

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: <u>HON. PAUL A. GOETZ</u>	PART	47
<i>Justice</i>		
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GREAT WALL MEDICAL P.C., JOON SONG	INDEX NO.	<u>157517/2017</u>
Plaintiffs,	MOTION DATE	<u>08/18/2021</u>
- v -	MOTION SEQ. NO.	<u>011</u>
MICHELLE LEVINE,	DECISION + ORDER ON MOTION	
Defendant.		
-----X		

The following e-filed documents, listed by NYSCEF document number (Motion 011) 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 303, 304, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315

were read on this motion to/for REARGUMENT/RECONSIDERATION.

In this defamation action stemming from defendant’s July 7, 2017 visit to plaintiffs’ medical office, defendant moves pursuant to CPLR 2221 to renew her prior motion to dismiss the complaint pursuant to CPLR 3211(a)(7), which was denied by order dated May 9, 2019, and for an order awarding defendant attorneys’ fees and costs for defending this action. Plaintiffs oppose the motion and cross-move pursuant to CPLR 3211(g)(3) for limited discovery.

Defendant’s motion to renew is based on a recent change to the anti-SLAPP (Strategic Lawsuits Against Public Participation) law. Specifically, Civil Rights Law Section 76-a was amended in November 2020 to substantially broaden its scope in order to “protect citizens from frivolous litigation that is intended to silence their exercise of the rights of free speech and petition about matters of public interest.” 2019 NY A.B. 5991 (NS), New York Committee Report. The amended Civil Rights Law Section 76-a broadens the anti-SLAPP law to include “[a]n action involving public petition and participation,” which is defined to include a claim based on “any communication in a place open to the public or a public forum in connection with

an issue of public interest” Civil Rights Law Section 76-a(1)(a). The term “public interest” is to “be construed broadly and shall mean any subject other than a purely private matter.” Civil Rights Law Section 76-a(1)(d). Further, given the remedial nature of the statute, courts have held that it applies retroactively. *Palin v. New York Times Co.*, 510 F.Supp.3d 21 (S.D.N.Y. 2020).

Here, the allegedly defamatory statements at issue in plaintiffs’ amended complaint were published on public websites, such as Yelp, ZocDoc, and Facebook. The statements themselves concern defendant’s experience with plaintiffs’ medical practice and accuse plaintiff of unethical billing and medical practices. The reviews are clearly intended as a warning to other women, “so that [they] are not scammed in the same way.” Amended Complaint, para. 25. Thus, contrary to plaintiffs’ contention that the statements involve a purely private matter, the statements fall under the anti-SLAPP law because they were posted in a public forum and were made in connection with an issue of public interest, namely the integrity of plaintiffs’ medical practice. Plaintiffs’ argument that some of the statements were made privately, and thus are not subject to the anti-SLAPP law, does not save this claim as plaintiffs failed to explicitly plead this in the amended complaint and can only point to one such allegation, which does not meet the particularity requirements to sustain a defamation claim under CPLR 3016. *See* Amended Complain, para. 85.

Under CPLR 3211(g), a motion to dismiss under CPLR 3211(a)(7) must be granted where a party demonstrates that the action involves a matter of public petition and participation under Civil Rights Law Section 76-a, unless the party opposing the motion demonstrates that the cause of action has a substantial basis in law. In order to do so, plaintiffs must demonstrate, 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” Civil Rights Law Section 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.” *Prozeralik v. Capital Cities Communications*, 82 N.Y.2d 466, 474 (1993) (internal citation omitted).

Notably, “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) (internal citations omitted). In making this determination, courts will typically infer actual malice from objective facts, such as “the defendant’s own actions or statements, the dubious nature of his sources, [and] the inherent improbability of the story.” *Id.* “If it cannot be shown that the defendant knew that the statements were false, a plaintiff must demonstrate that the defendant made the statements with reckless disregard of whether they were true or false.” *Lindberg v. Dow Jones & Co.*, 2021 WL 5450617, at *3 (S.D.N.Y. 2021). The reckless conduct “is not measured by whether a reasonably prudent [person] would have published or would have investigated before publishing but by whether the defendant in fact entertained serious doubts as to the truth of [the] publication.” *Id.* In other words, “did the defendant lie?” *Id.*

In their amended complaint, plaintiffs vehemently dispute the allegedly defamatory statements, contending that what defendant said was false and was solely intended to harm plaintiffs’ reputation and business. However, as discussed above, defendant’s animosity towards plaintiffs is irrelevant and even the truth or falsity of the statement is not necessarily dispositive for purposes of the anti-SLAPP law. Rather, the court must determine whether defendant knew or had substantial doubts about the truth of her statements.

