MEMORANDUM

SUPREME COURT - STATE OF NEW YORK
COUNTY OF QUEENS - **IAS PART 34**

- x

FRANK BORZELLIERI,

Plaintiff,

- against -

DAILY NEWS, LP, NEW YORK DAILY NEWS COMPANY, CORINNE LESTCH, LARRY McSHANE, ANNE MARIE ZAGAGLIA and CONNIE ANESTIS,

Defendants.

- x

BY: McDONALD, J.

Index No.: 11731/12

Motion Date: 1/9/13

Motion Cal. No.: 19

Motion Seq. No.: 1

Defendant Daily News, LP, defendant Corinne Lestch, and defendant Larry McShane have moved for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the complaint against them.

On July 31, 2011, the Daily News published an article written by defendant Corinne Lestch over the headline "Principal of Hate," followed by "School boss' racist writings worry parents." The first paragraph of the article read: " A firebrand educator with ties to a white supremacist group is running a Bronx Catholic school where most of the students are black and Latino, the Daily News has learned." The article concerned plaintiff Frank Borzellieri, then 48, who had served as the principal of Our Lady of Mount Carmel School for two years, "despite, " the article read, "a history of controversial writings and campaigns ***." " In 2004," the article continued, "Borzellieri wrote the book 'Don't Take It Personally: Race, Immigration, Crime and Other Heresies,' in which he declares 'diversity is a weakness' and says the rising black and Hispanic populations in America will lead to the 'New Dark Age.'" Borzellieri had been hired by Eric Rapaglia, identified in the article as "Mount Carmel pastor," who had known of his views but had hired him anyway, at a time when, according to an Archdiocese spokesman quoted in the article, "pastors had great leeway and discretion in the hiring of principals."

On August 2, 2011, the Daily News published another article written by defendant Lestch concerning Borzellieri whose first paragraph read: "The Archdiocese of New York has launched an

internal probe into whether a Bronx principal's ties to a white supremacist group have affected his work at an ethnically diverse elementary school." The alleged "white supremacist group" was the New Century Foundation, the publisher of Borzellieri's books and a magazine called American Renaissance , "a monthly magazine dealing with race and racial issues here and abroad." The article informed the reader that the probe had begun after the Daily News "revealed" that "he has written books declaring America's expanding black and Hispanic populations will create a 'New Dark Age'" and that "he has written for the white supremacist publication American Renaissance."

Later on August 2, 2011, the Daily News published a third article about Borzellieri headlined "Bronx Catholic school principal Frank Borzellieri fired over ties to white supremacist group." Among other things, the article made reference to Borzellieri's "racist ties" and writings for " the white supremacist publication American Renaissance."

On August 24, 2011, the Daily News published a fourth article about plaintiff Borzellieri headlined "White supremacist principal replaced by Fordham professor at Bronx parochial school." Defendant Lestch wrote: "Last month, The News revealed Borzellieri penned a 2004 book asserting 'diversity is a weakness' and frequently contributed to the white supremacist publication American Renaissance."

The plaintiff, who asserted in his book Lynched: A Conservative's Life on a New York City School Board that he "speak[s] the truth about the racial, cultural and educational issues that are destroying this country," began this action for defamation on or about June 4, 2012.

"It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference***." (*Jacobs v. Macy's East, Inc.*, 262 AD2d 607, 608; *Leon v. Martinez*, 84 NY2d 83.) The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (*see, Stukuls v. State of New York*, 42 NY2d 272; *Jacobs v. Macy's East Inc., supra*) , and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading. (*See,Rovello v. Orofino Realty Co., Inc.*, 40 NY2d 633.)

The plaintiff may submit affidavits and evidentiary material

on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint. (*See*, *Rovello v. Orofino Realty Co., Inc. supra; Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 AD2d 159.) Nevertheless, "[w]hile typically the pleaded facts will be presumed to be true and accorded a favorable inference, 'allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence [will] not [be] entitled to such consideration' ***." (*Marraccini v. Bertelsmann Music Group Inc.*, 221 AD2d 95, 98, quoting *Roberts v. Pollack*, 92 AD2d 440, 44; *see*, *Ullmann v. Norma Kamali, Inc.*, 207 AD2d 691; *Fisher v. Maxwell Communications Corp.*, 205 AD2d 356.)

The elements of a cause of action for defamation are "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se ***." (*Dillon v. City of New York,* 261 AD2d 34, 38.)

Not all false statements are actionable. As a general rule, the expression of an opinion is constitutionally protected and may not be the subject of a cause of action for defamation. *See*, *Steinhilber v. Alphonse,* 68 NY2d 283; *Rinaldi v. Holt, Rinehart & Winston*, 42 NY2d 369; *Guerrero v. Carva*, 10 AD3d 105.) Whether a statement in one of fact or opinion is a question of law for the court to decide. (*Mann v. Abel*, 10 NY3d 271; *Silsdorf v. Levine*, 59 NY2d 8.)

There are four factors which should generally be considered in determining whether a statement is one of fact or opinion: "(1) an assessment of whether the specific language in issue has a precise meaning which is readily understood or whether it is indefinite and ambiguous; (2) a determination of whether the statement is capable of being objectively characterized as true or false; (3) an examination of the full context of the communication in which the statement appears; and (4) a consideration of the broader social context or setting surrounding the communication including the existence of any applicable customs or conventions which might 'signal to readers or listeners that what is being read or heard is likely to be opinion, not fact' ***." (*Steinhilber v. Alphonse, supra,* 292, quoting *Ollman v. Evans*, 750 F2d 970, 983; *Mann v. Abel*, 10 NY3d 271.)

