COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1983CV00920

ANTHONY MICHAEL BRANCH

vs.

TURTLEBOY DIGITAL MARKETING, LLC & others[1]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO DISMISS PURSUANT TO THE Anti-SLAPP STATUTE AND MASSACHUSETTS RULES OF CIVIL PROCEDURE 12(b)(1), (b)(4), (b)(6), and (b)(10)

The plaintiff, Anthony Michael Branch ("plaintiff"), has filed this action against the defendants, Turtleboy Digital Marketing ("Turtleboy"), Worcester Digital Marketing, LLC ("WDM"), and Aiden T. Kearney ("Kearney," together, "defendants"), alleging defamation. The defendants now move to dismiss the plaintiff's complaint pursuant to G.L. c. 231, § 59H ("the anti-SLAPP[2] statute"),[3] Mass. R. Civ. P. 12(b)(1), 12(b)(4),[4] 12(b)(6), and 12(b)(10). The parties appeared before the Court on September 22, 2020, for a hearing on the defendants' Special Motion to Dismiss pursuant to G.L. c. 231, § 59H. After hearing, upon review of the pleadings and memoranda filed in this case, the Court **DENIES** the defendants' Special Motion to Dismiss and **DENIES** the 12(b) Motion.

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[1] Turtleboy Enterprises, LLC /d/b/a Turtleboysports.com, Worcester Digital Marketing, LLC, and Aiden T. Kearney, in his personal capacity

[2] "The acronym 'SLAPP' stands for 'Strategic Lawsuit Against Public Participation.'" Ayasli v. Armstrong, 56 Mass. App. Ct. 740, 748 (2002).

[3] The defendants cite to the incorrect statute, G.L. c. 231, § 85H. Section 85H is inapplicable here.

[4] At the hearing on the motion, the defendants withdrew the claim to dismiss pursuant to Mass. R. Civ. P. 12(b)(4).

BACKGROUND

"In making its determination [on the Special Motion to Dismiss], the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based." G.L. c. 231, § 59H. In his affidavit, Kearney attests that he is the manager of WDM and the publisher and operator of www.turtleboysports.com, the website owned by WDM. The plaintiff, in his affidavit, attests that he is a Pentecostal Bishop and a "well-respected civil rights leader." The plaintiff alleges that on July 19, 2016, he was invited by students of Brockton Public Schools to support the removal of the "housemaster" title from certain staff positions and to support changes to the school's demerit system.

The dispute between the parties arises from a subsequent internet publication by the defendants on August 23, 2016. Specifically, the defendants published an article on www.turtleboysports.com entitled "Fake Bishop Tony Branch Forces Brockton High School To Change Name From 'Housemasters' To 'Deans' Because.....Slavery." The post quoted an article by the Brockton Enterprise newspaper, which described the plaintiff as "chairman of the Brockton Diversity Commission," and detailed how the Brockton School Committee unanimously voted to change the name of certain high school administrators from "housemaster" to "dean." The Turtleboysports.com post reporting on the Brockton Enterprise article stated: "See, Worcester isn't the only place with fake pastors who exist for the sole purpose of bilking the taxpayers and stirring up racial tensions." Additionally, it stated: "Anyway, this is how people like 'Bishop' Tony Branch make a living. They get fake theology degrees from online schools, and then they expect special treatment from the local government because they call themselves 'religious leaders.' But all they're really trying to do is make money. Because there's a lot of money to be made in the racism-industrial complex." Finally, the Twitter account

associated with www.turtleboysports.com posted a tweet that same day, stating "Fake clergy @BranchBishop forces Brockton HS to eliminate 'housemasters' cuz it triggers slavery and is racist[,]" providing a hyperlink to the article on www.turtleboysports.com and "tagging" the plaintiff's Twitter account. The plaintiff sent the defendants a message via Facebook on August 26, 2016, asking them to remove or retract the false assertions about the plaintiff within the article from their website, which message the defendants read and ignored.

