

S&P Pharm. Corp. v Syed

2023 NY Slip Op 34923(U)

April 24, 2023

Supreme Court, Kings County

Docket Number: Index No. 506684/2022

Judge: Carolyn E. Wade

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At an IAS Term, Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 24th day of April, 2023.

PRESENT:

HON. CAROLYN E. WADE, J.S.C.

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S&P PHARMACY CORP. d/b/a MARHABA PHARMACY,
SHAZIA PHARMACY, INC., PERVEZ SIDDIQUI, and
SHAZIA BIBI,

Plaintiffs,

- against-

Index No. 506684/2022

UWAIS SYED, SARWAR CHAUDHRY, and FAROOQ
MIRZA,

Defendants.

MS # 1

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The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed.....	7-11.....
Opposing Affidavits (Affirmations).....	13-21.....
Reply Affidavits (Affirmations).....	22.....

Upon the foregoing cited papers, and after oral argument in this defamation action, defendant Uwais Syed (hereinafter, "Syed") moves (in motion [mot.] sequence [seq.] number [no.] 1) for an order, pursuant to CPLR 3211 (a) (7), dismissing the complaint of plaintiffs S&P Pharmacy Corp. (hereinafter, "S&P"), Shazia Pharmacy Inc. (hereinafter, "Shazia Pharmacy"), Pervez Siddiqui (hereinafter, "Siddiqui"), and Shazia Bibi (hereinafter, "Bibi") (collectively, "plaintiffs") for failure to state a claim upon which relief can be granted.

Factual Background

Plaintiffs S&P and Shazia Pharmacy are both pharmacies owned by Bibi Siddiqui is the former owner of S&P. Defendants Sarwar Chaudhry (hereinafter, "Chaudhry"), and Farooq Mirza (hereinafter, "Mirza") are publishers/reporters who own a Pakistani newspaper that is circulated in print and online. Syed is the former supervising pharmacist at S&P who has filed a federal retaliation lawsuit against plaintiffs in which he accused them of engaging in fraud, among other allegations.

Plaintiffs allege that Syed, aided by Chaudhry and Mirza, (collectively, "defendants") published and disseminated a series of defamatory stories about plaintiffs through multiple forums, including WhatsApp Messenger, digital and print newspapers, and other direct messaging platforms (Complaint at ¶ 21). Allegedly, Chaudhry financed the publication of each of these articles, which were written by Mirza (Complaint at ¶¶ 22, 28). According to plaintiffs, these communications were false and included allegations of illegal and fraudulent conduct that were widely consumed by the tight-knit Pakistani community in Brooklyn, New York and resulted in severe personal, professional, and emotional consequences for plaintiffs (Complaint at ¶ 31). In their complaint, plaintiffs point to five alleged defamatory statements or publications made by defendants. The first alleged defamatory statement was contained in an email to several elected officials and community members on or about October 2, 2020, requesting that Bibi and Siddiqui be investigated for their involvement in criminal conduct (Complaint at ¶ 32). The email was sent from the account of "Laura Susan," who plaintiffs contend is a

fictional name created by defendants for the sole purpose of spreading false information aimed at publicly shaming plaintiffs amongst prominent community figures (Complaint at ¶ 33). The second alleged defamatory statement was released on or about October 21, 2021 and consisted of a ten-minute audio news report circulated in multiple WhatsApp group chats (Complaint at ¶ 36). In this audio recording, defendants allegedly falsely claim that Bibi and Siddiqui offered Syed \$450,000.00 in exchange for him to destroy evidence he claims to possess indicative of fraudulent activity in plaintiffs' pharmaceutical business (Complaint at ¶ 37). Plaintiffs allege that in this news report, defendants also state that one of their previously owned pharmacies was raided by the government, they frequently mishandled medications and billed for unfilled prescriptions, and that Bibi regularly engaged in fraud (Complaint at ¶¶ 38-41).

The third defamatory statement was allegedly made at or around the same time as the audio recording. Plaintiffs allege that Syed made statements to Mirza who authored an article which was then posted by Chaudhry on his news platform, "Sahafat." This newspaper article was titled "*New York: Pharmacy Fraud Revealed in Pakistani American Community*" and was published in print, digitally, and on various social media platforms (Complaint at ¶ 43). In the article, it is claimed that plaintiffs were the subject of a "high level inquiry" by the Inspector General's Office, Syed was offered \$450,000.00 to destroy evidence of alleged fraud, United Health Care, a major health insurance provider, severed ties with plaintiffs due to their fraudulent activity, and

plaintiffs regularly engaged in illegal billing and prescription refilling practices (Complaint at ¶¶ 44-53).

The fourth alleged defamatory statement was published on November 20, 2021. Defendants allegedly published another defamatory article in print and digital format titled "*Pakistani-American Community's Biggest Fraud Scandal Case in US Filed in Court*", a reference to the filing of Syed's federal lawsuit against plaintiffs, which was widely circulated on social media and WhatsApp (Complaint at ¶55). Syed was listed as a source for this article (Complaint at ¶¶58, 61).

The fifth alleged defamatory statement was made on or about January 13, 2022, when an article titled "*Shazia Pharmacy Fraud Case in Court*" was published by defendants. The article was accompanied by an image of both Bibi and Siddiqui which plaintiffs assert was done to encourage their public humiliation (Complaint at ¶¶ 65-67). Plaintiffs allege that since Shazia Pharmacy, while named in Syed's federal lawsuit, was never his place of work, he therefore cannot claim that his allegations of fraud relate to Shazia Pharmacy. Plaintiffs allege that including Shazia Pharmacy in this headline was a defamatory ploy deliberately intended to extend public disdain to all the plaintiffs' individual businesses and not just S&P, which was the pharmacy where Syed worked. Plaintiffs further allege that the defendants reiterated in the article the false story of a \$450,000.00 offer to Syed asking him to destroy evidence of fraud. According to plaintiffs, the article also incorrectly stated details such as the date, time and location of the court conferences and details of confidential mediation proceedings related to Syed's

federal lawsuit against plaintiffs (Complaint at ¶¶ 69-71). In addition, plaintiffs also cite to an undated article by Mirza titled "*Pharmacy Medicare & Medicaid Fraud Alert in Brooklyn NY, A Pakistani Day Care Owner and Woman Involved,*" which also allegedly contained multiple unsubstantiated allegations against plaintiffs, including overbilling, prescription fraud, investigation by law enforcement, and insurance fraud. Plaintiffs claim that because of defendants' defamatory statements, they have suffered severe and irreparable personal, professional, and emotional harm.

Procedural History

On or about March 7, 2022, plaintiffs commenced this action by filing a summons and complaint against defendants asserting seven causes of action for defamation, libel, slander per se, intentional infliction of emotional distress, negligent infliction of emotional distress, punitive damages, and a preliminary and permanent injunction. Chaudhry joined issue on or about April 29, 2022, with the filing of an answer. Mirza has not appeared. On or about May 13, 2022, Syed filed the instant motion to dismiss.

The Parties' Positions

Syed's Contentions

Syed contends that plaintiffs' causes of action for defamation, libel, and slander per se should be dismissed because plaintiffs have failed to articulate the alleged defamatory statements underlying their claims, and the alleged statements are not defamatory, are privileged as they relate to an anticipated and actual litigation, are about an issue of public interest and plaintiffs have failed to allege actual malice, the alleged

statements contain numerous opinions, and plaintiffs have failed to allege that each statement referred to each plaintiff.

Syed argues that plaintiffs' allegations are too general and vague to state a claim for defamation. He asserts that plaintiffs' complaint does not contain quotations from the entire alleged statements, making it impossible for Syed to understand what statements plaintiffs are attributing to him. He argues that while plaintiffs' complaint contains summaries and descriptions of the defamatory statements that plaintiffs allege are in the e-mail, articles, and audio report, without direct quotes and context, it is impossible to understand whether each alleged statement is indeed defamatory.¹ He argues that summaries and descriptions of an alleged defamatory statement are insufficient to state a claim for defamation. Syed avers that many of the statements that plaintiffs cite as evidence of defamation are not actually defamatory in that no reasonable person would have contempt, ridicule, aversion, or an evil opinion of plaintiffs as their reaction to them.

Syed also asserts immunity from liability for statements two (2) through five (5) as those statements are related to his federal lawsuit in which he alleges that plaintiffs committed fraud. He argues that statements made by parties in the course of a judicial proceeding are absolutely privileged so long as they are material and pertinent to the issue to be resolved in the proceeding. According to Syed, the privilege extends to statements made before litigation begins if the party has a good faith basis to anticipate litigation and the statements are pertinent to the anticipated litigation. Statements two (2)

¹ Plaintiffs later submitted the alleged defamatory articles and a transcript of the audio news file

and three (3), he asserts, are privileged as they are statements made by him in anticipation of litigation. In addition, Syed points to New York Civil Rights Law § 74 which he contends bars a civil action against a person for the publication of a fair and true report of any judicial proceeding. He argues that many of the statements contained in defamatory statements four and five were made after his federal lawsuit was filed and are true and accurate reporting of the facts of the lawsuit, and thus are protected by the litigation privilege and Civil Rights Law § 74.

Syed maintains that because the alleged defamatory statements all relate to an issue of public interest, plaintiffs are required to plead actual malice which they have failed to do. To plead malice, he argues, requires allegations of specific facts that give rise to the inference that a defendant acted with malice and poses a heavy burden for the plaintiffs, which they have not met. He asserts that rather than allege the facts necessary to support an inference that Syed acted with malice, plaintiffs blankly assert, in a single paragraph, that all defendants acted with malice.

Syed argues that many of the alleged defamatory statements are opinion statements that cannot support an action for defamation. He contends that many of the statements as pled contain opinions, as the statements either do not have a precise meaning or cannot be proven to be true or false. According to Syed, plaintiffs also fail to distinguish which statements refer to which plaintiffs as some statements refer to a subset of plaintiffs, but not all of them which is due to insufficient pleading.

with their opposition papers.

With respect to plaintiffs' cause of action for intentional infliction of emotional distress, Syed claims that the alleged defamatory statements are not sufficiently outrageous to state such a claim, and that this cause of action is duplicative of other tort claims, which the law prohibits. As for plaintiffs' claim for negligent infliction of emotional distress, Syed maintains that it should be dismissed because he owed no special duty to plaintiffs, the alleged statements could not have caused plaintiffs to fear for their physical safety, plaintiffs allege that all of defendants' conduct giving rise to this claim was intentional, and it is also duplicative of their defamation claims.

Syed asserts that Plaintiffs' claims for punitive damages should be dismissed, because there is no stand-alone cause of action for punitive damages in New York. He also asserts that plaintiffs' claim for injunctive relief should be dismissed because there is no stand-alone cause of action for an injunction in New York, and since plaintiffs' defamation claims should be dismissed so should their request for injunctive relief.

