Chiavarelli v Williams*, 256 AD2d 111, 113 [1st Dept 1998]).

Frechtman v Gutterman, 115 AD3d 102, 104-105 (1st Dept 2014).

Plaintiff's claim of libel per se must be dismissed since the 2/16/18 article does not state, or even suggest, that he improperly performed his professional

duties or engaged in unprofessional conduct. *See Cardali v Slater*, 167 AD3d 476 (1st Dept 2018). Although the 2/16/18 article referred to plaintiff as a sexagenarian and stated that "comely coeds" resided in the same dorm as he did, no reasonable reader would understand this language to suggest that plaintiff was, as he claims, "a sexual deviant, an illegal holdover tenant, and had acted (and was continuing to act) dishonestly and wrongfully, and for his own personal amusement and sexual gratification." Doc. 1 at pars. 69-70.

Plaintiff's alternative argument, that the 2/16/18 article was defamatory by implication, is also without merit. "Defamation by implication is premised not on direct statements but on false suggestions, impressions and implications arising from otherwise truthful statements." *Armstrong v Simon & Schuster*, 85 NY2d 373 at 380-381 (1995) (internal quotation marks omitted). "To survive a motion to dismiss a claim for defamation by implication where the factual statements at issue are substantially true, the plaintiff must make a rigorous showing that the language of the communication as a whole can be reasonably read to both impart a defamatory inference and to affirmatively suggest that the author intended or endorsed that inference." *Stepanov v. Dow Jones & Co., Inc.*, 120 A.D.3d 28, 37-38 (1st Dept 2014). The Appellate Division, First Department has held that "this rule strikes the appropriate balance between a plaintiff's right to recover in tort for statements that defame by implication and a defendant's First Amendment

protection for publishing substantially truthful statements (see *Armstrong*, 85 NY2d at 381)." *Stepanov v Dow Jones, & Co., Inc*., 120 AD3d at 38.

Plaintiff's claim for defamation by implication must be dismissed based on this standard given that none of the statements in the 2/16/18 article meet this rigorous test. "Whether particular words are defamatory presents a legal question to be resolved by the court in the first instance." *Stepanov v Dow Jones, & Co., Inc*., 120 AD3d at 37 (citation omitted). This Court finds that no reasonable reader would construe the language in the 2/16/18 article to mean that plaintiff "was a sexual deviant" who was using the dorm room "for his own personal amusement and sexual gratification." Doc. 1 at pars. 69-70. Nor does the 2/16/18 article imply dishonesty on the part of the plaintiff.

Plaintiff's claim regarding the 2/26/18 article is barred by the one-year statute of limitations for defamation. See CPLR 215(3). Further, the references to plaintiff in the 2/26/18 article do not relate back to the allegations in the initial complaint so as to circumvent the statute of limitations. In any event, the references to plaintiff in the 2/26/18 article are not defamatory.

Since plaintiff's defamation claim is dismissed, Linda's claim for loss of consortium must fail as a matter of law. Moreover, "[a] spouse of a defamed person does not have a cause of action for her own mental anguish and suffering."

See *Geddes v. Princess Properties International, Ltd.*, 88 AD2d 835 (1st Dept 1982).

The remaining contentions are without merit or need not be addressed given the findings above.

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

ORDERED that the motion to dismiss by defendants NYP Holdings, Inc. d/b/a New York Post, Julia Marsh, in her personal and professional capacities, and Caroline Spivack, in her personal and professional capacities, is granted to the extent of dismissing the complaint in its entirety against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that, within 20 days, counsel for the movants shall serve a copy of this order, with notice of entry, upon counsel for plaintiffs, as well as the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

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

4/27/2020
DATE

KATHRYN E. FREED, J.S.C.

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