

Guo Wengui v Strategic Visions US, LLC
2020 NY Slip Op 32072(U)
June 26, 2020
Supreme Court, New York County
Docket Number: 157538/2019
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTYPRESENT: HON. KATHRYN E. FREED

PART

IAS MOTION 2EFM

Justice

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INDEX NO.

157538/2019

GUO WENGUI,

Plaintiff,

- v -

MOTION SEQ. NO.

002 003 004
005 006STRATEGIC VISIONS US, LLC, J. MICHAEL WALLER,
FRENCH WALLOP, EDWARD GREIM, DOW JONES &
COMPANY, INC., ARUNA VISWANATHA, and KATE
O'KEEFE,DECISION + ORDER ON
MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26,
74, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 148, 150, 182, 191, 192, 193

were read on this motion to/for

DISMISSALThe following e-filed documents, listed by NYSCEF document number (Motion 003) 27, 28, 29, 30, 31,
32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 75, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122,
123, 151, 174, 175, 176, 177, 178, 179, 180, 181

were read on this motion to/for

DISMISSALThe following e-filed documents, listed by NYSCEF document number (Motion 004) 44, 45, 46, 76, 124,
125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 152, 184

were read on this motion to/for

DISMISSALThe following e-filed documents, listed by NYSCEF document number (Motion 005) 47, 48, 49, 50, 51,
52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 72, 136, 137, 138, 139, 140, 141, 142, 143,
144, 145, 146, 147, 153, 172, 173

were read on this motion to/for

DISMISSThe following e-filed documents, listed by NYSCEF document number (Motion 006) 156, 157, 158, 159,
160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 186, 187, 188, 189, 190, 197, 199, 200, 201

were read on this motion to/for

DISMISS

Motion sequence numbers 002, 003, 004, 005 and 006 are hereby consolidated for
disposition.

In this defamation action commenced by plaintiff Guo Wengui a/k/a Miles Kwok, defendant Strategic Vision US LLC (“SVUS”) moves (motion sequence 002) to dismiss the complaint pursuant to CPLR 3211(a)(1), (a)(7), and (a)(8); defendant French Wallop (“Wallop”) moves (motion sequence 003) to dismiss the complaint pursuant to CPLR 3211(a)(1), (a)(7), and (a)(8); defendant *pro se* J. Michael Waller (“Waller”) moves (motion sequence 004) to dismiss the complaint pursuant to CPLR 3211(a)(7); defendants Dow Jones & Company (“Dow”), Aruna Viswanatha (“Viswanatha”), and Kate O’Keefe (“O’Keefe”) (hereinafter collectively “the Dow defendants”) move (motion sequence 005) to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7); and defendant Edward Greim (“Greim”) moves (motion sequence 006) to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7). Plaintiff opposes the motions. After consideration of the parties’ arguments, as well as a review of the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff is a citizen of Hong Kong who allegedly fled to the United States due to political persecution and is now a New York resident seeking asylum in this country. Doc. 1 at pars. 16, 31. In his complaint, plaintiff alleged that he has attempted to expose corruption at the highest levels of the Communist Party of China (“CCP”) and in the government of the People’s Republic of China; was “the most outspoken and vitriolic critic of the [CCP]; and was “the most wanted Chinese political dissident [in] the world”. Doc. 1 at pars. 2, 28.¹ He further claimed that SVUS,

¹ Plaintiff further asserted that members of his family were imprisoned in China and that the CCP seized \$30 billion in cash and assets from them. Doc. 1 at pars. 29-30, 32. Further, he claimed that China has tried to extradite and discredit him. Doc. 1 at pars. 33-35. Plaintiff alleged that, in response to China’s campaign to discredit him, he successfully brought defamation actions against Xia Yeliang and Li Hongkuan in the United States District Court for the East District of Virginia (“the Xia litigation”) and the United States District Court for the District of Maryland (“the Li litigation”), respectively. Doc. 1 at pars. 36-39. In the Xia litigation, a jury found in plaintiff’s favor. Doc. 165. In the Li litigation, plaintiff obtained a default judgment against defendant, the default

a Nevada limited liability company with its principal place of business in Virginia, was a shell company for its owners, Wallop and Waller, “career con-artists” who claimed to have “global government connections” and an ability to provide “strategic” research about high-profile individuals despite the fact that they were actually charging “exorbitant sums” to perform “research” on Facebook. Doc. 1 at pars. 3, 17-18.

According to plaintiff, SVUS, through Wallop and Waller, fraudulently induced Eastern Profit Corporation Limited (“EPC”) to enter into a contract with it and that this is evidenced by an action pending in the United States District Court for the Southern District of New York (“SDNY”) styled *Eastern Profit Corporation Limited v Strategic Vision US, LLC*, Case No. 18-cv-2185 (“the EPC litigation”). Doc. 1 at par. 4. Specifically, asserted plaintiff, EPC sued SVUS for breach of contract and fraudulent misrepresentation because SVUS, which was allegedly hired to identify evidence of money laundering by the CCP and Chinese government officials, failed to fulfill its contractual obligations to EPC and had misrepresented that it had the ability to perform such work. Doc. 1 at par. 6; Doc. 52.

