Straka v Lesbian Gay Bisexual & Transgender Community Ctr., Inc.
2020 NY Slip Op 32116(U)
July 1, 2020
Supreme Court, New York County
Docket Number: 155961/2019
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. 155961/2019

BRANDON STRAKA, #WALKAWAY CAMPAIGN, LLC, MICHAEL BERNSTEIN, BLAIRE WHITE,

Plaintiff,

- v -

MOTION SEQ. NO. 001 002 002

THE LESBIAN GAY BISEXUAL & TRANSGENDER COMMUNITY CENTER, INC., GLENNDA TESTONE, GABRIEL FAROFALDANE, JASON ROSENBERG, GORDON BEEFERMAN

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 43, 49, 50, 51, 52, 65, 67, 68

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 44, 45, 46, 47, 48, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 66

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 44, 45, 46, 47, 48, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 66

were read on this motion to/for DISMISSAL.

In this defamation action, co-defendants Glennda Testone (Testone), Gabriel Farofaldane (Farofaldane) and the Lesbian Gay Bisexual & Transgender Community Center, Inc. (LGBTCC; together, the LGBTCC defendants) move to dismiss the amended complaint pursuant to CPLR 3211 (motion sequence number 001). Co-defendants Jason Rosenberg (Rosenberg) and Gordon Beeferman (Beeferman; together, the individual defendants) move separately for the same relief, and plaintiffs Brandon Straka (Straka), Michael Bernstein a/k/a Mike Harlow (Harlow), Blaire

White (White) and #WalkAway Campaign, LLC (#WalkAway; together, plaintiffs) cross-move for sanctions, fees and costs (together, motion sequence number 002). The motions and cross motion are decided in accordance with the following decision.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Straka is the founder and executive director of #WalkAway, a New York State licensed domestic not-for-profit limited liability company, and co-plaintiffs Harlow and White are "associates" of #WalkAway's who assist in its non-profit activities. *See* amended complaint, ¶¶ 1-9. The complaint describes those activities as holding or promoting events that are designed to promote "peaceful social discourse, political awareness and promotion of alternative expressions of gay identity and LGBT identity within the LGBT Community." *Id.*, ¶ 4. Defendants Testone and Farofaldane are, respectively, the executive director and the events coordinator/reservation specialist of LGBTCC, a New York State licensed foreign corporation that is engaged in the business of "offering the LGBT Communities of New York City, advocacy, health and wellness programs, arts, entertainment, cultural events and various social and cultural services." *Id.*, ¶¶ 10-14. Co-defendants Rosenberg and Beeferman are individuals unaffiliated with either #WalkAway or LGBTCC. *Id.*, ¶¶ 15-16.

The amended complaint alleges that, on March 14, 2019, Straka executed a contract with the LGBTCC to reserve space at its New York County location to hold a proposed #WalkAway panel discussion there, and also remitted payment to the LGBTCC of $650.00. *See* amended complaint, ¶ 30. It next avers that Farofaldane emailed Straka on March 20, 2019 to request him to review the LGBTCC's rules and guidelines, and to confirm his understanding of those rules

and guidelines by returning an initialed acknowledgment to the LGBTCC. *Id.*, ¶ 34. The complaint does not indicate whether or not Straka complied with Farofaldane's requests, but it does allege that the LGBTCC cancelled the scheduled #WalkAway event on March 22, 2019 "without valid reason or prior warning," and that the LGBTCC thereafter returned his $650.00 payment on March 26, 2019. *Id.*, ¶¶ 38-39.

The amended complaint further alleges that: 1) on May 19, 2019, defendant Rosenberg posted a defamatory Tweet about the scheduled #WalkAway event on the Twitter social media platform; 2) on March 21, 2019, defendant Beeferman prepared and posted a document entitled "An Open Letter to the LGBT Center" on the Airtable social media platform which contained several defamatory statements about #WalkAway, and which demanded that the LGBTCC cancel the scheduled #WalkAway event; and 3) on March 22, 2019, Testone posted responses to the "Open Letter" on Twitter and on the LGBTCC's website that contained defamatory statements about #WalkAway, and that acknowledged that the LGBTCC had decided to cancel #WalkAway's scheduled event so as not to violate the LGBTCC's policies and mission. *See* amended complaint, ¶¶ 32-45. For their part, both sets of defendants respond that none of the challenged statements was defamatory. *See* notice of motion (motion sequence number 001), Loftus affirmation, ¶¶ 16-68; notice of motion (motion sequence number 002), Green affirmation, ¶¶ 20-66.

Plaintiffs originally commenced this action on June 14, 2019, but later served an amended complaint on July 31, 2019 that sets forth causes of action for: 1) violation of New York City Human Rights Law (HRL) § 8-107 (4) (a); 2) violation of New York City HRL § 8-102 (26); 3) violation of New York State Executive Law § 296 (2) (a); 4) defamation and/or libel; 5) defamation *per se*; and 6) breach of contract. *See* amended complaint ¶¶ 46-71. Rather

than file answers, the LGBTCC defendants and the individual defendants each filed separate motions to dismiss the complaint (motion sequence numbers 001 and 002). Plaintiffs filed opposition to the former and filed a cross motion for sanctions in response to the latter (motion sequence number 002). After receiving all of the parties' submissions, this Court held a hearing on February 20, 2020. Although this Court was thereafter closed in response to the Covid-19 emergency, this matter is now fully submitted and the motions are ready for resolution. This decision will review the dismissal requests first and the sanctions requests afterward.

