SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LISA HEADLEY** **PART** **28M**

Justice

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DENNISA TORRES

Plaintiff,

- v -

NATALIE MARRERO,

Defendant.

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INDEX NO. 154253/2020

MOTION DATE 03/31/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 35

were read on this motion to/for DISMISSAL.

Defendant, Natalie Marrero ("defendant"), filed the motion before this court for an Order to dismiss the complaint alleging that 1) pursuant to *CPLR §3211(a)(5)*, the action is barred by the statute of limitation; 2) pursuant to *CPLR §3211(a)(8)*, the Court does not have personal jurisdiction over the defendant; 3) pursuant to *CPLR §3211(a)(7),* the plaintiff failed to state a cause of action; and 4) pursuant to *CPLR §3211(*g), that the action involves public petition and participation, as defined in *Civil Rights Law §76-a(1)(a)*. Defendant also requests this Court to award defendant with the costs of this action, including reasonable attorney's fees; to award sanctions pursuant to *Rule 130-1.1 of the Rules of the Chief Administrative Judge*, and to grant such other relief the Court finds just. Plaintiff, Dennisa Torres ("plaintiff"), filed opposition. Defendant filed a reply.

I. Background

This action stems from a neighborly dispute over damage allegedly caused by plaintiff's construction workers on the defendant's property. The defendant, who is an attorney and works for the NYC Department of Education, claims that the defendant made complaints to her work supervisor, and also made defamatory statements at a public hearing in the town of Pelham, New York, where the parties reside. The plaintiff also asserts claims for defamation arising from an e-mail sent by the defendant and communications made by defendant that circulated to others. Plaintiff asserts a cause of action for libel *per se*, slander *per se*, and slander against defendant. Plaintiff is seeking $300,000 in actual damages, with punitive damages and costs.

Specfically, the plaintiff alleges that the defendant sent plaintiff's supervisor an e-mail alleging that the plaintiff used her work e-mail to refer to the defendant as a "RATalie." Plaintiff also alleges that she had been approached by the local police in Pelham over various complaints the defendant made to them regarding the damage done by the plaintiff's construction contractor who had been working without permits. The plaintiff further alleges that the defendant repeated those facts at a public hearing.

Plaintiff alleges the email circulated by defendant which included the term "RATalie" was doctored by defendant. Plaintiff cited the doctored email as follows:

> *"The town supervisor you called was just here. He was the same person who gave us the permit. He determined that the fence was built well, does not encroach on your property and meets the specifications. In sum, the only issue here was that we did not notify you and that the contractor went on your property and left tools there. RATalie."*

Plaintiff alleges the authentic email recovered from the NYC Department of Education computer servers and email system from plaintiff's account instead reads as follows:

> *"The town supervisor you called was just here. He was the same person who gave us the permit. He determined that the fence was built well, does not encroach on your property and meets the specifications. In sum, the only issue here was that we did not notify you and that the contractor went on your property and left tools there. For that we apologize. I really hope this is the end of this unpleasant exchange and we can move past it."*

In addition, plaintiff alleges, *inter alia*, that on June 10, 2019, the defendant continued in her defamatory course of conduct by relaying the false claims of cyber-bullying and harassment at a Pelham Manor town hall meeting in front of the Board of Trustees, the Mayor, the Town Supervisor and dozens of neighbors. Plaintiff states this caused enormous damage to her career and reputation, and led to emotional distress and public ridicule.

Lastly, plaintiff alleges on June 14, 2019 that the defendant forwarded the "doctored email" referenced above to the Pelham Manor Police Department, claiming that plaintiff engaged in cyber-bullying and harassment in an attempt to get plaintiff arrested. Plaintiff states she received a call on June 14, 2019, by the Pelham Manor Police Department regarding an investigation in this matter.

II. **Defendant's Motion to Dismiss**

In support of the motion to dismiss, the defendant argues the action is barred by the one-year statute of limitations for defamation claims, and the claim is barred even under the former Governor Cuomo's executive order. *See, CPLR 215(3); Executive Order 202.8*. Defendant argues plaintiff's claim occurred on June 9, 2019, when defendant sent an email to plaintiff's former supervisor, and the plaintiff commenced this action by filing a summons with notice on June 11, 2020, which is 2 days more than the one-year time-frame. Defendant argues that although New York Governor Cuomo issued an executive order on March 20, 2020 tolling or suspending all statutes of limitations, the tolling period officially ended on November 3, 2020. Defendant argues that since the plaintiff filed a complaint on November 4, 2020, after the tolling period ended, it is irrelevant to the issue of timeliness, because the issue is when the action was commenced by filing the summons, not when the complaint was filed. *CPLR §304 (a).*

Defendant also argues that the summons with notice is insufficient to confer jurisdiction over defendant, and the action must be dismissed. Defendant contends that the plaintiff filed a summons with notice on June 11, 2020, and then a corrected copy was filed on June 22, 2020, but such copy was not served at that time, or within the 120 days as required by *CPLR §306-b*.

Defendant contends plaintiff served a copy of the summons with notice and the verified complaint to the defendant on November 6, 2020, and failed to serve the form of summons which is required when it is accompanied by a complaint.

In addition, defendant argues that the language defendant used that plaintiff claims in the complaint is not defamatory, as a matter of law. Defendant argues that the supposedly "doctored" e-mail was sent by defendant to plaintiff, but it bears the same heading and date stamp as the original from plaintiff to defendant, and if defendant doctored the e-mail it would have been a new date and time stamp. Additionally, defendant argues that even if plaintiff is arguing that defendant stated plaintiff called defendant a "rat," that is an insult, not a literal statement of fact and cannot be construed as defamatory. Defendant argues that the allegations of "verbal harassing, cyber bullying, and threatening" are words without specific meaning, as a defamation claim must be premised on statements of facts which are capable of being proven true or false. Defendant argues that the complaint is too vague and unspecific to constitute defamation, and defendant's statements both to plaintiff's supervisor and at the public hearing are also protected opinion.

Further, defendant argues that the plaintiff failed to state a cause of action regarding the claim of slander because plaintiff fails to set forth the exact words spoken as required under *CPLR §3016(a)*. Defendant also argues that the cause of actions are subject to an absolute privilege, because it was made by "individuals participating in a public function." *Citing to Stega v. NY Downtown Hosp.*, 31 N.Y. 3d 661, 669 (2018).

Defendant also argues that the action is barred by the newly amended Anti-SLAPP statute, which states, in part:

> (1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or
> (2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition," is subject to a motion to dismiss."

Civil Rights Law §§70-a &76-a (2020), CPLR 3211 (g).

Here, the defendant argues the statements made at the town hall meeting were complaints about plaintiff's contractor and she was repeating the summary of her prior police complaints, therefore, such statements are in connection with an "issue of public interest," and in exercise of her "constitutional right of petition."

III. **Plaintiff's Opposition to the Motion to Dismiss**

In opposition, plaintiff argues that this action is not barred by the statute of limitations because the complaint was filed immediately after the end of tolling extensions on November 4, 2020, therefore, the action was also timely filed. Plaintiff contends that the summons with notice confers jurisdiction over the defendant as it complies with the statutory requirement under *CPLR §305* because it states the basis of the venue designated, the plaintiff's address, the index number assigned, the nature of the action and relief sought, and the sum of money for which judgment may be taken in case of default. In addition, plaintiff argues that the defendant falsified an email and had malicious intent to get plaintiff fired and for plaintiff to face criminal charges from the Police of Pelham Manor. Plaintiff contends that the defendant's statements were not an opinion, but were false and defamatory and made with actual malice, and the comments made at the town-hall meeting by defendant are not subject to a qualified privilege since there was no judicial, legislative, or executive proceeding. Lastly, plaintiff argues the Anti-Slapp statute is not applicable in this case

because there was no public interest being served by defendant's "false and defamatory conduct." In addition, the plaintiff contends that this action was commenced prior to the enacting of the new law, and thus, requests this Court to deny defendant's motion in its entirety, or in the alternative, to allow plaintiff leave to file an amended summons and complaint.

In reply, defendant argues that the plaintiff has still failed to set out the exact words which are allegedly slanderous and fails to allege facts demonstrating malice sufficient to overcome the absolute privilege afforded to "individuals participating in a public function," or the qualified privilege for statements "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." Lastly, defendant states that although the anti-SLAPP statutes were enacted on November 10, 2020, after the action was commenced, they apply to pending cases.

IV. DISCUSSION

"When deciding a motion to dismiss a complaint pursuant to *CPLR §3211*, the court is required to afford the pleading 'a liberal construction.' It must accept the facts alleged in the complaint as true, accord [the] plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *New York Racing Ass'n v. Nassau Regional Off-Track Betting Corp.*, 29 Misc. 3d 539, 545 (Sup. Ct. 2010). Additionally, "when deciding a motion to dismiss made pursuant to *CPLR §3211(a)(7)*, the court must determine whether the pleader has a cognizable cause of action, not whether it has been properly plead." *Sutphin Mgt. Corp. v. Rep 755 Real Estate, LLC,* 20 Misc. 3d 1135(A) (Sup. Ct. 2008), *order affd and remanded*, 73 A.D. 3d 738 (2d Dep't 2010). Therefore, the dismissal of a claim is appropriate if the claim is made up of " [a]llegations that consist of bare legal conclusions or factual claims that are flatly contradicted by documentary evidence or are inherently incredible." *Napoli v. Bern*, 60 Misc. 3d 1221(A) (Sup. Ct. 2018), *aff'd sub nom., Napoli v. New York Post*, 175 A.D. 3d 433 (1st Dep't 2019).

First, *New York Civil Rights Law § 76-a* states:

> [A]n "action involving public petition and participation" is a claim based upon any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition. In an action involving public petition and participation, damages may only be recovered if the plaintiff, in addition to all other necessary elements, shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue.

See, *New York Civil Rights Law § 76-a*.

Second, *New York Civil Rights Law § 70-a* states:

> 1. A defendant in an action involving public petition and participation, as defined in paragraph (a) of subdivision one of section seventy-six-a of this article, may maintain an action, claim,

> cross claim or counterclaim to recover damages, including costs and attorney's fees, from any person who commenced or continued such action; provided that:
>
> (a) costs and attorney's fees shall be recovered upon a demonstration, including an adjudication pursuant to subdivision (g) of rule thirty-two hundred eleven or subdivision (h) of rule thirty-two hundred twelve of the civil practice law and rules, that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law;
>
> (b) other compensatory damages may only be recovered upon an additional demonstration that the action involving public petition and participation was commenced or continued for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights; and
>
> (c) punitive damages may only be recovered upon an additional demonstration that the action involving public petition and participation was commenced or continued for the sole purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights.
>
> 2. The right to bring an action under this section can be waived only if it is waived specifically.
>
> 3. Nothing in this section shall affect or preclude the right of any party to any recovery otherwise authorized by common law, or by statute, law or rule.

See, New York Civil Rights Law § 70-a

After a review of the defendant's motion papers, and the plaintiff's arguments in opposition, this Court finds that plaintiff has failed to state a claim for defamation and the plaintiff did not meet the heightened pleading standard required pursuant to the newly amended Anti-SLAPP statute.

In the case at bar, plaintiff alleges bare legal conclusions of defamation, and does not set forth any specific evidence to allege defendant's defamatory conduct. Specifically, the plaintiff states that the defendant doctored an e-mail to make it appear that plaintiff called defendant a "rat." Such assertion is insufficient for plaintiff to have a cause of action for defamation. The term "rat," colloquially, is not a statement of fact, it is an insult, and a matter of opinion. "Since falsity is a requirement of a defamation claim, and only factual assertions are capable of being proven false, defamation actions can only be premised on assertions of fact, not opinion. Whether a statement is fact or opinion must be determined by the court as a matter of law, and it depends on whether a reasonable reader would consider the assertions to be opinion or fact." *Hassig v. FitzRandolph*, 8 A.D. 3d 930, 931 (3d Dep't 2004). There is not enough evidence in the "doctored" e-mail for the plaintiff to have a viable cause of action for defamation. Moreover, a reasonable reader viewing the alleged defamatory term in the email alone would see the term as a mere insult, or an opinion,

not a potential true factual statement. Moreover, plaintiff does not set forth any specific statements or factual evidence of defendant's alleged defamatory conduct at the town-hall meeting held in their Pelham neighborhood. Plaintiff's claims are very general and do not allege any specific statements spoken by defendant, which cannot be enough to sustain a cause of action for defamation.

This Court also finds that plaintiff failed to meet the heightened pleading standard required pursuant to the newly-amended Anti-SLAPP statute. The amended Anti-SLAPP statute imposes a heightened pleading standard which shifts the traditional burden for a motion to dismiss from the defendant to the plaintiff. *See*, *CPLR §3211(g)*. A plaintiff is now required to establish by "clear and convincing evidence" that there is a substantial basis in fact and law for its claim. *Id.* Here, the plaintiff fails to set forth any specific record of defamatory conduct, and this Court finds that the allegation of the supposed doctored email is insufficient to constitute defamation.

If this Court allowed plaintiff to continue with this defamation action, there would be a flood of litigation for defamation claims based on mere" puffery," or opinion. Although the Anti-SLAPP statute was enacted after this action was commenced, the statute is designed to be retroactive. *See*, *Sackler v. Am. Broadcasting Companies, Inc.*, 71 Misc. 3d 693, 695 (Sup. Ct. 2021) [the Court ruled that the anti-SLAPP amendments applied retroactively]. Moreover, while plaintiff argues this matter is not a public interest concern, this Court finds the amendment to *Section 76-1 of the Civil Rights Law* applies. The amendment broadly widens the "ambit of law to include matters of 'public interest', which is to be broadly construed, e.g. anything other than a "purely private matter." *Id*. at 697. This Court must grant defendant's motion to dismiss, as not doing so would infringe on defendant's constitutional right to free speech, as her alleged conduct was a matter of opinion, and not fact.

Accordingly, it is

ORDERED that the defendant's motion to dismiss is GRANTED in its entirety, on the basis that this Court finds plaintiff failed to state a cause of action for defamation and the amended Anti-SLAPP statute compels dismissal of the complaint; and it is further

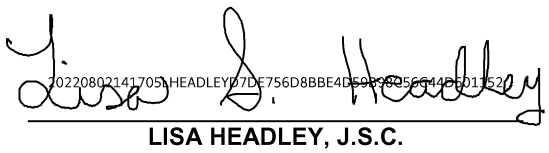
ORDERED that the within action is DISMISSED with prejudice against defendant Natalie Marrero; and it is further

ORDERED that the Clerk of Court shall enter judgment in favor of defendant Natalie Marrero dismissing the instant matter against her, together with costs and disbursements taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that any requested relief sought not expressly addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, defendant shall serve a copy of this Decision/Order upon the plaintiff with notice of entry.

This constitutes the Decision and Order of the Court.



8/2/2022
DATE

LISA HEADLEY, J.S.C.

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