

ARVIN AMATORIO,

Plaintiff,

- vs. -

**NORMAN SCHMELZ, IRA TREUHAFI,
MANDY SUERO and WENDY
LOSZYNSKI,**

Defendants.

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : BERGEN COUNTY**

Docket Number:

BER-L-563-20

**MEMORANDUM OF LAW IN OPPOSITION TO
MOTION OF DEFENDANTS
TO DISMISS THE COMPLAINT**

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PRELIMINARY STATEMENT

Defendants have moved to dismiss the Complaint of Arvin Amatorio for defamation and false light invasion of privacy pursuant to *R. 4:6-2(e)* for failure to state a claim for which relief can be granted. Defendants' motions, however (they are identical), suffer numerous deficiencies, not least of which is a consistent confusion between the standards of proof to establish various aspects of plaintiff's claims – particularly with regard to state of mind – and the far less demanding requirements of notice pleading.

The motion also fails to come adequately to grips with the legal standard for what constitutes “defamatory meaning” of a published assertion of fact about a plaintiff. While the motion states, “Assuming, *arguendo*, that the allegations in Plaintiff's Complaint are true, Defendant was merely reporting on allegations presented in a publicly filed document in the Indiana federal court system,” the press release and related email blast and online publication by the defendants says far more than this. Rather, the press release, made only days before a contested election between defendant Schmelz and plaintiff Amatorio for mayor of Bergenfield, asserted, as set out in detail in both the Complaint and below, far more than that a former client of plaintiff, Czesar Hernandez, were filed in an Indiana court. Its tone and import convey the unmistakable message that those claims are actually **true**, to the extent that defendants' press release, purportedly based on the Hernandez allegations:

- “called on” that Mr. Amatorio quit the mayoral race;
- urged “immigrants who are abused and taken advantage of . . . call on Mr. Amatorio to withdraw his candidacy and resign from Bergenfield Council as well”;
- accused Mr. Amatorio of “selfish, wrong and deliberate [legal] misfilings that served to enrich his own and his client's pockets”;

- asserted that Mr. Amatorio, an immigrant from the Philippines who is admitted to practice in New York and never claimed to practice law in New Jersey, “is not the first, nor the last person to take advantage of their own countrymen in order to make a quick dollar”; and
- claimed that Mr. Amatorio, who is licensed in New York and does not practice law in New Jersey, “is not licensed to practice law in the State of New Jersey” and evades discipline because “the local disciplinary committee has no jurisdiction over him to investigate these serious allegations.”

The assertion in defendants’ motion that the foregoing constitutes “merely reporting on allegations presented in a publicly filed document in the Indiana federal court system” is unsustainable. Defendants’ scurrilous accusations not only gave the impression that the Hernandez allegations were true, but went beyond them impugn Mr. Amatorio’s professional ethics, humanity, loyalty to both his fellow Filipinos and to the United States, of which he is a citizen, and accused him unjustly of nothing less than a serious criminal offense under federal law.

The calumny published by defendants meets every standard for claims of defamation and false light invasion of privacy, including, easily the well-known requirement of actual malice. Their motion to be relieved of responsibility for their conduct, which, in the absence of a retraction continues unabated, should be denied.

STATEMENT OF FACTS¹

Plaintiff Arvin Amatorio is the mayor of Bergenfield, New Jersey, and a Democrat. Defendant Norman Schmelz is the former Republican mayor of Bergenfield. Defendant Ira

¹ A complete statement of the facts is set forth in the Complaint filed in this action and is incorporated by reference herein.

Treuhaft is an attorney and a resident of Bergenfield who acted as an advisor to defendant's reelection campaign. Defendant Mandy Suero is an event planner and was an unsuccessful Republican candidate for Bergenfield's city council in 2019 as was defendant Wendy Loszynski, a retired nurse.

Arvin Amatorio was born in the Philippines, the son of two public school teachers. Mr. Amatorio obtained an undergraduate degree in economics in Manila and then attended the College of Law at San Sebastian, where he earned his law degree. He and his wife moved to the United States in 2002, following which Mr. Amatorio worked as an adjunct professor in New York City while studying for the New York bar, which he passed on his first attempt. Since his admission to the New York Bar in 2006, Mr. Amatorio has maintained a law office in New York City. He also sees immigration clients, which is an entirely federal practice, at Washington Avenue in Bergenfield for the convenience of his clients.

Mr. Amatorio was a member of the Bergenfield City Council during the mayoral election held on November 7, 2019. A Democrat, Mr. Amatorio's involvement in politics came about with some reluctance, and he maintains a decidedly low-key style. For example, in a January 25, 2019 interview with *The FilAm*, an online publication for Filipinos in metropolitan New York, he was asked, in his capacity as an experienced Filipino immigration lawyer, about the announcement by the Department of Homeland Security that immigrants from the Philippines, the Dominican Republic and Ethiopia would no longer be eligible for the H-2A and H-2B visa programs. Despite already being an elected official in the Democratic Party, Mr. Amatorio declined to ascribe political motives to the Republican administration in Washington concerning this decision, saying, "It's very unfortunate that this happened but looking at stats, if the stats are accurate, it's reasonable for certain countries such as U.S. to do that if they see that there is abuse of the process. From

2014 to 2016, 40 percent of T visas were being issued to the Philippines, that's very alarming. It raised a red flag. . . . It did not come from the political aisle. It's from organic, administrative cleaning. . . . We [Filipino immigrants] raised a red flag. We can't say we are being singled out as a people."

Nonetheless, Mr. Amatorio's Filipino origin and his role as an experienced immigration lawyer are potent political advantages for him. According to the 2010 US census, over 17% of Bergenfield's population is of Filipino origin, a figure that is probably higher now. Mr. Amatorio's adversary in the 2019 election for Bergenfield mayor was defendant Schmelz, who was running together with a "slate" of fellow Republicans consisting of himself and defendants Suero and Loszynski. Defendant Treuhaft has been chairman of Bergenfield's Republican committee and is a prominent Republican activist in Bergen County. Treuhaft acted as a press spokesman and contact for defendant Schmelz when he was mayor.

On or about November 2, 2019 – five days before the election – Schmelz's team issued a press release purporting to report on scandalous litigation claims made against Mr. Amatorio in a federal court case in Indiana (the "Release"). According to the Release, the allegations of the proposed amended complaint brought *pro se* by plaintiff Czesar Hernandez allege that "the Defendants including Amatorio are accused of 'made false and fraudulent promises of timely immigration sponsorships and proper payment of prevailing wage to lure Plaintiff into employment, only for the Plaintiff to later realize Defendants did not timely file his immigration papers and did not correctly pay him his offered prevailing wage rate.'" Additionally, the Release quoted the proposed pleadings as stating that "Plaintiff was forced under the circumstances to continue working for Defendants as leaving Defendants would definitely make him unlawfully staying in the county and would make him subject to deportation."

The Release stated that “Arvin Amatorio is alleged to have violated the Trafficking Victims Protection Act in his work for a Filipino who is a Physical Therapist.” The Release went on to state as follows:

I am calling on Mr. Amatorio to resign his candidacy for Mayor effective immediately,” said his opponent Mayor Norman Schmelz. “I call upon all people in Bergenfield who care about the rights of those who are trafficked, on those immigrants who are abused and taken advantage of to call on Mr. Amatorio to withdraw his candidacy and resign from Bergenfield Council as well.

It begs the question, how many more immigrant families have been ruined by Mr. Amatorio’s selfish, wrong, and deliberate misfilings [*sic*] that served to enrich his own and his client’s pockets. Mr. Amatorio, unfortunately, is not the first, nor the last person to take advantage of their own countrymen in order to make a quick dollar. I call upon everyone, including his running mates and those on the ballot with him to condemn him and his alleged actions and to demand clear answers as to his professional dealings and responsibilities. What complicates matters, is that Mr. Amatorio [*sic*] did not attend a law school accredited by the American Bar Association, and as a result is not licensed to practice law in the State of New Jersey, and the local disciplinary committee has no jurisdiction over him to investigate these serious allegations.

In fact, however, the only factual allegations in the proposed amended complaint that actually refer to conduct by Mr. Amatorio are the following: That Mr. Amatorio is a lawyer licensed in the State of New York (¶ 20) who represented the plaintiff as an immigration lawyer and prepared documents in connection with that representation (¶ 21); that Mr. Amatorio regularly prepared such documents and mailed them to Indiana for another defendant and the plaintiff to sign (¶23), that he regularly communicated with the Indiana-based defendants (¶ 24), and that he regularly transacted business in Indiana (¶ 25); that Mr. Amatorio was “the instrumentality” through which another defendant made representations and submitted forms to the Immigration and Naturalization Service (¶¶ 58 – 60)); that Mr. Amatorio did not timely inform the plaintiff of the denial of his application for an H-1B visa (¶ 80) and that Mr. Amatorio helped the plaintiff filed a new petition (¶ 88); that Mr. Amatorio “knew or should have known”

that plaintiff's immigration status would not be resolved favorably in such a manner as to permit him to remain in the United States and to work legally (¶ 92 - 93); that Mr. Amatorio's attempt to remediate plaintiff's status as an undocumented immigrant working in the United States without legal authority "benefited" him, presumably because Mr. Amatorio was paid a fee for his legal services (¶¶ 94, 109); and that Mr. Amatorio did not return an email and several phone messages from Hernandez (¶ 95).

These allegations, submitted by the plaintiff Czesar Hernandez acting *pro se*, at most allege a claim (however based on inaccurate factual against Mr. Amatorio for professional negligence. (The claim by Hernandez of malfeasance by Hernandez is inaccurate because it does not acknowledge that, at the time of the filings made by Mr. Amatorio on Hernandez's behalf, Hernandez's work permit had been revoked but Hernandez had not informed Mr. Amatorio of this fact.) As of the date of the Complaint in this matter, the United States District Court for the District of Indiana had not ruled on Hernandez's motion to amend his complaint.

