SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02M

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RAUL ESCARZA

Plaintiff,

- v -

MARY EVANCHO,

Defendant.

INDEX NO. 154116/2021

MOTION DATE 07/11/2023, 09/11/2023

MOTION SEQ. NO. 004 005

DECISION + ORDER ON MOTION

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HON. LORI S. SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 36, 37, 39, 53, 55, 65

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 36, 37, 39, 53, 55, 65

were read on this motion to/for STRIKE PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 54, 56, 60, 61, 62, 63, 64, 66, 67, 68, 69, 70

were read on this motion to/for DISMISS.

In this defamation action, plaintiff Raul Escarza ("Plaintiff") moves in Motion Sequence 004 to strike the Answer of defendant Mary Evancho ("Defendant") pursuant to CPLR 3126. Defendant opposes the motion and moves in Motion Sequence 005 to dismiss the Complaint pursuant to CPLR §§ 3211(a)(7), 3126, and 3212, which Plaintiff opposes. The motions are consolidated herein for disposition.

This is one of five actions brought against Defendant, a rent stabilized tenant who has resided at 114 West 73rd Street in Manhattan ("the Building") for over 40 years (NYSCEF Doc. 41). In this action, Plaintiff claims that he was the Building's manager and that on numerous

occasions including on or about August 5, 2020, Defendant purportedly contacted nonparty Robert Malta, the owner of the Building and Plaintiff's employer, and made false and defamatory remarks including racial slurs, claimed he was incompetent, and stated that Plaintiff should be fired. Plaintiff alleges that Malta demoted him and removed him as the Building's manager (NYSCEF Doc. 1). The Complaint asserts causes of action for slander, intentional infliction of emotional distress ("IIED"), and tortious interference with employment relations.

Notably, this action was filed on the same day as another action against Defendant alleging identical causes of action brought by the Building's superintendent. That action was dismissed in a decision dated April 10, 2024 (*Lopez v Evancho*, New York County Index No. 154118/2021, Doc. 47 [Latin, J.]). In both actions, Malta submits affidavits in opposition to the motions to dismiss which are nearly identical, with both averring that he believed the plaintiff in each respective action to be competent employees before Plaintiff's allegedly incessant and false complaints about their qualifications.

Defendant maintains that the action must be dismissed. She annexes her lease which shows that she pays $1,457.70 per month for her rent stabilized apartment (NYSCEF Doc. No. 43). She states that the five actions were all brought as a concerted effort by Malta to get her to vacate her apartment. She denies making the statements attributed to her but states that, even if she had made them, they are not actionable as they constitute pure opinion. She claims in the alternative that the action should be dismissed because, despite Plaintiff's claim that he lost his job as a result of her purported statements to Malta, he in fact continued to work as the Building's manager. She contends that he continued to answer communications about the Building, was listed as manager on the Building's registration, and signed a Notice to Cure served on her during that period (NYSCEF Docs. 50 and 51).

In Motion Sequence 005, Defendant moves to dismiss the Complaint on the basis that her alleged statements to Malta are nonactionable opinion and are not slander per se. On a motion to dismiss pursuant to CPLR § 3211(a)(7), the Court must accept as true the facts alleged in the complaint and grant plaintiff every possible inference (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). However, a complaint must be dismissed where its claims rest upon "factual allegations which fail to state a viable cause of action" or "that consist of bare legal conclusions" (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006]).

A plaintiff states a cause of action for slander by alleging that the defendant made a false statement to a third party without privilege or authorization that causes harm or is one of the types of statements actionable regardless of harm (*see Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014]). Statements that tend to injure the plaintiff in their trade, business, or profession can constitute slander per se, in which case the plaintiff does not need to allege special damages (*Liberman v Gelstein*, 80 NY2d 429, 435 [1992]). It is well established that a statement of pure opinion is not actionable (*Steinhilber v Alphonse*, 68 NY2d 283, 289 [1986]). A statement that is accompanied by a recitation of the facts upon which it is based or that does not imply that it is based upon undisclosed facts is a nonactionable pure opinion (*id.*). Mere epithets and insults are nonactionable opinions (*see, e.g., Wiener v Doubleday*, 142 AD2d 100, 105 [1st Dept 1988]). Distinguishing between statements of fact and nonactionable opinion are a question of law for the Court (*Davis v Boehim*, 24 NY3d 262, 269 [2014]).

The Court finds that Defendant's purported statements to Plaintiff's employer are not actionable as slander as a matter of law. Although the Court does not condone the offensive and derogatory statements that Plaintiff allege were made, these statements are mere epithets and therefore nonactionable opinion (*see Wiener*, 142 AD2d at 105). Defendant's purported

statement that Plaintiff "should not be working in a building, he's incompetent and should not be running a building, he should be fired!" is also nonactionable pure opinion as it does not imply that it is based on undisclosed facts (*see Steinhilber*, 68 NY2d at 289). This statement is also not one that would tend to injure Plaintiff in his trade, business, or profession so as to constitute slander per se. Such a statement must allege that Plaintiff's conduct was "incompatible with the proper conduct of [his] trade, profession, or business" and "must be made with reference to a matter of significance and importance for that purpose, rather than a more general reflection upon the plaintiff's character or qualities" (*Liberman*, 80 NY2d at 436). Here, Defendant's alleged statement about Plaintiff's competence is too general to be considered made with reference to a matter of significance related to the conduct of his profession. Plaintiff's first cause of action for slander is accordingly dismissed.

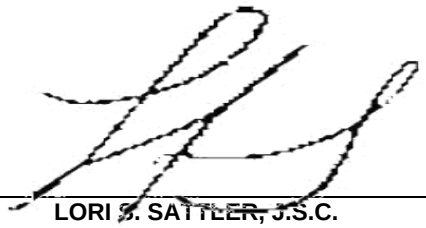
The Court also dismisses the second and third causes of action alleging IIED and tortious interference, respectively. The IIED claim is duplicative of the slander cause of action as they are both based upon the same alleged facts and seek the same relief (*see Hirschfeld v Daily News, L.P.*, 269 AD2d 248, 249 [1st Dept 2000]). It therefore must be dismissed. The tortious interference with employment relations cause of action is also dismissed. Plaintiff has not asserted that Defendant's conduct was criminal, and, because Plaintiff's slander action is being dismissed, no independent tort was committed (*see Carvel Corp. v Noonan*, 3 NY3d 182, 190 (2004).

As the Complaint is dismissed for failure to state a claim, Plaintiff's motion to strike Defendant's Answer for failure to comply with discovery demands is denied.

Accordingly, it is hereby:

ORDERED that Plaintiff's motion (Motion Sequence 004) is denied; and it is further

ORDERED that Defendant's motion to dismiss (Motion Sequence 005) is granted and the Complaint is dismissed in its entirety.



5/23/2024
DATE

LORI S. SATTLER, J.S.C.

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