The plaintiff asserts that the authors of the article negligently and unreasonably failed to investigate and inquire into the truth of the plaintiff's profession, and falsely labeled him as a "fake bishop." The plaintiff further asserts that in the month following the article's publication, he received three wedding cancellations, for which he charged between $600-$800 each. He alleges that he typically performed approximately ten weddings a year, which has been reduced to three a year since the article's publication, and avers that he performed none in 2020. He further asserts that he lost the opportunity to "test preach" at two churches in Brockton in 2017 for $400 and $300 per service, respectively, because the article surfaced during a background check and the churches did not want issues "around legitimacy." Finally, at the hearing on the motion, the plaintiff asserted that he lost an associate pastor job, which he avers was salaried at $42,000 a year, because of the online article. The plaintiff filed this action on August 23, 2019, and an Amended Complaint on August 26, 2019.

DISCUSSION

I. Defendants' Special Motion to Dismiss

The defendants move to dismiss the plaintiff's Complaint under G.L. c. 231, § 59H, the anti-SLAPP statute. The anti-SLAPP statute provides a procedural remedy for early dismissal of lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of

speech and petition for the redress of grievances. Duracraft Corp. v. Holmes Prods. Corp., 427 Mass. 156, 161 (1998) (quotation and citation omitted). To prevail on a special motion to dismiss pursuant to the anti-SLAPP statute, the movant must make a threshold showing that the claims against it are based on petitioning activity alone, and have no substantial basis other than or in addition to the petitioning activity. Blanchard v. Steward Carney Hosp., 477 Mass. 141, 147 (2017) (Blanchard I) (citations omitted).

Petitioning activity is defined, in part, as "any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding" or "any statement reasonably likely to enlist public participation in an effort to effect such consideration." G.L. c. 231, § 59H. Here, the sole conduct alleged in the plaintiff's complaint is the online publication of the August 23, 2016 article on www.turtleboysports.com and the subsequent "tweet" linking to the article. In his affidavit in support of the Special Motion to Dismiss, Kearney states that the "entire premise" of the website is "to open awareness to the public of governments [sic] failures and criticize the government, her employees and the parties therein." He also states that a secondary purpose of the website is to "draw others into the public dialogue."

At the hearing on the motion, counsel for the defendants asserted that the article was attacking what it perceived to be "wasteful governmental issues" brought before the Brockton School Committee. The article takes a critical stance regarding the Brockton School Committee's decision to change some of its administrative terminology to be more "politically correct," and criticizes the School Committee's reliance on the plaintiff, whose credentials the defendants dispute by calling him a "fake bishop" in the article and "fake clergy" on Twitter, in making its decision about school policy. Accordingly, the defendants' alleged conduct fits

within the anti-SLAPP statute's definition of petitioning because it includes "any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding" or "any statement reasonably likely to enlist public participation in an effort to effect such consideration." G.L. c. 231, § 59H. While not explicitly stated, the article aims to encourage governmental review of issues the defendants believe to be wasteful, such as updating certain administrative language within the school system, and further encourages public participation in its endeavor to influence the government to avoid such actions in the future. See Aldana v. Worcester Digital Mktg., LLC, 2020 Mass. Super. LEXIS 128, at *7 (Mass. Super. Ct. 2020) (Krupp, J.) (finding a similar online post by the same defendants constituted petitioning activity because it implicitly "encourage[d] governmental review of bail and sentencing policies").

The defendants must also show that the sole basis for the plaintiff's suit is their petitioning. Office One, Inc. v. Lopez, 437 Mass. 113, 122 (2002) ("The focus solely is on the conduct complained of, and, if the *only* conduct complained of is petitioning activity, then there can be no other 'substantial basis' for the claim.") (citation omitted). The Amended Complaint satisfies this requirement as it relates only to the content and impact of the online article and Twitter post. Accordingly, the defendants have met their threshold burden.

Once it is established that the claims against the movant are based on petitioning activity alone, the burden shifts to the plaintiff to show by a preponderance of the evidence that the movant's petitioning activity was a sham because it lacked a reasonable basis in law or fact, and that the petitioning activity caused the plaintiff actual injury. 477 Harrison Ave., LLC v. Jace Boston, LLC, 477 Mass. 162, 168 (2017); Blanchard, 477 Mass. at 156. The defendants' online post is primarily based on excerpts from a Brockton Herald article reporting on the decision of

the Brockton School Committee to revise its administrative terminology and demerit system and on a similar decision by several public high schools in Newton, and it quotes the plaintiff extensively about the issue in his capacity as "chairman of the Brockton Diversity Commission." The plaintiff does not advance any specific arguments in his opposition to address whether the defendants' petitioning activity, including the excerpts denying his credentials as a religious leader, are a "sham," and thus he does not meet his burden on this issue.