LEGAL CONCLUSIONS

I. Dismissal

When evaluating a defendant's motion to dismiss pursuant to CPLR 3211 (a), the court "must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference." *See Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 52 (2106), citing *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002). It has been held, however, that where the documentary evidence submitted flatly contradicts the plaintiff's factual claims, the entitlement to the presumption of truth and the favorable inferences are both rebutted, and dismissal is warranted. *Scott v Bell Atl. Corp.*, 282 AD2d 180, 183 (1st Dept 2001), *affd as mod Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d at 314, citing *Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 (1st Dept 1994). Here, as previously noted, the amended complaint sets forth six causes of action against all of the named defendants, and two sets of the defendants move separately to dismiss that amended complaint. This Court will consider each cause of action in turn.

Plaintiffs' first cause of action alleges that defendants violated HRL § 8-107 (4) (a) by "unlawfully discriminat[ing] against [them] on the basis of their sexual orientation and gender identity as part of a routine pattern of invidious discrimination within the LGBT Community." *See* amended complaint, ¶¶ 46-48. Their third cause of action uses the same language in alleging that defendants violated New York State Executive Law § 296 (2). *Id*., ¶¶ 53-55. The relevant portion of New York City HRL § 8-107 provides as follows:

> "a. It shall be an unlawful discriminatory practice for any person who is the owner . . . of any place or provider of public accommodation:
>
> > "1. Because of any person's actual or perceived . . . sexual orientation, . . ., directly or indirectly:
> >
> > > "(a) To refuse, withhold from or deny to such person the full and equal enjoyment, on equal terms and conditions, of any of the accommodations, advantages, services, facilities or privileges of the place or provider of public accommodation; . . ."

HRL § 8-107 (4) (a). The relevant portion of New York State Executive Law § 296 provides as follows:

> "2. (a). It shall be an unlawful discriminatory practice for any person, being the owner . . . of any place of public accommodation, resort or amusement, because of the . . . sexual orientation, gender identity or expression . . ., directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof, including . . . to publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement, to the effect that any of the accommodations, advantages, facilities and privileges of any such place shall be refused, withheld from or denied to any person on account of . . . sexual orientation, gender identity or expression . . ., or that the patronage or custom thereat of any person of or purporting to be of any particular . . . sexual orientation, gender identity or expression. . ., is unwelcome, objectionable or not acceptable, desired or solicited."

Executive Law § 296 (2) (a).

The Court of Appeals holds that this provision "must be liberally construed to accomplish the purposes of the statute." *Matter of Cahill v Rosa*, 89 NY2d 14, 20 (1996). It also holds that the HRL affords greater protection from discrimination based on a party's sexual orientation than the Executive Law does. *See Levin v Yeshiva Univ.*, 96 NY2d 484 (2001).

In their motion, the LGBTCC defendants assert that "the pleading requirements for a discrimination claim under [New York State Executive Law § 296] and [New York City HRL § 8-107] are materially the same as those that apply to claims under 42 U.S.C. § 1981," and that, pursuant to federal law, a complaint must allege that: "(1) [a] plaintiff is a member of a [protected class]; (2) [a] defendant [had the] intent to discriminate on the basis of [the plaintiff's] membership in a protected class; and (3) [the existence of] discrimination concerning one of the statute's enumerated activities." *See* defendants' mem of law (motion sequence number 001) at 5-9. The LGBTCC defendants then argue that, although the amended complaint sufficiently alleges the first and third of these elements with respect to plaintiffs' HRL and Executive Law claims, those claims must nevertheless fail because the amended complaint's allegations do not sufficiently "establish an intent to discriminate on the basis of plaintiffs' sexual orientation and/or gender identity." *Id.*

Plaintiffs' opposition insists that the amended complaint sufficiently alleges all three of the foregoing elements. *See* plaintiffs' mem in opposition (motion sequence number 001) at 3-8.

In reply, the LGBTCC defendants assert that plaintiffs' opposition "fail[s] to remedy the defects in their complaint and fail[s] to show defendants' intent to discriminate." *See* Loftus reply affirmation, ¶¶ 3-8. Although neither parties' arguments are entirely persuasive, this Court nevertheless finds for the LGBTCC defendants.

To begin with, the parties have misstated the law. Despite their agreement on the point, the Appellate Division, First Department does *not* hold that discrimination claims pursuant to the HRL and the Executive Law are essentially equivalent to federal law discrimination claims, or that all such claims share the same component elements. *See e.g.*, *Morse v Fidessa Corp.*, 165 AD3d 61 (1st Dept 2018); *Williams v New York City Hous. Auth.*, 61 AD3d 62 (1st Dept 2009). However, New York law does require that proponents of sex discrimination claims under Executive Law § 296 (2) (a) or HRL § 8-107 must "plead . . . facts demonstrating how they were denied the privileges [at issue] . . . on the basis of sex," and that a plaintiff's failure to include such pleadings in a complaint mandates dismissal of the claim. *Goldin v Engineers Country Club*, 54 AD3d 658, 659-660 (2d Dept 2008). Here, this Court finds that the amended complaint's pleadings are inadequate under that controlling standard. The LGBTCC's announcement concerning its cancellation of the March 28, 2019 #WalkAway event stated as follows:

> "In recent days we have learned that *certain of the panelists announced for this event have made repeated, well-documented past statements that violate our mission, values and the spirit of inclusiveness for all individuals and identities that is core to our work and who we are*. Our space is a place of safety and refuge for those most vulnerable among us, and we will do everything in our power to protect that. Permitting this event to proceed would make many of our community members feel unsafe and, among other things, interfere with their ability to participate in other Center programming."

See notice of motion (motion sequence number 001), exhibit 6 (emphasis added).

Plaintiffs assert that the amended complaint does "not allege discrimination based upon [their] political views, but rather that they "were discriminated against because of their sexual and gender identities." *See* plaintiff's mem of law (motion sequence number 001) at 8. However, this assertion is belied by the text of the LGBTCC announcement, which refers to the center's "mission," but plainly does *not* mention sexual or gender identities. The court also notes

that plaintiffs own ensuing assertion, that the LGBTCC "used its policies as a pretext, or cover, for not wanting to permit one of their own to express controversial views," appears to *admit* that the LGBTCC objected to their political views rather than their sexual or gender identities. *Id.* Because this documentary evidence flatly contradicts the amended complaint's allegations, this Court concludes that plaintiffs have failed to plead facts to demonstrate that defendants denied them the use of the LGBTCC's location because of their sexual or gender identities. Therefore, this Court finds that plaintiffs' first and third causes of action must fail as a matter of law, and grants so much of the LGBTCC defendants' motion as seeks dismissal of those claims.

This Court makes a similar finding regarding the individual defendants, albeit for a different reason. In their motion, the individual defendants argue that the amended complaint does not allege that either of them is an "owner, lessee, proprietor, manager, superintendent, agent or employee of a place of public accommodation," which is a predicate for liability under HRL § 8-107 or Executive Law § 296. *See* defendants' mem of law (motion sequence number 002) at 21-23. This Court agrees, since the statutory language speaks for itself. The individual defendants note that plaintiffs failed to respond to this argument in their opposition papers. *See* defendants' reply mem (motion sequence number 002) at 2-5. They also correctly note that the amended complaint is devoid of any allegation that either of the individual defendants had any connection with the LGBTCC. *Id.* Thus, this Court concludes that plaintiffs' first and third causes of action must fail as against the individual defendants as a matter of law. Further, given the lack of any responsive argument in plaintiffs' opposition papers, this Court determines that plaintiffs have abandoned those claims as against the individual defendants. Therefore, this Court grants so much of the individual defendants' motion as seeks dismissal of plaintiffs' first and third causes of action.

With respect to plaintiffs' second cause of action, which alleges that defendants violated HRL § 8-102 (26) by "engag[ing] in a pattern of egregious cyberbullying," the LGBTCC defendants argue that the subject Administrative Code provision merely sets forth a definition of the term "cyberbullying," but that New York law does not recognize a civil cause of action for cyberbullying. *See* amended complaint, ¶¶ 49-52; Loftus reply affirmation, ¶¶ 9-12. The individual defendants raise the same argument in their moving papers. *See* defendants' mem of law (motion sequence number 002), at 22-23. Plaintiffs do not address this argument in either of their opposition memoranda. For its part, this Court was unable to locate a subparagraph 26 in HRL § 8-102 which purportedly sets forth the definition of "cyberbullying." However, it did discover a recent Court of Appeals decision which invalidated the cyberbullying provision of an Albany County local law ("the Dignity for All Students Act") on the ground that it violated the Free Speech Clause of the First Amendment of the U.S. Constitution as overbroad. *People v Marquan M.*, 24 NY3d 1 (2014). The Court opined that "cyberbullying is not conceptually immune from government regulation," but it did not recognize a cause of action created by the Albany County local law. 24 NY3d at 8. Because plaintiffs have failed to establish that New York law recognizes a cause of action for "cyberbullying," or that HRL § 8-102 (26) creates such a cause of action, this Court grants so much of both the LGBTCC defendants' and the individual defendants' motions as seek dismissal of plaintiffs' second cause of action.

Plaintiffs' fourth cause of action alleges defamation by libel. *See* amended complaint, ¶¶ 56-62. The elements of a defamation claim 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.'" *Frechtman v Gutterman*, 115 AD3d 102, 104 (1st Dept 2014); quoting *Dillon v City of New York*, 261 AD2d

34, 38 (1st Dept 1999). In an action to recover damages for defamation, "[t]he issue of whether particular words are defamatory presents a legal issue to be resolved by the court." *Greenberg v Spitzer*, 155 AD3d 27, 44 (2d Dept 2017); quoting *Brach v Congregation Yetev Lev D'Satmar*, 265 AD2d 360, 361 (2d Dept 1999). Under New York law, truth is a complete defense to a defamation claim. *See e.g.*, *Birkenfeld v UBS AG*, 172 AD3d 566 (1st Dept 2019); *Udell v NYP Holdings, Inc.*, 169 AD3d 954 (2d Dept 2019).

Here, the LGBTCC defendants aver that the amended complaint only identifies one allegedly defamatory statement by them; i.e., the March 22, 2019 event cancellation notice which was posted on the center's website and Twitter account. *See* amended complaint, ¶¶ 40-41. They correctly assert that this is the only statement that this Court may consider, given that CPLR 3016 (a) requires the proponent of a defamation claim to "set forth the particular words complained of" in the complaint. *See Gear Up, Inc. v City of New York*, 140 AD3d 515, 515 (1st Dept 2016); citing *Khan v Duane Reade*, 7 AD3d 311 (1st Dept 2004). Plaintiffs' opposition papers do not dispute this point or request the court to consider any other statements by the LGBTCC defendants. *See* plaintiffs' mem of law (motion. Sequence number 001) at 9-12. As a result, this Court will limit this current inquiry to the portion of the amended complaint that discusses the LGBTCC's March 22, 2019 event cancellation notice.

As an initial matter, the LGBTCC defendants note that: 1) the amended complaint does *not* allege that Farofaldane had anything to do with the March 22, 2019 event cancellation notice; and that 2) while the amended complaint does allege that Testone "issued" the statement on behalf of the LGBTCC and posted it on the center's website and Twitter account, the printouts of those two documents belie that allegation, since Testone's name does not appear anywhere on either of them. *See* Loftus reply affirmation, ¶ 13; amended complaint, ¶¶ 40-42; notice of

motion (motion sequence number 001), exhibits 6, 7. Counsel for the LGBTCC defendants repeated these arguments at the February 20, 2020 hearing of these motions, but plaintiffs' counsel offered no response or opposition to them. *See* transcript, p 4-5, 8, 12-17. This Court therefore deems plaintiffs to have conceded the argument. This Court also finds that the amended complaint and the documentary evidence both speak for themselves, that the amended complaint contains no defamation allegations against Farofaldane, and that the documentary evidence (i.e., the copies of the event cancellation notice) "flatly contradicts" plaintiff's defamation allegations against Testone. *Scott v Bell Atl. Corp.*, 282 AD2d at 183. Therefore, this Court grants so much of the LGBTCC defendants' motion as seeks to dismiss plaintiff' fourth cause of action as against Farofaldane and Testone.

With respect to the LGBTCC itself, defendants argue that the statements in the cancellation notice are not defamatory, as a matter of law, because they do not state "facts,' but rather a non-actionable "opinion by [the LGBTCC] and an interpretation of its own mission statement." *See* defendants' mem of law (motion sequence number 001), at 10-12. Plaintiffs agree that "[i]t is black letter law that while false statements of fact are actionable, matters of personal opinion are not," but aver that the statements in the cancellation notice are *not* expressions of opinion. *See* plaintiffs' mem of law (motion sequence number 001) at 10-13. Instead, plaintiffs assert that it "is not correct . . . [that] defendants' statement[s are opinions which] could be proven true or false," because the LGBTCC "must then know how to distinguish between behaviors that either violate or comport with its policies," and therefore "cannot hide behind conflating the administration of [its] policies with opinion." *Id.* The LGBTCC replies that, under the governing legal standard, the statements in the cancellation notice can only be regarded as opinions. *See* Loftus reply affirmation, ¶¶ 13-16. The court agrees.

In *Mann v Abel* (10 NY3d 271 [2008]), the Court of Appeals summarized the law regarding the protection of opinions from defamation claims as follows:

> "Whether a particular statement constitutes an opinion or an objective fact is a question of law. Expressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation. Distinguishing between opinion and fact has proved a difficult task, but this Court, in furtherance of that endeavor, has set out the following factors to be considered: "(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."
>
> In *Immuno AG. v Moor–Jankowski,* we declined to adopt an analysis that would require courts first to search the article for particular factual statements and then to hold such statements actionable unless couched in figurative or hyperbolic language. Rather, we held that 'courts must consider the content of the communication as a whole, as well as its tone and apparent purpose' and in particular 'should look to the over-all context in which the assertions were made' and determine on that basis 'whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff.'"

10 NY3d at 276 (internal citations omitted). Here, the "content of the cancellation notice as a whole," and its "tone and apparent context," show that it was simply an announcement that the LGBTCC was cancelling a previously scheduled event. Thus, the "over-all context" in which the LGBTCC made the challenged statements about plaintiffs was within a public announcement. That announcement made passing references to plaintiffs' previous activities in order to explain why the LGBTCC had decided to cancel the #WalkAway event; to wit: "we have learned that *certain of the panelists announced for this event have made repeated, well-documented past statements* that violate our mission, values and the spirit of inclusiveness for all individuals and identities that is core to our work and who we are." *See* notice of motion (motion sequence number 001), exhibit 6. However, the cancellation notice did not mention those "repeated, well-documented past statements" any further. Instead, it stated that the LGBTCC had determined that #WalkAway's goals and values were so incompatible with its

own that holding the #WalkAway event might "negatively impact people and/or organizations that use the LGBTCC, and/or cause conflict or interference with other LGBTCC programs." The remainder of the notice's four paragraphs were devoted to extolling the LGBTCC's own goals and values. This Court believes that a "reasonable reader" would be likely to derive two things from the cancellation notice: 1) the information that the LGBTCC had cancelled the #WalkAway event; and 2) the LGBTCC's reason for doing so - i.e., that it considered that #WalkAway's mission and methods were incompatible with its own. Further, this Court finds that a "reasonable reader" would likely regard the former item (the cancellation) as a fact, and the latter item (the explanation for the cancellation) as a result of the LGBTCC's low opinion of #WalkAway, which is what drove its decision. This Court does not believe that a "reasonable reader" would likely understand the cancellation notice to convey any particular negative facts about #Walkaway, since it simply does not contain any. The LGBTCC's subsequent Twitter posting says even less; merely informing the public that:

> "Upon further review and consideration, the [LGBTCC] has cancelled the March 28 #WalkAway event. Full statement available at [LGBTCC website]."