Plaintiffs' Opposition

In opposition, plaintiffs contend that Syed's motion attacks the substance of the claims and their interpretation, but fails to dispute the existence of the defamatory words or statements or Syed's involvement in disseminating or producing them. Further, they assert, Syed has not proffered any evidence absolving him of liability or disproving any of their factual claims and therefore they are entitled to further substantiate their claims through discovery. Plaintiffs argue that the complaint adequately pleads causes of actions for defamation, libel, and slander per se against all defendants because they have

provided five written statements and one spoken statement that are defamatory and were communicated to third parties, with Syed being the central source. Plaintiffs maintain that they have met the burden of withstanding a motion to dismiss because they have provided descriptive and relevant excerpts of the defamatory statements and have specified time, platforms, and people to which the publications were distributed.

Plaintiffs argue that the defamatory statements made by defendants were not opinion but were affirmations of fact. They argue that the allegations contained specific allegations of criminal conduct and defendants failed to confirm the validity of the statements and instead reported them as absolute truth. Plaintiffs note that five of the statements, were sourced from news platforms which meant they were assertions of fact not opinion. Concerning the issue of malice, plaintiffs argue that the New York Court of Appeals has explained that the reckless disregard standard is met when defendants are highly aware that the statements are probably false. They contend that Syed, as a party to the federal litigation, and having worked for plaintiffs, was aware that the statements were patently untrue, satisfying the reckless disregard standard. Plaintiffs argue that they have adequately pled their claim for slander per se because the alleged defamatory statements consisted of allegations of specific criminal and unethical conduct, including fraudulent billing and prescription refilling practices, attempting to procure the destruction of evidence of fraud in exchange for a large sum of money, and mishandling medication.

Plaintiffs contend that Syed is not immune from liability based on the litigation privilege because his statements are egregiously defamatory and are not at all pertinent to the pending federal lawsuit or any of the allegations contained in his federal complaint. Plaintiffs point to the naming of Shazia Pharmacy in an article that alleges the same fraudulent conduct occurred there as what allegedly occurred at S&P. Plaintiffs argue that Syed could not have observed any fraudulent activity at Shazia Pharmacy since he did not work for that entity but rather S&P, and therefore the allegations published against Shazia Pharmacy are knowingly false and were made with a defamatory purpose in mind. Syed's statements, they argue, can only be reasonably inferred to have been published with ill will and for the purpose of defaming plaintiffs as the allegations are irrelevant to the subject matter of his federal lawsuit and have no factual underpinnings whatsoever.

Plaintiffs maintain that their cause of action for intentional infliction of emotional distress should withstand a motion to dismiss because defendants' conduct was extreme and outrageous as they conspired to launch a smear campaign against plaintiffs. They claim that defendants' actions were intentional and were the result of a vengeful Syed, who wanted to punish plaintiffs for his alleged wrongful termination. Plaintiffs argue that their businesses and reputations have suffered tremendously, that they have been shunned by their community, and have suffered extreme emotional distress. As for their claim for negligent infliction of emotional distress, plaintiffs state that they have pled this cause of action in the alternative to intentional infliction of emotional distress. Plaintiffs maintain

that defendants had a responsibility to perform their due diligence in reporting matters truthfully so as not to damage a person's livelihood or emotional wellbeing unfairly, and erroneously. They state that Syed's actions provided an assurance of genuineness as he professed lies to public as truth.

Plaintiffs argue that they are entitled to punitive damages and may seek them as separate relief because Syed's conduct was intentional, calculated, and is sufficiently outrageous. Plaintiffs assert that they are entitled to injunctive relief also as a separate remedy because their businesses have suffered irreparable harm because of Syed's relentless smear campaign which cannot be appropriately remediated in their community without the immediate retraction of the defamatory statements. They aver that for them to have a reasonable chance to regain their social and financial standing in society, injunctive relief is necessary.

Syed's Reply

Syed argues that plaintiffs have brought this suit in retaliation against him for filing a federal retaliation complaint. He argues that most of plaintiffs' allegations that he defamed them are based on pure speculation as to whether he even made the statements attributed to him. In many of the primary sources for the alleged defamatory statements, Syed claims he is not even named as a source. He further argues that the primary sources that plaintiffs have submitted contain defamatory statements about him too, and therefore it makes no sense that he would publish these statements. Syed contends that there is no good reason to believe, and good reason not to believe, that he made these statements or

caused them to be published. Specifically, he argues, there are no statements attributed to Syed in the defamatory statements Nos. 1, 4 and 5, and there is no reason to believe he was involved in these communications in any way. Further, he contends that the allegation regarding the \$450,000.00 offer to destroy evidence is attributed to unnamed sources or no source at all, in the primary source evidence plaintiffs provide. He argues that plaintiffs' contention that he is the source for that statement is speculative and incoherent, and in the context in which the offer is described in the various publications, it is defamatory to him (Syed). He claims that without alleging any specific facts, plaintiffs claim that Syed published defamatory statements. However, plaintiffs do not allege that Syed ever shared the articles with anyone, that he paid Mirza or other third parties to publish them, or that he took any specific steps to cause the distribution of the statements. He points out that the articles contain statements that are potentially defamatory to him such as statements from Bibi and Siddiqui that he sexually harassed his co-workers and showed them pornography, for which he was fired. Thus, he argues, plaintiffs' argument that he caused the articles to be published is without basis, and therefore the statements therein cannot be reasonably attributed to him.

Syed asserts that plaintiffs have not responded to his claim that the alleged defamatory statements are too vague to be actionable. Plaintiffs, he states, do not clarify which specific statements in the primary sources are allegedly defamatory but instead allege generally that the articles are defamatory. He also points out that plaintiffs did not respond to his argument that they have not specified which plaintiffs are bringing

defamation claims for which statements. Syed maintains that plaintiffs' contention that statements about one corporate entity or individual are actionable by an associated corporation or individual are contrary to law. For each individual plaintiff, the court should dismiss each defamation claim that is based on statements that do not specifically name that individual plaintiff, Syed contends.

Syed also argues that plaintiffs did not coherently or specifically respond to his arguments that many of the alleged defamatory statements are either not defamatory or are opinions which are not actionable. He maintains that it is plaintiffs' burden to establish that, in the context of the entire communication, a disputed statement is not protected opinion. He avers that plaintiffs have not addressed the specific statements that he has described as opinions but instead only state generally that since they have not been criminally charged, any statement relating to criminality must be defamatory.

Syed reiterates that most of the statements contained in defamatory statements Nos. 2 through 5 are protected by the litigation privilege as they report the allegations in his federal complaint. He claims that as a general matter, any alleged statements related to plaintiffs committing fraud or violating pharmaceutical reporting and handling rules are protected because they are the central allegations in his federal complaint. Plaintiffs, he contends, have failed to meet their burden of establishing that the identified statements are not protected by the litigation privilege and, therefore, their claims based on these statements should be dismissed. Syed disputes plaintiffs' argument that statements pertaining to Shazia Pharmacy are not protected by the litigation privilege and maintains

they are mistaken about the scope of the litigation privilege, and the allegations in the federal complaint, which include an integrated employer theory. Therefore, statements that Shazia Pharmacy engaged in fraud, he asserts, are substantially accurate and are thus protected by the privilege.

Syed reasserts that plaintiffs' claims for intentional infliction of emotional distress and negligent infliction of emotional distress are duplicative of their defamation claims and argues that plaintiffs fail to address this issue in their opposition. He also questions whether these claims satisfy the standard of "outrageous" conduct, which the Court of Appeals has said is rigorous and difficult to satisfy. He also states that plaintiffs failed to address whether he owed a duty to the plaintiffs or that the conduct has some guarantee of genuineness as required to state a claim for negligent infliction of emotional distress. As for the punitive damages claim, Syed argues that plaintiffs essentially concede in their opposition that New York has no independent cause of action for punitive damages. Syed maintains that plaintiffs are not entitled to injunctive relief because they have not pled sufficient facts to state a claim for same. He argues that case law indicates that the courts strongly disfavor prior restraints on speech. Moreover, according to Syed free speech is protected from censorship unless it is shown to be likely to produce a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance, or unrest, and prior restraints are not permissible merely to enjoin the publication of libel. He contends that plaintiffs essentially want an injunction to enjoin the publication of libel, which is insufficient as a matter of law.

Discussion

In determining a motion to dismiss pursuant to CPLR 3211 (a) (7), a court must “accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Kolchins v Evolution Mkts., Inc.*, 31 NY3d 100, 105-106 [2018], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; see also *Strujan v Kaufman & Kahn, LLP*, 168 AD3d 1114, 1115 [2d Dept 2019]; *Gorbatov v Tsirelman*, 155 AD3d 836, 837 [2d Dept 2017]). Allegations consisting of bare legal conclusions must not be considered (see *Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141-142 [2017]). “Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss” (*Gorbatov*, 155 AD3d at 837, quoting *Shaya B. Pacific, LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34 [2d Dept 2006]).

A court may consider affidavits or deposition testimony submitted by plaintiff to remedy any defects in the complaint, but not for the purpose of determining whether there is evidentiary support for the pleading (see *Leon*, 84 NY2d at 88; *Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]). “If the court considers evidentiary material, the criterion then becomes whether the proponent of the pleading has a cause of action, not whether he has stated one”

(*Sokol*, 74 AD3d at 1181-1182; *see also Hendrickson v Philbor Motors, Inc.*, 102 AD3d 251, 257-258 [2d Dept 2012]). “[U]nless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Consideration of evidentiary materials “will almost never warrant dismissal under CPLR 3211 (a) (7) unless the materials establish conclusively that [the plaintiff] has no cause of action” (*Hendrickson*, 102 AD3d at 258 [internal quotation marks omitted]; *see also Lawrence v Graubard Miller*, 11 NY3d 588, 595 [2008]).

Defamation

“Defamation is the injury to one’s reputation either by written expression, which is libel, or by oral expression, which is slander” (*Idema v Wager*, 120 F.Supp.2d 361, 365 [S.D.N.Y. 2000]). “The elements of a cause of action for defamation are (a) a false statement that tends to expose a person to public contempt, hatred, ridicule, aversion, or disgrace, (b) published without privilege or authorization to a third party, (c) amounting to fault as judged by, at a minimum, a negligence standard, and (d) either causing special harm or constituting defamation per se” (*see Rosner v Amazon.com*, 132 AD3d 835, 836–837 [2d Dept 2015]; *Kamchi v Weissman*, 125 AD3d 142, 156 [2d Dept 2014]; *see also Davis v Boenheim*, 24 NY3d 262, 268 [2014]). “Truth is an absolute defense to an action based on defamation” (*Heins v Board of Trustees of Inc. Vil. of Greenport*, 237 AD2d 570, 571 [2d Dept 1997]; *see Goldberg v Levine*, 97 AD3d 725, 726 [2d Dept

2012)). “On a motion to dismiss a defamation claim, the court must decide whether the statements, considered in the context of the entire publication, are reasonably susceptible of a defamatory connotation, such that the issue is worthy of submission to a jury (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014] [internal quotation marks omitted]).

Defamatory statement No. 1, made on or about October 2, 2020, is an e-mail, purportedly from Laura Susan, which states, “We the people request an (sic) thorough investigation on these criminal operating individuals” and describes an audit of “suspicious” and “unethical practices” at Healthways Pharmacy, a non-party to this case, which was formerly owned by Siddiqui and names both Siddiqui and Bibi as operators of the facility. Further, it states, “shame on both Pervaiz [Siddiqui] and Shazia [Bibi] on looting our hard earned tax dollars and living lavishly shame shame shame!!!!.” This statement is defamatory because, in view of the entire e-mail, it alleges that Siddiqui and Bibi are engaged in criminal activity such that various politicians enumerated in the e-mail should be shamed for continuing to support them.

Defamatory statement No. 2 is an audio news report in which defendants accuse Siddiqui and Bibi of offering \$450,000 to Syed to destroy the evidence that he allegedly possesses that demonstrates that plaintiffs have engaged in pharmacy fraud. This statement is defamatory because it accuses Siddiqui and Bibi of a serious crime which is likely to induce an evil opinion of them and subject them to public contempt or ridicule. “Imputing a serious crime to the plaintiff[s] constitutes defamation per se” (*Knut v Metro*

Intern., S.A., 91 AD3d 915, 916 [2d Dept 2012]). The audio clip further alleges, that the “parties retained two private arbitration lawyers who would appear before an arbitrator to make the offer of \$450,000 to make the case go away”, and that Healthways Pharmacy was raided by government officials and being operated without a pharmacist, and that plaintiffs “have tarnished the image of the Pakistani community and Pakistan”. These allegations are not defamatory because the allegation that they intended to make a settlement offer in arbitration to “make the case go away”, and that their business was raided and operated without a pharmacist are not statements that describe any alleged action on their part that would tend to expose plaintiffs to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of them. The statement regarding tarnishing the image of the Pakistani community is not defamatory because it is a non-actionable statement of opinion. “A statement can only be defamatory if it is a statement of fact; pure opinion cannot be defamatory. New York courts apply a three-factor test to determine whether a reasonable person would consider a statement to be a fact or a non-actionable opinion: “(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal...[to] readers or listeners that what is being read or heard is likely to be opinion, not fact” (*Conti v Doe*, 535 F.Supp.3d 257, 267 [S.D.N.Y. 2021] [internal quotation marks and citations omitted]). Whether plaintiffs have tarnished the image of

Pakistanis cannot be proven true or false, and in the context of the article, this statement would be seen by readers as a matter of opinion.

In the audio report, plaintiffs are referred to as a "pharmacy mafia." Defendants' use of the term "pharmacy mafia" to refer to plaintiffs is not defamatory because it does not have a precise meaning, cannot be proven true or false, and in context presents as a statement of pure opinion, which is not actionable. However, the statement contained in the audio news report that accuses plaintiffs of billing for prescriptions that are not filled is defamatory because it accuses them of a serious crime that would tend to induce an evil opinion of plaintiffs and subject them to public contempt.

Defamatory statement No. 3 alleges that plaintiffs were the subject of a high-level inquiry by the Inspector General's Office. This statement is not defamatory because it does not allege any wrongdoing by the plaintiffs despite the inquiry so there is no defamatory connotation. Statement No. 3 also alleges that plaintiffs run "dozens" of pharmacies in Brooklyn. This statement does not have any defamatory meaning because merely stating that plaintiffs operate dozens of pharmacies does not cast the plaintiffs in a negative light and would not induce an evil opinion of them or subject them to public contempt. Statement No. 3 also alleges that Siddiqui is an 80-year-old mastermind of the pharmacy fraud at plaintiffs' businesses. This statement is defamatory because it alleges serious criminal conduct by Siddiqui that would tend to induce an evil opinion of him in the minds of right-thinking persons. Statement No. 3 also contains a statement about the alleged scheme involving plaintiffs, in which they attempted to pay Syed \$450,000.00 to

destroy evidence of fraud and is therefore defamatory. Plaintiffs also point to the statement contained in Statement No. 3 that, “[a]t the front is a Pakistani woman who has also added her relatives to the pharmacy network, Dr. Wahid, who also owns two pharmacies, has given 300 prescriptions daily and in almost a year from 84 thousand to 90 thousand prescriptions have been exposed. While other doctors used to send 100 prescriptions on a daily basis, Dr. Wahid alone used to send 300 prescriptions into these pharmacies”. This statement is not defamatory because while in the context in which this statement is made in the article, it suggests that there may have been fraudulent activity on the part of the plaintiffs, it does not accuse plaintiffs directly of any crime or wrongdoing involving this doctor, rather the statement is more of an indictment of Dr. Wahid than it is of plaintiffs and therefore does not convey a defamatory meaning as far as any of the plaintiffs are concerned. The accusation contained in statement No. 3 that “[i]n one Pharmacy, under the name of a Pakistani who does not exist, \$30,000 prescriptions were billed” is defamatory because it alleges plaintiffs have committed a serious crime. The statement that plaintiffs S&P and Shazia Pharmacy billed for prescriptions that were never filled or were billed under the name of a fictitious patient is defamatory because it alleges a serious crime and would tend to induce an evil opinion of plaintiffs. The allegation that United Health Care closed plaintiffs’ billing accounts is not defamatory because it does not accuse them of a serious crime, nor does it tend to induce an evil opinion of plaintiffs or expose them to public contempt or ridicule. Statement No. 3 also alleges that Siddiqui’s former business, Healthways, was raided by the Health

Inspector on January 21, 2020. “To state a claim for defamation, a plaintiff must establish that the [challenged] matter is published of and concerning the plaintiff...As a general rule, defamatory words directed at a corporation or organization do not give rise to a claim by the individuals associated with it” (*Brimelow v New York Times Company*, 2020 WL 7405261 [S.D.N.Y. 2020] [internal quotation marks and citations omitted]). The statement about Healthways is not defamatory because alleging that a raid took place at one of their pharmacies that is not a party to this action is not of or concerning any of the plaintiffs in this case, so it cannot induce an evil opinion of them or subject them to public contempt or ridicule. The allegation in Statement No. 3 that plaintiffs did not properly refrigerate medicines at their pharmacy is not defamatory because while it does tend to cast plaintiffs in a negative light, it is not a statement that tends to induce an evil opinion of plaintiffs or subject them to contempt or ridicule.

In defamatory statement No. 4, defendants wrote an article with the headline “Biggest Fraud Scandal Case in US Filed in Court.” This statement is not actionable for defamation because it is a statement of opinion that cannot be proved true or false. Statement No. 4 also states that various law enforcement agencies are investigating plaintiffs and have interrogated them several times. This statement is not defamatory because while allegations that defendants are subject to investigation may tend to paint plaintiffs in a negative light, it is not of the sort that will induce an evil opinion of plaintiffs or subject them to public contempt or ridicule. However, the statement that an offer was made to Syed to destroy evidence of fraud is defamatory.

Defamatory statement No. 5 is an article discussing Syed's lawsuit against plaintiffs. The plaintiffs cite the headline, "Shazia Pharmacy Fraud Case In Court" as a defamatory statement. This statement is not defamatory because it is a substantially true description of Syed's lawsuit and does not have a defamatory connotation. "It is fundamental that truth is an absolute unqualified defense to a civil defamation action and substantial truth suffices to defeat a charge of libel" (*Conti*, 535 F.Supp.3d at 271 [internal quotation marks omitted]). Even though Shazia Pharmacy is not Syed's former place of work, it is named as a defendant in his lawsuit, therefore this is not a false or misleading headline, and it only announces that Syed's lawsuit sounding in fraud has been filed.

Plaintiffs also allege the photos of Siddiqui and Bibi appearing in the article are defamatory. These pictures are not defamatory because Siddiqui and Bibi are indeed defendants in Syed's fraud case so have not been portrayed in a false light or falsely linked to allegations of fraud. Statement No. 5 contains a reference to the alleged settlement between plaintiffs and Syed for \$450,000.00, but the statement as it appears in this article is not defamatory since it only describes the settlement offer as one offered for "damages and compassion" and not for Syed to destroy evidence of a crime.

Having determined which of the alleged false statements are defamatory, the court now addresses whether any of the defamatory statements were subject to privilege. Syed argues that defamatory statements Nos. 2 through to 5 are either subject to the litigation privilege or protected by Civil Rights Law § 74.

“It is well settled that [p]ublic policy mandates that certain communications, although defamatory, cannot serve as the basis for the imposition of liability in a defamation action. When compelling public policy requires that the speaker be immune from suit, the law affords an absolute privilege, while statements fostering a lesser public interest are only [qualifiedly] privileged” (*Rosenberg v Metlife, Inc.*, 8 NY3d 359, 365 [2007] [internal quotation marks and citations omitted]). “The absolute privilege generally is reserved for communications made by individuals participating in a public function, such as executive, legislative, judicial or quasi-judicial proceedings” (*Id.*). “The litigation privilege provides that a statement that is pertinent to litigation is privileged and cannot be the basis of a defamation action” (*Gottwald v Sebert*, 193 AD3d 573, 580 [1st Dept 2021]). “[T]he application of privileged status to communications...during the course of litigation is also relevant to pre-litigation communication” (*3P-733, LLC v Davis*, 187 AD3d 626, 628 [1st Dept [2020]]).

The defamatory statements contained in Statements Nos. 2 and 3 pertain to the subject matter of Syed’s lawsuit and were allegedly made by Syed on or about October 21, 2021, just seven days before Syed filed his federal lawsuit alleging that the plaintiffs engaged in fraud at their businesses. On October 28, 2021, Syed filed a complaint in the United States District Court for the Eastern District of New York. In his federal complaint, Syed alleges an elaborate fraud scheme at S&P and plaintiffs’ other pharmacies in which plaintiffs billed Medicare and Medicaid and other insurance providers for prescriptions that were never issued to any customers. Syed also alleges

plaintiffs double-billed for prescriptions, Bibi and Siddiqui facilitated the fraudulent activity, Dr. Wahid assisted plaintiffs in their fraudulent activity by writing an excessive amount of fraudulent prescriptions, United Health Care closed its billing accounts with S&P, plaintiffs' fraud enabled S&P to be profitable, and Siddiqui played an outsized role in furthering the fraudulent scheme (see generally Federal Complaint, NYSCEF Doc No. 11). "[S]tatements made prior to the commencement of an anticipated litigation are privileged, and that the privilege is lost where a defendant proves that the statements were not pertinent to a good faith anticipated litigation" (*Front, Inc. v Khalil*, 24 NY3d 713, 720 [2015]). Statements made to the press in anticipation of litigation are protected by the privilege (*id.* at 720; see *Tacopina v O'Keeffe*, 645 Fed. Appx. 7, 8 [2d Cir. 2016] ["Tacopina's defamation claim against Parlatore is premised on statements made in an affidavit Parlatore filed in court on behalf of a client. These statements are therefore privileged and cannot form the basis for a defamation claim...Even crediting Tacopina's allegation that Parlatore shared the affidavit with the Daily News before filing it in court, Tacopina has still not sustained his burden of showing that the statements were not pertinent to a good faith anticipated litigation"]) [citations omitted]).

"Further, the test to determine whether a statement is pertinent to litigation is extremely liberal, such that the offending statement, to be actionable must have been outrageously out of context" (*Flomenhaft v Finkelstein*, 127 AD3d 634, 637 [1st Dept 2015] [internal quotation marks and citations omitted]). "[W]here the privilege is invoked, any doubts are to be resolved in favor of pertinence" (*Id.* [internal quotation

marks omitted]). “Pertinenc[e] is a question of law for the court to decide” (*Feist v Paxfire, Inc.*, 2017 WL 177652 at *4 [S.D.N.Y. 2017]). Here, the defamatory statements made in anticipation of litigation were clearly pertinent to Syed’s lawsuit, where many of the defamatory remarks closely resemble the allegations of his federal complaint. The defamatory statement regarding the settlement offer related to the federal litigation is not outrageously out of context where it is evident from the allegations in Syed’s federal complaint that he engaged in discussions with Bibi and Siddiqui about the alleged fraud that he had discovered prior to filing the lawsuit. Thus, his discussions with Bibi and Siddiqui about a potential settlement is germane to the subject matter of the lawsuit.

The statements made by Syed in anticipation of litigation are subject to a qualified privilege. “[A] statement is subject to a qualified privilege when it is fairly made by a person in the discharge of some public or private duty, legal or moral, or in the conduct of his [or her] own affairs, in a matter where his [or her] interest is concerned. In general, if the privilege is “qualified, it can be lost by plaintiff’s proof that defendant acted out of malice” (*Front, Inc.*, 24 NY3d at 719 [internal quotation marks and citations omitted]). Plaintiffs allege that “defendants published or caused the statements to be published with malice” (Complaint at ¶ 88). Plaintiffs, despite this conclusory allegation, fail to allege any facts tending to show that Syed acted with malice in making the alleged defamatory statements and, therefore, the qualified privilege still applies to Syed’s alleged statements contained in defamatory statements Nos. 2 and 3.

Defamatory statements Nos. 4 and 5 are protected by the absolute litigation

privilege as they were made after Syed filed his federal lawsuit against plaintiffs and concern the subject matter of his litigation. Moreover, these statements are privileged pursuant to Civil Rights Law § 74, which provides, “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, or for any heading of the report which is a fair and true headnote of the statement published” (Civil Rights Law § 74). “Comments that essentially summarize or restate of the allegations of a pleading filed in an action are the type of statements that fall within section 74’s privilege. As to the requirement that the publication be a fair and true report of the official proceeding, the Court of Appeals has stated that [f]or a report to be characterized as fair and true within the meaning of [Civil Rights Law § 74] thus immunizing its publisher from a civil suit sounding in libel, it is enough that the substance of the article be substantially accurate” (*Saleh v New York Post*, 78 AD3d 1149, 1152 [2d Dept 2010] [internal quotation marks and citations omitted]). Based on a careful reading of Syed’s federal complaint, it is evident that the articles that comprise defamatory statements Nos. 4 and 5 are a substantially accurate summary of the allegations contained in Syed’s federal lawsuit and are thus absolutely privileged pursuant to Civil Rights Law § 74.

Defamatory statement No. 1 is not subject to any privilege and plaintiffs have alleged that the defamatory statements “injured the reputation of the plaintiffs personally and in their trade, business, and profession, and exposed them to public hatred, contempt, and ridicule” (Complaint at ¶ 90). Defamatory statement No. 1 was of and concerning

Bibi and Siddiqui only, and not the pharmacy plaintiffs. Plaintiffs Bibi and Siddiqui have therefore stated a claim against Syed for defamation with respect to defamatory statement No. 1. S&P's & Shazia Pharmacy's claim for defamation is dismissed as all the defamatory statements pertaining to them are privileged. Plaintiffs' defamation claim as it pertains to defamatory statements Nos. 2 -5 is dismissed.

Libel

Plaintiffs' second cause of action is for libel, which is defamation published in written form. The court finds that Bibi and Siddiqui have stated a claim for libel as it pertains to defamatory statement No. 1, an e-mail which, when viewed in its entirety, alleged that Siddiqui and Bibi were engaged in criminal activity. Plaintiffs have sufficiently alleged that the statement was false, defamatory regarding Bibi and Siddiqui, was published to third-parties when it was sent to various politicians, and allegedly resulted in harm to plaintiffs' reputation. The statement also imputes an allegation of misconduct to Bibi and Siddiqui in their profession as pharmacy operators which constitutes libel per se. "[A] defamatory statement is libelous per se if it imputes fraud, dishonesty, misconduct, or unfitness in conducting one's profession" (*Matovcik v Times Beacon Record Newspapers*, 46 AD3D 636, 637 [2d Dept 2007]). Defamatory statement No.1 is also not subject to any privilege. Thus, that branch of Syed's motion seeking to dismiss the libel claim as it pertains to Bibi and Siddiqui related to statement No. 1 is denied. However, plaintiffs' libel claim is dismissed as it pertains to defamatory statements Nos. 2-5, which are subject to privilege as set forth above.

Slander Per Se

Plaintiffs' third cause of action is for slander per se. Slander is spoken defamation. "Generally, a plaintiff alleging slander must plead and prove that he or she has sustained special damages, i.e., the loss of something having economic or pecuniary value. A plaintiff need not prove special damages, however, if he or she can establish that the alleged defamatory statement constituted slander per se. The four exceptions which constitute slander per se are statements "(i) charging plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman" (*Epifani v Johnson*, 65 AD3d 224, 233 [2d Dept 2009] [internal quotation marks and citations omitted]).

Plaintiffs' slander per se claim is predicated on defamatory statement No. 2 which is a news report in the form of an audio recording. Defamatory statement No. 2 is subject to the litigation privilege for statements made in anticipation of litigation and is therefore not actionable. Accordingly, plaintiffs' claim for slander per se is dismissed.

Intentional Infliction of Emotional Distress

Plaintiffs' fourth cause of action is for intentional infliction of emotional distress. To state a claim for intentional infliction of emotional distress, a plaintiff must plead four elements: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress" (*Howell v New York Post Co., Inc.*, 81 NY2d 115, 121 [1993]). In order to impose liability for this

intentional tort, the conduct complained of must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. The element of outrageous conduct is rigorous, and difficult to satisfy, and its purpose is to filter out trivial complaints and assure that the claim of severe emotional distress is genuine” (*Roach v Stern*, 252 AD2d 488, 491 [2d Dept 1998] [internal quotation marks and citations omitted]). Here, none of the alleged defamatory statements made by Syed are sufficiently outrageous in character or extreme in degree to as to go beyond all possible bounds of decency. While some of the statements accuse plaintiffs of engaging in criminal conduct and are defamatory in nature, there is no statement contained within any of the alleged defamatory speech submitted by plaintiffs that rises to the level of extreme and outrageous conduct. Furthermore, “New York courts do not allow [intentional infliction of emotional distress] claims where the conduct complained of falls well within the ambit of other traditional tort liability (*see McGrath v Nassau Health Care Corp.*, 217 F.Supp.2d 319, 335 [E.D.N.Y. 2002]). Since plaintiffs have failed to establish that defendants engaged in extreme and outrageous conduct, and in any event, their intentional infliction of emotional distress claim is duplicative of their defamation claims, said claim is hereby dismissed.

Negligent Infliction of Emotional Distress

Plaintiffs’ fifth cause of action is for negligent infliction of emotional distress. To state a claim for negligent infliction of emotional distress, a plaintiff must allege that the

defendant: (i) owed a duty of care; (ii) breached the duty of care; (iii) resulting in direct, rather than consequential, emotional harm; and (iv) that possesses “some guarantee of genuineness” (*Taggart v Costabile*, 131 AD3d 243, 255-256 [2d Dept 2015]). “[A] cause of action to recover damages for negligent infliction of emotional distress must generally be premised upon conduct which unreasonably endangers the plaintiff’s physical safety” (*Glendora v Gallicano*, 206 AD2d 456, 456 [2d Dept 1994] [internal quotation marks omitted]). Here, plaintiffs have failed to plead facts alleging that defendants owed them a duty of care or that defendants breached such a duty. Plaintiffs allege that defendants made defamatory statements that caused them emotional harm but do not allege any conduct on the part of defendants that unreasonably endangered their physical safety. Plaintiffs have therefore failed to state a claim for negligent infliction of emotional distress. Accordingly, plaintiffs’ claim for negligent infliction of emotional distress is dismissed.

Punitive Damages

Plaintiffs’ sixth stand-alone cause of action for punitive damages must be dismissed. “New York does not recognize an independent cause of action for punitive damages. Moreover, punitive damages are available for the purpose of vindicating a public right only where the actions of the alleged tort-feasor constitute gross recklessness or intentional, wanton or malicious conduct aimed at the public generally or are activated by evil or reprehensible motives” (*Aronis v TLC Vision Ctrs., Inc.*, 49 AD3d 576, 577 [2d Dept 2008] [internal quotation marks and citations omitted]). Inasmuch as plaintiffs have

failed to allege any tortious conduct on the part of defendants aimed at the public generally, punitive damages are not warranted and said claim is hereby dismissed.

Preliminary and Permanent Injunction

Plaintiffs' seventh cause of action for a preliminary and permanent injunction enjoining defendants from publishing defamatory speech is also dismissed. "An injunction is a remedy, a form of relief that may be granted against a defendant when its proponent establishes the merits of its substantive cause of action against that defendant. Although it is permissible to plead a cause of action for a permanent injunction, ... permanent injunctive relief is, at its core, a remedy that is dependent on the merits of the substantive claims asserted" (*Weinreb v 37 Apartments Corp.*, 97 AD3d 54, 59 [1st Dept 2012] [internal quotation marks omitted]). Defamatory statement no. 1 is not subject to privilege and is the source of plaintiffs' remaining substantive claims, which are for defamation and libel. However, "[p]rior restraints on speech are strongly disfavored . . . [and] [f]ree speech is protected from censorship unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest" (*Rosenberg Diamond Dev. Corp. v Appel*, 290 AD2d 239, 239 [1st Dept 2002] [internal quotation marks and citations omitted]). Defamatory statement No. 1 does not contain any speech that is likely to result in a serious substantive evil. Moreover, plaintiffs have pled no facts that support the contention that defendants' continued speech is likely to produce a clear and present danger of a serious substantive evil that arises far above public inconvenience, annoyance or unrest. Thus, prior restraints

are not permissible herein merely to enjoin the publication of libel. Accordingly, plaintiffs' injunctive relief claim is dismissed.

Conclusion

Accordingly, it is hereby

ORDERED that Syed's motion (mot. seq. no. 1) to dismiss plaintiffs' complaint is **GRANTED** to the extent that plaintiffs' claims for slander per se, intentional infliction of emotional distress, negligent infliction of emotional distress, punitive damages, and preliminary and permanent injunction and said claims are hereby **DISMISSED**; and it is further

ORDERED that S&P and Shazia Pharmacy's claims for defamation and libel are **DISMISSED**; and it is further

ORDERED that Syed's motion to dismiss plaintiffs' complaint is **DENIED** as to Bibi and Siddiqui's claims for defamation and libel as based upon statement No. 1.

The Court has considered the parties' remaining contentions and finds them to be without merit.

All relief not specifically granted herein has been considered and is denied.

This constitutes the Decision and Order of the Court.

E N T E R,



HON. CAROLYN E. WADE, J. S. C.

2023 MAY 12 AM 9:50
CLERK

HON. CAROLYN E. WADE
JUSTICE OF THE SUPREME COURT