

Reeves v Associated Newspapers, Ltd.

2021 NY Slip Op 34084(U)

August 4, 2021

Supreme Court, New York County

Docket Number: Index No. 154855/2020

Judge: Phillip Hom

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 2

-----X
KARL REEVES, C.E.I.N.Y. CORP., CONSOLIDATED
ELEVATOR INDUSTRIES, INC.,
CONSOLIDATED ELEVATOR SERVICE CORP.,

INDEX NO. 154855/2020

MOTION DATE April 6, 2021

Plaintiff,

MOTION SEQ. NO. 002

- v -

ASSOCIATED NEWSPAPERS, LTD., MAIL MEDIA INC.,
DAILY MAIL CORPORATION, DAILY MAIL AND
GENERAL TRUST, DMG MEDIA LIMITED, ANNETA
KONSTANTINIDES

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 92, 93 were read on this motion to/for DISMISS.

Plaintiffs Karl Reeves (“Reeves”) and C.E.I.N.Y. Corp., Consolidated Elevator Industries, Inc. and Consolidated Elevator Service Corp. (collectively “the Consolidated Companies”) bring this action for defamation, intentional and negligent infliction of emotional distress, tortious interference with contract, tortious interference with prospective business relations, and *prima facie* tort. These causes of action seek redress for harms allegedly suffered as the result of an article (“the Article”) published by defendant Associated Newspapers Ltd., d/b/a Mail Online and The Daily Mail (“ANL”), and written by defendant Anneta Konstantinides (“Konstantinides”)¹, which reported on long-running legal battles between Reeves and his

¹ Plaintiffs voluntarily dismissed the remaining defendants named in the case caption, by way of a notice of discontinuance (*see* Notice of Discontinuance Without Prejudice as to Certain Defendants [NYSCEF Doc No. 11]).

estranged wife, actress Julianne Michelle (“Michelle”). Reeves alleges that 11 statements contained in the Article are false and defamatory.

Defendants now move, pursuant to CPLR 3211 (a) (1), (a) (7), and (g), and New York Civil Rights Law §§70-a and 76-a for an order dismissing the Complaint in its entirety and with prejudice, awarding costs and attorney’s fees to Defendants.

For the reasons set forth below, it is ORDERED that Defendants’ motion is granted.

BACKGROUND

The Parties

Reeves is president and CEO of the Consolidated Companies – a group of corporations that own and operate elevator installation, service, and repair businesses (Complaint [NYSCEF Doc No. 1], ¶ 29).

ANL publishes the news website MailOnline, which is accessible in the United States at <https://www.dailymail.co.uk/ushome/index.html> (*id.*, ¶ 39). Konstantinides, the author of the Article, is a former reporter for ANL (*id.*, ¶¶ 38, 42).

The Legal Proceedings Between Reeves and Michelle

In November 2015, Reeves married Michelle, an actress who appeared in numerous movies, including the 2010 movie “Wall Street: Money Never Sleeps.” From the outset, the marriage was difficult, and the couple’s problems escalated after Michelle became pregnant with their first and only child.

Following their daughter’s birth, Reeves was arrested on at least five occasions. For instance, on one such occasion, Michelle alleged that he “pushed her into the dresser causing a

scratch to her arm, visible bruising with a welt, and complaint of pain to her right arm/elbow” while their daughter was nearby (*see* 1/23/17 arrest report [NYSCEF Doc No. 24]). Reeves has been charged with crimes that include assault, endangering the welfare of a child, criminal possession of a controlled substance, and aggravated harassment (*see* 1/27/17 Charging Document [NYSCEF Doc No. 25]). According to District Attorney Ashley Foote, all charges against Reeves were ultimately dismissed, after Reeves entered into a plea agreement that required him to comply with an “order of protection” preventing him from “committing any crimes” against Michelle or their daughter (*see* 9/21/17 DA Letter [NYSCEF Doc No. 27]).

In 2017, Michelle filed for divorce. Since that time, she and Reeves have been involved in a contentious divorce proceeding and custody battle (*see Reeves v Reeves*, Index No. 300865/17 [Sup Ct, NY County]) (the “divorce action”); File No. 279684, *Reeves v Reeves*, Index Nos.: NN-03153/17, V-13342/17, and V-13086-17 [Family Ct, NY County]) (“the custody action”). For the last 15 months, while the custody action proceeds in Manhattan Family Court, that court has awarded Reeves temporary sole custody of his only child with Michelle; the child has a full stay away order of protection against Michelle; and Michelle is only entitled to limited visits with her child, which must be supervised by family counselors at Comprehensive Family Services (CFS) (*Reeves aff* [NYSCEF Doc No. 66], ¶¶ 3-4).

On January 23, 2019, Reeves also filed a defamation action against Michelle, her mother, The Foundation for Child Victims of Family Court (“FCVFC”) (a non-profit entity that assists parties in custody litigation), and Jill Jones-Soderman, FCVFC’s executive director (*see Reeves v Reeves, et al.*, Index No. 150731/2019 [Sup Ct, NY County]) (the “defamation action”).

The defamation action arises out of a series of ethics complaints filed by FCVFC and posted on its website against individuals involved in the custody action, including the presiding

judge, a legal aid attorney, social workers, and caseworkers (*see* ethics complaints [NYSCEF Doc Nos. 31-33]). In the ethics complaints, FCVFC alleged that each of these actors actively hid or ignored Reeves' harmful behavior, biasing the custody action in his favor. Among other things, FCVFC asserted that Reeves sent death threats to Michelle's family, and that he was a "self-described and proud of it, Neo Nazi" (*see* ethics complaint against Judge [NYSCEF Doc No. 31], at 4). FCVFC also alleged that Reeves was a "substantiated drug abuser" who used "Cocaine with Ketamine, a horse tranquilizer known to induce intense altered psychological states including unremitting depression" (*id.* at 5; *see also* ethics complaint against Comprehensive Family Services Administration and Staff [NYSCEF Doc No. 32], at 1 ["(e)xtensive testimony exists dealing with (Reeves') use of Steroids, Cocaine, Ketamine, and other illegal drugs"]; ethics complaint against the Administration for Children's Services [NYCEF Doc No. 33], at 4 (Reeves "has a history of drug abuse engagement in drug culture activity with drugs that are known to precipitate intense mood changes from acute violence to profound depression; Steroids, Cocaine, Ketamine"). The defamation action included copies of the ethics complaints (*see* complaint in defamation action, exhibits F-H [NYSCEF Doc No. 28]).

On May 20, 2019, Reeves filed an *ex parte* application to voluntarily dismiss Michelle and her mother from the defamation action, but re-asserted claims against FCVFC and the executive director (*see* defamation action dismissal application [NYSCEF Doc No. 34]). The court granted this application, and the case against FCVFC and the executive director is now in discovery.

Defendants' Article on the Legal Proceedings between Reeves and Michelle

On July 2, 2019, ANL published the Article (NYSCEF Doc No. 2) in the DailyMail.com. The Article was entitled “‘Seriously, I’ll kill both of them’: NY socialite and actress is locked in vicious custody battle with ‘racist, ketamine-snorting’ millionaire CEO husband after he accused her of Pornhub fame and threatened to kill her parents” (complaint, ¶ 42). The Article reported on allegations made in the various legal proceedings between Reeves and Michelle. The Article also reported on text messages from Reeves, and included still photographs from a video depicting Reeves snorting a substance from a glass tray in his kitchen (Article at 3, 11-12). Mirroring the allegations in the ethics complaints, the caption to the photographs noted that the substance “appears to be ketamine and cocaine” (*id.* at 3). The Article also referred to a second, earlier video, which depicts Reeves discussing the purchase of “K,” “coke,” and “CK” (a designer drug combining ketamine and cocaine) (*id.*, at 4-5). The Article included numerous statements from Reeves and his attorneys, which made clear that Reeves denied the allegations made against him. Among other things, the Article quoted Reeves’ divorce attorney saying that Michelle’s allegations were “patently false” and a “well-orchestrated extortion and smear campaign” (*id.* at 3). It also quoted the defamation action, in which Reeves said that Michelle and her mother had “manufactured” allegations “in an effort to engineer a lucrative financial settlement,” that Michelle “engineered” to have him arrested, and that Michelle “saw the writing on the wall ... that [he] was in fact the better, more capable and fit parent” (*id.* at 4, 12).

The Complaint

On June 30, 2020, Plaintiffs filed this defamation action against Defendants. The Complaint quotes eleven statements from the Article that Reeves alleges are false and

defamatory; it also includes one generalized paraphrase of the Article that he claims is “false and defamatory” (Complaint, ¶ 43). Specifically, plaintiffs allege that the Article contained the following false and defamatory statements:

- a. “‘Seriously, I’ll kill both of them’: NY socialite and actress is locked in vicious custody battle with ‘racist, ketamine-snorting’ millionaire CEO husband after he accused her of Pornhub fame and threatened to kill her parents”;
- b. that “Reeves was arrested after he allegedly threatened to kill [Michelle’s] parents while they stood outside the five-star Carlyle Hotel”;
- c. that Reeves assaulted Michelle, which resulted in his arrest in January 2017;
- d. that those charges “were dismissed on the condition that Reeves comply with an order of protection against [Michelle] and [their] daughter.”
- e. that “Court records have also revealed texts in which Reeves has threatened to kill [Michelle] and her parents.”
- f. that “the court documents, video and audio clips seen exclusively by DailyMail.com allege that Reeves, the owner of elevator installation company CEI New York is a Neo-Nazi.”
- g. that Reeves “was once again recorded threatening to kill [Michelle’s] mother, Joycelyn Engle.”
- h. “Reeves especially took issue with Julianne’s career as an actress, so much so that he allegedly had to see a cognitive behavioral therapist over it while she effectively gave up her film career for years.”
- i. “[Reeves] dropped the defamation suit against [Michelle] on the same day DailyMail.com reached out to him for comment.”
- j. “[Michelle] told police Reeves tried to strangle her in front of their daughter when she was two months old,” and “Reeves allegedly swung at her while she was holding their daughter and pushed her into a dresser.”
- k. “After she put their daughter in her crib, she claims Reeves pushed her into a dresser, ‘causing a welt and substantial pain to her arm’ while their daughter was just a few feet away, according to the Domestic Incident report.”

1. the Article also included a still frame shot from a video with the caption, “Karl Reeves snorting what appears to be ketamine and cocaine from a glass dish in his kitchen” (*id.*).

The Complaint also includes tort claims by Reeves for intentional and negligent infliction of emotional distress, and *prima facie* tort (*id.*, ¶¶ 77-87, 112-116). Finally, the Complaint alleges claims by three of Reeves’ businesses (the Consolidated Companies) for tortious interference and *prima facie* tort (*id.*, ¶¶ 88-116).

DISCUSSION

Although on a motion to dismiss a complaint pursuant to CPLR §3211 (a) (7), “the pleading is to be afforded a liberal construction,” and “the facts as alleged in the complaint [are presumed] as true” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]), “factual claims [that are] either inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration” (*Mark Hampton, Inc. v Bergreen*, 173 AD2d 220, 220 [1st Dept 1991] [citation omitted]; *see also Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233 [1st Dept 1994]).

The court also may grant a motion to dismiss under CPLR § 3211(a) (1) if the “documentary evidence submitted ‘conclusively establishes a defense to the asserted claims as a matter of law’” (*Scott v Bell Atl. Corp.*, 282 AD2d 180, 183 [1st Dept 2001], quoting *Leon v Martinez*, 84 NY2d 83, 88 [1994]; *see also* CPLR § 3211 (g) [motion to dismiss “shall be granted unless the party responding ... demonstrates that the cause of action has substantial basis in law”]).

Construing the claims in the generous matter to which they are entitled, this Court nevertheless concludes that Defendants' motion to dismiss must be granted, as none of the alleged defamatory statements identified by Plaintiffs is actionable, and the other claims alleged by Plaintiffs are legally deficient on their face.

Defamation (First Cause of Action)

A. The Fair Report Privilege

Defendants assert that the "fair report" privilege bars most of Plaintiffs' defamation claims under Civil Rights Law § 74 ("CRL § 74"). Pursuant to the fair report privilege, "[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" (Civil Rights Law § 74; *see Cholowsky v Civiletti*, 69 AD3d 110, 114 [2d Dept 2009] [it is "incumbent on the party asserting the privilege to establish that the statements at issue reported on a 'judicial proceeding'"]). "The privilege afforded by Civil Rights Law § 74 is an affirmative defense to a claim of defamation" (*Greenberg v Spitzer*, 155 AD3d 27, 42 [2d Dept 2017]). New York courts routinely grant motions to dismiss defamation claims based on the fair report privilege where, as here, they arise from reporting on government proceedings, including court proceedings (*see e.g. Holy Spirit Assn. for the Unification of World Christianity v New York Times Co.*, 49 NY2d 63 [1979]; *Akpinar v Moran*, 83 AD3d 458 [1st Dept 2011]; *Misek-Falkoff v American Lawyer Media*, 300 AD2d 215, 216 [1st Dept 2002]). Whether an article presents a fair and true report of a judicial or official proceeding is a threshold question of law for the court to decide (*see, e.g., Holy Spirit*, 49 NY2d at 65-68).

The New York legislature enacted this statute to protect “an active, thriving and untrammelled press” in reporting on judicial proceedings and to ensure that such reports have “broad protection” in an era where the news business – by its nature – demands condensed reporting with quick deadlines (*Idema v Wager*, 120 F Supp 2d 361, 365 [SD NY 2000] [citation omitted], *affd* 29 Fed Appx 676 [2d Cir 2002]; *see also Beary v West Publishing Co.*, 763 F2d 66 [2d Cir] *cert denied* 474 US 903 [1985] [the purpose of the privilege is to promote the dual public policy interest of ensuring the free flow of true information without fear of being sued, and public dissemination of judicial decisions and proceedings for proper administration of justice]). As a result, the privilege created by CRL § 74 is “absolute and is not defeated by the plaintiff’s allegations of malice or bad faith” (*Pelayo v Celle*, 270 AD2d 469, 469 [2d Dept 2000]; *accord Phangat v New York State Div. of Human Rights*, 89 AD3d 597, 597 [1st Dept 2011], *lv denied* 19 NY3d 389 [2012], *cert denied* 568 US 943 [2012]). Thus, the fair report privilege cannot be overcome even by the assertion that a journalist “knew” that allegations reflected in an arrest report or other official proceeding were false (*see CBS Broadcasting Inc. v Counterr Group*, 2008 WL 11350274, * 14, 2008 US Dist LEXIS 126089, * 41 [SD NY 2008] [“(t)hat Idema alleges CBS knew the statements it published were false is of no consequence, as malice does not defeat the privilege accorded by CRL § 74 to reports of judicial proceedings”).

The fair report privilege has been liberally interpreted to provide broad protection for news reports of judicial proceedings (*Holy Spirit*, 49 NY2d at 67). Thus, this privilege applies “where the publication is a comment on a judicial, legislative or other official proceeding . . . and is a ‘fair and true’ report of that proceeding” (*Saleh v New York Post*, 78 AD3d 1149, 1151 [2d Dept 2010]). Courts construe the first element broadly, and the report or article need not stem directly from a judicial proceeding, but rather, can be *about* a judicial proceeding. Accordingly,

“[c]omments that essentially summarize or restate allegations of a pleading filed in an action are the type of statements that fall with section 74’s privilege” (*Lacher v Engel*, 33 AD3d 10, 17 [1st Dept 2006]; accord *Russian Am. Found., Inc. v Daily News, L.P.*, 109 AD3d 410, 413 [1st Dept 2013]). However, “[i]f the context in which the statements are made make it impossible for the ordinary viewer [listener or reader] to determine whether defendant was reporting on a judicial proceeding, the absolute privilege does not apply” (*Cholowsky*, 69 AD3d at 114-115 [internal quotation marks and citation omitted]).

As to the “fair and true” element, courts again take a broad view, with the Court of Appeals noting that for a report to be characterized as fair and true, “it is enough that the substance of the article is substantially accurate” (*Holy Spirit*, 49 NY2d at 67). Minor inaccuracies will not remove the article from the ambit of the statute (*Saleh*, 78 AD3d at 1153; *Posner v New York Law Publ. Co.*, 228 AD2d 318, 318 [1st Dept 1996]). Courts have rejected the notion that a news report be tested for literal accuracy because the language should not be “dissected and analyzed with a lexicographer’s precision . . . because a newspaper article [or on-line report] is, by its very nature, a condensed report of events which must, of necessity, reflect to some degree the subjective viewpoint of its author” (*Holy Spirit*, 49 NY2d at 68; accord *Alf v Buffalo News, Inc.*, 21 NY3d 988, 990 [2013]). Rather, the relevant inquiry is whether the article “provided substantially accurate reporting” (*Alf*, 21 NY3d at 990; see also *McRedmond v Sutton Place Rest. & Bar, Inc.*, 48 AD3d 258, 259 [1st Dept 2008]).

“Substantially accurate is interpreted liberally,” and “the test is whether the published account of the proceeding would have a different effect on the reader’s mind than the actual truth, if published” (*Highland Capital Mgt., L.P. v Dow Jones & Co., Inc.*, 178 AD3d 572, 573 [1st Dept 2019] [quotation marks and citation omitted]). Even the failure to report other facts

that were favorable to the complainant in the published news report constitutes a fair report where “those omissions did not alter the substantially accurate character of the article” (*McDonald v East Hampton Star*, 10 AD3d 639, 640 [2d Dept 2004]; accord *Rakofsky v Washington Post*, 39 Misc 3d 1226[A], 2013 NY Slip Op 50739[U], * 9 [Sup Ct, NY County 2013]). In summary, a court “must look for substantial and contextual accuracy of the news report as the standard for determining a fair report under [section 74]” (*Rakofsky*, Misc 3d 1226[A], 2013 NY Slip Op 50739[U], at * 9).

Importantly, CRL §74 protects reporting on allegations made in official proceedings, regardless of whether the underlying allegations are true or false (*see e.g. Mulder v Donaldson, Lufkin & Jenrette*, 161 Misc 2d 698, 705 [Sup Ct, NY County 1994] [“(t)he question is not whether or not the statement is ‘true.’ The question is whether it is a substantially accurate description of the claims made in the ... proceeding”], *affd*, 208 AD2d 301 [1st Dept 1995]; *see also Zappin v NYP Holdings, Inc.*, 2018 WL 1474414, * 7, 2018 US Dist LEXIS 49479, * 20 [SD NY 2018] [“(t)o invoke the § 74 privilege properly, Defendants need not prove that the statements made at the ... proceeding were, themselves, accurate; rather, all that matters for the application of § 74 is that the article is a substantially accurate rendering of what was said, even if the testimony given was not true”], *affd* 769 Fed Appx 5 [2d Cir 2019]).

Here, as more fully set forth below, because many of the challenged statements reported on allegations made in official government proceedings, and did so accurately, the statements are absolutely privileged.

As a threshold matter, it is well-established that documents filed in civil and criminal cases fall within the scope of “judicial proceedings” for purposes of analyzing the fair report privilege (*see e.g. Branca v Mayesh*, 101 AD2d 872, 873 [2d Dept 1984] [“Section 74 protection

extends ... to any pleading made within the course of the [judicial] proceeding”], *affd*, 63 NY2d 994 [1984]; *see also Malone v Daily News, LP*, 70 AD3d 418, 418 [1st Dept 2010] [“(t)he statements specified in the complaint were ... privileged insofar as they relied on documents in a judicial proceeding”]). Accordingly, the complaint in the defamation action, the attached exhibits, and the letter from the District Attorney dismissing certain criminal charges against Reeves are all within the broad protection for fair reports of “judicial proceedings.”

Furthermore, “New York courts have broadly construed the meaning of an official proceeding as used in Section 74” (*Penaherrera v New York Times Co.*, 2013 NY Slip Op 34181(U), ** 11 [Sup Ct, NY County 2013], quoting *Test Masters Educ. Servs., Inc. v NYP Holdings, Inc.*, 603 F Supp 2d 584, 588 [SD NY 2009]). “The test is whether the report concerns ‘actions taken by a person officially empowered to do so’” (*Freeze Right Refrig. & A.C. Servs. v City of N.Y.*, 101 AD2d 175, 182 [1st Dept 1984] [citation omitted]). Thus, CRL § 74 fair report privilege has long recognized arrest records as “official proceedings” (*see e.g. Hayt v Newsday, LLC*, 176 AD3d 787, 787 [2d Dept 2019] [“the article in question was substantially accurate in reporting the facts relating to the plaintiff’s arrest, and no action can be maintained against the defendant in connection with that article]; *Kramer v News Syndicate Co., Inc.*, 260 App Div 17, 19 [1st Dept 1940] [dismissing complaint for libel based on the publication in the appellant’s newspaper of an article reporting the arrest of the respondent, on ground that “the article complained of is a fair and true report of judicial and other public and official proceedings”], *revd on other grounds*, 284 NY 557 [1940]), as well as reports based on a district attorney’s investigation (*see Baumann v Newspaper Enter., Inc.*, 270 App Div 825, 825 [2d Dept 1946]).

The Court finds that the statements alleged in paragraphs 43 (b), (d) through (g), and (i) through (k) of the complaint accurately report on official and judicial proceedings, and

accordingly, they are absolutely privileged under CRL § 74 (*see e.g. Nix v Major League Baseball*, 189 AD3d 547, 548 [1st Dept 2020] [“At a minimum, the statement was a nonactionable ‘fair and true, i.e., ‘substantially accurate,’ report of the New York federal complaint”]; *Napoli v New York Post*, 175 AD3d 433, 434 [1st Dept 2019] [“The court properly dismissed plaintiff’s claims against the New York Post defendants” because “(t)he allegedly defamatory statements appearing in various news articles essentially summarize or restate the allegations in judicial filings in a case related to plaintiff, so they are protected by Civil Rights Law § 74”]).

The Court notes that the statement contained in paragraph 43 (c) of the complaint (“Reeves assaulted Michelle, which resulted in his arrest in January 2017”), is not actually in the Article. Plaintiffs admit this, claiming that the allegation was due to a “scrivener’s error” (*see* opposition memorandum [NYSCEF Doc No. 64], at 8, n 13). Given this admission, Plaintiffs’ claim based on this statement must be dismissed (*see e.g. Bacon v Nygard*, 189 AD3d 530, 530 [1st Dept 2020] [affirming partial motion to dismiss defamation claim for non-actionable statements]; *Greenberg*, 155 AD3d at 52-53 [same]).

1. Statements Based on 1/23/17 Arrest Report (Complaint, ¶¶ 43 [j] and [k])

First, the two challenged statements that reported Michelle’s allegation to the police in January 2017 that Reeves assaulted her were fair and accurate summaries of portions of Reeves’ January 23, 2017 arrest report (*see* Complaint, ¶ 43 [j] [Article reports that “[Michelle] told police Reeves tried to strangle her in front of their daughter while she was two months old” and “Reeves allegedly swung at her while she was holding their daughter and pushed her into a dresser”]; *id.*, ¶ 43 [k] [Article reports that “she claims Reeves pushed her into a dresser causing

a welt and substantial pain to her arm while their daughter was a few feet away, according to a Domestic Incident report”). The arrest report states that, on January 23, 2017, Reeves was arrested after Michelle called the police and claimed:

“She was reading and studying for school when [Reeves] came into the room and began to verbally abuse her calling her vulgar names and berating her. [She] tried to get away from [Reeves] by going to the bedroom. [Reeves] came after her and continued. [She] states she then put the baby down into the crib and that’s when [Reeves] pushed her into the dresser causing a scratch to her arm, visible bruising with a welt and complaint of pain to her right arm/elbow area”

(1/23/17 arrest report at 4). In response to the question “has suspect ever strangled or ‘choked’ you,” the arrest report reflects the answer “yes” (*see id.* at 5).

This Court finds that the Article accurately summarizes Michelle’s allegations, as reflected in the arrest report. Reeves does not deny this; instead, he merely asserts that he “never assaulted Michelle” (Complaint, ¶ 47), and that Defendants were on notice that Michelle’s statements to the police – which were set forth in arrest records and police reports – were false (*see* opposition memorandum at 26 [Michelle “lacked all credibility and fabricated the charges”]; *see also* Complaint, ¶ 57). However, Reeves’ denial, and the issue of whether or not her allegations were false are irrelevant to the application of the fair report privilege, which purposefully is designed to immunize reporting on the charges made in official proceedings, regardless of whether the underlying allegations are true or false (*Mulder*, 161 Misc 2d at 705; *Freeze Right*, 101 AD2d at 183 [“Section 74 ... was designed precisely to protect the publisher of a fair and true report from liability for just such an error [in the underlying court document] and to relieve it of any duty to expose the error through its own investigation”]; *Biro v Condé Nast*, 883 F Supp 2d 441, 479 [SD NY 2012] [plaintiff “does not allege that ... the Article reports [earlier lawsuits] inaccurately – he argues that the plaintiffs in the original suits were

incorrect in their allegations. This is not sufficient to defeat the fair and true report privilege”).

Accordingly, because the Article accurately reported on allegations in the arrest report, CRL § 74 privilege applies.

The Court rejects Reeves’ assertion that fair report privilege does not apply to arrest reports (*see* opposition memorandum at 25). To the contrary, courts applying CRL § 74 consistently have held that the privilege applies to “reports concerning the execution of arrests and/or search warrants” (*Sanders v Long Island Newsday*, 2010 WL 3419653, * 7, 2010 US Dist LEXIS 88799, * 19 [ED NY 2010] [collecting cases]; *see also Thomas v City of New York*, 2018 WL 5791965, * 9, 2018 US Dist LEXIS 189305, * 22 [plaintiff’s “arrest and the allegations concerning his conduct indisputably constitute an ‘official proceeding’”]).

2. Statement Based on District Attorney Letter (Complaint, ¶ 43 [d])

The Court further finds that the statement in the Article that criminal charges against Reeves “were dismissed on the condition that Reeves comply with an order of protection against [Michelle] and [their] daughter” (Complaint, ¶ 43 [d]), accurately reports the content of a letter from Assistant District Attorney Ashely Foote, which spells out the terms of a plea agreement between prosecutors and Reeves. According to the letter, in exchange for an Adjournment in Contemplation of Dismissal for one case against him, Reeves was required to comply with an “order of protection,” which prevented him from “committing any crimes” against Michelle and their daughter (*see* 9/21/17 DA Letter). The letter further noted, “[i]n exchange for this plea, the People dismissed as covered” three other cases against Reeves (*id.*).

Despite this letter from the prosecuting authority, Reeves asserts that the charges against him “were dismissed outright” (Complaint, ¶ 48), in essence, attempting to draw a distinction

between the requirement that he comply with the protective order, and it being a “condition” of dismissal. However, “[n]ewspapers cannot be held to a standard of strict accountability for use of legal terms of art in a way that is not precisely or technically correct by every possible definition” (*Gurda v Orange County Publ. Div. of Ottaway Newspapers*, 81 AD2d 120, 133 [2d Dept 1981], *revd on other grounds* 56 NY2d 705 [1982]; *accord Cholowsky v Civiletti*, 16 Misc 3d 1138[A], 2007 NY Slip Op 51742[U], * 3 [Sup Ct, Suffolk County 2007], *affd* 69 AD3d 110 [2d Dept 2009]). A contrary holding would “defeat the purposes of the First Amendment ... and the public’s right to know would be seriously threatened” (*Gurda*, 81 AD2d at 133). Here, Reeves does not deny that there was a protective order issued against him, or that the dismissal of at least one charge required that he comply with that order. Nor does he deny that the dismissal of three other charges resulted from the same plea agreement, which required him to comply with the protective order. Thus, whether Reeves’ compliance with the protective order was technically a “condition” of dismissal of all the charges against him or only one of the charges, the effect on the mind of the readers is the same. Thus, this statement is protected under CRL § 74.

Reeves also argues that the September 2017 District Attorney’s Letter is not an “official” record covered by the fair report privilege (*see* opposition memorandum at 29). However, courts routinely hold that news reports about arrests and criminal charges based on statements by government officials are absolutely privileged under CRL § 74 (*see e.g. Mistretta v Newsday Media Group*, Index No. 41/2019 at 4 [Sup Ct, Nassau County Sept. 17, 2019] [news report based on letter submitted by the Nassau County District Attorney’s Office to County Executive was privileged under section 74]; *Jeanty v City of Utica*, 2017 WL 6408878, * 18, 2017 US Dist LEXIS 218307 [ND NY 2017] [report based on statement made by District Attorney during

interview was privileged under Section 74]). Here, Defendants accurately reported on the disposition of the criminal charges against Reeves as recounted in the September 2017 District Attorney's letter – an official government document, on government letterhead, explaining the “plea agreement” in which Reeves agreed to comply with an order of protection in exchange for the dismissal of criminal charges.

Finally, Plaintiffs argue that Defendants “forfeit[ed]” the fair report privilege because they failed to “note that all allegations were dismissed and the accused was exonerated” (*see* opposition memorandum at 26). This assertion also is devoid of merit. The Article here did report that the charges against Reeves “were dismissed”; it also accurately reported that the dismissal was conditioned on Reeves complying with an order of protection. Reeves’ assertion that the charges against him were dismissed “outright” and that there is “no evidence” of a plea bargain (*id.* at 28) is directly contradicted by the September 2017 letter from the Assistant District Attorney, which states in relevant part:

“The assigned prosecutor and defense attorney reached a plea agreement giving the defendant [Karl Reeves] an Adjournment in Contemplation of Dismissal for the above captioned case [20081/2017], requiring the defendant to comply by an order of protection (preventing the defendant from committing any crimes against Mrs. Julianne Reeves and [her child]), and completing and complying with conditions set forth by ACS ... In exchange for this plea, the People dismissed as covered, dockets 20080/2017, 2017NY024108, and 2017NY028554”

(9/21/17 District Attorney Letter).

Thus, regardless of whether Reeves’ compliance with the protective order was a condition for dismissal of one of the charges against him or multiple charges, the effect on the mind of the reader is the same: after a criminal charge was brought against Reeves, he entered into a plea agreement that required him to comply with an order of protection. Consequently, the Article was a “substantially accurate” report of a judicial proceeding (*see Cholowsky*, 69 AD3d

at 115 [report is “substantially accurate” if it would not “produce a different effect on a reader than would a report containing the precise truth”]; *Holy Spirit*, 49 NY2d at 68 [“When determining whether an article constitutes a ‘fair and true’ report, the language used therein should not be dissected and analyzed with a lexicographer's precision”]).

Accordingly, the challenged statement reporting on the dismissal of charges against Reeves is unquestionably privileged CRL §74 as a fair report of official records and proceedings.

3. Statement Based on 4/15/17 Police Report, 12/1/17 Family Offense Petition and District Attorney Letter (Complaint, ¶ 43 [b])

Reeves also claims that it was false for the Article to state that he “was arrested after he allegedly threatened to kill [Michelle’s] parents while they stood outside of the five-star Carlyle Hotel” (Complaint, ¶ 43 [b]; Article at 12). This statement appeared in the Article in the context of a broader discussion about Reeves’ arrest record and his relationship with Michelle’s parents:

“In addition to allegedly threatening to kill her mother, arrested for being in possession of prescription pills without being able to verify validity of possession and possession of a firearm without a NYC license, Reeves was arrested after he allegedly threatened to kill her parents while they stood outside the five-star Carlyle Hotel.

In September 2017, the charges were dismissed on the condition that Reeves comply with an order of protection against her and their daughter”

(Article at 12).

Although Reeves asserts that he was never actually arrested for threatening to kill Michelle’s parents, the “gist” of this statement is that Reeves was accused of threatening Michelle’s parents, but the District Attorney did not pursue charges against him. That is entirely accurate. On April 15, 2017, the police reported a complaint by Michelle’s father that Reeves told him, when the two men were in front of the Carlyle Hotel, that Reeves “will see [the father]

dead,” which caused the father “alarm” (*see* 4/15/17 police report [NYSCEF Doc No. 26], at 1). The statement that Reeves threatened to kill Michelle’s parents is also consistent with a December 1, 2017 Family Offense Petition filed by Michelle’s mother (and attached to the defamation action complaint), which states that Reeves “threatened to kill me and my husband at the Carlyle Hotel” (*see* Family Offense Petition [NYSCEF Doc No. 29], at 3). Thus, because this statement in the Article accurately reports the contents of the police report, the Family Offense Petition and the District Attorney’s letter – that Michelle’s parents complained to police that Reeves had threatened to kill them, but no charges against him were pursued – it is covered by the fair report privilege. The fact that Reeves was not arrested is a minor inaccuracy.

4. Statement Based on Documents Attached to the Defamation Action (Complaint, ¶ 43 [f])

With respect to the statement in the Article that “court documents, video, and audio clips ... allege that Reeves, the owner of elevator installation company CEI New York is a Neo-Nazi” (Complaint ¶ 43 [f]; *see* Article at 3), Reeves alleges that “[t]here are no court documents, video, and audio clips, which state Reeves is a ‘Neo Nazi’” (Complaint, ¶ 50). However, this statement comes from Reeves’ own complaint in the defamation action, which attached as exhibits the ethics complaints filed by the FCVFC. The ethics complaints include allegations that Reeves is a “self-described, and proud of it, Neo Nazi, racist, homophobic domestic violence abuser, child abuser” (*see* defamation action complaint; ethics complaint against Judge, at 5). Accordingly, Defendants’ reporting on an allegation that is part of the court record in Reeves’ defamation action is protected under CRL §74 (*see Saleh*, 78 AD3d at 1152 [“Comments 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]).

Reeves asserts that the FCVFC ethics complaint was not part of an "official proceeding" under CRL § 74 because it was only posted on FCVFC's website, not "filed" any place (*see* opposition memorandum at 4, 28). However, even assuming that FCVFC did not submit this document to the State Commission on Judicial Conduct, despite what the document indicates, there is no dispute that Reeves "filed" this document with the court, by attaching it to his publicly-filed complaint in the defamation action. As such, the ethics complaint is part of a judicial proceeding, and its allegation about Reeves being a "self-described ... Neo Nazi" was accurately related in the Article. Accordingly, the statement that "court documents" included the allegation that Reeves is a Neo Nazi is absolutely privileged under CRL § 74.

Reeves also argues that CRL §74 should not apply because the challenged statement only references "court documents" broadly, and does not identify the defamation action specifically. This argument is meritless, as it need only be clear to an "ordinary viewer, listener, or reader" that "the defendant was reporting on a judicial or other official proceeding" (*id.* at 1151 [internal quotation marks, brackets and citation omitted]; *see also* *Fridman v BuzzFeed, Inc.*, 2021 NY Slip Op 30860[U], * 8-9 [Sup Ct, NY County 2021]). There is no requirement that the specific court proceeding be identified (*see* *Kinsey v New York Times Co.*, 991 F3d 171, 180 [2d Cir 2021] [affirming the district court's order granting a motion to dismiss the plaintiff's libel suit under CRL § 74, and noting that "our case law does not require that the court filing, the court, or the jurisdiction be specifically identified in the article. The key question is whether the reader is able to determine that the report is of *a* proceeding"'] [italics in original]). Thus, "even if the article failed to clearly identify the specific proceeding at issue," CRL § 74 applies (*id.*).

Here, the Article's express reference to "court documents" makes it clear to any reader that the Article is reporting on allegations in a judicial proceeding. Moreover, a few paragraphs later, following the statement referencing "court documents" containing the "Neo-Nazi" allegation, the Article discusses the defamation action, explaining that it was brought against Michelle, her mother, FCVFC, and FCVFC's executive director, and that, as part of that action, Reeves "alleged that [Michelle]'s allegations were manufactured by her and her mother in an effort to engineer a lucrative financial settlement to the parties' divorce and custody proceedings" (Article at 3). The Article later references the court in which the defamation action was filed, stating that, "[a]ccording to documents filed in the Supreme Court, Julianne claimed Reeves is a Neo-Nazi, homophobic, domestic violence abuser, and child abuser" (*id.* at 6).

Accordingly, this statement is clearly protected by the fair report privilege.

5. Statement That Reeves Dropped the Defamation Action (Complaint, ¶ 43 [i])

The Article's statement that Reeves dropped "the defamation suit against [Michelle] on the same day DailyMail.com reached out to him for comment" (complaint, ¶ 43 [i]; Article at 12) is also protected by the fair report privilege. The defamation action alleged defamation claims against Michelle, her mother, FCVFC, and FCVFC's executive director (*see* defamation action complaint). On May 20, 2019, Reeves filed a motion to sever the case against Michelle and her mother, and to dismiss that portion of the action, claiming that he wanted to "concentrate his efforts on vindicating his rights against Michelle and [her mother] in the pending divorce and child custody proceedings" (*see* defamation action dismissal affidavit [NYSCEF Doc No. 34], ¶¶ 1, 4).

Reeves contends that the fact that he dismissed Michelle from the defamation action on May 20, 2019, the day before he was contacted by the DailyMail.com for comment on May 21, 2019, means that this statement is false, and is not covered by the fair report privilege (*see* opposition memorandum, at 34). The Court rejects this argument, as the “gist” or “sting” of the statement is accurate – Reeves filed a defamation action against Michelle, which he subsequently dropped. New York courts repeatedly have held that where the “gist” of the description of a judicial proceeding is accurate, such minor inaccuracies do not negate the CRL § 74 fair report privilege (*see Posner*, 228 AD2d at 318 [“The motion court correctly held that the article published in defendant newspaper was a substantially accurate report of the decision ... and therefore privileged under Civil Rights Law § 74. The minor inaccuracies in the article cited by plaintiff do not make it otherwise”]; *Foley v CBS Broadcasting, Inc.*, 28 Misc 3d 1227[A], 2006 NY Slip Op 52712[U], * 4 [Sup Ct, NY County 2006] [“At most, the broadcasts contained minor inaccuracies about the proceedings—for example, that the premises was padlocked not only because of violations for unlicensed activities but also because of consumer complaints. Such inaccuracies did not deprive the broadcasts of the cloak of the privilege”]).

The Article also accurately reported Reeves’ explanation for dropping the claim, stating that “Reeves indicated he would address her false claim against him in their divorce proceeding” (Article at 12). Accordingly, this statement, like the other statements that accurately reported on official government records and judicial proceedings, cannot give rise to a defamation claim.

6. Statements Based on Text Messages and Recordings (Complaint, ¶¶ 43 [e] and [g])

Reeves next takes issue with two statements referencing text messages and recordings in which he threatened to kill Michelle and her parents (*see* Complaint, ¶ 43 [e] [Article reports that “Court records have also revealed texts in which Reeves has threatened to kill [Michelle] and her parents”]; *id.*, ¶ 43 [g] [Article reports that “Reeves was once again recorded threatening to kill (Michelle’s) mother, Joycelyn Engle”]).

The statement that Reeves threatened to kill Michelle is consistent with one of the ethics complaints attached to the defamation action, which alleged that Reeves “has actively been sending death threats to [Michelle]” (*see* NYCEF Doc No. 31, at 4). It also corresponds with the January 23, 2017 arrest report. In response to the question “Has the suspect ever threatened to kill you or your children?” Michelle responded, “yes” (*see* 1/23/17 arrest report at 5). The statement that Reeves threatened to kill Michelle’s parents is also consistent with the Family Offense Petition, which alleges that Reeves “threatened to kill me and husband several times” (*see* Family Offense Petition at 2). Thus, both statements, which essentially summarize the contents of the arrest report and Family Offense Petition, and the ethics complaint attached to the defamation action pertaining to the alleged death threats, are also protected by the fair report privilege.

B. Substantial Truth of the Statements Based on Text Messages and Audio and Video Recordings (Complaint, ¶¶ 43 [h] and [i])

“To state a cause of action alleging defamation, a plaintiff must allege that the defendant published a false statement, 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” (*Rosner v Amazon.com*, 132 AD3d 835, 836-837 [2d Dept 2015]; see also *Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014]).

Falsity is a required element of a defamation claim (*Rinaldi v Holt, Rinehart & Winston, Inc.*, 42 NY2d 369, 380 [1977] [“the plaintiff must establish that the statement was, in fact, false”]). Thus, a defamation action must be dismissed when the statement at issue is “substantially true” (*Tannerite Sports, LLC v NBCUniversal News Group*, 864 F3d 236, 242 [2d Cir 2017]). “[A] statement is substantially true if the statement would not have a different effect on the mind of the reader from that which the pleaded truth would have produced” (*id.* [citation omitted], see also *Masson v New Yorker Magazine, Inc.*, 501 US 496, 517 [1991] [a statement is not “false” so long as “the substance, the gist, the sting, of the libelous charge [is] justified”] [citation omitted]). When assessing substantial truth, “[t]he entire publication, as well as the circumstances of its issuance, must be considered” (*Tannerite*, 864 F3d at 243 [citation omitted]; see also *Stepanov*, 120 AD3d at 38). Courts apply this standard liberally, to prevent the media from being “damaged by an overly technical or exacting conception of truth in publication” (*Tannerite*, 864 F3d at 243).

Courts evaluating motions to dismiss under CPLR §3211 (a) (1) routinely consider incontrovertible documents that establish the substantial truth of a challenged statement (*see e.g.* *Muhlhahn v Goldman*, 93 AD3d 418, 418-19 [1st Dept 2012] [dismissing libel claim where defendant’s recordings of interviews with plaintiff established substantial truth of statements]; *Chinese Consol. Benevolent Assn. v Tsang*, 254 AD2d 222, 223 [1st Dept 1998] [defamation claim “was correctly dismissed based on the withdrawal slips apparently signed by defendant, who does not challenge their authenticity, and which establish the truth of the alleged statement”]; *Gutierrez v McGrath Mgt. Servs., Inc.*, 152 AD3d 498, 502 [2d Dept 2017]

[dismissing defamation claim where defendants’ “documentary evidence ... utterly refuted the allegations in the complaint by demonstrating that the allegedly defamatory content in the notices was true”).

Here, as in the cases discussed above, irrefutable documents, i.e., text messages from Reeves to Michelle, and video and audio clips of Reeves, show that statements set forth in the Complaint, ¶¶ 43 (h) and (l), are not actionable because they are substantially true.

First, Reeves claims that it was false for the Article to state that he “took issue with Julianne’s career as an actress, so much so that he allegedly had to see a cognitive behavioral therapist” (Complaint ¶ 43 [h]); Article at 8). However, as the Article sets forth, a recording of Reeves includes his angry accusations of Michelle being on Pornhub after Michelle appeared in a simulated sex scene in one of her films (Article at 8-10; *see also* 8/5/16 audio recording [NYSCEF Doc No. 36], at 00:02). Accordingly, it was not materially false to state that Reeves “took issue” with Michelle’s acting career.

Because Reeves cannot credibly deny that he made these statements, no claim can arise from the Article’s accurate reporting of them (*see Cabello-Rondón v Dow Jones & Co.*, 2017 WL 3531551, * 7, 2017 US Dist LEXIS 131114, * 18 [SD NY 2017], *affd* 720 Fed Appx 87 [2d Cir 2018] [holding that the plaintiff failed to allege falsity, because he did not challenge the “gist or substance” of the statement, because “without challenging the accuracy of the statement that he was under investigation, [the plaintiff] cannot sufficiently plead falsity by alleging that he is not the ‘biggest’ target of the investigation”]; *see also Udell v NYP Holdings, Inc.*, 169 AD3d 954, 957 [2d Dept 2019] [article reporting that judge’s husband parked car in a space for a prisoner van was not substantially false when plaintiff “admitted, in essence, that he parked where he should not have parked”]).

Here, too, because Reeves cannot challenge the recordings, he cannot base a defamation claim on the Article's statement that he "took issue with Julianne's career as an actress."

With respect to the Article's statement that he had to see a cognitive behavioral therapist, a statement that an individual consulted with a therapist – something that can be said of countless individuals, particularly those who are working through marital troubles or other personal concerns – is not defamatory as a matter of law, because it "does not arouse in the mind of the average person in the community an evil or unsavory opinion [] or expose plaintiff to public hatred, contempt, or aversion" (*Pritchard v Herald Co.*, 120 AD2d 956, 956 [4th Dept 1986]). Notably, Reeves does not deny that he has seen a therapist.

Reeves next claims that a caption on a photograph in the Article – "Karl Reeves snorting what appears to be ketamine and cocaine from a glass dish in his kitchen" – is false (*see* Complaint, ¶¶ 43 [1], 45). However, this statement is supported by numerous videos depicting Reeves' behavior. For example, in a video dated August 3, 2016, Reeves discusses purchasing "K" (short for Ketamine) and "coke and CK," (short for Cocaine and Ketamine mixture), which he refers to as a "good combo" (*see* 8/3/16 video recording [NYSCEF Doc. No. 38]). In another video less than two weeks later, Reeves is seen snorting a substance from a glass tray in his kitchen (still photos of which were in the Article) (*see* 8/14/16 video recording [NYSCEF Doc No. 39]; Article at 3). This is consistent with the allegations that FCVFC made in the ethics complaints, which stated that Reeves has a history of using "Cocaine with Ketamine," (*see* ethics complaint), and the Family Offense Petition filed by Michelle's mother, which states that Reeves "is still using drugs" (*see* petition, at 2). Reeves does not deny that he was snorting an illicit substance and provides no contrary explanation for the images of him snorting something from a tray in his kitchen, nor does he identify any alternative substance that he claims was being

ingested. The reason is clear: if Reeves were ingesting some other illicit substance, the gist or sting of the Article still would be substantially true. Given the videos, the Article's description of what the still photograph depicted was substantially accurate.

In opposition, Reeves does not dispute that the text messages identified in the motion were from him, or that the recordings are of him. Instead, Reeves objects to this Court considering these documents, claiming that without an "authenticating affidavit," this evidence is not "irrefutable" and, hence, is not admissible as "documentary evidence" under CPLR § 3211 (a) (1) (*see* opposition memorandum at 35-36). However, New York courts have repeatedly held that these types of communications do constitute "documentary evidence" for purposes of a dismissal motion under CPLR § 3211 (a) (1) (*see Epstein v Feldman*, 2019 NY Slip Op 31124[U], * 5-6 [Sup Ct, NY County 2019] [granting motion to dismiss under CPLR § 3211 [a] [1] based on text messages from plaintiff submitted with defendants' motion papers]; *see also Kolchins v Evolution Mkts., Inc.*, 128 AD3d 47, 58 [1st Dept 2015] [rejecting Supreme Court's conclusion that correspondence such as emails do not suffice as documentary evidence for purposes of CPLR § 3211 (a) (1); "[t]his Court has consistently held otherwise").

Here, the text messages contain Reeves' telephone number – which matches the phone number listed for him in the police reports (*see e.g.* 1/23/17 police report) – and Reeves does not dispute their authenticity. Moreover, for the video and audio recordings, Defendants did provide an "authenticating affidavit" (*see* 6/25/18 Michelle aff from the custody action [NYSCEF Doc No. 48]). Thus, the text messages, video recordings, and audio recordings submitted by Defendants may properly be considered by this Court as documentary evidence; these materials have been authenticated; and Reeves does not – and cannot – dispute their authenticity. Accordingly, the statements based on this documentary evidence are not defamatory.

C. The Headline Is Protected as a Fair Index of the Article's Truthful Content

Finally, Reeves alleges that the Article's headline is defamatory (*see* Complaint, ¶ 43 [a] [“‘Seriously I’ll Kill Both of Them’: NY socialite and actress is locked in vicious custody battle with ‘racist, ketamine-snorting’ millionaire CEO husband after he accused her of Pornhub fame and threatened to kill her parents”]).

However, in order to determine whether the headline of a news article is defamatory in nature, “the court must initially determine whether the headline was a fair index of the article with which it appears” (*Mondello v Newsday, Inc.*, 6 AD3d 586, 587 [2d Dept 2004]; *see also Test Masters Educ. Servs.*, 603 F Supp 2d at 589 [a headline is not actionable so long as it is a “fair index of the substantially accurate material included in the article”] [internal quotation marks and citation omitted]). “The rule is general that both the headline and the item to which it is attached are to be considered one document in determining the effect of an article being complained of as defamatory” (*Cole Fischer Rogow, Inc. v Carl Ally, Inc.*, 29 AD2d 423, 426 [1st Dept 1968] [citation omitted], *affd* 25 NY2d 943 [1969]; *see also Von Gerichten v Long Is. Advance*, 202 AD2d 495, 496 [2d Dept 1994] [holding that the “headline of the article [] must be read and evaluated in conjunction with the text it precedes”]). This is a threshold question of law for the court (*see Pritchard v Herald Co.*, 120 AD2d 956, 956 [4th Dept 1986]). “If the headline is indeed a ‘fair index’ of the related news article, it is not actionable as a matter of law” (*White v Berkshire-Hathaway, Inc.*, 10 Misc 3d 254, 255 [Sup Ct, Erie County 2005], citing *Gunduz v New York Post Co.*, 188 AD2d 294, 294 [1st Dept 1992]; *see also Cabello-Rondón*, 2017 WL 3531551 at * 6, n 3, 2017 US Dist LEXIS 131114 at * 16, n 3 [granting motion to dismiss]).

Under this standard, “[a] newspaper need not choose the most delicate words available in constructing its headline” (*Test Masters Educ. Servs.*, 603 F Supp 2d at 589). In fact, “it is permitted some drama in grabbing its reader’s attention” (*id.* [using “Scam” in headline to refer to company was fair index of article reporting that Consumer Protection Bureau had investigated the company and demanded it provide refunds]; *see also Gunduz*, 188 AD2d at 294 [headline, “Public Enemy No. 1,” was non-actionable fair index of article even though plaintiff, a taxi driver, had not committed a crime]). Even if a headline is “unfortunate, sensationalist and drafted simply to garner attention,” it is not actionable where it is a fair index of the underlying article (*Louis v NYP Holdings, Inc.*, 54 Misc 3d 1222[A], 2017 NY Slip Op 50276[U], * 2 [Sup Ct, NY County 2017]).

Here, the headline is a fair index of the content in the Article, which, as explained above, is not actionable. Specifically:

- The statement “seriously, I’ll kill both of them” comes directly from an August 5, 2016 audio recording of Reeves, quoted in the Article. The statement that Reeves “threatened to kill [Michelle’s] parents” encapsulates this recording, as well as other materials referenced in the Article.
- The statement that Reeves is “locked in [a] vicious custody battle” is indisputably true (*see Reeves aff* [NYSCEF Doc. 66], ¶¶ 2-5).
- The statement that Reeves is an alleged racist is from the Article’s report about the ethics complaints, attached to the defamation action complaint, in which FCVFC accused Reeves of being a “neo-Nazi” and “racist.”
- The description of Reeves as “ketamine snorting” summarizes the videos, discussed in the Article, in which Reeves discusses purchasing “CK” and “K” and which show him snorting a substance from a tray. It is further based on the ethics complaints, which alleged that Reeves had a history of using ketamine and cocaine.
- The statement that Reeves accused Michelle of “Pornhub fame” comes from the August 5, 2016 audio recording, in which Reeves tells Michelle “You’re just on Pornhub.”

Accordingly, the headline is not actionable.

In opposition, Reeves asserts that, because the headline includes the phrase “custody battle,” to the extent the Article also reports allegations made in the defamation action, the headline is not a fair index of the Article (*see* opposition memorandum at 36-37). However, a headline, by definition, is an abbreviated description of the subjects discussed in the body of an article. Here, upon reading the Article, a reader clearly can see that there were multi-court legal battles between Reeves and Michelle, including a divorce action, a separate custody action, and a defamation action. Using the term “custody battle” as a shortened term of reference does not negate the fact that the headline is a fair index of the various allegations on which the Article reports.

Indeed, New York courts repeatedly have held that publishers must be given flexibility in constructing headlines. For example, in *Kesner v Dow Jones & Co.* (2021 WL 256949, 2021 US Dist LEXIS 14358 [SD NY 2021]), the court held that the headline “The Lawyer at the Center of the SEC Pump-and-Dump Case,” was protected as a fair index of an article, even though the plaintiff – the lawyer referenced in the headline – was not personally mentioned in the SEC Complaint. As the court explained, the article reported on various publicly filed complaints, and anyone reading the article would understand that the plaintiff was at the “center” of the case because of his connections to key participants. Here, too, any reader of the Article would understand that the headline encompassed allegations made against Reeves in various legal battles with Michelle, not just the custody action.

Reeves further claims that the headline is inaccurate because it refers to him as a “‘racist’, full stop” (*see* opposition memorandum, at 37). To the contrary, it is Reeves’ characterization of

the headline that is inaccurate. The term “racist” appears in the headline in single quotations, indicating that defendants are quoting allegations made against Reeves, not making factual assertions. This is made even more clear by reading the Article, which stated accurately that “court documents allege” that Reeves is a Neo-Nazi, and that Reeves denied the allegations (Article, at 2).

Accordingly, because the headline fairly summarized the body of the Article, and because the statements in the Article were not actionable as a matter of law, the headline is not actionable, as a fair index of the Article’s contents.

**Intentional and Negligent Infliction of Emotional Distress
and Prima Facie Tort (Second, Third and Sixth Causes of Action)**

In his second cause of action for intentional infliction of emotional distress, Reeves alleges that “[d]efendants acted with the intent to cause severe emotional distress” by “publish[ing] the Defamatory Statements” (Complaint, ¶¶ 79-80). In his third cause of action for negligent infliction of emotional distress, Reeves alleges that “[d]efendants owed [him] a duty of care to . . . act with reasonable care and breached that duty by, among other things, publishing the Defamatory Statements” (*id.*, ¶ 86). In the sixth cause of action for primary tort, plaintiffs allege that “[d]efendants, by their publication of the Article, intentionally inflicted harm on Reeves and Consolidated without excuse or justification” (*id.*, ¶ 113).

All of these causes of action are based upon the same conduct as that alleged in the defamation claim – the statements published in the Article. As such, they are merely an attempt to recast the defective defamation claims as claims for negligent and intentional infliction of emotional distress and *prima facie* tort. New York courts routinely dismiss such derivative

claims where, as here, they “fall within the ambit of other traditional tort liability, namely, [a] cause of action sounding in defamation” (*Fleischer v NYP Holdings, Inc.*, 104 AD3d 536, 538 [1st Dept 2013] [dismissing “causes of action alleging prima facie tort and intentional infliction of emotional distress against each of the defendants . . . as duplicative”]; *see also Matthaus v Hadjedj*, 148 AD3d 425, 425 [1st Dept 2017] [“Supreme Court properly granted defendant’s motion to dismiss plaintiff’s claim for intentional infliction of emotional distress as duplicative of her defamation cause of action”]; *Bacon v Nygard*, 140 AD3d 577, 578 [1st Dept 2016] [“The intentional infliction of emotional distress and prima facie tort claims are duplicative since the underlying allegations fall ‘within the ambit’ of the defamation causes of action”]; *Stanley v City of New York*, 71 Misc 3d 171, 181 [Sup Ct, NY County 2020] [“As an initial matter, causes of action for intentional and negligent infliction of emotional distress are not permitted if they essentially duplicate tort . . . causes of action”]; *National Nutritional Foods Assn. v Whelan*, 492 F Supp 374, 384 [SD NY 1980] [“(i)t would make no sense . . . to deem certain expressions immune from suit as libel, and then find them sufficient in the identical factual context to constitute a prima facie tort”]).

Because these claims are based on the same conduct as Reeves’ defamation claim – the statements published in the Article – they must be dismissed as duplicative.

The Consolidated Companies’ Claims for Tortious Interference with Contract and Prospective Business Relations (Fourth and Fifth Causes of Action)

In the fourth cause of action for tortious interference with contract, the Consolidated Companies allege that “[d]efendants’ publication of the Defamatory Statements was intended to and did in fact cause certain long-time clients to discontinue and/or breach their contractual

relationships with Consolidated” (Complaint, ¶ 99). In their fifth cause of action for tortious interference with prospective business relationships, the Consolidated Companies allege that “the Defamatory Statements were intended to harm not only Reeves but also Consolidated,” and that “[a]s a direct and proximate result of Defendants’ tortious conduct, Consolidated was actually and wrongfully prevented from continuing their business relationships with certain long-term clients and from entering into business relationships with prospective clients, including Empire” (*id.*, ¶¶ 107-108).

The Consolidated Companies’ claims for tortious interference with contract and tortious interference with prospective business relations must also be dismissed as a matter of law. The Consolidated Companies complain only about one statement in the Article: “court documents . . . seen exclusively by DailyMail.com allege that Reeves, the owner of elevator installation company CEI New York, is a Neo-Nazi” (complaint, ¶ 90; Article at 2-3). However, this statement is not “of and concerning” the Consolidated Companies – it does not allege that the Companies have expressed views consistent with the Nazi party or authorized any such comments. Rather, it reports about court documents alleging that Reeves is a Neo-Nazi (*see e.g. New York Times Co. v Sullivan*, 376 US 254, 288 [1964] [respondent’s defamation claim lacked merit when allegedly defamatory statement was not “of and concerning” him]; *see also Affitrex Ltd. v General Elec. Co.*, 161 AD2d 855, 856 [3d Dept 1990] [statements concerning an owner or officer of a corporation are not deemed to be statements about the corporation itself for purposes of defamation law; statement that company owner is an “evil man” was not “of and concerning” company]). In addition, this statement is a fair report of the allegations made by the defendants in the defamation action and is therefore privileged under CRL §74.

Since neither Reeves nor the Consolidated Companies can state a claim for defamation based on this statement, the Companies cannot re-name their claims as “tortious interference with contract” or “tortious interference with business relationship.” Under New York law, claims for tortious interference will be dismissed as duplicative where they are “based on the same substantive facts pleaded with respect to [a] defamation cause of action” (*Ripka v County of Madison*, 162 AD3d 1371, 1373 [3d Dept 2018]; see e.g. *Phillips v Carter*, 58 AD3d 528, 528 [1st Dept 2009] [dismissing tortious interference claim with contract because underlying defamation claim failed to state a cause of action]; *Dobies v Brefka*, 273 AD2d 776, 778 [3d Dept 2000] [“we decline to reinstate the claim for tortious interference with economic advantage in the absence of an alleged act of interference with a contract or business relationship distinct from the general declaration of injury to reputation included in plaintiff’s defamation claims”]; *Restis v American Coalition Against Nuclear Iran, Inc.*, 53 F Supp 3d 705, 727 [SD NY 2014] [dismissing tortious interference with contract claim as duplicative of defamation claim]).

Accordingly, here, because the Consolidated Companies cannot state a defamation claim, dismissal of their tortious interference claims is required, since the alleged defamation is the basis for the allegation that Defendants’ conduct was accomplished by wrongful means (*Sabharwal & Finkel, LLC v Sorrell*, 117 AD3d 437, 438 [1st Dept 2014]; see also *Perez v Violence Intervention Program*, 116 AD3d 601, 602 [1st Dept 2014] [dismissing tortious interference claim as “duplicative of the defamation claim, as [it alleges] no new facts and seek[s] no distinct damages from the defamation claim”]).

Although the Consolidated Companies concede that the Article does not include any allegedly defamatory statements that are “of and concerning” them, these Plaintiffs nonetheless assert that they are entitled to bring tortious interference claims, based on the purported damage

to their reputation from the Article (*see* opposition memorandum at 41). However, under New York law, claims of damage to reputation are, in essence, defamation claims, and cannot be recast into a different tort (*see e.g. Abshier v Sunset Recordings, Inc.*, 2014 WL 4230124, * 9, 2014 US Dist LEXIS 119742, * 25 [SD NY 2014] [citation omitted] [“New York courts have consistently held that claims ostensibly based on intentional interference with advantageous and contractual relations, but which in fact are based solely on damage to the pleader’s reputation, are to be treated as defamation claims”]; *Williams v Arpie*, 56 AD2d 689, 690 [3d Dept 1977] [dismissing cause of action seeking “damages for pain, humiliation and disgrace” based on allegation that “defendants spread false rumors and reports concerning plaintiff” because it “plainly sounds in defamation no matter what label plaintiff seeks to place upon it”]; *affd* 44 NY2d 689 [1978]).

SLAPP

Defendants contend that this action must also be dismissed, pursuant to CPLR § 3211 (g), on the ground that it constitutes an impermissible Strategic Lawsuit Against Public Participation (“SLAPP”). On November 10, 2020, New York enacted a statute that amended the state’s SLAPP law to expand its protections in cases arising from the exercise of free speech. As amended, the statute applies to claims arising from “any communication in a place open to the public or a public forum in connection with an issue of public interest;” or from “any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest” (Civil Rights Law § 76-a (“Section 76-a”). The amended law, like its predecessor statute, provides that a motion to dismiss “shall be granted” unless the plaintiff can show that “the cause of action has a substantial basis in law or is

supported by a substantial argument for an extension, modification, or reversal of existing law” (CPLR 3211 [g]). Under the amended law, a defendant is also entitled to recover its attorneys’ fees unless the plaintiff meets its burden of demonstrating that their claims have a “substantial basis in fact and law” (Civil Rights Law § 70-a [1] [a]).

Here, the Complaint was filed before the amendment was enacted, but the Court does not need to address whether the current version of the SLAPP statute applies retroactively because the Court dismissed Plaintiffs’ Complaint under CPLR §§3211 (a) (1) and (7). The Court does not reach defendants’ arguments that this action should be dismissed pursuant to CPLR § 3211 (g), and that they should recover their attorneys’ fees. This action was commenced under a cognizable legal theory, and although this Court found plaintiffs’ arguments unpersuasive, the action was not frivolous (*see Clemente v Impastato*, 290 AD2d 864, 865 [3d Dept 2002] [“we conclude that plaintiff’s defamation action, although now dismissed, was commenced with a substantial basis in fact and law”]).

Even if the Court were to assume that the action was properly characterized as a SLAPP suit under the amended statute, Defendants would not be entitled to damages, as the Civil Rights Law does not mandate the imposition of costs and attorneys’ fees in every situation in which such a claim is interposed. Indeed, to the contrary, Civil Rights Law § 70–a (1) (a) provides, in pertinent part, only that “costs and attorney’s fees *may* be recovered” (emphasis added).

Accordingly, “it is . . . clear that the unambiguous use of the term “may” in the statute makes the decision to award attorneys’ fees and costs discretionary rather than mandatory” (*Matter of West Branch Conservation Assn., Inc. v Planning Bd. of Town of Clarkstown*, 222 AD2d 513, 515 [2d Dept 1995]; *see e.g. National Fuel Gas Distrib. Corp. v PUSH Buffalo (People United for Sustainable Hous.)*, 104 AD3d 1307, 1309 [4th Dept 2013] [“Although the amended complaint