See notice of motion (motion sequence number 001), exhibit 7.

In any event, because the court concludes that the cancellation notice contains an expression of the LGBTCC's opinion about #WalkAway, but not any actionable false statements, and because the First Amendment protects expressions of opinion from defamation claims, the court finds that plaintiffs' fourth cause of action must fail, as a matter of law. *See e.g.*, *Jacobus v Trump*, 156 AD3d 452, 453 (1st Dept 2017) (statements of opinion are not actionable). Accordingly, the court grants so much of the LGBTCC defendants' motion as seeks dismissal of plaintiffs' fourth cause of action as against the LGBTCC.

Plaintiffs' fourth cause of action also alleges that the individual defendants made defamatory statements in: 1) a March 19, 2019 Twitter post by Rosenberg and 2) the March 21, 2019 Airtable post by Beeferman entitled "An Open Letter to the LGBT Center" (which Rosenberg also signed). *See* amended complaint, ¶¶ 32, 35-37. This Court will analyze them separately.

Rosenberg's March 19, 2019 Tweet consisted of the following short statement:

> "Like are y'all that desperate for money? This is incredibly egregious that you'd host an event where panelists have used queer slurs and stood behind policies that put the community at great risk. Stand for something. SOMETHING."

See amended complaint, ¶ 32; Green reply affirmation, exhibit J.

The individual defendants first argue that "every single statement identified in the complaint is true or at the least substantially true." *See* defendants' mem of law (motion sequence number 002) at 8-11. Plaintiffs respond that "defendants' statements are factually inaccurate and patently untrue." *See* plaintiffs' mem of law (motion sequence number 002) at 7. The individual defendants' reply papers restate their original argument, and cite to certain documentary submissions which, they assert, chronicle plaintiffs' alleged "queer slurs." *See* defendants' reply mem (motion sequence number 002) at 5; exhibit G; notice of motion (motion sequence number 002), exhibits G, I, M, N. Regarding the "truth" defense to the defamation claims, the Appellate Division, First Department, has observed that:

> "The essence of the tort of libel is the publication of a statement about an individual that is both false and defamatory. Since falsity is a necessary element of a libel claim, and only 'facts' are capable of being proven false, it follows that a libel action cannot be maintained unless it is premised on published assertions of fact."

Guerrero v Carva, 10 AD3d 105, 111 (1st Dept 2004) (internal citations omitted).

Here, the individual defendants have presented documents which establish that: 1) plaintiffs Straka, Harlow and White were scheduled to be panelists at the cancelled #Walkaway

event at the LGBTCC; 2) on October 22, 2018, Straka posted a Twitter comment that derided the terms "trans," "genderfluid," "genderqueer" and "non-binary" as "not real" and "leftist crap"; 3) on August 23, 2019 Straka posted another Twitter comment that used the pejorative term "gaystapo" in reference to the LGBTCC; 4) on November 29, 2018, Harlow posted a comment on Google's social media platform which equated the term "queer" with "fetishized dysfunction" and "emotional instability," and as a synonym for "worthless," "mildly insane," "obsessed," and "disparaging"; and 5) since January 2017, White has intermittently created and uploaded episodes of a video series entitled "Triggering Trannies" which features taunts of people who identify as "trans." *See* notice of motion (motion sequence number 002), exhibit G; Green reply affirmation, exhibit G. In this Court's view, all of these comments may be fairly described as "queer slurs" because they were clearly intended as insults. As a result, this Court finds that the individual defendants have demonstrated, by documentary evidence, that the assertion in Rosenberg's March 19, 2019 Tweet, that "panelists have used queer slurs," was a true statement. Because of this, New York law immunizes it against plaintiffs' defamation claim. Therefore, this Court grants the individual defendants' motion to dismiss so much of plaintiffs' fourth cause of action as is based on Rosenberg's March 19, 2019 Tweet.

Beeferman's March 21, 2019 Airtable post entitled "An Open Letter to the LGBT Center" (which Rosenberg also signed) is longer and more specific than Rosenberg's Tweet. *See* amended complaint, ¶ 36; notice of motion (motion sequence number 002), exhibit F. The portions of it that are relevant to this motion to dismiss are as follows:

> "The speakers booked for March 28th's Town Hall, Brandon Straka, Blaire White, Rob Smith, and Mike Harlow, espouse openly white supremacist, transphobic, xenophobic, and otherwise bigoted views that are dangerous to our communities. Straka, the organizer of the #WalkAway Campaign, has been on the programs of Tucker Carlson, Laura Ingraham, and Alex Jones, all of whom give credence to violently anti-immigrant, racist, sexist, and queerphobic ideologies. Straka and Harlow even appeared on Gavin

> McInnes's CRTV show to talk about #WalkAway two weeks after McInnes's violent Proud Boys gang attacked counter-protesters on the Upper East Side, kicking and punching young queers while yelling 'Faggot!'
>
> "The stated goal of 'WalkAway' is to draw LGBTQI+ people to the right. However, as a cursory search of the speakers' public statements shows, they are far-right provocateurs who share responsibility for incitement to violence against trans people, black people, women, immigrants, Jews, and Muslims, and who publicly associate themselves with prominent, violent members of the 'Alt Right' white nationalist movement. What's more, their 'WalkAway' platform is the arm of a partisan propaganda machine which accuses their political opponents of supporting 'special rights' for gender and sexual minorities.
>
> * * *
>
> "Please see the link below for detailed documentation of their transphobic, Islamophobic, antifeminist, and racist incitement. Recent history from Christchurch to Charlottesville shows that giving a platform to such peddlers of hate empowers self-described white supremacists, sexists, transphobes, and homophobes, and encourages them to escalate their activity from hateful speech to physical violence against our communities. Giving a platform to these speakers is deeply irresponsible at this moment."

