SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

----------X Index No: EF009958-2024

DANIEL G. CASTRICONE, ESQ.

Plaintiff,

DECISION and ORDER
(Mot. Seq. #1 & #2)

-against-

MARY VAUGHT,

Defendant.

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McGOVERN, J.

The following papers filed electronically were considered in connection with Defendant Mary Vaught's motion (Mot. Seq. #1) for an Order, pursuant to CPLR §3211 dismissing the Complaint and for an award of attorney's fees pursuant to Civil Rights law §76-a and Plaintiff's motion (Mot. Seq. #2) for an Order pursuant to CPLR §3025(b) granting leave to amend his Complaint:

Motion#1

Notice of Motion, Affirmation in Support, Exhibits A-B…….Doc. 3-6
Affirmation of Mary Vaught…….Doc. 7
Affirmation of Joseph Rickard……..Doc. 8
Memorandum of Law in Support…….Doc. 9
Memorandum of Law in Opposition……Doc. 15
Memorandum of Law in Reply…….Doc. 17

Motion #2

Notice of Motion, Affirmation ……Doc. 14,16
Affirmation in Opposition……Doc. 18

Procedural History

Plaintiff Daniel G. Castricone, Esq. commenced this action on his own behalf with the filing of a Summons and Verified Complaint on November 21, 2024. The Complaint includes a recitation factual allegations culminating in what appears to be a claim for damages due to Defendant's alleged negligence, slander, libel, defamation of character and intentional infliction of emotional distress based on a Facebook post concerning Plaintiff's statements at a meeting of the Tuxedo Union Free School District Board of Education. Defendant now seeks dismissal of this action as a Strategic Lawsuit Against Public Participation ("SLAPP"). By Notice of Motion dated March 14,

2025, Defendant Mary Vaught timely filed[1] the instant pre-answer motion to dismiss the Complaint pursuant to CPLR §3211 and for an award of attorney's fees pursuant to Civil Rights law §70-a. By Notice of Motion dated April 2, 2025, Plaintiff seeks an Order pursuant to CPLR §3025(b) granting leave to amend his Complaint.

Factual Background

Plaintiff, a practicing attorney, is the incumbent president of the Board of Education (the "School Board") of the Tuxedo Union Free School District (the "District") seeking re-election in the upcoming vote. Defendant is a community member, former member of the School Board, and a journalist for a local news reporting outlet.

During a School Board meeting on September 18, 2024, the matter of simultaneous compensation to two district Superintendents was discussed. At the time, the District Superintendent, Jeff White, was on medical leave and an acting Superintendent, Nancy Teed, had been installed at a pay rate of $1,000 per day. In response to questions concerning payments to both individuals, Plaintiff allegedly responded that the District was not paying Mr. White as he was on unpaid medical leave. Following that meeting, Defendant submitted a Freedom of Information Law (FOIL) request to obtain payroll records which reportedly reflected payments by the District to Mr. White during the time of his medical leave.

Plaintiff alleges the following Facebook post, made by Defendant following her receipt of the records in response to her FOIL request, was defamatory towards Plaintiff:

> "At the September meeting of the BOE, not long after they put Nancy Teed in place [as acting Superintendent] at a rate of $1K per day, BOE President Dan Castricone publicly stated that the District was NOT paying two Superintendents at once because Jeff White [the incumbent Superintendent] was on medical leave and as such not collecting a pay check. I FOILED the pay records and was not surprised to discover that the information provided to the public by Mr. Castricone was blatantly false. See below the record of payment to Mr. White. Guys, if we do nothing to hold these folks accountable, this stuff is going to keep happening. Our money is being misused and we are being lied to about it."

[1] Pursuant to communication between Plaintiff and counsel for Defendant in December 2024, Defendant was granted an extension of time to respond to the Complaint until January 5, 2025. Counsel for Defendant avers in his Affirmation that an additional extension until March 15, 2025 was agreed to, which assertion has not been contested by Plaintiff.

Defendant's Facebook post was visible online from November 20, 2024 – November 21, 2024, when she removed it for reasons unrelated to the content. Plaintiff asserts that the 24-hour period during which Defendant's Facebook post was available and viewable

The Parties' Contentions

Defendant argues Plaintiff's Complaint, filed one day after her Facebook post was made (and on the same day it was removed), constitutes a SLAPP suit designed to prevent her from participating in public discourse concerning fiscal issues and educational policies in the District during the period of time leading up to Plaintiff's run for re-election as president of the District's School Board in May 2025. Defendant argues the Complaint must be dismissed because, in addition to the pleaded claims failing as a matter of law under ordinary pleading standards, the Complaint is subject to the heightened pleading standard imposed by New York's Anti-SLAPP Statute because the Facebook post at issue addresses a matter of public concern. She further contends Plaintiff has not and cannot meet his burden of demonstrating a substantial basis on which to conclude a jury could find, by clear and convincing evidence, that she published the post despite knowing or believing it to be false.