The defendants secured publication of the Release on November 2, 2019 at the InsiderNJ.com website at the URL <https://www.insidernj.com/press-release/federal-lawsuit-filing-alleges-amatorio-guilty-violating-trafficking-victims-protection-act-2003-upon-fellow-filipino/>, where it remains online and accessible. The Release was also distributed by the Schmelz campaign by email, including emails sent or caused to be sent by defendants Treuhaft, Suero and Loszynski, to an unknown number of recipients.

The Complaint alleges, on information and belief, that the Release was an attempt by the defendants to break the link of affection and political appeal between Mr. Amatorio, a successful Filipino immigrant, and Filipino and other minority and immigrant voters in Bergenfield by falsely painting him as an exploiter of immigrants. At the same time, the Release functioned to "remind"

Bergenfield voters who might be suspicious or even contemptuous toward immigrants or minorities that Mr. Amatorio fell into both of these categories, while cynically taking on the false mantle of moral superiority and concern for such communities as a shield against charges of appealing to ethnic or nativist prejudice.

Following the publication of the Release by defendants, Helen Castillo, incoming president of PAFCOM (Philippine American Friendship Community), the major Filipino advocacy organization in New Jersey, told The FilAm that she believed the Release was “a sheer form of desperation from his opponents” because they were aware that Mr. Amatorio was “doing very well in his campaign.” Indeed, Mr. Amatorio did win the Bergenfield mayoral campaign. The false and defamatory statements contained in the Release, however, were never retracted, disavowed or removed from publication by any of the defendants, despite their knowledge of the falsehoods and misrepresentations contained in it and despite Mr. Amatorio’s public release of a statement condemning these falsehoods and threatening litigation against the defendants for publishing them.

These statements remain posted on the InsiderNJ.com website under the headline, “SCHMELZ: FEDERAL LAWSUIT FILING ALLEGES AMATORIO IS GUILTY OF VIOLATING THE TRAFFICKING VICTIMS PROTECTION ACT OF 2003 UPON FELLOW FILIPINO.” The words “guilty of” – implying, as they do, criminal, not civil liability – were entirely created by defendants; the Hernandez claims are entirely civil in nature. According to the website’s automated traffic counter, this “article,” i.e., the Release, had been viewed over 7,000 times when the Complaint in this action was filed in February.

These false and defamatory statements impugn Mr. Amatorio’s character, his legal and personal ethics, his skills and competence as an attorney and accuse him of criminal guilt as well. The statement in the Release that “immigrant families have been ruined by Mr. Amatorio’s

selfish, wrong, and deliberate misfilings [*sic*] that served to enrich his own and his client's pockets" contains many false claims about Mr. Amatorio that purports to be factual. Specifically, however, the Complaint states that No immigrant family has been ruined by Mr. Amatorio's conduct; the Hernandez Filing does not allege that an immigrant family has been ruined by Mr. Amatorio's conduct; the Hernandez Filing does not allege that multiple immigrant families have been ruined by Mr. Hernandez's conduct; Mr. Amatorio's conduct in connection with his representation of Hernandez was not wrong; Mr. Amatorio did not deliberately engage in misconduct in connection with his representation of Hernandez; that Mr. Amatorio wrongfully acted to "enrich his and his client's pockets [*sic*]" is false as well.

The Statement in the Release that "call[s] upon all people in Bergenfield who care about the rights of those who are trafficked, on those immigrants who are abused and taken advantage of to call on Mr. Amatorio to withdraw his candidacy and resign from Bergenfield Council as well" contains many false claims about Mr. Amatorio that purports to be factual. Specifically, the implication that Mr. Amatorio is engaged in trafficking or does not care about the rights of victims of trafficking was meant to be and reasonably is understood as a statement that he did do so or is doing so, which claim is false. Moreover, the implication that the Hernandez Complaint contains allegations that could plausibly be construed as conduct meeting the definition of trafficking, a serious federal felony, is not reasonable and was meant to be and reasonably is understood as a statement that Mr. Amatorio did engage in trafficking or is doing so, which claim is false. Similarly, the implication that Mr. Amatorio has abused or does abuse immigrants was meant to be and reasonably is understood as a statement that he did do so or is doing so, which claim is false. The implication that Mr. Amatorio has also taken advantage of

or does take advantage of immigrants was meant to be and reasonably is understood as a statement that he did do so or is doing so, which claim is false.

The Statement in the Release that “Mr. Amatorio, unfortunately, is not the first, nor the last person to take advantage of their own countrymen in order to make a quick dollar.” contains many false claims about Mr. Amatorio that purports to be factual. Specifically, Mr. Amatorio has not taken advantage of “his own countrymen” or anyone else “in order to make a quick dollar.” Mr. Amatorio is an American citizen and his “countrymen” are Americans. To the extent the term “countrymen” is meant to refer to Filipinos, Mr. Amatorio has not taken advantage of Filipinos.

The Statement in the Release that “What complicates matters, is that Mr. Amatorio [*sic*] did not attend a law school accredited by the American Bar Association, and as a result is not licensed to practice law in the State of New Jersey, and the local disciplinary committee has no jurisdiction over him to investigate these serious allegations” contains many false claims about Mr. Amatorio that purports to be factual. Specifically, the implication that that the allegations in the Hernandez Filings involve Mr. Amatorio’s practice of law or any other transaction or activity by him involving New Jersey was meant to be and reasonably is understood as a statement that they did, which claim is false.

The implication that that Mr. Amatorio is engaged in the unauthorized practice of law in New Jersey was meant to be and reasonably is understood as a statement that he did do so or is doing so, which claim is false. The implication that that Mr. Amatorio is evading ethical oversight by the courts, when in fact he is amenable to discipline in the State of New York, where he is admitted to the bar, was meant to be and reasonably is understood as a statement that he did evade such oversight so or is doing so, which claim is false. The statement that that Mr.

Amatorio is not admitted to practice law in New Jersey because he did not attend a law school accredited by the American Bar Association is false.

The inference that Mr. Amatorio, who graduated from a law school in the Philippines before immigrating to the United States and passing the New York Bar, was meant to be and reasonably is understood as an assertion that he could not obtain admission to an ABA-accredited law school in the U.S. and that he is presumably of low intelligence or was academically unsuccessful, which claim is false.

LEGAL ARGUMENT

I. LEGAL STANDARD FOR MOTION TO DISMISS UNDER RULE 4:6-2(e)

For a court to determine that a case should be dismissed for failure to state a claim under *R. 4:6-2(e)*, the inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint. *Rieder v. Dep't of Transp.*, 221 N.J. Super. 547, 552 (App. Div.1987); *Am. Humanist Ass'n v. Matawan-Aberdeen Reg'l Sch. Dist.*, 440 N.J. Super. 582, 588 (Law. Div. 2015). This standard was articulated by the New Jersey Supreme Court in *Printing Mart v. Sharp Electronics*, 116 N.J. 739 (1989), as follows:

We approach our review of the judgment below mindful of the test for determining the adequacy of a pleading: whether a cause of action is “suggested” by the facts. . . . A reviewing court searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary. At this preliminary stage of the litigation the court is not concerned with the ability of plaintiffs to prove the allegations contained in the complaint. For purposes of analysis plaintiffs are entitled to every reasonable inference of fact.

Id. at 746 (citations omitted). “The primary distinction between a motion under *R. 4:6-2(e)* and the summary judgment rule, *R. 4:46* is that the former is based on pleadings themselves.” *Rules*

Governing the Courts of New Jersey, cmt. 4.1.2 (Pressler & Verniero, eds., 2017). “The rule expressly provides that if any material outside the pleadings is relied [up]on on a 4:6-2(e), it is automatically converted into a summary judgment motion.” *Id.*

II. THE COMPLAINT STATES A CLAIM FOR DEFAMATION

There are two claims in the Complaint. The first is for defamation. A *prima facie* case of defamation requires a plaintiff to establish the publication of a false and defamatory statement concerning another and fault amounting at least to negligence by the publisher. *Somerset Dev., LLC v. Cleaner Lakewood*, No. A-2819-10T3, 2012 WL 4370271, at *3 (App. Div. Sept. 26, 2012) (citing *DeAngelis v. Hill*, 180 N.J. 1, 12-13 (2004)) (internal quotations omitted). Where, as is the case here, a claim is brought by a “public figure,” negligence is insufficient. The pleadings must satisfy the constitutional “actual malice” standard, alleging that “the publisher either knew that the statement was false or published with reckless disregard for the truth” *Lynch v. New Jersey Educ. Ass’n*, 161 N.J. 152, 165 (1999).

“A defamatory statement, generally, is one that subjects an individual to contempt or ridicule, one that harms a person’s reputation by lowering the community’s estimation of him or by deterring others from wanting to associate or deal with him.” *G.D. v. Kenny*, 15 A.3d 300, 310 (N.J. 2011) (citations omitted). This includes, in particular, a “statement falsely attributing criminality to an individual is defamatory as a matter of law,” *id.* as is a statement that a person might be charged with criminal conduct, *Lawrence v. Bauer Pub. & Printing Ltd.*, 89 N.J. 451, 459–60 (1982). False statements are also capable of a defamatory meaning if “they adversely reflect on plaintiff’s fitness to conduct [his or] her profession.” *Blakey v. Cont’l Airlines, Inc.*, 164 N.J. 38, 72 (2000). “[A]n attack against a practitioner exposes him to ridicule or contempt and subjects him to loss of confidence, one of the most precious assets for the successful practice of

any profession. The natural tendency of such a charge is to cause injury to reputation.” *Mick v. Am. Dental Ass’n*, 49 N.J. Super. 262, 274 (App. Div. 1958). The allegations of the Complaint, and specifically those laid out below in contradistinction to the ones made in the Hernandez filing, fall into at least these two categories of defamation.