Id.

The individual defendants aver that "plaintiffs' attempt to create liability for a politically motivated Open Letter has been rejected by all courts in this state," and assert that, "to the extent the statements [in the Open Letter] are not facially true . . ., the statements are not readily susceptible to a construction as being true or false." *See* defendants' mem of law (motion sequence number 002) at 10-11. Plaintiffs respond that "defendants' statements are factually inaccurate and patently untrue and constitute defamation *per se* on the premise that they impute to Plaintiffs the commission of serious crimes." *See* plaintiffs' mem of law (motion sequence number 002) at 7-9. The individual defendants reply that "plaintiffs' generic objections are confused." *See* defendants' reply mem (motion sequence number 002) at 5-6. However, both parties' arguments are somewhat confused.

In *Davis v Boeheim* (24 NY3d 262 [2014]), the Court of Appeals offered the following explanation in an attempt to clarify the procedure for analyzing documents such as the Open Letter:

> "In order for the challenged statements to be susceptible of a defamatory connotation, they must come within the well established categories of actionable communications. Thus, a false statement 'that tends to expose a person to public contempt, hatred, ridicule, aversion or disgrace constitutes defamation.' 'Since falsity is a necessary element of a defamation cause of action and only "facts" are capable of being proven false, "... only statements alleging facts can properly be the subject of a defamation action."
> "A defamatory statement of fact is in contrast to 'pure opinion' which under our laws is not actionable because '[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.' For, '[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.' A pure opinion may take one of two forms. It may be 'a statement of opinion which is accompanied by a recitation of the facts upon which it is based,' or it may be '[a]n opinion not accompanied by such a factual recitation' so long as 'it does not imply that it is based upon undisclosed facts.'
> "While a pure opinion cannot be the subject of a defamation claim, an opinion that 'implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, ... is a "mixed opinion" and is actionable.' This requirement that the facts upon which the opinion is based are known 'ensure[s] that the reader has the opportunity to assess the basis upon which the opinion was reached in order to draw [the reader's] own conclusions concerning its validity.' What differentiates an actionable mixed opinion from a privileged, pure opinion is 'the implication that the speaker knows certain facts, unknown to [the] audience, which support [the speaker's] opinion and are detrimental to the person' being discussed.
> "Distinguishing between fact and opinion is a question of law for the courts, to be decided based on 'what the average person hearing or reading the communication would take it to mean.' 'The dispositive inquiry ... is "whether a reasonable [reader] could have concluded that [the statements were] conveying facts about the plaintiff."'
> "We apply three factors in determining whether a reasonable reader would consider the statement connotes fact or nonactionable opinion:
> "'(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.'
> "The third factor 'lends both depth and difficulty to the analysis,' and requires that the court consider the content of the communication as a whole, its tone and apparent purpose. Thus, we have adopted a holistic approach to this inquiry."

24 NY3d at 268-270 (internal citations omitted).

Here, this Court finds that the Open Letter contains both types of non-actionable opinion statements.

In the first quoted paragraph of the Open Letter, Beeferman states that plaintiffs "espouse openly white supremacist, transphobic, xenophobic, and otherwise bigoted views that are dangerous to our communities." *See* amended complaint, ¶ 36; notice of motion (motion sequence number 002), exhibit F. He then recites that plaintiffs have appeared on television shows hosted by Tucker Carlson, Laura Ingraham, Alex Jones and Gavin McInnes. *Id*. The first statement clearly expresses Beeferman's opinion that plaintiffs hold views about LGBTQI+ people which he characterizes as "bigoted" and "dangerous." The second sentence recites that plaintiffs have publicly appeared on television shows where they have discussed those views with hosts who are known to share them. The first sentence expresses an opinion. The second sentence expresses a factual basis for that opinion. Taken together, they are a "statement of opinion which is accompanied by a recitation of the facts upon which it is based." As such, they are not actionable. *Davis v Boeheim*, 24 NY3d at 269.

In the second quoted paragraph of the Open Letter, Beeferman states that plaintiffs "are far-right provocateurs who share responsibility for incitement to violence against trans people, black people, women, immigrants, Jews, and Muslims, and who publicly associate themselves with prominent, violent members of the 'Alt Right.'" *See* amended complaint, ¶ 36; notice of motion (motion sequence number 002), exhibit F. It also states that #WalkAway is "the arm of a partisan propaganda machine which accuses their political opponents of supporting 'special rights' for gender and sexual minorities." *Id*.