Alternatively, the plaintiff may meet his burden by demonstrating, based on the totality of the circumstances and "'such that the [Court] may conclude with fair assurance,' . . . two elements: (a) that [his] suit was 'colorable'; and (b) that the suit was not 'brought primarily to chill' the special movant's legitimate exercise of its right to petition,' i.e., that it was not retaliatory." Blanchard II, 483 Mass. at 204, quoting Blanchard I, 477 Mass. at 159-161.

Determining whether a claim is colorable requires the Court to consider whether it "'offers some reasonable possibility' of a decision in the party's favor." Blanchard II, 483 Mass. at 208 (citation omitted). The plaintiff asserts a claim against the defendants for defamation. To establish a defamation claim, the plaintiff must allege that the defendant made a statement concerning the plaintiff to a third party (publication), the statement could damage the plaintiff's reputation in the community, the defendant was at fault for making the statement, and the statement caused economic loss or is actionable without economic loss (including libel). See Scholz v. Delp, 473 Mass. 242, 249 (2015). To recover on a claim of libel against news media defendants[5], the plaintiff must show the defendants published one or more false and defamatory statements, of fact rather than opinion, of and concerning the plaintiff. See Dulgarian v. Stone,

[5] By the nature of their website and publications regarding issues of public concern, the defendants are "media defendants." See Aldana, 2020 Mass. Super. LEXIS 128, at *11 n.10 (describing the Supreme Judicial Court's broad interpretation of the term as applicable to the defendants in this case).

420 Mass. 843, 847 (1995). "Only statements that are provably false are actionable." Veilleux v. National Broad. Co., 206 F.3d 92, 108 (1st Cir. 2000). In determining whether a challenged statement qualifies as an expression of opinion, the Court considers the totality of the statement in the context in which it was published, all the words used, any cautionary terms used by the publisher, and all the surrounding circumstances, including the medium of publication and its audience. See Lyons v. Globe Newspaper Co., 415 Mass. 258, 263 (1993).

Here, there is no dispute that the defendants published a statement concerning the defendant by repeatedly describing him as a "fake bishop" throughout their online article on www.turtleboysports.com and on Twitter as "fake clergy." In his affidavit, Kearney describes the website as a "newspaper," describes the awards for "public journalism" he has personally received, and describes the website as a place to "open awareness to the public of governments [sic] failures and criticize the government" and to encourage "public dialogue." The defendants do not dispute that they made the statements. Further, it is clear that describing someone who purports that their occupation is as a Pentecostal Bishop as a "fake pastor[] who exist[s] for the sole purpose of bilking taxpayers and stirring up racial tensions" could damage their reputation in the community, and the plaintiff has alleged as much. Additionally, whether the plaintiff is a Pentecostal Bishop or not is a fact, the truth of which is provable. Finally, although libel falls into the category of specific circumstances that do not require a showing of related economic loss, the plaintiff has alleged such loss in his Amended Complaint.

At the hearing on the motion, the plaintiff stated that he considers himself a "public figure" because he is an elected official as Vice Chair of the Southeastern Regional School Committee. Courts have determined that a plaintiff in a defamation action is a public figure where he has acquired such notoriety or fame that he is "a household name on a national scale."

Bowman v. Heller, 420 Mass. 517, 522-523 (1995) (quotation omitted). While it is clear that the plaintiff does not satisfy that definition, courts have also regarded individuals as public figures where they have played a central role in a public controversy or a matter of public concern which is the subject of the plaintiff's claim. Id. at 523. According to his affidavit, the plaintiff accepted an invitation from students and activists of Brockton Public Schools to support the removal of the "housemaster" title and change the school's demerit system. In the Brockton Herald article quoted by the defendants, the plaintiff, as "chairman of the Brockton Diversity Commission," "recently appealed to the school committee to make the change," and he is quoted throughout the article discussing the merits of the decision to change the name. Thus, the plaintiff is a limited public figure for the purposes of his defamation claim because he plays a central role in the matter of public concern central to his claim.

Having determined that the plaintiff is a limited purpose public figure and that the alleged defamatory statements addressed matters of public concern, the Court now turns to whether the plaintiff has met his burden of proving actual malice. That is, the plaintiff must demonstrate that the defendants published the defamatory statement with knowledge that it was false or with reckless disregard of its truth or falsity. New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964). "Reckless disregard requires proof that the publisher acted with a high degree of awareness of [its] probable falsity or . . . entertained serious doubts as to the truth of his publication." Van Liew v. Eliopoulos, 92 Mass. App. Ct. 114, 121 (2017). Courts may infer actual malice from circumstantial evidence. Id. The plaintiff has alleged that the defendants published their defamatory remarks with actual malice. For example, the defendants' article repeatedly refers to the plaintiff as a "fake bishop," implies that he received a "fake theology degree" from an online school, and accuses him of posing as a legitimate religious leader for the

"sole purpose" of "bilking" taxpayers of their money. The article also includes a picture of the plaintiff wearing a religious garment, and discusses his opinions and advocacy as a civil rights leader regarding the issue of the Brockton schools' administrative terminology, as reported by the Brockton Herald. The Court may infer from the totality of the article that the www.turtleboysports.com article was published with a reckless disregard for its truth or falsity. Accordingly, the plaintiff's claim for libel is colorable for purposes of this analysis because there is a reasonable possibility of a decision in his favor based on his allegations.

To be "fairly assured" in its conclusion, the Court must be confident that the challenged claim is not a "SLAPP" suit. Blanchard II, 483 Mass. at 205. In addition to considering "[t]he course and manner of proceedings, the pleadings filed, and affidavits stating the facts upon which the liability or defense is based," Blanchard I, 477 Mass. at 160, the Court also considers the presence or absence of "the classic indicia" of a "typical" SLAPP suit. Blanchard II, 483 Mass. at 206-207. Among other factors, the Court may consider "whether it is a lawsuit [] directed at individual citizens of modest means for speaking publicly against development projects . . . whether the lawsuit was commenced close in time to the petitioning activity; whether the anti-SLAPP motion was filed promptly; the centrality of the challenged claim in the context of the litigation as a whole, and the relative strength of the nonmoving party's claim; [and] evidence that the petitioning activity was chilled[.]" Blanchard II, 483 Mass. at 206-207. Here, while the plaintiff's libel claim is the heart of his lawsuit, there is no assertion that the defendants will cease petitioning, and the anti-SLAPP motion was filed within sixty days of service. It is clear, however, that the plaintiff's suit is not a "typical" SLAPP suit. It was not brought against individual citizens of modest means by developers. It was filed exactly three years after the defendants posted the article online, suggesting that the plaintiff was motivated by

the alleged harm he experienced as a result of the article's publication, rather than by a desire to chill the defendants' further participation in petitioning. Compare Blanchard II, 483 Mass. at 206 n.9 (close proximity in time between petitioning activity and nonmoving party's claim may suggest claim was retaliatory or intended to chill further petitioning activity). In considering the totality of the record, the Court is fairly assured that the plaintiff's claim is colorable and not retaliatory. Accordingly, the Court will **DENY** the defendants' Special Motion to Dismiss pursuant to G.L. c. 231, § 59H.

