To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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DR. JOSEPH RYAN,

Plaintiff,

-against-

DECISION & ORDER
Index No. 55063/2020
Sequence No. 1

DR. KIMBERLY COLLICA-COX,

Defendant.

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WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 4-20, were read in connection with defendant's motion for summary judgment to dismiss the complaint.

Plaintiff brings this action against defendant to recover damages sounding in defamation.

At the time of the alleged incidents, on or about March 2019, plaintiff was a tenured professor, and Chair of the Criminal Justice and Security Department at Pace University ("Pace"), and defendant was also employed as a professor in the same Department. Plaintiff became the subject of a grievance brought by defendant for sex discrimination and other accusations, including a purported hostile work environment and hindering tenure. Plaintiff believes that the grievance was brought against him when he became a whistle blower for reporting that defendant was allegedly misusing Pace funds, which was later determined to be unfounded.

According to the summons and complaint, defendant's purported defamatory statements, which were primarily made during Pace's investigation of the grievance, include that he: supported a male for tenure track position, was getting rid of people in the Department, failed to provide a

lot of guidance to defendant, resisted change, commented on defendant's research, called her "dog lady" , cancelled her classes, did not value women, at one point was sort of flirty and weird, poorly treated faculty members, and other similar comments (NYSCEF #1).

Plaintiff claims that defendant's alleged defamatory statements were made in bad faith and maliciously, and when taken together, defendant's statements falsely portrayed plaintiff as an incompetent department chair and diminished his professional standing and reputation at Pace and beyond.

Upon the foregoing papers, the motion is decided as follows:

A proponent of a summary judgment motion must make a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]; Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the motion papers (Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1986]; Jakabovics v Rosenberg, 49 AD3d 695 [2d Dept 2008]; Menzel v Plotkin, 202 AD2d 558, 558-559 [2d Dept 1994]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact in admissible form "sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v New York, 49 NY2d 557, 562 [1980]; Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). In deciding a motion for summary judgment, the court is "required to view the evidence presented in the light most favorable to the party opposing the motion and to

draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]).

In support of defendant's motion, she offers her affidavit (NYSCEF#8). Defendant asserts that prior to January 2019, her professional relationship with plaintiff was friendly and collegial. This changed in January 2019, when plaintiff refused to approve defendant's proposed office hours, despite the fact that the proposed hours were the same as they had been for several years prior. Based on plaintiff's alleged behavior towards other professors, defendant was worried that plaintiff would attempt to jeopardize approval of her tenure application. Defendant shared her concerns about plaintiff with the Dean of Pace's College of Arts &Sciences, Dr. Nira Herrmann. Although Dr. Herrmann offered to meet with plaintiff to discuss defendant's concerns, she refused that offer, believing that it could make matters worse. In early April 2019, defendant learned that plaintiff had accused her of misappropriating grant funding. After an investigation of plaintiff s allegations against defendant, it was concluded that defendant had not engaged in any improper conduct. Defendant felt that plaintiff was targeting her, after cancelling her class for lack of enrollment. As mentioned above, defendant filed a formal written grievance on May 8, 2019, citing two allegations: (i) that Plaintiff was not appropriately carrying out the duties of the Chair of the Department; and (ii) that Plaintiff had treated defendant unfairly based on gender.

Outside counsel, Cynthia Maxwell Curtin was retained by Pace to investigate these allegations. Curtin concluded that there was not enough evidence to suggest that plaintiff's behavior towards defendant was related to and/or motivated by gender. However, Curtin also

concluded that plaintiff had acted vindictively towards defendant, tried to impede defendant's progress toward tenure, and otherwise created a hostile work environment.

After reviewing Curtin's report, the next step in Pace's grievance process was the review of Curtin's recommendation by the Committee, which agreed with Curtin's conclusions. The Committee's recommendations were then forwarded to Dr. Vanya Quinones, Executive Vice President for Academic Affairs at Pace, who was ultimately responsible to resolve interfaculty disputes. Dr. Quinones issued a written decision, dated August 20, 2019, accepting Curtin's findings of fact and agreeing with the Committee's recommended course of action. Dr. Quinones determined that plaintiff could no longer effectively function as the Chair of the Department, and ordered that plaintiff remain suspended until his term expired (NYSCEF#9).

As pertinent here, it is well-settled that the elements of a cause of action to recover damages for defamation are "(a) a false statement that tends to expose a person to public contempt, hatred, ridicule, aversion, or disgrace, (b) published without privilege or authorization to a third party, (c) amounting to fault as judged by, at a minimum, a negligence standard, and (d) either causing special harm or constituting defamation per se" (Braunstein v Day, 195 AD3d 589 [2d Dept 2021) [internal quotation marks omitted]).