Leaving aside, for the moment, Beeferman's personal characterizations of plaintiffs as "far-right provocateurs" and of #WalkAway as "the arm of a partisan propaganda machine," the

balance of the paragraph expresses Beeferman's opinions that: 1) as a result of their views, plaintiffs "share responsibility for incitement to violence against" certain minority groups; and 2) the "propaganda machine" that #WalkAway is a part of "accuses its political opponents of supporting 'special rights' for gender and sexual minorities." Although this paragraph does not supply a factual basis of the reason for Beeferman's opinions, as the preceding one did, this Court notes that the second paragraph is qualified by the portion of the Open Letter's last paragraph, which invites the reader to "[p]lease see the link below for detailed documentation of their [plaintiffs'] transphobic, Islamophobic, antifeminist, and racist incitement." *Id.* The First Department has recognized that a "remark [which is] is prompted by or responsive to a hyperlink . . .is 'accompanied by a recitation of the facts upon which it is based,' and therefore qualifies as 'pure opinion.'" *Sandals Resorts Intl. Ltd. v Google, Inc.*, 86 AD3d 32, 43 (1st Dept 2011); quoting *Steinhilber v Alphonse*, 68 NY2d 283, 289 (1986). Here, because the link in the final paragraph provides information to support the opinions alluded to in the second paragraph, this Court concludes that this portion of Beeferman's Open Letter is not actionable either, because it "does not imply that it is based upon undisclosed facts." *Davis v Boeheim*, 24 NY3d at 269.

Returning now to Beeferman's personal characterizations of plaintiffs as "far-right provocateurs" and of #WalkAway as "the arm of a partisan propaganda machine," this Court is cognizant of the rule that "'[e]ven apparent statements of fact may assume the character of statements of opinion, and thus be privileged, when made in . . . circumstances in which an audience may anticipate [the use] of epithets, fiery rhetoric or hyperbole.'" *Frechtman v Gutterman*, 115 AD3d at 106; quoting *Steinhilber v Alphonse*, 68 NY2d at 294. In the context of today's hotly debated political disagreements over LGBTQI+ rights, the court believes that it is

only reasonable to expect the use of "epithets, fiery rhetoric or hyperbole," and that is what this Court deems Beeferman's ungenerous personal characterizations of plaintiffs to be. As a result, this Court finds that those statements do not constitute actionable defamation. Accordingly, the the individual defendants' motion to dismiss so much of plaintiffs' fourth cause of action as is based on Beeferman's Open Letter is granted

Plaintiffs' fifth cause of action alleges defamation *per se*. *See* amended complaint, ¶¶ 63-68. Defamation *per se* is not a separate and distinct cause of action from regular defamation. Rather, it is a defamation claim in which, in lieu of pleading the element of "special damages," the proponent instead pleads that a defendant made one or more of four types of "*per se* libelous" statements. *Frechtman v Gutterman*, 115 AD3d 1at 104, quoting *Dillon v City of New York*, 261 AD2d at 38. New York law recognizes that "the four exceptions which constitute 'slander *per se*' are statements (1) charging plaintiff with a serious crime; (2) that tend to injure another in his or her trade, business or profession; (3) that plaintiff has a loathsome disease; or (4) imputing unchastity to a woman." *Epifani v Johnson*, 65 AD3d 224, 234 (2d Dept 2009); citing *Liberman v Gelstein*, 80 NY2d 429, 435 (1992).

Here, plaintiffs' assert that defendants' statements "constitute defamation *per se* on the premise that they impute to plaintiffs the commission of serious crimes." *See* amended complaint, ¶ 66. However, this Court has already dismissed plaintiffs' defamation claim on the grounds that: 1) Farofaldane and Testone did not make any defamatory statements; 2) the challenged statements by the LGBTCC and Beeferman were expressions of opinion that are protected by the First Amendment; and 3) the challenged statement by Rosenberg is protected by the truth defense. Because plaintiffs' defamation claim lacks merit, it is immaterial whether they opted to plead it with the element of "special damages" as a regular defamation claim or to plead

one of the four alternative "*per se*" elements. Therefore, this Court finds that plaintiffs' defamation *per se* claim is also unsustainable, as a matter of law, and grants both the LGBTCC defendants' motion and the individual defendants' motion to the extent of dismissing plaintiffs' fifth cause of action.

Plaintiffs' sixth cause of action alleges breach of contract. *See* amended complaint, ¶¶ 69-71. The proponent of a breach of contract claim must plead the existence and terms of a valid, binding contract, its breach, and resulting damages. *See e.g. Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435 (1st Dept 1988). "[T]he burden of proving the existence, terms and validity of a contract rests on the party seeking to enforce it." *Eden Temporary Services, Inc. v House of Excellence Inc.*, 270 AD2d 66, 67 (1st Dept 2000), quoting *Paz v Singer Co.*, 151 AD2d 234, 235 (1st Dept 1989). Here, the LGBTCC defendants assert that plaintiffs have failed to meet their pleading requirements because they have "neither annexed a copy of the contract to the complaint nor adequately recited the provisions of the contract upon which its claims were based." *See* Loftus reply affirmation, ¶¶ 17-23. It is true that neither the amended complaint nor plaintiffs' opposition papers identifies any provision of the purported contract that the LGBTCC defendants allegedly breached, and it is also true that plaintiffs have not produced a copy of said contract. However, the amended complaint does acknowledge that Farofaldane sent plaintiffs a copy of the LGBTCC's rules and guidelines concerning the permitted uses of their facility and also acknowledges that the LGBTCC refunded plaintiffs' $650.00 deposit after it cancelled the #Walkaway event for ostensibly violating those guidelines. *See* amended complaint, ¶¶ 34, 38-39. Even read in the light most favorable to plaintiffs, these allegations do not allege a "unilateral cancellation without prior notice and without valid reason;" indeed, they appear to indicate the opposite. In any event, plaintiffs' failure to produce the alleged contract or to plead

which of its terms were breached and how, is fatal to its claim against the LGBTCC defendants. *See e.g.*, *Austin v Gould*, 137 AD3d 495 (1st Dept 2016); *New York City Educ. Constr. Fund v Verizon N.Y. Inc.*, 114 AD3d 529 (1st Dept 2014). Therefore, this Court grants so much of the LGBTCC defendants' motion which seeks dismissal of plaintiffs' sixth cause of action.

The individual defendants observe that plaintiffs' sixth cause of action does not allege that either Rosenberg or Beeferman was a party to the contract between #WalkAway and the LGBTCC that was allegedly breached. *See* defendants' mem of law (motion sequence number 002) at 21, n 17. Plaintiffs' opposition papers do not respond to this assertion or set forth any legal argument to support a claim that the individual defendants did breach that contract. In any case, it is axiomatic that a breach of contract claim cannot be maintained against a defendant who was not a party to the agreement in question. *See Blank v Noumair*, 239 AD2d 534, 534 (2d Dept 1997). Here, it is plain that the amended complaint does not allege that the individual defendants were parties to the purportedly breached contract. Therefore, this Court grants so much of the individual defendants' motion as seeks dismissal of plaintiffs' sixth cause of action.

II. Sanctions

The balance of the individual defendants' motion requests an award of sanctions against plaintiffs pursuant to 22 NYCRR § 130-1.1, and plaintiffs' cross motion makes the same request against the individual defendants (motion sequence number 002). The individual defendants argue that all of plaintiffs' causes of action in the amended complaint were frivolous as against Rosenberg and Beeferman, and plaintiffs respond that the portion of the individual defendants'motion that sought sanctions against them was frivolous. *See* defendants' mem of law (motion sequence number 002) at 21-25; plaintiffs' mem of law (motion sequence number

002) at 11-12. 22 NYCRR § 130-1.1 (c) (2) defines as "frivolous" as, among other things, any act that "is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another." This Court notes that, on August 12, 2019, before the motion to dismiss was filed, counsel for the individual defendants sent plaintiffs' counsel a "safe harbour letter" that; 1) informed him of defendants' position that plaintiffs' claims against them were frivolous; 2) outlined defendants' legal arguments underlying that position; 3) requested that counsel withdraw the complaint as against Rosenberg and Beeferman; and 4) informed counsel that his failure to do so within one week would result in the individual defendants adding a sanctions request to their dismissal motion. *See* notice of motion (motion sequence number 002), exhibit E. Plaintiffs' counsel evidently did not respond to the safe harbour letter, and there is no mention of it in either plaintiffs' opposition papers or memorandum of law. *See* notice of cross motion (motion sequence number 002), Straka aff, ¶¶ 1-27; plaintiffs' mem of law (motion sequence number 002) at 11-12. In the earlier portion of this decision, this Court noted that plaintiffs named Rosenberg and Beeferman as defendants in all six causes of action in the amended complaint, even though only two of them (#4 defamation and #5 defamation *per se*) alleged any activity by Rosenberg and Beeferman. This Court dismissed the remaining four causes of action as baseless as against Rosenberg and Beeferman because the amended complaint never alleged that either of them controlled the LGBTCC or was a party to the contract between the LGBTCC and #WalkAway

However, even though the Court did not find in favor the two causes of action for defamation and defamation per se (causes #4 and #5, respectively) there was at least some basis put forth by plaintiffs in support of those causes of action and they cannot therefore be

considered as entirely "frivolous" As such the Court, elects not to award sanctions against the plaintiffs.

On the other hand, plaintiffs' cross motion does not articulate any rationale as to how the individual defendants' actions were "frivolous." Therefore the Court finds that the plaintiffs cross motion fails to support an award of sanctions and must be denied.

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

ORDERED that the motion to dismiss the amended complaint, pursuant to CPLR 3211, of co-defendants Glennda Testone, Gabriel Farofaldane and the Lesbian Gay Bisexual & Transgender Community Center, Inc., against plaintiffs Brandon Straka, #WalkAway Campaign, LLC, Michael Bernstein a/k/a Mike Harlow, and Blaire White (motion sequence number 001) is granted and the amended complaint is dismissed in its entirety as 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 the motion to dismiss the amended complaint, pursuant to CPLR 3211, of co-defendants Jason Rosenberg and Gordon Beeferman against plaintiffs Brandon Straka, #WalkAway Campaign, LLC, Michael Bernstein a/k/a Mike Harlow, and Blaire White (motion sequence number 002) is granted to the extent that the amended complaint is dismissed in its entirety as 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 the cross motion of plaintiffs Brandon Straka, Michael Bernstein a/k/a Mike Harlow, Blaire White and #Walkaway Campaign, LLC (motion sequence number 002) is denied in all respects; and it is further

ORDERED that, within thirty days of entry of this order, counsel for the moving party shall serve a copy of this order with notice of entry upon all parties and upon 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 dismissals herein; 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 (access*ible 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.

7/1/2020
DATE

KATHRYN E. FREED, J.S.C.

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