SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER **PART** 08

Justice

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MARY E DAVIS,

Plaintiff,

- v -

JOYCE F. BROWN, IN HER INDIVIDUAL CAPACITY AND HER OFFICIAL CAPACITY AS PRESIDENT OF FASHION INSITUTUTE OF TECHNOLOGY, FASHION INSTITUTE OF TECHNOLOGY

Defendant.

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INDEX NO. 151757/2021

MOTION DATE 10/03/2023

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 66, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ORDERED that these motions are decided as follows.

Familiarity with the court's prior decision on motion sequence 1 to dismiss plaintiff's complaint is assumed.

Plaintiff now moves for summary judgment as to liability on her sole remaining claim, defamation by implication. Defendants cross-move for summary judgment dismissing plaintiff's claim and "for return of FIT's attorney work product improperly in Plaintiff's possession" and "for permission for defendants' previously served verifications to be deemed timely".

The court will first consider the parties' arguments on summary judgment. Issue has been joined and note of issue has not yet been filed. Therefore, summary judgment relief is available. On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without

the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

The allegedly defamatory letter, which was sent from defendant Brown on February 21, 2020, states in relevant part the following:

> To the FIT Community,
>
> Today I am writing to update you on the preliminary steps we have taken and are continuing to take in response to the fallout of the MFA Fashion show on February 7. … It is the beginning of accountability. And we cannot expect our community to trust us without a full examination of how this came about.
>
> First and foremost, we have commissioned an independent investigation of ourselves. Bond, Schoeneck & King, an external law firm, will immediately conduct a thorough and objective probe into the incident, including what led up to the show and what followed.
>
> …
>
> It also appears – based upon information available – that the styling and accessorizing used in the show were provided to him rather than chosen at his discretion. To us, this indicates that those in charge of and responsible for overseeing the show failed to recognize or anticipate the racist references and cultural insensitivities that were obvious to almost everybody else. That's inexcusable and irresponsible – but also why we are commissioning and independent investigation.
>
> …

> As a result, we are announcing today that the Dean of the School of Graduate Studies and the Chair of the MFA Fashion Design Department have been placed on administrative leave, pending the conclusion and outcome of the investigation.

In a decision/order dated December 15, 2022, the Appellate Division First Department held as follows:

> The letter contains no defamation on its face; it does not outright state plaintiff was incompetent or racist. Considering the letter was issued in response to community criticisms, the letter implies that plaintiff was responsible for the show and failed to recognize the accessories as insensitive, even though she took no part in managing, directing, or approving the show.
>
> ...
>
> The letter omitted plaintiff's nonparticipation in the production, direction, and management of the fashion show; her unawareness as to the accessories the designers planned to present; the FIT policy precluding academic deans from evaluating, censoring, or approving student and alumni work; and plaintiff's prompt response to student concerns and her proactive approach to address those concerns; and implied that plaintiff was responsible for the show, was aware of the accessories, could approve them, and failed to respond to student concerns.

Plaintiff argues that "this Court has the authority to determine that the Letter can be interpreted by an average reader in only one way: as implying that Davis was responsible for the accessories and failed to recognize the accessories as racist or culturally insensitive." The court disagrees. The letter instead merely states, in response to the "fallout," that plaintiff was placed on administrative leave pending the outcome of an investigation into "the incident, including what led up to the show and what followed." The letter admits that "based upon information available", it appeared that an FIT alumnus who showed the collection with the culturally insensitive accessories was not responsible for selecting those accessories, but that they were provided to the alumnus and Brown then goes on to opine: "To us, this indicates that those in charge of and responsible for overseeing the show failed to recognize or anticipate the racist references and cultural insensitivities that were obvious to almost everybody else. That's

inexcusable and irresponsible – but also why we are commissioning and independent investigation."

Brown does not say that plaintiff "failed to recognize or anticipate the racist references and cultural insensitivities" but left it open as to who was "in charge of and responsible for overseeing the show" pending the results of the independent investigation. The First Department has determined that the letter states a claim for defamation by implication because the letter omitted facts regarding plaintiff's nonparticipation in the show, awareness of the accessories, and the school's policies as well the facts concerning what plaintiff did after the show took place. The First Department further held that the letter "implied that plaintiff was responsible for the show, was aware of the accessories, could approve them, and failed to respond to student concerns" (211 AD3d at 526).

It is not defamation by implication to put plaintiff on administrative leave. Nor as this court previously found and the First Department agreed, did the letter contain actionable defamation on its face. However, plaintiff argues that the average reader of the letter would conclude that plaintiff was responsible and in charge of the show or perhaps even further, that plaintiff actually chose the accessories and styled the collection at issue. This is a fact question which cannot be determined on the record before the court. That record includes the following.

On February 18, 2020, three days before the letter at issue was published, plaintiff wrote a memo to FIT's senior management team advising that she met with students on February 12, 2020 regarding the fashion show, five days after the fashion show took place. Plaintiff learned that the students' concerns were not limited to the February 7 fashion show but included a number of specific concerns regarding behavior by certain faculty and the "culture" at the MFA program. Plaintiff and one of the non-party faculty members at issue then met with the second-

year cohort on February 18, 2020, where specific examples of toxic behavior by certain faculty members was detailed in plaintiff's memo. Plaintiff specifically acknowledged in the memo that as Dean of the School of Graduate Studies, the academic environment of the graduate school fell within her purview, that she would work with the students and faculty to "improve these conditions", that future concerns should be reported to her and plaintiff planned to come to the studio for "a shorter touch-base once a week".

On this record, defendants have proffered a legitimate basis to put plaintiff on administrative leave three days later, and to announce that fact to the FIT community. The fact that this information was disclosed in the subject letter does not necessarily transform that statement into defamation by implication. "Defamation by implication is premised not on direct statements but on false suggestions, impressions and implications arising from otherwise truthful statements" (*Armstrong v. Simon & Schuster*, 85 NY2d at 380–381 [1995] [internal quotation marks omitted]). The implied defamation cause of action was recognized by the Court of Appeals in a 1963 decision determining that, although the publication at issue contained no directly defamatory statements, "a jury should decide whether a libelous intendment would naturally be given to it by the reading public acquainted with the parties and the subject-matter" (*November v. Time Inc.*, 13 NY2d 175 [1963]).

In *Stepanov v. Down Jones & Company Inc.* (120 AD3d 28 [2014]), the First Department rejected a plaintiff's argument that the burden on a defamation by implication claim should be lighter than it actually is. Instead, the First Department explained that to even survive a motion to dismiss, "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. We believe this rule strikes the

appropriate balance between a plaintiff's right to recover in tort for statements that defame by implication and a defendant's First Amendment protection for publishing substantially truthful statements" (citing *Armstrong*, 85 NY2d at 381).

Here, if a reasonable factfinder, "acquainted with the parties and the subject-matter" (*November, supra*), read the letter to imply that plaintiff was responsible for styling at the fashion show and/or responsible for and/or had the ability to stop the models wearing the culturally insensitive accessories from walking down the runway, a jury may further reasonably conclude that defendants intended the average reader to make that inference or otherwise endorsed that inference.

However, as the Court of Appeals explained in *Rinaldi v. Holt, Rinehart & Winston, Inc.*(42 NY2d 369 [1977] *cert. den.* 434 US 969 [1977]), although one cannot make up facts out of whole cloth, "omission of relatively minor details in an otherwise basically accurate account is not actionable." The February 21, 2020 letter was not designed, nor did it purport to be, an exhaustive account of what happened leading up to, during and after the fashion show. Rather, it was a response to FIT community concerns, an attempt to diffuse a volatile situation around a particular designer who by all accounts was not responsible for styling the collection-at-issue, an announcement that an independent investigation was going to be conducted and that plaintiff was being placed on administrative leave. The letter did not contain any false statements of fact (as is law of the case). Plaintiff, an at-will employee, was responsible for overseeing what was allegedly a toxic environment and the letter was clearly prefaced as preliminary, based upon limited information available at the time, and would require further investigation. Thus, it remains for a jury to determine a further question of fact as to whether the omission of details

outlined by the First Department was "relatively minor", therefore rendering the allegedly defamatory letter unactionable.

For all these reasons, the parties' applications for summary judgment are denied.

As for defendants' request for "permission for defendants' previously served verifications [to Plaintiff's Requests to Admit] to be deemed timely", the court will overlook defendants' delay and grant that portion of their motion since public policy favors decisions on the merits and plaintiff is not otherwise prejudiced. The balance of defendants' motion is also denied. The "Bond Report", to the extent defendants' claim it is privileged, that privilege has been waived since the document has been available on NYSCEF for a lengthy period of time and defendants have otherwise been dilatory in moving for this relief. Moreover, defendants have not shown that it established that it was privileged in the first place.

In accordance herewith, it is hereby **ORDERED** that plaintiff's motion and defendants' cross-motion for summary judgment are denied; and it is further

ORDERED that defendants' cross-motion is granted only to the extent that their request for "permission for defendants' previously served verifications to be deemed timely" is granted and said responses are deemed timely; and it is further

ORDERED that the balance of defendants' cross-motion is denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.

10/11/2024
DATE

LYNN R. KOTLER, J.S.C.

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

151757/2021 DAVIS, MARY E vs. JOYCE F. BROWN, IN HER
Motion No. 003