Here the gravamen of defendants’ motion is that the Release was merely recounting allegations in a public filing; that the statements in the Release were true or, alternatively, that they were privileged as “fair reporting” of an official court document. Both these variations of the same argument fail here, however, for the reasons set out below.

i) The Release distorted, characterized and went beyond merely reporting the allegations by Hernandez.

As a threshold matter, it is not a defense to assert that merely reporting the truth about what someone else said about a plaintiff insulates a defendant from liability for defamation based on those statements. “Harm from a defamatory opinion statement is redressable when the statement implies underlying objective facts that are false.” *Ward v. Zelikovsky*, 136 N.J. 516, 531 (1994). Thus, “While a defendant may attempt to assert the truth as a defense, that defense ‘does not refer to the truthful republication of a defamatory statement but to the truth of the statement’s contents.’” *Petersen v. Meggitt*, 407 N.J. Super. 63, 74 (App. Div. 2009), quoting, *Lawrence*, *supra*. On a motion at the pleading stage, the defense of truth regarding Hernandez’s allegations cannot trump the well-pleaded allegations in the Complaint that Hernandez’s claims are false.

No less important, “Under the common law, truth, if established, exonerates the publisher of a defamatory statement of fact. For the defense to apply, however, the truth must be as broad as the defamatory imputation or ‘sting’ of the statement.” *Lawrence*, 89 N.J. at 451 (citations omitted). Here the sting of the Release, which was published under the headline, “SCHMELZ: FEDERAL LAWSUIT FILING ALLEGES AMATORIO IS GUILTY OF VIOLATING THE

TRAFFICKING VICTIMS PROTECTION ACT OF 2003 UPON FELLOW FILIPINO,” was considerable. The claim by Hernandez had nothing to do with “guilt,” of course; it is a civil, not a criminal, matter. And the defamatory nature of these inferences is particularly cogent **in the context of the rest of the Release**, which breathlessly presents the Hernandez allegations as true and demands that, based on them, Mr. Amatorio should quit the mayoral race, give himself over for reckoning to supposed additional “victims” of his trafficking, make amends for his practice of exploiting fellow Filipinos and quit evading bar disciplinary authorities. In light of these statements in the Release, defendants’ bloodless frame-by-frame “analysis” of the “truth” of the statements made in the Release is as an apt an example of missing the forest for the trees as can be imagined, and is of little or no guidance to the Court.

Moreover, even if the thin thread of “truth” (i.e., truth regarding **what Hernandez vaguely alleges** in a proposed pleading, but which of course Mr. Amatorio – who is not even a party to that litigation – denies) running through the Release could reasonably be traced by the intended audience, it would not support defendant’s argument that it “merely reported” that “somebody filed something” in Indiana. As the Supreme Court explained in *Petro-Lubricant Testing Labs., Inc. v. Adelman*, 233 N.J. 236 (2018), “Deciding whether a statement is defamatory requires an evaluation of “the fair and natural meaning” of the challenged words through the perspective of a reasonable person. The allegedly defamatory statements must be viewed in the context of the whole publication. Whether a modified article is a republication will depend—in large part—on whether the altered article contains defamatory statements not expressed in the original article.” *Id.* at 253–54 (internal quotes and citations omitted). Here the Release is defamatory because it went far beyond the claims made in the Hernandez action to include statements published by the

defendants via the Release (“the Release”) which state or imply false and defamatory facts concerning Mr. Amatorio’s personal and professional ethics purporting to be objectively true.

The statements in the Release that constitute “defamatory statements not expressed in the original” include the following:

1. After summarizing the allegations of the Hernandez complaint, the Release states, “I call upon all people in Bergenfield who care about the rights of those who are trafficked, on those immigrants who are abused and taken advantage of to call on Mr. Amatorio to withdraw his candidacy and resign from Bergenfield Council as well,” (Complaint, ¶ 24). This can only mean one of two things: Either Mr. Amatorio – who is not only an immigrant himself but practices immigration law – (a) either does **not care** about the rights of those immigrants are the victims of trafficking, are abused and taken advantage of (which would be defamatory for him, given his professional work); or, worse – but the more obvious inference – that (b) that the allegations of the Hernandez complaint are true and **that Mr. Amatorio himself is a human trafficker** – that is to say, a **criminal**.
2. The Release continues: “It begs the question, **how many more immigrant families have been ruined** by Mr. Amatorio’s selfish, wrong, and deliberate misfilings [*sic*] that served to enrich his own and his client’s pockets.” (*Id.*) The only possible understanding of this sentence is that, **in addition** to the one immigrant family alleged in the Hernandez complaint to have been “ruined” by Mr. Amatorio’s conduct, the only question is not whether others have also been, but how many have also been – meaning that, according to the Release, **other immigrant families have been “ruined” by Mr. Amatorio**, and need only to be identified and recompensed.