An allegedly "defamatory statement is subject to a qualified privilege when it is fairly made by a person in the discharge of some public or private duty, legal or moral, or in the conduct of his own affairs, in a matter where his [or her] interest is concerned" (Braunstein v Day, 195 AD3d 589 [2d Dept 2021) [internal quotation marks omitted]. "The rationale for applying the privilege in these circumstances is that so long as the privilege is not abused, the flow of information between persons sharing a common interest should not be impeded" (Liberman v Gelstein, 80 NY2d 429, 437 (1992).

Here, defendant and Curtin share a "common interest", namely the investigation into plaintiff's alleged mistreatment of defendant, in which defendant communicated her concerns about plaintiff to administration, which was in a position, and did cause an investigation. The alleged defamatory statements were made in the course of defendant's employment in a matter which concerned her interests as it involves communications and treatment among professors within the academic community of Pace (Melious v Besignano, 125 AD3d 727, 729 [2d Dept 2015]). Nothing in this record suggests that a reasonable jury could find that defendant was not seeking, at least in part, to advance that common interest for academic reputation and integrity of Pace. Thus, defendant established, prima facie, that she was entitled to a qualified privilege of common interest (Colantonio v Mercy Med. Ctr., 135 AD3d 686, 691 [2d Dept 2016]).

As is the case here, once a qualified privilege is shown, the burden of proof shifts to the plaintiff to demonstrate that the communication made by defendant was not made in good faith but was motivated solely by malice, making the protection provided by the qualified privilege inapplicable (*see, Liberman v. Gelstein, supra*). "Unlike situations in which the 'actual malice' standard is constitutionally imposed and must therefore be proved by 'clear and convincing' evidence...to defeat qualified privilege in New York, the plaintiff need only establish 'actual malice' by a preponderance of the evidence (*Albert v. Loksen,* 239 F.3d at 273). Preponderance is the normal quantum of proof applicable in civil cases, and none of the New York cases discussed above suggests that more than a preponderance is required to establish common-law malice" (Chandok v Klessig, 632 F.3d 803, 816 [2d Cir. 2011]).

To defeat this shield of qualified privilege, "the plaintiff may show either common-law malice,- spite or ill will, or may show actual malice, i.e., knowledge of falsehood of the statement or reckless disregard for the truth" (Laguerre v Maurice, 192 AD3d 44, 49 [2d Dept

2020] [internal quotation marks omitted]. Constitutional malice, a/k/a "actual malice," requires a showing of knowledge that the statement was false or made it with a reckless disregard for the truth (Diorio v Ossining U.F.S.D. 96 AD3d 710 [2d Dept 2012]). Mere conclusory allegations, or charges based upon surmise, conjecture, and suspicion are insufficient to defeat the claim of qualified privilege (Bernacchi v Cty. of Suffolk, 118 AD3d 931, 932 [2d Dept 2014]).

Here, plaintiff failed to raise a triable issue that the statements were motivated by either common-law or actual malice. Most of the alleged defamatory statements described how plaintiff conducted himself as Department head, and interacted with other professors and coworkers at the Pace. These statements were made to administrators to address concerns about plaintiff's behavior in the context of Pace. Contrary to the plaintiff's contention, he failed to set forth facts sufficient to establish that any statements by defendant were consistent only with a desire to injure [him]...or that malice was the one and only cause for the statement, or that defendant's statement was solely motivated by a desire to injure the plaintiff (Colantonio v Mercy Med. Ctr., 135 AD3d 686, 691–92 [2d Dept 2016]). Here, as long as defendant made the statements to further the interest that was protected by the privilege, this shield will not be pierced.

Accordingly, based upon the record, the evidence does not support that the challenged statements were motivated solely (if at all) by malice. Rather, it can be said that defendant's action were undertaken in the discharge of her duty to Pace to cooperate with the investigation.

Finally, plaintiff's contention that the summary judgment motion is premature because of outstanding discovery is without merit. Plaintiff failed to offer any evidentiary basis to suggest that discovery may lead to relevant evidence, or that facts essential to opposing the motion were exclusively within the knowledge and control of defendant. While all depositions and other discovery may not have been completed, plaintiff's counsel's assertion that additional discovery

might reveal something helpful to the determination of liability in this matter does not provide a basis pursuant to CPLR 3212(f) for postponing judgment "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion" (Colantonio v Mercy Med. Ctr., 135 AD3d at 693).

Therefore, in light of the foregoing, it is hereby

ORDERED, that defendant's motion for summary judgment is **Granted**, and the complaint is dismissed. The Clerk shall mark his records accordingly.

All matters not herein decided are denied. This constitutes the Decision and Order of the court.

Dated: August 26, 2021
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

TO: All Parties by NYSCEF