In support of her motion, Defendant submits an affidavit in which she attests, *inter alia*, to her FOIL request and receipt of records concerning payment to District administrative personnel which were the basis for her Facebook post at issue. She further states her Facebook post was made based on official records obtained through a FOIL request, which record was attached to the post. The Facebook post at issue solely concerned the matter of payment to the two superintendents and did not reference Plaintiff in any capacity other than as School Board president.

Plaintiff opposed Defendant's motion by filing a motion for leave to amend his Complaint, and argues his action should be permitted to proceed based on the proposed Amended Complaint which now includes specific allegations that Defendant's post contained a false statement that was verifiable and was made with reckless disregard for the truth, supporting a claim of actual malice and raising a triable issue of fact. Plaintiff argued Defendant mischaracterized the FOIL documents and omitted crucial context.

In further support of her motion and in opposition to Plaintiff's motion, Defendant argues Plaintiff failed to oppose her motion, despite his submission of a document titled as a

"Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment" which disregards the standard of review and his evidentiary burden to establish a substantial basis to conclude he will be able to prove by clear and convincing evidence Defendant published the challenged statement with actual malice. Defendant argues Plaintiff did not contest or even address the correct legal precedent raised by her motion and submitted nothing more than conclusory allegations in the form of a proposed Amended Complaint. Defendant also argues Plaintiff's Complaint lacks merit and fails under even ordinary standards of pleading as it is based solely on conclusory allegations consisting of bare legal conclusions with no factual specificity.

Legal Analysis

With respect to actions for defamation, New York enacted legislation in 1992, aimed at protecting citizens facing litigation arising out of public petition and participation. *Mable Assets, LLC v. Rachmanov*, 192 A.D.3d 998 (2d Dept. 2021). Such SLAPP suits are characterized as having little legal merit but filed to burden opponents with legal fees and the threat of liability and are meant to discourage others from speaking out in the future. *Id*.

In November 2020, the Civil Rights Law and the Civil Practice Law & Rules were amended to broaden the scope of protection of defendants facing SLAPP suits to include a "broad, almost all-encompassing group of citizens." *Nelson v. Ardrey*, 231 A.D.3d 179, 182 (2d Dept. 2024); (CPLR §3211(g); §3212(h); CRL §§ 70-a and 76-a). Under the new statutes, an "action involving public petition and participation" includes "(1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or (2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of constitutional right of petition." (CRL §76-a[1][a]).

Civil Rights Law § 76-a states:

> In an action involving public petition and participation, damages may only be recovered if the plaintiff, in addition to all other necessary elements, shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue.

As correctly argued by Defendant, the instant action falls under the anti-SLAPP statute. The

term "public forum" is traditionally interpreted as a place that is open to the public where information is freely exchanged, and has evolved to include, *inter alia*, podcasts, as well as internet forums that feature customer reviews of various businesses. *Nelson v. Ardrey*, 231 A.D.3d 179 (2d Dept. 2024); *see Aristocrat Plastic Surgery, P.C v. Silva*, 206 A.D.3d 26 (1st Dept. 2022)(negative review on website that provides forum for patient reviews of surgery and cosmetic procedures.); *VIP Pet Grooming Studio, Inc. v. Sproule*, 224 A.D.3d 78 (2d Dept. 2024)(posts on Yelp and Google); *Reeves v. Associated Newspapers, Ltd*, 232 A.D.3d 10 (1st Dept. 2024)(statements made in on-line news articles.) Most recently, the Second Department in *Nelson v. Ardrey*, *supra*, specifically held that Facebook is a public forum within the meaning of Civil Rights Law § 76-1(a). (231 A.D.3d at 185) As the instant matter pertains to a Facebook Post, it was unquestionably made on a public forum.

The anti-SLAPP statute was similarly broadened to include the term "public interest," which means any subject other than a purely private matter. (*Nelson*, *supra*, 231 A.D.3d at 183). Inasmuch as the statement at issue clearly discussed matters relating to the District's expenditure of funds for personnel, the statement qualifies as a matter of public interest. The 2020 amendments provide that "public interest" shall be broadly construed to embrace "matters of political, social, or other concern to the community." *Reeves v. Associated Newspapers, Ltd*., 232 A.D.3d 10, 19 (1st Dept. 2024). Here, the Facebook post concerned the existence of records that directly contradicted Plaintiff's verbal assertions at the School Board meeting that two superintendents were not being paid salaries simultaneously. Applying the concept of "public interest" broadly, as the Court must, there is little doubt the anti-SLAPP statute applies to the instant matter.

The procedure for dismissing a SLAPP suit is codified in CPLR § 3211(g) which provides that a motion to dismiss pursuant to CPLR § 3211(a)(7) "shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification, or reversal of existing law. *See CPLR*§ 3211(g)(1). In making the determination on a motion to dismiss pursuant to Section 3211(g), a court is required to consider the pleadings and supporting and opposing affidavits stating the facts upon which the action or defense is based. CPLR §3211(g) provides:

> Stay of proceedings and standards for motions to dismiss in certain cases involving public petition and participation. 1. A motion to

> dismiss based on paragraph seven of subdivision (a) of this section, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation, as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law, shall be granted unless the party responding to the motion demonstrates that the action, claim, cross claim or counterclaim has a substantial basis in fact and law or is supported by a substantial agreement for an extension, modification or reversal of existing law. The court shall grant preference in the hearing of such motion.

When statements involve public participation in a place open to the public or on a public forum, the statements at issue are scrutinized under heightened pleading standards set forth in CPLR §3211(a), which provides that if the defendant moves to dismiss the action under subdivision (a)(7) of that section and demonstrates that the action is a SLAPP suit (the statements were made in a public forum), the burden is thrust onto the plaintiff to establish the claim has the requisite "substantial basis." *See Matter of Related Properties, Inc. v. Town Board of Town/Village of Harrison*, 22 A.D.3d 587 (2d Dept. 2005). Simply put, if the defendant demonstrates the participation is public, then the burden shifts to the plaintiff to show substantial basis. However, if a plaintiff cannot show substantial basis, then the case must be dismissed, and the defendant can seek an award of attorney's fees. "Under CPLR §3211(a), a motion to dismiss under 3211(a)(7) must be granted where a party demonstrates the action involves a matter of public petition and participation under *Civil Rights Law* § 76-a, unless the party opposing the motion demonstrates that the cause of action has a substantial basis in law." *Great Wall Med. P.C. v. Levine*, 74 Misc.3d 1224(A)(Sup. Ct. NY Co. 2022). To do that, Plaintiff must demonstrate by clear and convincing evidence "that any communication which gave rise to the action was made with knowledge of its falsity or with reckless disregard or whether it was false…" Civil Rights Law §76-a(2). Stated another way, the plaintiff must furnish clear and convincing evidence that the communication was made with "'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id*. (citing *Prozeralik v. Capital Cities Communications*, 82 N.Y.2d 466, 474 [1993]).

Accordingly, Plaintiff herein bears the burden of establishing by clear and convincing evidence that the allegedly defamatory false statements were made with [actual malice, that is]

knowledge of their falsity or with reckless disregard to whether the statements were true or false." *Prozeralik, supra*, at 474; *Singh v. Sukhram*, 56 A.D.3d 187, 194 (2d Dept. 2008). Importantly, despite its name, the actual malice standard does not measure malice in the sense of ill will or animosity, but instead the speaker's subjective doubts about the truth of the publication. *Coleman v. Grand*, 523 F.Supp.3d 244, 260 (E.D.N.Y. 2021).

In the instant matter, the Court finds Plaintiff has not established through clear and convincing evidence that the alleged defamatory false statements were made by Defendant with her knowledge of their falsity or with reckless disregard as to whether the statements were true or false. Defendant's Facebook post was made after she obtained records from a FOIL request which reflected payments to the Superintendent on leave, in direct contradiction to Plaintiff's statement at the School Board meeting on September 18, 2024. Accordingly, not only do the records disprove Plaintiff's claim of the falsity of the statement, but they also provide objective support for Defendant's claim that she knew the statement to be true. Thus, because the anti-SLAPP statute applies, and Plaintiff cannot meet his burden of clear and convincing evidence that the statement was made by Defendant with her knowledge of its falsity, Plaintiff's action must dismissed.

In light of the foregoing, the Court denies Plaintiff's motion for leave to amend his Complaint. Notwithstanding that leave to amend a Complaint pursuant to CPLR §3025(b) may be freely given, the circumstances of this matter do not warrant such consideration. Inasmuch as Plaintiff has failed to submit anything to meet his burden of establishing by clear and convincing evidence a substantial basis to deny Defendant's motion, the Court finds no support for his claims, including those as pleaded in the proposed Amended Complaint. Accordingly, Plaintiff's motion is denied.

Defendant further asserts that, based upon the statutory requirements set forth in Civil Rights Law § 70-a(1)(a), costs and attorneys' fees must be granted to a Defendant when there is a dismissal of an anti-SLAPP suit. Defendant asserts inasmuch as the instant motion seeks relief pursuant to anti-SLAPP provisions, the Court is "compelled" to find that the Plaintiff "must" reimburse her costs, expenses, and attorney's fees under Civil Rights Law § 70-a(1)(a). In addressing the statutory requirement set forth in Civil Rights Law §70-a, the Court notes the statute provides a defendant in an action that involves public petition and participation may maintain an action, claim, or cross claim or counterclaim to recover damages that include costs and attorney's

fees from anyone who commenced and continued the action. In light of the fact this application is made within Defendant's motion filed before an Answer was interposed, the Court finds the claim to be properly asserted pursuant to Section 70-a. Therefore, Defendant is entitled to reasonable attorney's fees and costs.

Accordingly, it is hereby

ORDERED that Defendant's motion (Mot. Seq. #1) for dismissal of the Complaint is GRANTED in its entirety that the Complaint is dismissed; and it is further

ORDERED that Plaintiff's motion (Mot. Seq. #2) for leave to amend his Complaint is DENIED and it is further

ORDERED that counsel for Defendant shall within ten (10) days file an Affirmation of Fees and Bill of Costs to be considered for approval by the Court.

The foregoing constitutes the Decision and Order of this Court.

Dated: May 7, 2025

E N T E R

HON. KYLE C. McGOVERN, J.S.C.