3. Further from the Release (*id.*): “Mr. Amatorio, unfortunately, is not the first, nor the last person to take advantage of their own countrymen in order to make a quick dollar. I call upon everyone, including his running mates and those on the ballot with him to condemn him and his alleged actions . . .” Here the Release explicitly states that “Mr. Amatorio . . . **is** not the first, nor the last person to take advantage of their own countrymen.” There is no “alleged” here: The Release simply states that Mr. Amatorio criminally took advantage of “his countrymen.”
4. While no one can appropriately be “condemned” for being **accused** of something wrong – only for doing it – here defendants cynically insert the word “alleged” in a phrase calling on “everyone” to “**condemn him and his alleged actions**” in the Release (*id.*). The obvious implication of the statement is that the Hernandez allegations are true – for why else should Mr. Amatorio be condemned?
5. Finally, as set out in the Complaint (*id.*), the Release also stated, “What complicates matters, is that Mr. Amatorio [*sic*] did not attend a law school accredited by the American Bar Association, and as a result is not licensed to practice law in the State of New Jersey, and the local disciplinary committee has no jurisdiction over him to investigate these serious allegations.” The obvious and intended implication of this statement, which is composed of a series of half-truths, is that Mr. Amatorio is not a “real” law school graduate; is practicing law without a license in New Jersey; and, most significantly, is evading disciplinary oversight concerning “these serious allegations” – suggesting, contrary to fact, that a disciplinary complaint has been lodged against Mr. Amatorio or that someone at least attempted to do so in New Jersey, without success.

As set forth in the Complaint (see, e.g., ¶¶ 41-45) each of these statements is false and defamatory or implies an obvious defamatory inference meant to be understood as fact. As set forth in the Complaint, Mr. Amatorio, an immigrant himself who practices immigration law, and whose career is premised on assisting immigrants, is not an immigration trafficker – i.e., a criminal – or even “merely” abuser of immigrants. As stated in the Complaint, Mr. Amatorio has never “ruined” any immigration families, much less multiple ones; he did not commit the acts of which he accused in the Hernandez filing; and he is neither engaged in the unauthorized practice of law in New Jersey, in evading attorney discipline or for that matter is he the subject of an ethics complaint concerning the Hernandez claims.

Each of these obvious statements or connect-the-dots implications of the Release is false and defamatory. For this reason, defendants’ expansive chart purporting to chart how the statements in the Release plot against the Hernandez allegations is of no relevance here and indeed serves mainly as a distraction from defendants’ improper conduct.

ii) The fair-report privilege does not apply under facts such as these.

As an initial matter, the fair-report privilege asserted as the centerpiece of defendants’ motion cannot, as a matter of law, provide a basis to dismiss a defamation claim under New Jersey law. “[V]irtually all courts that have discussed this issue have found that privilege is an affirmative defense, not an essential element of a defamation claim.” *JNL Mgmt., LLC v. Hackensack Univ. Med. Ctr.*, No. CV185221ESSCM, 2019 WL 1951123, at *7 (D.N.J. May 2, 2019). Privilege, or the absence of privilege, is not an element of a defamation claim that needs be pleaded for purposes of deciding a motion to dismiss but a matter of proof to be brought forward by the one asserting it. “Fair reporting,” then, like the related defense of truth, is at best available

at the summary judgment level, and only then if the evidence elicited in discovery do not rise to a dispute appropriate for trial.

In any event, the allegations of the Complaint set forth facts demonstrating malicious intent on defendants' part which would vitiate the privilege, certainly at the pleading stage. As the Appellate Division explained in *Reilly, supra*, which also involved defamation directed at a political rival:

[A] report which is true when made may be defamatory if repeated under circumstances different from those surrounding the original publication. . . . [T]he privilege fails because of the malicious motives which Peter Gillen virtually admitted. Regardless of any privilege the original publication might have enjoyed, it can be nullified by the malicious motive of the republisher. *Trautwein v. Harbourt*, 40 N.J. Super. 247, 263-264 (App. Div), *certif. den.* 22 N.J. 220 (1956). "The qualified privilege affords protection only if there is no ill motive or malice in fact." *Swede v. Passaic Daily News*, [30 N.J. 320, 332 (1959)]. **Gillen's motive was not to communicate information of public interest, the only legitimate basis of the privilege, but rather to cripple plaintiff's reelection chances.**

176 N.J. Super. at 328 (emphasis added). As the Court wrote in *Newman v. Delahunty*, 293 N.J. Super. 491, 510 (Law. Div.), *aff'd*, 293 N.J. Super. 469 (App. Div. 1996), quoting *Silsdorf v. Levine*, 59 N.Y.2d 8 (1983), *cert. denied* 464 U.S. 831 (1983), "Even privilege has its limitations and even a public figure in the midst of a political campaign is entitled to some degree of protection. . . . sufficient protection is afforded defendants by virtue of the requirement that plaintiff prove actual malice. The court should reject defendants' suggestion that this Court strip Mr. Amatorio of this baseline level of protection against a tortious assault on his professional and personal reputation.

