

**Epoch Group Inc. v Politico, LLC**

2021 NY Slip Op 32644(U)

December 9, 2021

Supreme Court, New York County

Docket Number: Index No. 652753/2021

Judge: William Perry

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

**PRESENT: HON. WILLIAM PERRY PART 23**

*Justice*

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EPOCH GROUP INC.,

Plaintiff,

- v -

POLITICO, LLC, MARK SCOTT, TINA NGUYEN

Defendants.

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INDEX NO. 652753/2021

MOTION DATE 08/16/2021

MOTION SEQ. NO. 001 002 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11 were read on this motion to/for PRO HAC VICE

The following e-filed documents, listed by NYSCEF document number (Motion 002) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 38 were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 003) 31, 32, 33, 34, 35, 36, 37 were read on this motion to/for PRO HAC VICE

Plaintiff Epoch Group, Inc. brings this action against Defendants Politico, Mark Scott, and Tina Nguyen, alleging that the Defendants defamed the Plaintiff through the publication of a March 16, 2021 article titled "MAGA voters discovered a new home online. But it isn't what it seems." In motion sequence numbers 001 and 003, Defendants and Plaintiff, respectively, move unopposed for pro hac vice admission. In motion sequence number 002, Defendants move to dismiss the complaint for failure to state a claim and for attorneys' fees and costs pursuant to Civil Rights Law § 70-a. Motion sequence 002 is fully submitted and the motions are consolidated for disposition.

## Background

Plaintiff, which owns and operates the print and online publication known as The Epoch Times, commenced this defamation action on April 23, 2021 against Defendants Politico, an online publication specializing in political coverage, and two of its employees: Mark Scott, Politico's chief technology correspondent, and Tina Nguyen, whom Plaintiff refers to as Politico's "MAGA and disinformation reporter".<sup>1</sup> (NYSCEF Doc No. 2, Complaint, at ¶¶ 6-9.) The article at issue, titled "MAGA voters discovered a new home online. But it isn't what it seems." was published by Politico and co-authored by the individual Defendants. (*Id.* at ¶¶ 17-19; NYSCEF Doc No. 22, Article.)

In its Complaint, Plaintiff alleges that the Defendants published the demonstrably, purposefully, and recklessly false article to diminish the Plaintiff's brand and reputation. (Complaint at ¶¶ 22, 23, 27.) Specifically, Plaintiff takes issue with certain "Statements," underlining and providing them as excerpts in the Complaint: (*Id.* at ¶ 23.) Those Statements are as follows:

... According to a review of corporate records and online activity by POLITICO, SafeChat has close links to The Epoch Times, an English-language media outlet affiliated with Falun Gong, the Chinese spiritual movement known for its antagonism toward the Chinese Communist Party and described by critics as a "cult."

...  
It's part of a growing network of Falun Gong-affiliated media outlets that is creating its own far-right social media pipeline — one that amplifies MAGA themes while promoting the agenda of groups dedicated to the ouster of the Chinese Communist Party.

...  
"It makes perfect sense for a high demand group in bed with Big Data to build a content pipeline [referring to SafeChat][.]

...  
An Epoch Times story — posted on the outlet's unofficial SafeChat channel with almost 15,000 followers — about how Republicans who had voted to convict Trump in his impeachment trial were facing a conservative backlash, generated

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<sup>1</sup> "MAGA" is an acronym referring to the slogan of former president Donald Trump: "Make America Great Again".

hundreds of comments. “Dirty rotten bastards,” said an online commentator when discussing The Epoch Times story. “Hang ‘em high for betrayal and sedition.”

(*Id.* at ¶ 23a-23c, the Statements.)

Plaintiff sets forth causes of action for defamation per se, defamation per quod, and unfair competition by disparagement, based on the following “false points” allegedly communicated by the Defendants in the article:

- a. The Epoch Times had acquired SafeChat, a post-election source of ‘extremist’ ‘disinformation.’
- b. SafeChat operates under the control of The Epoch Times.
- c. The Epoch Times and SafeChat both disseminate political extremist disinformation, including that of ‘white nationalists.’
- d. The Epoch Times is more ‘cult’ than news source.
- e. The Epoch Times depends for its content on hoaxers and ‘conspiracy theor[ists]’ associated with The Epoch Times.
- f. ‘SafeChat’ is a new extremist outpost in affiliation with The Epoch Times to incubate and encourage ‘extremism’, ‘violence, and ‘false news’.
- g. The link between SafeChat and The Epoch Times is conclusively shown by the presence of a former Epoch Times employee on staff at SafeChat.

(Complaint at ¶ 22.) Plaintiff further submits certain tweets from the individual Defendants, alleging that they “classify Defendant Scott as an impulsive ideologue” and demonstrate that both Defendants disregarded actual facts in the drafting of the article. (*Id.* at ¶ 24-25; NYSCEF Doc No. 4, Tweets.)

Defendants move to dismiss for failure to state a claim, arguing that “(i) [the Statements] are not defamatory as a matter of law; (ii) they cannot reasonably be understood as statements about Plaintiff; (iii) they are statements of protected opinion; and/or (iv) they are substantially true.” (NYSCEF Doc No. 19, Def.’s Memo, at 8.) Additionally, Defendants argue that the

Complaint must be dismissed pursuant to CPLR 3211[g] and Civil Rights Law § 76-a, as this is an “action involving public petition and participation,” which requires Plaintiff to demonstrate that the action has a “substantial basis in law” and that the defamatory statements at issue were made with actual malice. (*Id.* at 14-16; 25-27.)

In opposition, Plaintiff argues that the pleading of malice has been satisfied, and that further discovery is necessary to establish “the fullness of the malice at play[.]” (NYSCEF Doc No. 24, Opposition, at 8.) Plaintiff also argues that it need not show actual malice by clear and convincing evidence to avoid dismissal, but that it must only “plead facts supporting an inference of malice” at this stage in order to avoid dismissal. (*Id.* at 25.) Plaintiff further alleges that Defendants’ use of/referral to the “Statements” contained in the Complaint is inappropriate, and that, instead, “the [correct] test is whether the article itself, *as a whole*, would be taken by the average reader as defamatory.” (*Id.* at 15-16.)

### Discussion

On a pre-answer motion to dismiss a complaint for failure to state a cause of action, pursuant to CPLR 3211 [a] [7], “the court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory.” (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 121 [1st Dept 2002].) However, “factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration.” (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003].)

Additionally, where a defendant moves to dismiss for failure to state a cause of action and the action involves the public interest (as defined by Civil Rights Law § 76-a), CPLR 3211[g]

provides that the court “shall” grant the motion unless the plaintiff meets a heightened burden of demonstrating that its cause of action “has a substantial basis in law[.]” (CPLR 3211[g][1]; *see also Duane Reade, Inc. v Clark*, 2 Misc 3d 1007[A], at \*5 [Sup Ct, NY County 2004] [“In order to avoid dismissal of its SLAPP suit complaint, plaintiff must establish by clear and convincing evidence a ‘substantial basis’ in fact and law for its claim. The Legislature viewed ‘substantial’ as a more stringent standard than the ‘reasonable’ standard that would otherwise apply”].)

The recently-amended Civil Rights Law § 76-a, now requires a plaintiff to establish by “clear and convincing evidence that any communication which gives rise to the action was made with [actual malice], where the truth or falsity of such communication is material to the cause of action at issue.” (Civil Rights Law § 76-a; *see also Sweeney v Prisoners' Legal Servs. of New York, Inc.*, 84 NY2d 786, 792 [1995] [“Actual malice means that defendants published the false information about plaintiff with knowledge that it was false or with reckless disregard of whether it was false or not”]; *Lindberg v Dow Jones & Co., Inc.*, 2021 WL 5450617, at \*3 [SD NY, Nov 22, 2021] [“the actual malice standard [measures] the speaker's subjective doubts about the truth of the publication. If it cannot be shown that the defendant knew that the statements were false, a plaintiff must demonstrate that the defendant made the statements with reckless disregard of whether they were true or false [i.e.] whether ... the defendant in fact entertained serious doubts as to the truth of his publication”] [internal quotation marks omitted]; *see also Sackler v American Broadcasting Companies, Inc.*, 71 Misc 3d 693 [Sup Ct, NY County, Mar 9, 2021].)

Here, the court finds that Plaintiff fails to establish by clear and convincing evidence that the Defendants’ article was published with actual malice. (*See Massa Constr., Inc. v Meaney*, 2021 WL 4321438, at \*2-4 [Sup Ct, NY County, May 10, 2021]; *Sackler*, 71 Misc 3d at \*5.) Plaintiff submits “no evidence ... [and] cites to no facts which would argue in favor of the conclusion that

Defendant[s] published a news article with knowledge of its falsity or reckless disregard thereof.” (*Reus v ETC Housing Corporation*, 72 Misc 3d 479, 487 [Sup Ct, Clinton County, May 6, 2021].) Plaintiff’s opposition on this point merely recites and rewords the conclusory allegations contained in the Complaint, i.e., that “Defendants made [up a story] ... to associate Epoch with SafeChat ... [and] intentionally fabricated links and affiliations between Epoch and SafeChat.” (Opposition at 26.) Accordingly, Plaintiff fails to meet its burden pursuant to CPLR 3211[g], and the motion to dismiss the complaint is granted.

As such, Defendants have demonstrated their entitlement to attorneys’ fees and costs pursuant to Civil Rights Law § 70-a, which provides that “costs and attorney’s fees *shall* be recovered upon a demonstration, including an adjudication pursuant to [CPLR 3211(g)] that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law[.]” (CRL § 70-a [emphasis added].) Thus, it is hereby

ORDERED that Defendants’ motion sequence 002 to dismiss is granted and the Complaint is dismissed in its entirety; and it is further

ORDERED that within ten (10) days from the entry of this order, Ballard Spahr LLP shall file and serve on all parties an itemized bill fully detailing their actual costs and attorneys’ fees associated with this action; the truthfulness and accuracy of which shall be affirmed by an attorney of said firm who is fully familiar with the facts and circumstances of the instant matter; and it is further

ORDERED that if Plaintiff disputes the accuracy or reasonableness of the costs and attorneys’ fees incurred by Defendants, within ten (10) days from service of the itemized bill referenced above, they must file and serve on all parties a sworn statement setting forth their basis for disputing the accuracy or reasonableness of said costs and fees; and it is further

ORDERED that Defendants' motion sequence 001 and Plaintiff's motion sequence 003 for pro hac vice admissions are denied as moot in accordance with the above.

12/9/2021

DATE

WILLIAM PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE