IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, PH.D.,	)	
Plaintiff,	)	Case No. 2012 CA 008263 B
v.	)	Judge Natalia M. Combs Greene
NATIONAL REVIEW, INC., et al.,	)	Calendar Ten
Defendants.	)	

ORDER

This matter is before the Court on Defendants Mark Steyn and National Review, Inc.'s (the "NR Defendants") Motion for Reconsideration of July 19, 2013 Order (the "Motion") and the Opposition thereto. Upon consideration, the Motion is denied.[1]

Standard

"A motion for reconsideration, by that designation, is unknown to the Superior Court's Civil Rules. The term has been used loosely to describe two different kinds of motions . . . brought pursuant to" Rule 59 (e) and Rule 60 (b). *Kibunja v. Alturas, LLC*, 856 A.2d 1120, 1128

[1] The memorandum of points and authorities includes arguments in support of the NR Defendant's Motion for Reconsideration as well as the Special Motion to Dismiss Plaintiff's Amended Complaint pursuant to the District of Columbia's Anti-SLAPP Act and the Motion to Dismiss Plaintiff's Amended Complaint pursuant to D.C. Super. Ct. R. 12(b)(6). The Court is unsure whether the NR Defendants intended to combine three motions. Nonetheless, the Civil Rules do not permit parties to combine different motions. Accordingly, this Order only addresses the Motion for Reconsideration, specifically the NR Defendants' arguments that relate to material mistakes of fact and that the Court's did not specifically address Plaintiff's claim of Intentional Infliction of Emotional Distress. The case has (now) been transferred to Judge Weisberg presiding in Civil I. Thus, the Court will forward to Judge Weisberg the entire Motion for his consideration of the part of the Motion that address the Motion to Dismiss pursuant to the Anti-SLAPP Act. The parties may want to consider refilling that motion separately on Judge Weisberg's calendar. The Court will provide Judge Weisberg with all of the exhibits previously provided to this Court.

n.8 (D.C. 2004). Motions under either rule are committed to the broad discretion of the trial judge. *Wallace v. Warehouse Employees Union No. 730*, 482 A.2d 801, 810 (D.C. 1984). Rule 60 (b) provides that "the Court may relieve a party or a party's legal representative from . . . an order for the following reasons. . . (1) mistake, inadvertence, surprise, or excusable neglect . . .; or (6) any other reason justifying relief from the operation of the judgment." Rule 59 (e) provides that "[a]ny motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." This time period cannot be extended and is jurisdictional. *Circle Liquors, Inc. v. Cohen*, 670 A.2d 381 (D.C. 1996). A timely motion asserting that the Court committed an error of law is normally treated under Rule 59 (e). *In re Tyree*, 493 A.2d 314, 317 n.15 (D.C. 1985).

Special Motion to Dismiss Pursuant to Anti-SLAPP ACT

Defamation

The NR Defendants argue that the Court's ruling as to the defamation claim was significantly affected by its mistaken belief that the NR Defendants induced the Environmental Protection Agency (the "EPA") to investigate Plaintiff as well as the Court's belief that the NR Defendants had for years criticized Plaintiff's.[23] The NR Defendants argue that the correction of the Court's mistaken premise should affect its conclusion that Plaintiff met his initial burden of showing actual malice. The NR Defendants also argue that the Court should err on the side of nonactionability because "where the question of truth or falsity is a close one, a court should err

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[2] The NR Defendants allege that it was actually the CEI Defendants who criticized Plaintiff for years and caused the EPA to investigate Plaintiff.

[3] The NR Defendants argue that *National Review* is an "opinion magazine and website" that does not involve itself in governments and agency proceedings.

on the side of nonactionability." (quoting *Moldea v. New York Times Co.*, 306 U.S. App. D.C. 1, 8, 22 F.3d 310, 317 (1994)).[4]

Plaintiff counters that the Court's Order was well-reasoned, thus the Motion should be denied. Plaintiff argues that the factual misstatements are inconsequential to the Court's conclusion. Plaintiff argues that the NR Defendants do not allege any "new or additional circumstances" that were not previously before the Court, thus the Court should deny the Motion on procedural grounds. Plaintiff argues that the Court's ruling was based on the NR Defendants' knowledge of several the "investigations and exonerations "of Plaintiff and not the NR Defendants' petition to the EPA or the NR Defendants' criticism of Plaintiff over several years. Plaintiff also argues that the NR Defendants have harshly criticized Plaintiff for several years prior to the Sandusky comment and called for investigations of Plaintiff.[5]

A defamatory statement is one that "injure[s] the plaintiff in his trade, profession or community standing, or lower[s] him in the estimation of the community." *Payne v. Clark*, 25 A.3d 918, 924 (D.C. 2011) (citing *Clawson v. St. Louis Post-Dispatch, LLC.*, 906 A.2d 308, 313 (D.C. 2006). A plaintiff presents a *prima facie* case of defamation where the following elements are met: "(1) Defendant made a false or defamatory statement concerning the plaintiff; (2) . . .

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[4] The decision to err on the side of nonactionability is permissive and not mandatory. Also, to give this statement more context and provide a better understanding, the *Moldea* case quotes from *Liberty Lobby, Inc. v. Dow Jones & Co., Inc.*, 838 F.2d 1287, 1292 (D.C. Cir. 1988). The *Liberty Lobby Inc.* court stated "where no reasonable jury could find by a fair preponderance of the evidence that the statement complained of is false, summary judgment for the defendant should be granted." *Id.* In this case, however the Court finds that a reasonable jury could find by a fair preponderance of the evidence that the statement is false. In addition, while the standards are very similar, this matter is before the Court on the Special Motion to Dismiss pursuant to the Anti-SLAPP Act.

[5] In his Opposition Plaintiff references five instances in which the NR Defendants criticized Plaintiff, however the Court does not (for purposes of this Motion) consider this evidence because it was not previously before the Court. Plaintiff has not provided the Court with any authority, and the Court had found none, which would permit the Court to consider the information Plaintiff now posits.

defendant published the statement *without privilege* to the third party; (3) . . . defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm." *Payne*, 25 A.3d at 924.

The Court notes that upon review, the record was unclear regarding which Defendants induced the EPA to investigate Plaintiff and the length of time that the NR Defendants had engaged in harsh criticism of Plaintiff. Nonetheless, the Court finds that the confusion of facts does not amounts to a material mistake nor does it change the Court's analysis because the Court's ruling was not based on these facts. The Court incorporates its earlier ruling and reiterates the following.

The Court finds that there is sufficient evidence in the record to demonstrate that Plaintiff is likely to succeed on the merits. As the Court stated in its previous Order, the NR Defendants' reference to Plaintiff "as the man behind the fraudulent climate change 'hockey stick' graph" was essentially an allegation of fraud by Plaintiff. Plaintiff is a member of the scholarly academy and it is obvious that allegations of fraud could lead to the demise of his profession and tarnish his character and standing in the community.

The Court clearly recognizes that some members involved in the climate-change discussions and debates employ harsh words. The NR Defendants are reputed to use this manner of speech; however there is a line between rhetorical hyperbole and defamation. In this case, the evidence before the Court demonstrates that something more than mere rhetorical hyperbole is, at least at this stage present. Accusations of fraud, especially where such accusations are made frequently through the continuous usage of words such as "whitewashed," "intellectually bogus," "ringmaster of the tree-ring circus" and "cover-up" amount to more than rhetorical

hyperbole. In addition, whether the NR Defendants induced the EPA to investigate Plaintiff is not critical to this analysis because it is not disputed that the NR Defendants knew that the EPA and several reputable bodies had investigated Plaintiff and concluded that his work was sound. The evidence before the Court indicates the likelihood that "actual malice" is present in the NR Defendants' conduct.

Intentional Infliction of Emotional Distress ("IIED")

The NR Defendants argue that the Court did not in its ruling explicitly address Plaintiff's claim for Intentional Infliction of Emotional Distress ("IIED"). The NR Defendants argue that the Plaintiff cannot allege and prove the common law elements of a claim for IIED because the NR Defendants' disclaimer of the Simberg's Sandusky comment prevents the NR Defendants' commentary from reaching the level of "outrageousness." The NR Defendants argue that their reference to Simberg's article was not "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community" in light of the "reprehensible speech" that the Supreme Court has found to be protected speech. The NR Defendants' argue that Plaintiff has not provided any physical evidence of emotional distress.

Plaintiff argues that the Court's failure to provide an analysis for its ruling on the IIED claim is inconsequential, because the Court provided an analysis in its Omnibus Order to the CEI Defendants. Plaintiff alleges that the statement "Jerry Sandusky of Climate Science" is obviously extreme and outrageous because it would arouse the indignation of any average community member and "lead him to exclaim 'Outrageous!'" (quoting *Ortberg v. Goldman Sachs Group*, 64 A.3d 158, 162 (D.C. 2013). Plaintiff argues that a comparison of a person to a convicted pedophile is not "colorful" or "caustic." Plaintiff argues that the NR Defendants' co-

signed the CEI Defendants' accusations of Plaintiff's fraudulent conduct. Plaintiff argues that "if the NR Defendants intended to distance themselves from the Sandusky comparison, why do they continue to publish it on their website?" Plaintiff also argues that his burden is only to show that the alleged emotional distress was serious enough that "harmful consequences might be not unlikely to result." (quoting *Ortberg*, 64 A.3d at 164.

Similar to the legal standard for defamation, a public figure may only "recover for intentional infliction of emotional distress by showing that there was a false statement of fact, which was made with actual malice". *Foretich v. CBS, Inc.*, 619 A.2d at 59 (citing *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988). The public figure must prove "actual malice" by clear and convincing evidence." *Id.*[6] The Supreme Court has been clear that the constitutional protections given to defendants that are charged with defamation of a public figure are extended to other civil actions alleging emotional harm. *Barr v. Clinton*, 370 F.3d 1196, 1203 (D.C. Cir. 2004).

The Court finds that Plaintiff's claim for IIED is similar to that for defamation. There is sufficient evidence before the Court to indicate "actual malice." The NR Defendants have frequently accused Plaintiff of academic fraud regardless of their awareness that Plaintiff has

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[6] The Order does not discuss the elements of IIED because the issue was whether Plaintiff could prove actual malice and not whether Plaintiff could prove the general elements of an IIED claim. The elements of an IIED claim are "(1) extreme and outrageous conduct on the part of the defendants, which (2) intentionally or recklessly (3) causes the plaintiff severe emotional distress." *Williams v. District of Columbia*, 9 A.3d 484, 494 (D.C. 2010) (citing *Futrell v. Dep't of Labor Fed. Credit Union*, 816 A.2d 793, 808 (D.C. 2003). The conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." *Bernstein v. Fernandez*, 649 A.2d 1064, 1075 (D.C. 1991). Mental anguish and stress "do not rise to the level of severe emotional distress." *Futrell*, 816 A.2d at 808. The defendant's actions must be the proximate cause of "plaintiff's emotional upset of so acute a nature that harmful physical consequences are likely to result." *Id.* The Court notes that this claim was addressed in its Omnibus Order.

been investigated by several bodies and his work found to be proper. The NR Defendant's persistence despite the findings of the investigative bodies could be likened to a witch hunt. In fact, Plaintiff had nothing to do with the Sandusky case yet the NR Defendants seized upon that criminal act by a pedophile and did more, this Court finds, than simply comment on another article.

The Court agrees with the arguments advanced by Plaintiff. To place Plaintiff's name in the same sentence with Sandusky (a convicted pedophile) is clearly outrageous. The NR Defendants argue that they rejected Simberg's Sandusky comparison (in the *Football and Hockey* article). This argument, however begs the question. The article attempts to reject the Sandusky comparison by stating: "I'm not sure I would have extended that metaphor all the way to the locker-room showers with quite the zeal Mr. Simberg does". A few lines later, in that same article, the author cosigns the Sandusky reference by stating: "…whether or not he's the 'Jerry Sandusky of climate change.'" Seemingly rejecting the metaphor then reiterating it is not a clear rejection as the NR Defendants argue. The NR Defendants said Simberg "has a point" which could be interpreted to mean that the NR Defendants agree that Plaintiff "molested and tortured data."

In addition, the element requires only that Plaintiff to show "harmful physical consequences are likely to result" and not that they did occur. Accordingly, it is this 30th day of August 2013 hereby;

ORDERED, that the Motion is **DENIED**.

SO ORDERED.

Natalia M. Combs Greene
(Signed in Chambers)

Copies to:

The Honorable Frederick H. Weisberg

Parties