Indeed, even if consideration of the privilege defense were appropriate at this stage, the fair-report privilege would not apply here because as a matter of law, the Release was not a "fair

report.” In *Salzano v. North Jersey Media Group Inc.* 201 N.J. 500 (2010), the primary source of recent New Jersey jurisprudence concerning the fair-report privilege, the subject article – unlike the one here – accurately reported that the taking of funds was merely alleged and **did not leave the impression that the allegations were found to be true** or that any of the allegations have been otherwise adjudicated. *Id.* at 524. *See also, Lee v. TMZ Prods. Inc.*, No. CIV. 2:15-00234 WJM, 2015 WL 5638081, at *5 (D.N.J. Sept. 24, 2015). The rule is straightforward: A report of a lawsuit “need not report the proceedings verbatim, but is required to present a fair, impartial and accurate summary of what took place. The news story may be lively and filled with human interest, but in all matters which materially affect its purport it must be correct, for the privilege does not cover false statements of fact nor extend to distorted accounts.” *Bock v. Plainfield Courier-News*, 45 N.J. Super. 302, 307 (App. Div. 1957). At the pleadings stage (or at all), the Release cannot, as a matter of law, be said to be correct “in all matters with materially affect its purport.” Indeed, it may well be said as a matter of law that it is not. Thus, as the Court explained in *Petro-Lubricant*, a material, defamatory change to a previously published article “is one that relates to the defamatory content of the article at issue” that “alters the meaning of the original defamatory article or is essentially a new defamatory statement incorporated into the original article” *Id.*, 233 N.J. at 256.

Such alteration, amplification and distortion of mere reporting is exactly what the Release is. It is worth rehearsing the manner in which the Release went beyond the already false and scurrilous claims in Hernandez’s proposed pleading. The proposed amended complaint in the *Hernandez* action does **not** plead facts accusing Mr. Amatorio of being a human trafficker, as the Release claims. It does **not** allege, as the Release suggests, that Hernandez’s allegations were merely the tip of the iceberg in a scheme of comprehensive criminal exploitation against Filipino

immigrants by Mr. Amatorio. The Release, moreover, is entirely on its own feet in “demanding” that every good citizen of Bergenfield join the defendants in “condemning” Mr. Amatorio, a statement that has no meaning in the context of “alleged” allegations but, rather, only in the context of actual criminal conduct. In other words, the Release asserts that the Hernandez claims against Mr. Amatorio are **true**; are part of a wide **pattern** of exploitative, practice involving human trafficking which amounts to a serious **federal felony**. And the Release ends by implying – falsely – that Mr. Amatorio is skirting the law regarding both the legitimacy of his law practice and by evading oversight by the courts’ **ethics** enforcement agencies.

Thus, the allegations and implications of the language used in the Release go far beyond merely reporting on the filing of a proposed amended pleading in a distant state and make out a *prima facie* claim for defamation. “The unambiguous import of the . . . articles is to cast doubt on the reputations of plaintiffs . . . diminishes their standing in the community and is little different from an assertion that plaintiffs have actually been charged with certain crimes. Hence the court correctly ruled that the articles were libelous *per se, i.e.,* not susceptible of a nondefamatory interpretation.” *Lawrence*, supra, 89 N.J. at 459–60. “[I]f defendant published that a third person stated that plaintiff has committed a crime, it is no justification that the third party did in fact make that statement. Defendant must prove that in fact plaintiff committed the crime.” *Id.* at 461 (citations omitted). *See also, JNL Mgmt., LLC, supra*, 2019 WL 1951123 at *6 (while claims of criminal conduct made by third party and repeated by defendants may ultimately be found persuasive by a fact finder, at the pleadings stage the allegation that plaintiffs denied the veracity of these statements is sufficient to establish the reasonable inference that the statements are false and defamatory). The Release that is the subject matter of this action was not “fair reporting.”

iii) The Complaint adequately alleges facts sufficient to establish actual malice

Defendant’s brief at once makes repeated references to “clear and convincing evidence” – a standard invoked three times despite the fact that is irrelevant on a motion to dismiss – but also argues that the Complaint fails adequately to allege that defendants knew of the falsity of the claims in the Release or to allege actual malice.

It is sufficient, however, that the Complaint states plainly, however, that the false statements were made by defendants “despite their knowledge of the falsehoods and misrepresentations contained in it and despite Mr. Amatorio’s public release of a statement condemning these falsehoods and threatening litigation against the defendants for publishing them” (¶ 35) and “The defendants made and published the false statements in the Release knowing that they were false or with a reckless disregard for the truth” (¶ 47). That is because “at the pleading stage, a plaintiff alleging defamation with actual malice must plead facts from which malice might reasonably be inferred,” *Moriarty v. Classic Auto Grp., Inc.*, No. 13-5222 JBS/AMD, 2014 WL 884761, at *3 (D.N.J. Mar. 6, 2014) (collecting cases), an inference is all that is needed. Such an inference is found readily here. As the Supreme Court explained in *Lynch v. New Jersey Educ. Ass’n*, 161 N.J. 152 (1999), “The context of a statement can affect significantly its fair and natural meaning. Context can be as varied as an ongoing hostile relationship between a radio announcer and a listener, the section of a newspaper in which an article appears, or, **as here, a heated political contest.**” *Id.* at 168 (emphasis added).

Thus, as the Appellate Division held in *Reilly v. Gillen*, 176 N.J. Super. 321 (App. Div. 1980), not only is it not the case – as defendants suggest – that political rivalry provides defendants with a “get out of jail free” card regarding defamation. Rather, an inference of malice may be **premised** on political motivations for making false claims: “Gillen’s motive was not to communicate information of public interest, the only legitimate basis of the privilege, but rather

to cripple plaintiff's reelection chances.” 176 N.J. Super. at 328. Here too it is undisputed that the Release, filed on October 24, 2019, was made public on November 2, 2019 – five days before the election for mayor and city council which pitted defendants against plaintiff and his Democratic allies and who, until right before this election, had evinced no public expression of concern regarding the issue of immigrant rights.

iv) The Release was not mere political rhetoric or overheated invective

Defendant nonetheless contends that his widespread dissemination of vicious, personal lies about Mr. Amatorio was just part of the rough and tumble of political rivalry and is constitutionally protected as a fundament of democracy. He is mistaken, however, as is his reliance on the quotation from *Lynch v. New Jersey Educ. Ass'n*, 161 N.J. 152, 166 (1999) that, “A statement made in the heat of an election contest supplies the paradigm for that commitment to free debate.” The allegations do not merely concern “a statement.” Unlike in this case, in *Lynch* the Court found – on summary judgment, and based on evidence, not the pleadings – that each and every one of the assertions claimed by the plaintiff to be false and defamatory was in fact based on multiple outside sources. The Court concluded by observing, “The publication of false statements about a public official, including those published during an election campaign, disserves both the vilified official and the public. Freedom of speech tolerates the publication of such statements to avoid stifling open debate on matters of public concern. Even so tolerant a view nonetheless recognizes some limits on that freedom.” 161 N.J. at 177.

Indeed, as the United States Supreme Court stated over half a century ago,

That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which ‘are no essential

part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. * * *’ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

Garrison v. State of La., 379 U.S. 64, 75 (1964). Based on this principle, courts throughout the nation, all bound by the constitutional requirement that a public figure show actual malice to succeed on a defamation claim, have recognized that a finding of actual malice – which ultimately is premised on a state of mind seldom amenable to “smoking-gun” proof – can be inferred from facts suggesting that a false and defamatory statement was made for purposes of political advantage:

[C]ontrary to defendants' arguments, “the actual-malice standard is not an impenetrable shield for the benefit of those who engage in false speech about public figures.” *McKimm*, 89 Ohio St.3d at 147, 729 N.E.2d at 373 (holding that there was sufficient evidence of record at trial to support a decision by the Ohio Elections Commission reprimanding a successful candidate for political office for his false and misleading political cartoon depicting the opposing candidate engaging in unethical behavior). . . .

The allegations in plaintiffs' complaint sufficiently pled their claim of defamation by defendants to overcome a Rule 12(b)(6) motion to dismiss. See *Dockery v. Florida Democratic Party*, 719 So.2d 9, 11 (Fla. Dist. Ct. App. 1998) (holding that, where the husband of a candidate for political office filed a claim for defamation based on remarks made by the opposing candidate during the campaign, such complaint sufficiently alleged a cause of action for defamation such as to survive the defendants' motion to dismiss); see also *Pritt v. Republican National Committee*, 210 W. Va. 446, 453, 557 S.E.2d 853, 863 (2001) (holding that the plaintiff, an unsuccessful candidate for the office of governor, presented sufficient evidence to support her defamation claim for statements made about the plaintiff during the political campaign such that the trial court erred in granting summary judgment to the defendants).

Boyce & Isley, PLLC v. Cooper, 153 N.C. App. 25, 34–35, 568 S.E.2d 893, 901 (2002), *writ denied, review denied, appeal dismissed*, 357 N.C. 163, 580 S.E.2d 361 (2003).

It is obvious that the facts alleged here support a plausible inference – and regarding a state of mind (as to either intent or reckless disregard), no more can be asked, much less at the pleadings stage – of actual malice on this basis.

III. THE COMPLAINT STATES A CLAIM FOR FALSE LIGHT TORT

The second claim made by Mr. Amatorio here is the “false light” tort, which has two elements: (1) the false light in which the plaintiff was placed by defendant would be highly offensive to a reasonable person, and (2) the defendant had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. *G.D. v. Kenny*, 411 N.J. Super. 176, 195 (App. Div.), *aff’d*, 205 N.J. 275 (2011). The actual malice standard, which as set forth above is met by the pleadings here, applies to a false light claim as well. *Hornberger v. Am. Broad. Companies, Inc.*, 351 N.J. Super. 577, 598 (App. Div. 2002).

As defendants acknowledge, the same considerations on which their motion concerning dismissal of the defamation count of the Complaint apply here; similarly, they fail here as well, and this Court should deny their motion to dismiss.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the Verified Complaint, this Court should deny defendants' motion to dismiss the Complaint.

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