

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

-----X
MARCO CAVIGLIA,

Plaintiff,

-against-

DECISION AND ORDER

JASMIN VAZQUEZ, ELISA SUMNER,
JANE DOE(S) (50) and JOHN
DOE(S) (50),

Index No. 1470/2018

Defendants.
-----X

HON. JAMES D. PAGONES, A.J.S.C.

Defendants move for an order, pursuant to CPLR 3016(a) and CPLR 3211, dismissing the plaintiff's action in its entirety, together with the costs and disbursements of this action. Additionally, the defendants seek to set this matter down for an inquest, pursuant to 22 NYCRR §130-1.1, to determine reasonable attorney's fee owed to them for the filing of this alleged frivolous lawsuit.

The following papers were read:

Notice of Motion-Affirmation-Affidavit-Affidavit-	1-12
Exhibits A-G-Affirmation of Service	
Affidavit in Response-Exhibits 1-6-Affidavit of	13-20
Service	
Reply Affirmation-Affirmation of Service	21-22

By way of background, plaintiff is the current Democratic

Commissioner of the Dutchess County Board of Elections.

Defendant Sumner is the Chairwoman of the Dutchess County Democratic Committee. Defendant Vazquez is a former employee of the Dutchess County Board of Elections and a former member of the Dutchess County Democratic Committee and the Dutchess County Young Democrats. The plaintiff's amended verified complaint contains three causes of action. The first cause of action, consisting of eighty-hour (84) paragraphs, seeks damages based upon the alleged defamatory statements/allegations made against the plaintiff, specifically that he was a bully and/or a misogynist. The second cause of action alleges the same facts as set forth in plaintiff's first cause of action and states that these defamatory statements have injured his economic and legal relationships. The third cause of action seeks a permanent injunction against each and every defendant from engaging in any continued alleged defamatory acts and statements. Plaintiff seeks combined damages in the amount of Two Million One Hundred Twenty-Six Thousand Nine Hundred Forty Dollars (\$2,126,940.00).

Defendants initially argue that the plaintiff's first amended complaint must be dismissed, pursuant to CPLR 3016(a), as the pleading is facially insufficient as the actual statements and the context in which they were purportedly made are not alleged with sufficient particularity.

CPLR 3016(a) provides that in an action to recover damages

for libel or slander, the particular words complained of shall be set forth in the complaint. A cause of action sounding in defamation which fails to comply with these special pleading requirements must be dismissed (see *Fusco v. Fusco*, 36 AD3d 589 [2nd Dept. 2007]). Failure to state the particular person or persons to whom the allegedly defamatory statements were made also warrants dismissal (*id.*).

Here, plaintiff's allegations contained in the first amended complaint clearly set forth the particular words complained of, i.e. that he was a misogynist and a bully, and specifically state that both named defendants uttered these allegations (compare *Lemieux v. Fox*, 135 AD3d 713 [2nd Dept. 2016]).

Defendants next move for dismissal, pursuant to CPLR 3211(a)-(7). On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (see *Guggenheimer v. Ginzburg*, 43 NY2d 268 [1977]). In considering such a motion, the 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 (see *Nonnon v. City of New York*, 9 NY3d 825 [2007]). Whether a plaintiff can ultimately establish his allegations is not part of the calculus (see *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11

[2005]).

Defendants contend that their alleged statements were not actionable because they constituted pure opinion. Since falsity is a necessary element of a defamation cause of action and only facts are capable of being proven false, it follows that only statements alleging facts can properly be the subject of a defamation action (see *Gross v. New York Times Co.*, 82 NY2d 146 [1993]). Thus, an expression of pure opinion is not actionable, no matter how vituperative or unreasonable it may be (see *Steinhilber v. Alphonse*, 68 NY2d 283 [1986]). Factors weighing on whether a statement is pure opinion are (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 readers or listeners that what is being read or heard is likely to be opinion, not fact (see *Brian v. Richardson*, 87 NY2d 46 [1995]).

In this case, the context of the complained statements as alleged in the plaintiff's amended verified complaint is such that a reasonable person would conclude that he or she was listening to pure opinion, not fact, about the plaintiff (see generally *Russell v. Davies*, 97 AD3d 649 [2nd Dept 2012]). Since

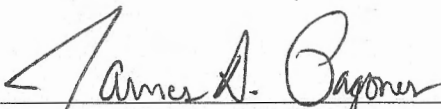
falsity is a necessary element of a defamation cause of action and only facts are capable of being proven false, it follows that only statements alleging facts can properly be the subject of a defamation action (see *Gross v. New York Times Co.*, 82 NY2d 146 [1993]). Here, the alleged remarks by the defendants that plaintiff is/was a bully or is /was misogynistic is the mere conveyance of the opinion of the defendants and cannot be seen as fact capable of being proven false (see *Konig v. WordPress.com*, 112 AD3d 936 [2nd Dept 2013]). Accordingly, as this Court has found that the alleged statements made are in fact pure opinion, the plaintiff's three causes of action fail.

The branch of defendants' motion seeking sanctions, in the form of legal fees incurred in defending this application, is denied in its entirety, as the Court, in its discretion, does not find plaintiff's conduct frivolous (see 22 NYCRR §130-1.1 [c]).

Based upon the foregoing, the plaintiff's complaint is dismissed without costs. This constitutes the decision and order of this Court.

Dated: October 5, 2018
Poughkeepsie, New York

ENTER


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