Plaintiffs’ amended complaint is entirely devoid of any non-conclusory allegations to show that defendant’s statements were made with knowledge of their falsity or with reckless

disregard of whether they were false, as required by Civil Rights Law Section 76-a. In an attempt to bolster the amended complaint, plaintiffs introduce various affidavits from their employees, most of which were submitted on prior motions.

First, in an attempt to show that defendant's statement regarding unnecessary testing was malicious, plaintiffs submit a note from her visit which states that she complained of pelvic pain. However, not only is this insufficient to demonstrate the truth or falsity of her statement, it also does not undermine defendant's belief as to the truth of her statement. Indeed, defendant Levine explains in her affidavit in support of her motion that she came into plaintiffs' office for an annual visit without complaints of pelvic pain and that this issue was only discussed at plaintiffs' urging. Affidavit of Michelle Levine sworn to on April 12, 2021, paras. 24-27. Thus, while defendant Levine may have discussed pelvic pain with the doctor and agreed to undergo an ultrasound, this does not undermine her belief in the statement that she underwent unnecessary testing.

Second, plaintiffs attempt to show that defendant knew that her statement about receiving a diagnosis of herpes over the phone was false by submitting an affidavit from another employee from 2017 which states she never communicated the results of the pathology tests to defendant. However, defendant may have spoken to another employee at the office as she called the office multiple times that day. Moreover, defendant Levine's detailed affidavit and the contemporaneous text messages attached thereto clearly demonstrate defendant's belief that she did receive such a diagnosis from plaintiffs' office and that she was distraught as a result. Thus, plaintiffs have failed to show that defendant was lying when she made this statement.

Finally, plaintiffs argue that defendant knew that her statements about the HIPAA violation was false because she herself has publicly filed her medical records in court prior to

plaintiffs filing a redacted version of the same records. However, defendant Levine is not a lawyer or a doctor and cannot be deemed to know the rule of waiver under HIPAA. As defendant Levine states in her reply affidavit, she is the patient and is not bound by HIPAA, as plaintiffs are, and thus she plausibly believed that filing this information did not absolve plaintiffs of their responsibilities under HIPAA.

Thus, plaintiffs have failed to plausibly demonstrate that any of the alleged defamatory statements were made with actual malice as required by Section 76-a of the Civil Rights Law. Further, their request for limited discovery must be denied as they have failed to submit an affidavit or a declaration under penalty of perjury to specifically show that they are missing facts essential to justify their opposition to the motion. Accordingly, plaintiffs' cause of action for defamation must be dismissed as plaintiffs have failed to demonstrate that it has a substantial basis in law under CPLR 3211(g). Likewise, plaintiffs' remaining claim for tortious interference with contract must be dismissed as defendant's conduct was not wrongful. *See Highland Capital Mgmt. v. Dow Jones & Co.*, 178 A.D.3d 572, 574 (1st Dep't 2019) (tortious interference with contractual relations claim was dismissed where alleged conduct was incidental to the lawful and constitutionally protected process of news gathering and reporting).

Defendant Levine also seeks to recover costs and attorney's fees incurred in defending this action. Under the newly amended Civil Rights Law Section 70-a, costs and attorney's fees shall be recovered in an anti-SLAPP action where the movant demonstrates that the action was commenced or continued without a substantial basis in law and fact. However, given the recent change in law, defendant is only entitled to recover costs and fees as of January 2021, when it was held that the law applies retroactively, *see Palin v. New York Times Co.*, 510 F.Supp.3d 21 (S.D.N.Y. Dec. 29, 2020).

Accordingly, it is

ORDERED that defendant's motion is granted and the amended complaint is dismissed, with costs and attorneys' fees, and the Clerk shall enter judgment accordingly; and it is further

ORDERED that the remaining counterclaim is severed and continued; and it is further

ORDERED that defendant shall submit an affirmation in support of her request for attorneys' fees within 20 days of entry of this order via NYSCEF and by email with a copy to all counsel to vzolotar@nycourts.gov; and it is further

ORDERED that any opposition to said affirmation shall be submitted within 10 days thereafter; and it is further

ORDERED that the parties shall appear for the previously scheduled Teams conference on March 31, 2022 at 9:30 am to discuss discovery on the remaining counterclaim.

<u>3/8/2022</u>				<u>PAUL A. GOETZ, J.S.C.</u>		
DATE						
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE