SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARY V. ROSADO** **PART** **33M**

Justice

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STEVEN ANTHONY BEHAR,

Plaintiff,

- v -

DAILY NEWS, L.P., SHANT SHAHRIGIAN

Defendant.

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INDEX NO. 154447/2022

MOTION DATE 08/18/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, and after oral argument, which took place on January 31, 2023, where Michael Scala, Esq. appeared for Plaintiff Steven Anthony Behar ("Plaintiff") and Matthew Leish, Esq. of Miller Korzenik Sommers Rayman LLP appeared for Defendants Daily News, L.P. ("Daily News") and Shant Shahrigian ("Shahrigian") (collectively "Defendants"), Defendants' motion to dismiss Plaintiff's Complaint is granted.

I. Background

Plaintiff was a candidate for New York City Council in the 2021 Democratic Primary (NYSCEF Doc. 1 at ¶ 6). Plaintiff launched his campaign in October 2020 (*id.* at ¶ 37). Defendants published three articles about Plaintiff in June of 2021 (*id.* at ¶ 45).

The first article was regarding a tweet from Plaintiff. The tweet was related to a feud over which candidate was the "education candidate." Plaintiff tweeted about his record in expanding schools, which he stated, "is better than 'Vote for Me I'm a Mommy!" (*id.* at ¶ 51). On June 8, 2021, Shahrigian called Plaintiff to inform Plaintiff he was writing an article for the Daily News about the "Mommy" tweet (*id.* at ¶ 54). After the phone call, Daily News published an article on

its website by Shahrigian with the headline "Queens Council candidate targeted in sexist tweet." (*id.* at ¶ 55). The Daily News also posted a link to the article via tweet, with the caption "A City Council wannabe in Queens is coming under fire for a sexist attack against a rival candidate." (*id.* at ¶ 66). The tweet contained a sentence which read "Steve Behar suggested his opponent Linda Lee's message boiled down to saying, 'Vote for Me I'm a Mommy!" (*id.*).

On June 15, 2021, Shahrigian called Plaintiff to inform him he was writing another article (*id.* at ¶ 75). The second article reported on Plaintiff's social media posts, which showed multiple instances of cursing at women, and allegedly dismissed the sexual assault accusations of Dr. Christine Blasey Ford ("Dr. Ford") against United States Supreme Court Justice Brett Kavanaugh ("Justice Kavanaugh") (*id.* at ¶ 76). Plaintiff told Shahrigian that he did not write that Dr. Ford was not credible, and that he found her credible (*id.* at ¶ 77). Later that day, the Daily News published an article with the headline "City Council wannabe Steve Behar directs online profanity, rage at women." (*id.* at ¶ 80). Shahrigian tweeted the article with the caption "NYC Council candidate @SABehar[1] has gone after a number of women on social media – along with joking about rape and apparently challenging a man to a fight after getting into an argument on Facebook." (*id.* at ¶ 82).

On June 17, 2021, Daily News published an article written by Mr. Shahrigian with the heading "Queens City Council Candidate Steve Behar Caught on Video Raging at Black Lives Matter demonstrators." (*id.* at ¶ 153). The Daily News also posted a link to the article on its Facebook page with the caption "A Queens City Council wannabe's profanity and rage aren't just confined to the online world" (*id.* at ¶ 174). One year earlier, on June 13, 2020, Plaintiff took his nephew and niece to a Black Lives Matter protest in Jamaica, Queens (*id.* at ¶¶ 132-133). While

[1] @SABehar is Plaintiff's Twitter handle.

at the protest, a group of twenty individuals, who were also supporters of Black Lives Matter, were protesting certain politicians accepting contributions from police unions (*id.* at ¶ 150). Plaintiff admits in his Complaint that he "was the first person to angrily engage the bullhorn toting interrupters" (*id.* at ¶ 143). The video of Plaintiff's confrontation went viral (*id.* at ¶ 152).

On May 24, 2022, Plaintiff initiated this action alleging the publications are defamatory. On July 27, 2022, Defendants moved to dismiss the Complaint pursuant to CPLR §§ 3211(a)(1), (a)(7), and (g) (NYSCEF Doc. 7). Defendants provide numerous reasons why the Complaint should be dismissed (NYSCEF Doc. 17). Defendants argue that notwithstanding one error, all of the statements published are true. Defendants also argue that the subjective characterization of Plaintiff as "sexist," "raging," and "potty-mouthed" are nonactionable opinions. Defendants assert the headlines are not actionable because they are fair indices of the articles with which they appear. Defendants further argue that Plaintiff cannot prove, by clear and convincing evidence, that the statements were published with actual malice.

In opposition, Plaintiff argues that his claims should not be dismissed because they have a substantial basis in law (NYSCEF Doc. 21). Plaintiff argues that the alleged defamatory statements are not substantially true because the average reader would understand the articles to mean that Plaintiff is violent towards women. Plaintiff also argues that the Complaint should not be dismissed because the defamatory statements are not opinions. Plaintiff argues the headlines are actionable. Plaintiff also asserts he sufficiently pled actual malice because Defendants published allegedly false material despite Plaintiff telling Defendants it was false or pointing them towards information which would show the statements are false.

In reply, Defendants argue that Plaintiff has not met his burden under the heightened CPLR 3211(g) standard (NYSCEF Doc. 22). Defendants further argue that the omission of relatively

minor details in an otherwise accurate article does not give rise to actionable defamation. Defendants also assert that whether or not a particular article constitutes unbalanced reporting is a matter of editorial judgment and is not actionable. Defendants state that simply because a headline names a plaintiff does not render the "fair index" defense inapplicable. Defendants also argue that Plaintiff has failed to meet the extremely high burden of showing by "clear and convincing evidence" that Defendants published each defamatory statement with actual malice. Defendants assert that the mere failure to investigate is inadequate to establish actual malice, especially where there is nothing "inherently improbable" about any of the challenged statements. Defendants also argue that even accepting Plaintiff's allegations as true, the mere denial of a reporter's allegations prior to publishing an article about those allegations is insufficient to establish actual malice.

II. Discussion

A. The First and Second Causes of Action

Whether particular words are defamatory presents a legal question to be resolved by the Court in the first instance (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28 [1st Dept 2014]). To prevail on the defense of truth, a defendant need not establish truth to an extreme degree so long as the defamatory material is substantially true; minor inaccuracies are acceptable (*Reus v ETC Housing* Corporation, 203 AD3d 1281 [3d Dept 2022]; *Moorhouse v Standard, New York*, 124 AD3d 1, 12 [1st Dept 2014]). To determine whether an allegedly defamatory statement is substantially true, the test is whether the statement would have a different effect on the mind of a reader from that which the pleaded truth would have produced (*Udell v NYP Holdings, Inc.* 169 AD3d 954 [2d Dept 2019]). New York recognizes defamation by implication, which is premised not on direct statements, but on false suggestions, impressions, and implications arising from otherwise truthful statements, the Court finds that the first cause of action is not defamatory by

implication (*see Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28 [1st Dept 2014]). The First Department has outlined the test to analyze whether statements are defamatory by implication:

> "To survive a motion to dismiss a claim for defamation by implication where the factual statements at issue are substantially true, the plaintiff must make a rigorous showing that the language of the communication as a whole can be reasonably read both to impart a defamatory inference and to affirmatively suggest that the author intended or endorsed that inference." (*Stepanov*, *supra* at 38).

The First Cause of Action alleges that "A City Council wannabe in Queens is coming under fire for a sexist attack against a rival candidate." (NYSCEF Doc. 1 at ¶ 252). The Court finds that this cause of action should be dismissed. First, this statement is substantially true. Multiple individuals, including other politicians, responded negatively to Plaintiff's tweet. Plaintiff even deleted the tweet after these responses. Therefore, there is nothing false about this allegedly defamatory statement (*see Berrio v City of New York*, 212 AD3d 569 [1st Dept 2023] [dismissing defamation claim where alleged statements released to media outlets were substantially true when they were made]; *Pitcock v Kasowitz, Benson, Torres & Friedman LLP*, 74 AD3d 613 [1st Dept 2010]). Plaintiff even published his own statement after the tweet, which was included in the article, stating, "On Monday, the Linda Lee campaign attacked my decades-long record on education…I responded by citing my record, but I was clearly too harsh in my response…I certainly never meant to offend anyone." (*see* NYSCEF Doc. 2). Because it is substantially true that Plaintiff came under fire, by his own admission, for a harsh response to Linda Lee's campaign, this cause of action is dismissed.

Nor is the article defamatory by implication. When reading the article as a whole. Plaintiff has not met its rigorous burden of showing that the article imparts a defamatory inference and that Defendants intended to affirmatively suggest the defamatory inference. While Plaintiffs focus on a small passage of the article, the article states Plaintiff is respected by other politicians and

included a statement from Plaintiff showing he expressed regret. This does not meet a rigorous showing that Defendants' affirmatively wished to defame him.

To the extent Plaintiff argues the use of the words "sexist attack" are defamatory, those are statements of opinion which are non-actionable (*see Silverman v Daily News, L.P.*, 129 AD3d 1054 [2d Dept 2015] [statement in newspaper article regarding school principal's purportedly racist writings and ties to a supremacist group were opinions and not facts]; *Russel v Davies*, 97 AD3d 649 [2d Dept 2012] [news reports about essay which was widely interpreted as racist and antisemitic were non-actionable opinion]; *Kaye v Trump*, 58 AD3d 579 [1st Dept 2009] ["loose, figurative or hyperbolic statements" are not actionable defamation] quoting *Dillon v City of New York*, 261 AD2d 34, 48 [1st Dept 1999]). Moreover, the article provided the purportedly sexist language, and the reactions from other politicians, to allow readers to come to their own opinions. Therefore, the mere use of the word "sexist " does not give rise to actionable defamation.

The second allegedly defamatory statement is "Steve Behar suggested his opponent Linda Lee's message boiled down to saying, "Vote for Me I'm a Mommy!" (NYSCEF Doc. 1 at ¶ 259). The Court agrees that this cause of action should be dismissed. Plaintiff tweeted "2600 new school seats is better than "Vote for me I'm a Mommy"! (*see* NYSCEF Doc. 11). Plaintiff conceded that "the Linda Lee campaign attacked my decades-long record on education…I responded by citing my record, but I was clearly too harsh in my response" (*see* NYSCEF Doc. 2). It is incontrovertible that Plaintiff's tweet suggested that his campaign message was one of expanding classrooms, which he directly juxtaposed as superior to Linda Lee's alleged message of "vote for me I'm a mommy". As the statement is substantially true, this cause of action should be dismissed. Like the first cause of action, this statement is also not defamatory by implication (*see Aboutaam v Dow Jones & Co.*, 180 AD3d 573 [1st Dept 2020])

B. The Third and Fourth Causes of Action

The third allegedly defamatory statement is "City Council wannabe Steve Behar directs online profanity, rage at women." This cause of action is dismissed. The article in which the statement was published cited to Plaintiff's tweet about Linda Lee's campaign, which Plaintiff already admitted was a "harsh response." The article then quoted a Facebook post from Plaintiff where he said to a Long Island woman "F—k you…You're a stupid racist c—t." Another Facebook post was quoted where he called Trump's Education Secretary, Betsy Devos "a dumb b---h" and "a despicable human being". Yet another Facebook post, directed at Trump's Department of Homeland Security Secretary Kirstjen Nielsen, said "Bye, bye Nazi Barbie! You are a despicable public servant and a disgrace to humanity!" (*see generally,* NYSCEF Doc. 14). The article also states that when asked for a comment about these posts, Plaintiff responded with "All I can say is if the worst thing I've done is curse out white supremacists and neo-Nazis, then I'm OK with that" (*see* NYSCEF Doc. 3).

By Plaintiff's own admission, the statement is substantially true and does not give rise to actionable defamation. Plaintiff argues that the statement is defamatory by implication because it makes it seem as though he only cursed off women online. However, Plaintiff ignores that the article, when read as a whole, also cited to Plaintiff cursing at men online. Moreover, when asked for a comment about the online cursing, Plaintiff admitted that he was "Ok with that." Plaintiff was provided an opportunity to recant or explain his statements, but having stood by the statements, he cannot now complain that they are defamatory. As Defendants provided a fair and well-rounded account of Plaintiff's frequent fights in Facebook comments sections, Plaintiff has failed to make a rigorous showing that (a) the article imparts a defamatory inference and (b) Defendants affirmatively intended to impart that inference.

The fourth cause of action alleges the statement "A potty-mouthed City Council wannabe in Queens has gone after a number of women on social media – along with joking about rape and apparently challenging a man to a fight after getting into an argument on Facebook" (NYSCEF Doc. 1 at ¶ 271). However, Plaintiff did curse at multiple women on social media. Moreover, he admittedly did joke about rape when he posted "come on now! Who didn't grope and rape girls in high school? Democrats are such snowflakes!" (NYSCEF Doc. 13). In his own affidavit, Plaintiff admitted that he informed Shahrigian that the aforementioned post was sarcastic (NYSCEF Doc. 20 at ¶ 27). Likewise, there is nothing false about the statement that Plaintiff "apparently challeng[ed] a man to a fight after getting into an argument on Facebook." There is a Facebook post where Plaintiff says "you prove you're more stupid and more of a p—sy with each post! My address is: [redacted]. I'm home. Let's see how tough you are! P—sy!" (NYSCEF Doc. 12). Based on this post, Plaintiff did "apparently challeng[e] a man to a fight on Facebook." The reference to Plaintiff as a "potty mouth" is a loose, figurative, or hyperbolic statement which does not give rise to actionable defamation (*Dillon v City of New York*, 261 AD2d 34 [1st Dept 1999]).

C. Fifth Cause of Action

The fifth cause of action alleges that "Among Behar's raving about Christine Blasey Ford's sexual assault allegations against Supreme Court Justice Brett Kavanaugh, Behar wrote on Facebook over two years ago, 'This woman is not credible and I refuse to destroy someone's career without any due process'" (NYSCEF Doc. 1 at ¶ 278). Unlike the other statements, Defendants concede that this published statement was false and made in error. Shahrigian provided an affidavit wherein he states that the "this woman is not credible" post was provided by a confidential source who stated that it concerned Dr. Ford's allegations against Justice Kavanaugh (NYSCEF Doc. 10 at ¶¶ 14-15). Shahrigian swore he found the source credible because Plaintiff had previously cast

doubt on a woman's claims of sexual harassment when his boss, former City council member Barry Grodenchik, was accused of sexual harassment in 2019 (*id.*). Shahrigian stated that even though Grodenchik admitted the harassment, Plaintiff continued to deny the allegations and publicly tweeted "He was railroaded. I witnessed the railroading." (*id.*).

Shahrigian swears it was only after the commencement of this lawsuit that he learned that the post referred to a woman who accused President Biden of sexual harassment in 2019 (*id.* at ¶ 19). Defendants argue that Plaintiff must show by clear and convincing evidence, that Defendants acted with actual malice when they published the statement, and that Plaintiff has failed to do so.

The parties concede the Anti-Slapp statute applies. The parties disagree whether actual malice has been shown by clear and convincing evidence. Civil Rights Law Section 76 § 76-(a)(2) provides that a plaintiff may only recover damages in an action involving public petition and participation if, "in addition to all other necessary elements, plaintiff shows by clear and convincing evidence that the allegedly actionable communication was made with knowledge of its falsity or with reckless disregard of whether it was false". Whether clear and convincing evidence that a statement was made with knowledge of its falsity or with reckless disregard of its falsity will be inferred from objective facts, including "the defendant's own actions or statements, the dubious nature of his sources, [and] the inherent improbability of the story." (*Great Wall Medical P.C. v Levine*, 74 Misc.3d 1224[A] at *2 [Sup. Ct., N.Y. County 2022] quoting *Coleman v Grand*, 523 F.Supp.3d 244, 260 [EDNY 2021]). The court must consider the pleadings and affidavits to determine if a plaintiff's claim has a substantial basis in law (CPLR § 3211[g][2]; *Carey v Carey*, 74 Misc. 3d 1214[A] at *4 [Sup. Ct., N.Y. County 2022]).

In determining reckless conduct in the context of actual malice, the inquiry is not whether a reasonably prudent person would have published or would have investigated before publishing.

Rather, there must be clear and convincing evidence that the author himself entertained serious doubts as to the truth of his publication or acted with a high degree of awareness of probable falsity (*Kipper v NYP Holdings Co., Inc.*, 12 NY3d 348 [2009]). Mere failure to investigate is insufficient to establish actual malice (*St. Amant v Thompson,* 390 US 727, 731 [1968]; *see also Rivera v Time Warner Inc.*, 56 AD3d 298 [1st Dept 2008]). Further, in the context of newspaper publishing, denial of certain statements prior to publishing, without more is insufficient to establish actual malice (*Humane League of Philadelphia, Inc. v Berman and Co.*, 108 AD3d 417, 419 [1st Dept 2013]; *see also Edwards v National Audubon Society, Inc.*, 556 F2d 113, 121 [2d Cir. 1977]).

Here, Shahrigian provided sworn testimony that based on (1) his belief that his source was credible; (2) the numerous social media posts wherein Plaintiff targeted women, and (3) Plaintiff's prior history of casting doubt on the credibility of sexual harassment victims, he did not entertain serious doubts as to his publication containing the Dr. Ford statement. In response, Plaintiff merely asserts that he denied the quoted post was about Dr. Ford, and that Shahrigian should have investigated his social media to verify whether the post.

Plaintiff does not provide in his affidavit that he explained to Shahrigian that the post at issue was about a woman who accused President Biden of sexual harassment. Plaintiff cites to a September 18, 2018 Facebook post where he states "I'm not ready to condemn Brett Kavanaugh as a criminal. However, since the claims against him seem credible, I'm in favor of investigating those claims and allowing for due process." (NYSCEF Doc. 20 at ¶ 23). However, he does not state that he brought this post to Defendants' attention during their phone call. Defendants' failure to comb through years of Plaintiff's Facebook posts to find a post where Plaintiff states Dr. Ford's claims "seem credible" is insufficient to establish actual malice. Precedent is clear: a mere denial as to the veracity of a statement, and a mere failure to investigate, while perhaps evidence of sloppy

journalism, is insufficient to show actual malice. As Plaintiff failed to show by clear and convincing evidence that Defendants acted with actual malice, this cause of action is dismissed.

D. Sixth and Seventh Causes of Action

Plaintiff alleges as his sixth cause of action that the statement "Queens City council candidate Steve Behar caught on video raging at Black Lives Matter demonstrators" is defamatory (*id.* at ¶ 284). The Seventh Cause of Action alleges that "Steve Behar went off on an expletive-filled tirade against Black Lives Matter Demonstrators gathered at a Jamaica, Queens, park last summer" is false and defamatory. However, video evidence, and Plaintiff's own admission, shows these statements are true. The article stated that "Out of about 100 demonstrators at the park that day, some were protesting local elected officials for taking campaign cash from police unions" (NYSCEF Doc. 3). The video shows Plaintiff yelling at the activists protesting local officials "You have no f—king business being here!" (*id.*). The video shows that when a demonstrator stated "we all have business being here" Plaintiff responded "F—k you! You're pathetic!" (*id.*). Plaintiff yelled "You co-opted a Black Lives Matter protest for your own Agenda! You should be ashamed!" (*id.*). Plaintiff admits he confronted these demonstrators.

While Plaintiff argues that the headline implies he is anti-Black Lives Matter, the article expressly states that Plaintiff was at the protest "to show my little niece and nephew that Black Lives Matter!" (*id.*). While Plaintiff argues that it was not Black Lives Matters protestors he was yelling at, this is expressly contradicted by the video. In fact, the demonstrators state "we are all here for Black Lives Matter." Because the video footage, which was included in the article, as well as direct quotes from the article, establish that Plaintiff did yell and curse at Black Lives Matter protesters. When read as a whole, the article does not give rise to defamation by implication.

In sum, the articles were published during a contested city council election and accurately reported on a number of well documented incidents related to Plaintiff. The media's role in informing the public about political candidates is an important facet of our democracy and attempts to chill the media's freedom of speech have been rebuffed by binding precedent and legislation (*see Gross v New York Times Co.*, 82 NY2d 146, 152-153 [1993] [holding that the New York State Constitution is "decidedly more protective of 'the cherished constitutional guarantee of free speech'"] quoting *Immuno AG. V Moor-Jankowski*, 77 NY2d 235 [1991]). Based on the facts presented here, Plaintiff's remedy is not suing Defendants for defamation. As Plaintiff's Complaint is dismissed pursuant to CPLR § 3211(g), the Court must award attorneys' fees (*see Golan v Daily News, L.P.*, 2023 N.Y. Slip Op. 01586 [1st Dept 2023]).

Accordingly, it is hereby,

ORDERED that Plaintiff's Complaint is dismissed in its entirety; and it is further

ORDERED that within twenty-one (21) days of entry of this Decision and Order, Defendants shall provide an application for attorneys' fees. Fourteen (14) days thereafter, counsel Plaintiff shall submit opposition, if any. Seven days after opposition, Defendants are permitted a reply. Courtesy copies shall be delivered to the Part 33 Clerk in Room 442; and it is further

ORDERED that within ten days of entry, counsel for Defendants shall serve a copy of this Decision and Order, with notice of entry, on Plaintiff; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

4/24/2023
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, 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