The terms "principal of hate" and "firebrand" applied to the plaintiff are statements of opinion because they are

incapable of "being objectively characterized as true or false." These statements are incapable of proof in the plaintiff's case, and it can never be shown whether his words and conduct came from hate, from fear, or from other causes and whether he was trying to incite unrest. The character of the man will be assessed differently by different individuals depending on their own subjective views. Subjective characterizations of the plaintiff's behavior made in the articles are nonactionable opinion. (*See*, *Farrow v. O'Connor, Redd, Gollihue & Sklarin, LLP*, 51 AD3d 626.) Moreover, the statements about the plaintiff were made in the context of a series of articles written by a reporter, and, as in *Russell v. Davies* (97 AD3d 649, 651), where an unsuccessful candidate sued various defendants in the media for portraying an essay that he had written as racist and anti-Semetic, "a reasonable reader would have concluded that he or she was reading and/or listening to opinions, and not facts, about the plaintiff." The reasonable reader would have been mindful that the reporter's writings were unavoidably influenced by her own political and moral views.

It is true that liability may be found where purported critical facts which are given for the opinion are false. (*See*, *Silsdorf v. Levine*, 59 NY2d 8; *Como v. Riley*, 287 AD2d 416[racism]; *Breen v Leonard*, 198 AD2d 392; *O'Neil v Peekskill Faculty Asso.*, 120 AD2d 36[racial slurs and bigotry]; *Ocean State Seafood, Inc. v Capital Newspaper, Div. of Hearst Corp.*, 112 AD2d 662.) However, in the case at bar, the plaintiff does not deny making the statements and committing the acts written about in the articles, regardless of how those statements and acts may be interpreted. His assertion that "My past writings do not reveal race hatred or White Supremacy; they were principled conservatism and libertarianism" is just another opinion.

Statements that do not have a precise meaning, but are rather "[l]oose, figurative or hyperbolic statements" are also not actionable. (*Dillon v. City of New York*, 261 AD2d 34, 38; *Kaye v. Trump*, 58 AD3d 579; *Wanamaker v. VHA, Inc.*, 19 AD3d 1011)

The characterization of the plaintiff as a "principal of hate" and a "firebrand" fall into this category. Even the calling of an individual a Nazi has been held to be non-actionable opinion. (*See*, *Wanamaker v. VHA, Inc*, *supra*; *Schwartz v. Nordstrom, Inc.*, 160 AD2d 240.)

The complaint fails to state a cause of action for the additional reason that the plaintiff is a limited purpose public figure. "Public figures for constitutionalized defamation purposes include 'limited-purpose' public figures, those who

'have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved' ***." (*Huggins v. Moore*, 94 NY2d 296, 301-302, quoting *Gertz v. Robert Welch, Inc.*, 418 US 323, 345.) The court holds that the plaintiff is a limited purpose public figure as a matter of law. (*See*, *Curry v. Roman*, 217 AD2d 314.)

The defendants showed that the plaintiff meets the test for a limited purpose public figure set out in *Lerman v. Flynt Distributing Co., Inc.*(745 F2d 123, 136 -137 [C.A.N.Y].) "A defendant must show the plaintiff has: (1) successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily injected himself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing access to the media."

"The essential element underlying the category of public figures is that the publicized person has taken an affirmative step to attract public attention." (*James v. Gannett Co.*, 40 NY2d 415, 422.) In the case at bar, plaintiff Borzellieri became a public figure by publishing his writings and by entering the public forum to influence public opinion. (*See*, *Howard v. Buffalo Evening News, Inc.*, 89 AD2d 793.) The plaintiff has voluntarily acted to influence the resolution of a public controversy. (*See*, *Fairley v. Peekskill Star Corp.*, 83 AD2d 294.) Moreover, the plaintiff's contention that his writings are "ancient history" is undermined by the documentary evidence in this case. In 2009, the year he was hired as principal of Our Lady of Mount Carmel, he published Lynched.

The case at bar is similar to *Farber v. Jefferys* (103 AD3d 514, 515), decided by the Appellate Division, First Department on February 19, 2013, where the appellate court held that the trial court "properly determined that plaintiff was a limited public figure because, through her publication of countless articles, she voluntarily injected herself into the controversial debate on whether HIV causes AIDS with a view toward influencing the debate ***."

As a limited purpose public figure the plaintiff had to adequately plead malice as an element of his causes of action for defamation. (*See*, *Farber v. Jefferys*, *supra*; *Konrad v. Brown*, 91 AD3d 545.) The complaint does not contain sufficient factual allegations showing that the defendants knew their statements were false (if they were), or published them with reckless disregard for the truth, or that they did not follow the

standards of information gathering employed by reasonable persons. (*See, Farber v. Jefferys, supra.; Konrad v. Brown, supra.)* Conclusory allegations of malice do not suffice. (*See, Rohrlich v. Consolidated Bus Transit, Inc.*, 15 AD3d 561; *Serratore v. American Port Services, Inc.*, 293 AD2d 464.*)*

In sum, the plaintiff is a limited purpose public figure suing over matters of opinion. He does not have recourse for the injury to his reputation, if any, from the law pertaining to defamation. Ironically, exoneration of the charge that he was the "principal of hate," may possibly be found in two of the very articles the defendants published about him. The July 31, 2011 article noted that there was no record of a complaint against the plaintiff. The August 2, 2011 article stated that according to a spokesman for the archdiocese : "there were no complaints in Borzellieri's work file regarding his performance as principal of Our Lady of Mount Carmel. Nor are there any complaints stemming from his previous job as a teacher at St. Barnabas High School in Woodlawn Heights, the Bronx." Whether these facts amount to exoneration is, like the rest of this case, a matter of opinion.

Accordingly, the motion is granted.

Short form order signed herewith.

Dated: Long Island City, N.Y.
April 22, 2013

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ROBERT J. McDONALD
J.S.C.