II. Defendants' Other Arguments

A. Mass. R. Civ. P 12(b)(1)

The defendants argue that the Court lacks subject matter jurisdiction because their conduct is immunized by 47 U.S.C. § 230(c)(1), the Communications Decency Act of 1996 ("CDA"). Section 230(c)(1) states that no provider of "an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." The defendants' argument under this theory is unavailing for several reasons. First, the CDA creates an affirmative defense and not a basis on which the defendants can challenge subject matter jurisdiction, especially at the pleadings stage. See Force v. Facebook, Inc., 934 F.3d 53, 57 (2d Cir. 2019). Second, the plaintiff does not allege that a third party published the defamatory content, but that the defendants themselves did. The defendants fall within the definition of "information content provider" under the CDA, defined as someone "responsible, in whole or in part, for the creation or development of the offending content." NPS, LLC v. StubHub, Inc., 2009 Mass. Super. LEXIS 97, at *35-36 (Mass. Super. Ct. 2009) (Gants, J.) (citing Fair Hous. Council of San Francisco Valley v. Roommates, LLC, 521 F.3d 1157, 1162 (9th Cir. 2008) and 47 U.S.C. § 230(f)(3)) (quotation marks omitted). See Murphy v. Boston

Herald, Inc., 449 Mass. 42, 67 n.24 (2007) (finding no immunity under the CDA where defendants were "actual publishers of the original defamatory statements, as well as the owners and operators of [the website posting the defamatory statements]"). The defendants' argument under Rule 12(b)(1) is therefore unavailing.

B. Mass. R. Civ. P. 12(b)(6)

The defendants argue that the Court should dismiss the lawsuit because the plaintiff has failed to state a claim upon which relief can be granted, pursuant to Mass. R. Civ. P 12(b)(6). To survive a Rule 12(b)(6) motion, a complaint must include "[f]actual allegations [sufficient] . . . to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact)[.]" Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotations omitted). In determining whether a complaint meets this standard, the Court accepts the factual allegations in the complaint as true. Galiastro v. Mortgage Elec. Registration Sys., 467 Mass. 160, 164 (2014). Thus, to survive this motion to dismiss, the plaintiff must plausibly allege that the defendants published defamatory and false statements about him with knowledge of its falsity or with reckless disregard for the truth. The plaintiff has done so, as discussed supra.

The defendants also argue that the plaintiff has failed to state a claim because their comments are protected speech under the First and Fourteenth Amendments of the United States Constitution, and Articles 16 and 19 of the Massachusetts Declaration of Rights. These arguments are also unavailing. In determining that the plaintiff has sufficiently pleaded a claim for libel, the Court has concluded that that the constitutional rights, both federal and state, of the defendants have not been infringed. The defendants' reliance on Lyons v. Globe Newspaper Co.

is misplaced because there the Court dealt with protected expressions of opinion. See Lyons v. Globe Newspaper Co., 415 Mass. 258, 267-268 (1993) ("Our cases protect expressions of opinion based on disclosed information because we trust that the recipient of such opinions will reject ideas which he or she finds unwarranted by the disclosed information"), and cases cited; c.f. Myers v. Boston Magazine Co., 380 Mass. 336, 343-344 (1980) (statements that plaintiff was the "worst" sports announcer in Boston and "enrolled in a course for remedial speaking" were, in context, statements of opinion, and thus not actionable). Here, as discussed supra, the Court has determined, as a matter of law, that the statements of the defendants regarding the plaintiff were not protected expressions of opinion. Accordingly, the Court declines to dismiss the plaintiff's Complaint pursuant to Rule 12(b)(6).

C. Mass. R. Civ. P. 12(b)(10)

The defendants argue that the plaintiff's Complaint should be dismissed for failure to state a proper claim for damages, pursuant to Mass. R. Civ. P. 12(b)(10). The Superior Court has jurisdiction over civil actions for money damages where "there is no reasonable likelihood that recovery by the plaintiff will be less than or equal to $25,000[.]" G.L. c. 212, § 3. The plaintiff's Opposition clarifies his error in completing the Civil Action Cover Sheet, where he listed $25,000 in damages for documented lost wages and compensation and an additional $25,000 for contract claims. At the hearing on the motion, the plaintiff clarified the damages he seeks, including approximately $6,700 from lost opportunities to perform weddings, and $42,000 for a lost associate pastor job. Accordingly, the Court declines to dismiss the plaintiff's Complaint pursuant to Rule 12(b)(10).

ORDER

For the foregoing reasons, the defendants' Special Motion to Dismiss is **DENIED**. The defendants' 12(b) Motion is **DENIED**.

Elaine M. Buckley
Justice of the Superior Court

DATED: December 4th, 2020