Although SVUS filed a counterclaim against plaintiff in the EPC litigation in 2018, said counterclaim was dismissed without prejudice in May 2019. Doc. 1 at pars. 6; Doc. 54.

Plaintiff claimed that SVUS thereafter “vindictively took to social media” in order to “harm [plaintiff’s] reputation as much as humanly possible.” Doc. 1 at par. 7. According to plaintiff, Waller, a resident of the District of Columbia, and Wallop, a resident of Virginia, used their social media platforms to call him a “fraud”, “abuser” of the United States legal system, “sadist”, “phony”, “thug”, “liar”, “propagandist”, and “spy” for the CCP. Doc. 1 at par. 8.

was then vacated, and the case was ultimately dismissed for lack of subject matter jurisdiction. Doc. 179. Plaintiff admitted in the Xia and Li litigation that he had nearly 500,000 Twitter followers. Docs. 29-30.

Plaintiff alleged that one of his colleagues introduced him to Wallop because he (the colleague) thought that Wallop would be able to assist plaintiff with public relations services. Doc. 1 at par. 40. Wallop told plaintiff that she and her partner, Waller, had significant connections to the government of the United States and other countries and that they could provide evidence of money laundering by high level officials of the CCP and Chinese government. Doc. 1 at pars. 42-45. Ultimately, plaintiff did not retain Wallop and Waller but rather retained SVUS to investigate money laundering by the CCP and Chinese government. Doc. 1 at par. 47.²

Plaintiff alleged in the complaint that Waller and Wallop engaged with CCP agents to attack him on Twitter. Specifically, alleged plaintiff, on June 7 and 12, 2019, respectively, Waller posted on his Twitter account that “Guo is a fraud” and that he is “untruthful.” Doc. 1 at pars. 55, 64; Doc. 77 at par. 67. On June 7, 2019 Waller allegedly stated that plaintiff insisted that SVUS break the law and then sued the company when it would not do so. Doc. 1 at par. 67; Doc. 77 at par. 79. On June 28, 2019, Waller allegedly accused plaintiff of witness intimidation in the Xia litigation. Doc. 1 at par. 58; Doc. 77 at pars. 70-71. That same day, Waller allegedly tweeted that one of plaintiff’s bodyguards “chased a 70 year-old woman into the street outside the federal courthouse because she was taking pictures of [plaintiff’s] car.” Doc. 77 at pars. 74-75.

On June 19, 2019, SVUS filed an amended answer and counterclaim, sounding in breach of contract and fraudulent misrepresentation, against plaintiff in the EPC litigation. Doc. 1 at pars. 70-71; Doc. 35; Doc. 56 at 46-53; Doc. 77 at pars. 83-98; Doc. 106.³ The amended counterclaim for fraud was based on certain misrepresentations plaintiff allegedly made “on behalf of and for the benefit of [EPC]”, including that he was a “Chinese dissident”, “opposed the [CCP]”, and

² This seemingly contradicts plaintiff’s claim that SVUS was merely a shell company for Wallop and Waller.

³ Although the amended counterclaims were asserted by SVUS, plaintiff claims that Wallop and Waller participated in drafting and approving them. Doc. 77 at par. 87.

sought to work with SVUS “to weaken the Chinese regime” and “advance . . . the interests of the United States.” Doc. 56 at 51. SVUS further alleged that plaintiff’s conduct was fraudulent because his true intention in entering into a contract with SVUS was “to bolster his position within the [CCP] and ingratiate himself with [China’s President and leader of the CCP] Xi Jinping.” Doc. 56 at 35-46.

Plaintiff alleged that the amended counterclaim falsely accused him of being a “spy” for China. Doc. 77 at par. 139. SVUS alleged in its amended counterclaim that plaintiff was “not the dissident he claimed to be” but rather that he was a “dissident-hunter, propagandist, and agent in the service of [China] and [the CCP].” Doc. 56 at 35. Although SVUS alleged in the amended counterclaim that plaintiff was a representative of EPC, as well as that he “controls and directs” EPC, plaintiff alleged that the amended counterclaim was completely irrelevant to the contract claims in dispute in the EPC litigation. Doc. 77 at par. 8; Doc. 56 at 5, 20.

On July 22, 2019, The Wall Street Journal (“the WSJ”), a publication owned by Dow, published an article about the allegations in the counterclaim, written by defendants Viswanatha and O’Keefe, entitled “Chinese Tycoon Holed Up In Manhattan Hotel Is Accused of Spying for Beijing” (“the WSJ article”). Doc. 1 at pars. 12, 91-92; Doc. 60; Doc. 77 at par. 15. The WSJ article also stated that “[SVUS], in a commercial dispute [the EPC litigation] with [plaintiff], alleged . . . that he is a spy for the Chinese government.” Doc. 1 at par. 98; Doc. 60; Doc. 77 at par. 153. The WSJ article further reported that plaintiff’s attorney adamantly denied this allegation, stating that “[SVUS]’ claims that [plaintiff] is a Beijing-backed spy utterly lack credibility.” Doc. 60. Additionally, the WSJ article contained plaintiff’s claim that SVUS was “abusing litigation privilege to slander [him].” Doc. 60. SVUS’ attorney, Greim, was quoted in the WSJ article as saying that “[o]ur goal is not only to hold [plaintiff] and his network accountable,

but also protect supporters of a free China from further injury.” Doc. 1 at pars. 13, 60, 87; Doc. 77 at par. 16.

Plaintiff claimed that, on July 21, 2019, the day before publication, a representative of his issued a statement to the WSJ stating, inter alia, that the allegations against him were false. Doc. 1 at pars. 93-94; Doc. 77 at par. 150. In the statement, plaintiff’s representative referred to the results in the Xia and Li litigations in an attempt to prove the falsity of the allegedly defamatory allegations. Doc. 1 at par. 95; Doc. 77 at 150. Plaintiff claimed that Dow, a Delaware corporation with its principal place of business in New York City, “compounded the harm to [his] reputation by republishing nearly all of the false and defamatory statements” made by SVUS, Waller, and Wallop, despite the fact that plaintiff “provided specific information on why [their] claims were false.” Doc. 1 at par. 14.⁴

On July 22, 2019, after the publication of the WSJ article, plaintiff’s representative called the editor responsible for the same, who admitted that he had not even read plaintiff’s full statement before the piece was published. Doc. 1 at par. 101; Doc. 77 at par. 155.

On July 23, 2019, Greim allegedly implied that plaintiff was involved in espionage for China, telling the Miami Herald that “[The evidence] showed that [plaintiff] was detained in China on the date he claims to have arrived in the U.S. in early 2015, that he sent hundreds of millions of dollars back and forth between China and the U.S. for years after Chinese authorities supposedly started seizing his assets, and that he’s used scores of lawsuits to engage in seemingly sham disputes against Chinese regime-connected entities.” Doc. 1 at pars. 88-89; Doc. 77 at par. 118.

On July 24, 2019, SVUS, Wallop, and Waller allegedly published the declaratory statements from their counterclaim on Waller’s website, www.jmichaelwaller.com, saying, inter

⁴ Plaintiff has also sued other media outlets which reported on the counterclaim. Doc. 48 at 7, n. 3.

alia, that plaintiff was a “[d]issident-hunter, propagandist, and agent in the service of the . . . [CCP].” Doc. 1 at par. 74. Plaintiff claimed that SVUS, Waller, Wallop and Greim were all aware of the falsity of the statement at the time of publication. Doc. 1 at pars. 75-85.

Plaintiff commenced the captioned action by filing a summons and complaint on August 1, 2019. Doc. 1. In the complaint, plaintiff alleged defamation per se. Doc. 1 at pars. 106-109. Specifically, plaintiff claimed that defendants’ statements that he was engaged in espionage for the Chinese government, as well as fraud and money laundering, were false; that defendants knew the statements were false at the time they were made or were recklessly indifferent to the falsity of the statements; that the statements were made with the intention of damaging plaintiff and that, as a result of the statements, plaintiff’s business interests, as well as his application for asylum in the United States, have been undermined. Doc. 1 at pars. 106-109.

After the complaint was filed, Greim moved, pursuant to CPLR 3211 (motion sequence 001), to dismiss the complaint. Doc. 5. Greim withdrew his motion to dismiss on March 2, 2020. Doc. 155.

On October 25, 2019, SVUS moved (motion sequence 002) to dismiss the complaint pursuant to CPLR 3211(a)(1), (a)(7), and (a)(8). Doc. 22. The same day, Wallop also moved to dismiss the complaint pursuant to CPLR 3211(a)(1), (a)(7), and (a)(8) (motion sequence 003) (Doc. 27); Waller moved to dismiss the complaint pursuant to CPLR 3211(a)(7) (motion sequence 004) (Doc. 44); and the Dow defendants moved to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7) (motion sequence 005) (Doc. 47).

Plaintiff amended the complaint on January 13, 2020 (Doc. 77). In the amended complaint, plaintiff alleged that SVUS, Greim, Waller and Wallop all participated in the drafting, review, and approval of the defamatory statements about plaintiff in the counterclaim, as well as

the defamatory assertions made by the parties in the press and on the internet. Doc. 77 at pars. 10, 33; Doc. 100 at 9. Although the amended complaint superseded the original complaint (*see Morrow v. MetLife Investors Insurance Co.*, 177 A.D.3d 128 [1st Dept 2019]), the movants in motion sequence numbers 002-005 opted to apply their motions to dismiss to the amended pleading. *See Sage Realty Corp. v Proskauer Rose LLP*, 251 AD2d 35 (1st Dept 1998).

Greim subsequently filed a motion to dismiss the amended complaint pursuant to CPLR 3211(a)(1) and (a)(7) (motion sequence 006) on March 4, 2020. Doc. 156.

THE PARTIES' CONTENTIONS AND LEGAL CONCLUSIONS:

SVUS' Motion To Dismiss (Motion Sequence 002)

In an affidavit in support of the motion, Wallop states that she is CEO and sole member and employee of SVUS. Doc. 25. Thus, asserts SVUS, it cannot be held liable for the statements by Waller or any other defendant. Doc. 26. SVUS also argues that plaintiff's allegations based on its amended counterclaim must be dismissed based on the litigation and fair reporting privileges. Doc. 26. Additionally, argues SVUS, plaintiff fails to adequately plead actual malice. Doc. 26. SVUS also maintains that the complaint must be dismissed based on a lack of personal jurisdiction. Doc. 26.

In opposition to the motion, plaintiff argues that that the amended complaint sufficiently alleges that SVUS is jointly responsible for the statements of its codefendants since all of the defendants coordinated and approved the dissemination of each other's false statements. Doc. 100 at 9-11. He further asserts that the litigation privilege does not apply herein since the allegations in the counterclaim, i.e., that plaintiff is a dissident hunter rather than a dissident, are unrelated to the allegedly defamatory statements. Plaintiff also claims that the litigation privilege does not

apply where, as here, a claim is brought maliciously and for the sole purpose of defaming plaintiff. Doc. 77 at pars. 83-86. Additionally, plaintiff maintains that the amended complaint sufficiently alleges actual malice, that he has no obligation to submit evidentiary facts in support of his allegation of actual malice, and that discovery is needed to determine whether SVUS, Waller and Wallop acted with such malice. In any event, contends plaintiff, said defendants acted with actual malice since they were aware that the courts in the Xia and Li actions found such assertions to be defamatory.

Plaintiff further asserts that SVUS' jurisdictional arguments are without merit since Waller and Wallop, on their own and with SVUS, met in New York City several times to negotiate the contract with ECP. Doc. 100.

In reply, SVUS argues that the statements in the amended counterclaim are protected by the litigation privilege since they were made during the course of, and were relevant to, the EPC litigation, wherein both parties thereto asserted fraud claims, and the statements were not asserted solely for the purpose of defaming plaintiff. Doc. 182. Specifically, urges SVUS, it alleged in its amended counterclaim that plaintiff fraudulently misrepresented his status as a dissident to induce SVUS to enter into the contract. Indeed, argues SVUS, the SDNY noted that EPC admitted that plaintiff acted as its agent, denied EPC's motion to strike the amended counterclaim on the ground that it contained irrelevant allegations about plaintiff, and ordered that discovery be conducted on the counterclaim. Docs. 176 at 3; 177-178. SVUS further asserts that the statements about the amended counterclaim are substantially accurate and thus privileged as a matter of law.

Additionally, SVUS argues that plaintiff has failed to adequately plead actual malice since the statements in the Xia and Li litigation are not identical to those herein. Specifically, in the Xia litigation, plaintiff was called, inter alia, a murderer, a swindler, a forgerer, an adulterer, a

kidnapper, and a racist, and was accused of committing “crimes against civilization and humanity.” Doc. 29. In the Li litigation, plaintiff was accused of incest and murder for hire, and was called a rapist, schizophrenic, a gangster, and a “communist spy puppy”. Doc. 30. Thus, argues SVUS, the outcomes of the Xia and Li litigations do not establish that it knew that its statements that plaintiff was not a dissident and was not an agent of the CCP were false. Since plaintiff failed to plead actual malice with convincing clarity, SVUS maintains that the complaint must be dismissed.

Additionally, argues SVUS, it cannot be held liable for statements by Greim or Waller. Even assuming that such statements could be deemed attributable to it, SVUS maintains that the statements are not defamatory.

Finally, SVUS claims that it is not subject to personal jurisdiction in New York.

Where, as here, a plaintiff sues a public figure for defamation, he or she has the burden of establishing actual malice by clear and convincing evidence. *See Freeman v Johnston*, 84 N.Y.2d 52, 56 (1994), *cert denied* 513 U.S. 1016 (1994); *see also New York Times Co. v Sullivan*, 376 U.S. 254, 279-280 (1964). The actual malice standard is also applied to “limited public figures,” or those persons who have voluntarily inserted themselves, or who are drawn into, a public controversy and thus become public figures in connection with a limited range of issues. *See Gertz v Robert Welch, Inc.*, 418 U.S. 323, 351 (1974). Here, it is undisputed that plaintiff falls into the category of a limited public figure, given his involvement in politics and his significant following on the internet. Thus, he must establish actual malice, and his amended complaint in this defamation action must be dismissed if he fails to do so. *See Jimenez v United Federation of Teachers*, 239 AD2d 265, 266 (1st Dept 1997).

A statement is made with actual malice when it is published “with knowledge that it was false or with reckless disregard of whether it was false or not.” *New York Times Co. v Sullivan*,

376 U.S. at 280; *see also Prozeralik v Capital Cities Communications*, 82 N.Y.2d 466, 474 (1993). Reckless disregard has been defined as a high degree of probable falsity. *See Gertz v Robert Welch, Inc.*, 418 U.S. 323, 332 (1974).

Here, the crux of plaintiff's argument is that SVUS knew, or should have been aware from the Xia and Li litigations that the statements made about him were false. However, as SVUS notes, the statements which were the subject of those defamation actions, set forth above, were far different from the allegation herein that plaintiff lied about being a dissident, and thus do not bear on the truth of the allegedly defamatory statements. Further, as SVUS notes, the complaint in Li was dismissed and is hardly the basis for SVUS to have known of the falsity of the allegations in the amended counterclaim. Moreover, SVUS could not have known of the falsity of the said allegations based on the verdict in Xia, which was based on completely different statements. Therefore, plaintiff has failed to establish actual malice with "convincing clarity." *Jimenez v United Federation of Teachers*, 239 AD2d at 266 (1st Dept 1997) citing *Freeman v Johnston*, 84 NY2d at 56.

This Court further determines that the allegedly defamatory material contained in the amended counterclaim is protected by the litigation privilege. This rule, which is designed to encourage parties to communicate freely during the course of judicial proceedings, deems absolutely privileged all statements made during the course of a litigation so long as such statements are material and pertinent to the litigation. *See Front, Inc. v Khalil*, 24 NY3d 713, 718 (2015); *Frechtman v Gutterman*, 115 AD3d 102, 107 (1st Dept 2014).

In determining whether the allegedly defamatory statements are pertinent to the judicial proceeding, they should be liberally construed. "It is enough if the offending statement may possibly bear on the issues in litigation * * * 'strict legal materiality or relevancy is not required to confer the privilege. There is difficulty in determining in some cases what is relevant or pertinent, and in deciding the

question the courts are liberal, and the privilege embraces anything that may possibly be pertinent or which has enough appearance of connection with the case so that a reasonable man might think it relevant. All doubt should be resolved in favor of its relevancy or pertinency, and for the purposes of relevancy the court will assume the alleged [defamatory] charges to be true, however false they may have been in fact." (*Seltzer v Fields*, 20 AD2d 60, 62-63, *affd* 14 NY2d 624.)

Baratta v Hubbard, 136 AD2d 467, 468-469 (1st Dept 1988).

The Appellate Division, First Department has also held that, to be pertinent to the litigation, "the barest rationality, divorced from any palpable or pragmatic degree of probability, suffices." *Pomerance v McTiernan*, 51 A.D.3d 526, 528 (1st Dept 2008), quoting *Sexter & Warmflash, P.C. v Margrave*, 38 AD3d 163, 173 (1st Dept 2007).

Applying this extremely liberal standard, this Court finds that the allegedly defamatory statements made by SVUS in the amended counterclaim are material and pertinent to the EPC litigation. Although plaintiff is not a party to the EPC litigation, SVUS' counterclaim alleges that he "is the actual person who controls and directs [EPC]" and the counterclaims SVUS asserted against EPC are based on plaintiff's conduct. Specifically, the counterclaim for breach of contract is based on actions EPC took through plaintiff and its fraudulent misrepresentation claim asserts that plaintiff "made misrepresentations of fact to [SVUS]" and that such misrepresentations were "made behalf of and for the benefit of [EPC]." As SVUS points out, it is of particular significance that, in the EPC litigation, the SDNY determined that EPC admitted that plaintiff acted as its agent, denied EPC's motion to strike the amended counterclaim on the ground that it contained irrelevant allegations about plaintiff, and ordered that discovery be conducted in connection with the

amended counterclaim. Docs. 176 at 3; 177-178. Therefore, plaintiff's claims against SVUS must be dismissed.⁵

Wallop's Motion to Dismiss (Motion Sequence 003)

In support of her motion Wallop argues, inter alia, that plaintiff's claims against her must be dismissed since he fails to allege that she made any defamatory remarks about him. Doc. 43. She further asserts that the complaint must be dismissed because plaintiff, a limited public figure, failed to prove actual malice. Id. In addition, she claims that this Court lacks personal jurisdiction over her because she was served while in New York to testify at a deposition in the EPC litigation and that there is no long-arm jurisdiction over her because her business transactions in New York are not substantially related to the defamation claim. Id.

In opposition to the motion, plaintiff argues that the amended complaint sets forth the specific defamatory language used by Wallop, i.e., that plaintiff is not the dissident he claims to be, but rather an agent of the CCP who is a dissident hunter. Doc. 112. Plaintiff further asserts that, as sole owner of SVUS, Wallop is liable for the defamatory comments made by the company. Doc. 112. Alternatively, plaintiff asserts that, even if Wallop is not liable for the defamatory statements in the counterclaim based on her role at SVUS, she is nevertheless liable based on her participation in drafting and approving the defamatory statements. Doc. 112. Similarly, plaintiff maintains that Wallop is liable for the statements made by Greim and Waller since she participated in their creation and approved their publication. Doc. 112.

⁵ The irony of plaintiff's reference to Wallop and Waller as "career con-artists" while simultaneously asserting that SVUS is not protected by the litigation privilege because of the defamatory remarks by those individuals is not lost on this Court.

Plaintiff further asserts that, since the amended complaint adequately pleads actual malice, SVUS' motion must be denied. In making this argument, he again relies on the fact that he prevailed in the Xia and Li litigation. Doc. 112. Additionally, plaintiff claims that he has properly pleaded actual malice by asserting that SVUS, Wallop and Waller filed their counterclaim in retaliation for the commencement of the EPC litigation. He also claims that the motion must be denied since discovery is needed to establish SVUS' motive for making the defamatory comments.

In addition, plaintiff argues that the litigation privilege is inapplicable herein since the allegedly defamatory comments are not "material and pertinent" to the issues in the EPC litigation and the counterclaim was brought maliciously and solely for the purpose of later defaming him. Doc. 112. Similarly, he maintains that Civil Rights Law § 74 is inapplicable herein given the malicious nature of the counterclaim.

Finally, plaintiff claims that he has stated a claim for defamation per se since defendants accused him of serious crimes.

In reply, Wallop argues that, since the allegedly defamatory statements in the amended counterclaim are at least marginally relevant to the EPC litigation, they are protected by the litigation privilege. Doc. 174. She further asserts that, although she is not alleged to have made any statements made about the EPC litigation, any such comments would have been protected by the fair reporting privilege. Additionally, Wallop maintains that, even if plaintiff had alleged that she made any defamatory remarks, which he did not, plaintiff has failed to impute any libel to her since he inadequately pleaded the actual malice claim. She also argues that she is not liable for any comments made by Waller on Twitter and that, in any event, such comments are not actionable. Wallop further posits that the complaint must be dismissed as against her because plaintiff failed to plead defamation per se or special damages. She also argues that there is no

personal jurisdiction over her since she was served with process while attending a deposition in the EPC litigation in New York and that her contacts with the state do not constitute a basis for long-arm jurisdiction over her.

For the reasons stated in connection with SVUS' motion to dismiss, the complaint against Wallop must be dismissed given plaintiff's failure to adequately plead actual malice. Additionally, as Wallop asserts, the amended complaint does not allege that she made any defamatory statement. Further, any attempt to hold Wallop vicariously liable for allegedly defamatory statements by Waller must fail given that plaintiff did not adequately plead a defamation claim. *See Rosenberg v Home Box Office, Inc.*, 2006 NY Slip Op 30358(U) (Sup Ct New York County 2006).

Waller's Motion To Dismiss (Motion Sequence 004)

Waller argues that the claims against him must be dismissed for failure to state a claim since they do not set forth the time, place or manner of the alleged defamatory statements. Doc. 44. He also asserts that plaintiff failed to plead actual malice. *Id.* In addition, plaintiff maintains that, for the same reasons set forth by Wallop, there is no personal jurisdiction over him. *Id.* He further asserts that the statements he made about the EPC litigation are protected by the fair report privilege set forth in Civil Rights Law § 74. *Id.*

In opposition to the motion, plaintiff claims that the amended complaint states a claim against Waller since the latter falsely stated that plaintiff lied about his status as a political dissident, thereby harming his reputation. Doc. 124. Plaintiff further claims that Waller's statements are defamatory because they accuse him of serious crimes. Additionally, plaintiff argues, for the reasons set forth above, that he has adequately pleaded actual malice in the amended complaint. Plaintiff further asserts that, because Waller published statements on the internet, they

are not protected by the litigation privilege. Additionally, plaintiff maintains that the statements maliciously published by Waller are not protected by Civil Rights Law § 74 since Waller used the lawsuit to defame him.

Plaintiff also argues that Waller's statements are defamatory since they accuse him of lying about being a victim of the Chinese government and accuse him of acts which, if committed, constitute serious crimes.

In addition, plaintiff claims that, since Waller was served in New York, there is personal jurisdiction over him. He also asserts that there is specific jurisdiction over plaintiff since the defamatory statements arose from the contract negotiated in New York between SVUS and EPC.

In reply, Waller argues that his statements are not defamatory and/or are privileged for the reasons set forth in his initial papers and the papers of his codefendants. Doc. 184. Specifically, he asserts that the posts on his personal website are protected by the fair report privilege. He also maintains that his tweets are either protected by the fair report privilege, constitute his opinion, or do not pertain to plaintiff.

For the reasons set forth above, the claims against Waller must also be dismissed due to plaintiff's failure to sufficiently plead that he acted with actual malice.

Dow Defendants' Motion To Dismiss (Motion Sequence 005)

The Dow defendants argue that plaintiff's claim fails because their reporting fairly and accurately summarizes SVUS' counterclaim and is therefore protected by the absolute privilege for news reports about judicial proceedings codified in New York Civil Rights Law § 74. Additionally, argue the Dow defendants, since plaintiff is an outspoken public figure on matters involving China, he must plead and prove that the WSJ article was published with actual malice,

meaning that they had knowledge of its falsity or had serious doubts about its truth, and that he failed to do so.

In opposition to the motion, plaintiff argues that the statements by Dow, Viswanatha, and O’Keefe are not privileged pursuant to Civil Rights Law § 74 since that section only protects a “fair and true” report of a legal proceeding. Doc. 136. In support of this contention, plaintiff states that said defendants “focus[] heavily on allegations made in [SVUS]’ counterclaim that [plaintiff] is not a dissident, and instead is in fact an agent of the [CCP]” and that plaintiff was accused of being a “spy”. Doc. 136 at 8. Plaintiff further asserts that he has adequately alleged actual malice since, as set forth above, they knew, as a result of the Xia and Li litigation, that similar claims against plaintiff were found to be defamatory and that they willfully avoided this fact.

In reply, Dow, Viswanatha and O’Keefe argue that they are clearly protected by the fair reporting privilege set forth in Civil Rights Law § 74 since the WSJ article was a “fair and true report” about the amended counterclaim, which essentially asserted that plaintiff made certain misrepresentations to conceal the fact that he was an agent of China and the CCP. Doc. 172. Indeed, as said defendants assert, plaintiff admits in the amended complaint that the WSJ’s “[a]rticle republished in summary and quotation form the bulk of the [amended] [c]ounterclaim’s false and sensational allegations.” Doc. 172. Although plaintiff claims that the WSJ article is not protected by privilege because it referred to him as a “spy”, whereas the amended counterclaim itself did not use that word, Dow, Viswanatha and O’Keefe respond that plaintiff’s own attorney undermined this argument by issuing an official statement specifically stating that the amended counterclaim accused plaintiff of being a “spy.” Doc. 87. Said defendants further assert that plaintiff’s claim that the fair reporting privilege does not apply because they did not mention the Xia and Li litigation is without merit.

Additionally, Dow, Viswanatha and O’Keefe argue that the amended complaint fails to adequately plead actual malice. In this regard, said defendants claim that whether they knew the allegations in the counterclaim were false is irrelevant to the issue of actual malice since their reporting on the counterclaim was accurate. Doc. 172. They further assert that, although plaintiff claims that his official statement was issued so that the WSJ “could confirm [the outcomes in the Xia and Li litigation]”, any failure to investigate by the WSJ, Viswanatha or O’Keefe is not evidence of actual malice. Although plaintiff insists that the editor of the statement did not read it before the WSJ article was published, said defendants claim that this is irrelevant since it does not prove that they knew that the information in the WSJ article was false or that they had serious doubts about its truth.

Civil Rights Law § 74 proves, in pertinent part, that:

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.

Where reporting on a judicial proceeding is “fair and true,” it is absolutely privileged pursuant to section 74 so long as “the substance of the article [is] substantially accurate.” *Holy Spirit Ass’n for Unification of World Christianity v. N.Y. Times Co.*, 49 N.Y.2d 63, 67 (1979). The statute is to be liberally applied “so as to provide broad protection to news accounts of judicial . . . proceedings.” *Becher v. Troy Publ’g Co.*, 183 A.D.2d 230, 233 (3d Dep’t 1992). Whether a publication is protected by the privilege is a question of law to be decided by the Court. *See, Holy Spirit Ass’n for Unification of World Christianity v. N.Y. Times Co.*, 49 N.Y.2d at 67-68.

The Dow defendants correctly assert that the claims against them must be dismissed given plaintiff's concession that "the [WSJ article] republished in summary and quotation form the bulk of the [amended counterclaim's] false and sensational allegations" Doc. 77 at par. 151. This concession defeats plaintiff's claim against them since "[c]omments that essentially summarize or restate the allegations of a pleading filed in an action are the type of statements that fall within section 74's privilege." (citation omitted). *Lacher v Engel*, 33 AD3d 10, 17 (1st Dept 2006).

The Dow defendants are also correct in asserting that the claims against them must be dismissed because even a cursory comparison between the allegations in the amended counterclaim and the contents of the WSJ article reflects that the WSJ article sets forth a "fair and true" summary of the EPC litigation. See *Aboutaam v Dow Jones & Co.*, 180 AD3d 573 (1st Dept 2020). Importantly, for example, the Dow defendants did not state that plaintiff *was* a spy, but merely reported that the amended counterclaim contained that allegation. Therefore, the complaint must be dismissed as against them.

Greim's Motion To Dismiss (Motion Sequence 006)

Greim argues that the claims against him must be dismissed because the statements made in the amended counterclaim are absolutely privileged as being relevant to the EPC litigation. Doc. 158. He maintains that the descriptions of plaintiff as a "dissident hunter" and "never a dissident" and as an "agent in the service of the People's Republic of China and the [CCP]" are relevant to the EPC litigation since they support the fraudulent misrepresentation claim asserted by SVUS against EPC.

Greim also asserts that the claims against him must be dismissed since plaintiff fails to state a claim of defamation per se and, since plaintiff has not done so, he was required to plead

special damages, which he has failed to do. Further, Greim argues that his comments to the WSJ and Miami Herald were privileged pursuant to Civil Rights Law § 74 and, in any event, were not otherwise defamatory. Additionally, Greim asserts that he cannot be liable for any tweets or website postings made by Waller, since he had no control over the latter. Finally, Greim asserts that the amended complaint must be dismissed since it fails to adequately plead actual malice.

In opposition to the motion, plaintiff argues that the defamatory statements contained in the amended counterclaim are not protected by the litigation privilege because they are not relevant to the EPC litigation and because the counterclaim was filed maliciously and solely for the purpose of later defaming plaintiff. Doc. 190. He further asserts that the amended complaint sufficiently alleges a claim of libel per se because accusing him of lying about his victim status subjects him to public contempt, ridicule, and/or disgrace and, thus, there is no need for him to plead special damages. Additionally, he asserts that the allegations against him are defamatory per se since they accuse him of committing serious crimes including acting as a spy for China while simultaneously misrepresenting to the U.S. government that he is seeking asylum based on his dissident status.

Plaintiff further argues that Greim's statements to the WSJ and Miami Herald are defamatory and not protected by the fair reporting privilege set forth in Civil Rights Law § 74. Specifically, he claims that Greim maliciously commenced the counterclaim asserting false charges and now seeks to escape liability by invoking the said statute. He also maintains that Greim's statements to the press were not fair and true reports of a judicial proceeding and suggested far worse conduct by plaintiff than alleged in the amended counterclaim.

Additionally, plaintiff insists that he has adequately pleaded that Greim, along with SVUS, Waller, and Wallop, coordinated and jointly approved the dissemination of defamatory statements.

Finally, plaintiff argues, for the reasons set forth above, i.e., that defendants knew about the results of the Xia and Li litigation, that he adequately pleaded actual malice.

In reply, Greim argues that the allegedly false allegations in the amended counterclaim are protected by the litigation privilege. Doc. 201. He further asserts that the statements he gave to the WSJ and Miami Herald are protected by Civil Rights Law § 74 because they are fair and true reports of the EPC litigation. Greim further insists that he did not maliciously assert the amended counterclaim in order to circulate a press release based on the allegations therein.

Greim also insists that the complaint must be dismissed because plaintiff has failed to adequately plead actual malice, i.e. that he failed to set forth allegations that he was aware, or should have been aware, of the alleged falsity of the allegedly defamatory statements. In this vein, Greim specifies that plaintiff's claims that the allegations in the counterclaim are not relevant in substance to the breach of contract claimed by plaintiff, and that such claims were also in any event irrelevant because plaintiff was not a party to the ECP litigation, and that Greim was on notice of the falsity of the statements as a result of the Xia and Li litigation, are without merit.

In addition, Greim asserts that he is not liable for any tweets made by Waller in June, 2019, emphasizing that there is no allegation that he had any control over Waller or that he asked Waller to make the statements.

The claims against Greim must be dismissed. Initially, plaintiff failed to sufficiently plead actual malice. Although plaintiff claims that Greim knew he was making false statements, or acted with reckless disregard to the falsity of such statements, he (plaintiff) again relies on the Xia and Li litigation to establish such actual malice. However, as discussed above, such argument is without merit.

Additionally, for the reasons set forth above, the allegedly defamatory statements made by Greim in the amended counterclaim are protected by the litigation privilege.

Greim is also correct that the statements he gave to the WSJ and Miami Herald are protected by Civil Rights Law § 74 since they are fair and true reports of the EPC litigation. Tellingly, asserts Greim, plaintiff admits in his opposition to Greim's motion that his (Greim's) statements to the WSJ and Miami Herald "clearly recount the defamatory statements in the [amended] [c]ounterclaim." Doc. 190 at 23. Thus, any such statements are not defamatory. *See Lacher v Engel*, 33 AD3d at 17 (1st Dept 2006).

In response to plaintiff's claim that Greim maliciously asserted a counterclaim against him so that he (Greim) could then circulate a press release or other communication based on the defamatory allegations, Greim correctly asserts that there is no allegation in the amended complaint that he "ran to the press." On the contrary, asserts Greim, the WSJ had reported about plaintiff on four previous occasions since 2017 and was merely continuing its coverage, and the Miami Herald reached out to him for a comment about the litigation.

Finally, Greim correctly asserts that he is not liable for any postings by Waller since he had no control over the latter. *See Hoffman v Landers*, 146 AD2d 744 (2d Dept 1989). Thus the complaint, insofar as asserted against Greim, must be dismissed.

The remainder of the parties' contentions are either without merit or need not be addressed given the findings above.

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

ORDERED that the motion of defendant Strategic Vision US LLC to dismiss the complaint herein (motion sequence 002) 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 the motion of defendant French Wallop to dismiss the complaint herein (motion sequence 003) 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 the motion of defendant J. Michael Waller to dismiss the complaint herein (motion sequence 004) 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 the motion of defendant defendants Dow Jones & Company, Aruna Viswanatha, and Kate O'Keefe to dismiss the complaint herein (motion sequence 005) 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 the motion of defendant Edward Greim to dismiss the complaint herein (motion sequence 006) 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 counsel for the moving party shall serve a copy of this order, with notice of entry, upon plaintiff, as well as on the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the dismissal; 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.

6/26/2020

DATE

CHECK ONE:

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CASE DISPOSED

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GRANTED

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DENIED

APPLICATION:

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SETTLE ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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NON-FINAL DISPOSITION

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GRANTED IN PART

☐

OTHER

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SUBMIT ORDER

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FIDUCIARY APPOINTMENT

☐

REFERENCE

20200620151805KFBED03E96F2C89FF246D2848C61D5768BB56D

KATHRYN E. FREED, J.S.C.