UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 14-62649-CIV-COHN/SELTZER

PRAKAZREL MICHEL, etc.,

Plaintiff,

vs.

NYP HOLDINGS, INC., etc., et al.,

Defendants.

_____/

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

THIS CAUSE is before the Court upon Defendants' Motion to Dismiss [DE 8] ("Motion"), Plaintiff's Response [DE 22], and Defendants' Reply [DE 24]. The Court has reviewed these papers, and is otherwise advised in the premises. The Court heard oral argument on March 2, 2015, on Defendants' request. Upon consideration, the Motion will be **GRANTED**.

I. Standard

Under Federal Rule of Civil Procedure 12(b)(6), a court shall grant a motion to dismiss where, based upon a dispositive issue of law, the factual allegations of the complaint cannot support the asserted cause of action. Glover v. Liggett Grp., Inc., 459 F.3d 1304, 1308 (11th Cir. 2006). Indeed, "[f]actual allegations must be enough to raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). Thus, a complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570).

Nonetheless, a complaint must be liberally construed, assuming the facts alleged therein as true and drawing all reasonable inferences from those facts in the plaintiff's favor. Twombly, 550 U.S. at 555. A complaint should not be dismissed simply because the court is doubtful that the plaintiff will be able to prove all of the necessary factual allegations. Id. Accordingly, a well-pleaded complaint will survive a motion to dismiss "even if it appears that a recovery is very remote and unlikely." Id. at 556.

II. Background

Plaintiff sues Defendants for Defamation and Infliction of Emotional Distress. Per the Complaint, Plaintiff Pras Michel is a Grammy award-winning musician who has turned his attention to philanthropy. [DE 1-2 at 7.] Defendants are the New York Post and two of its reporters, Isabel Vincent and Melissa Klein. [Id.] Michel sues over an article that appeared on the New York Post's "Page Six," a portion of the paper (and a stand-alone website) devoted to celebrity gossip. Plaintiff alleges that Vincent and Klein wrote the article. [Id.]

The offensive article is not long, and is reproduced in full below:

> **Ex-Fugee rapper bailed on his own 9/11 benefit concert**
>
> Pras Michel, the rapper who co-founded The Fugees, was a no-show as the headliner for a 9/11 charity event in Hell's Kitchen to benefit his own foundation.
>
> His Hope for Them foundation also bounced a check to the venue, falsely claimed MTV sponsored the fund-raiser and failed to register the charity with state officials.
>
> The group claims to minister to the poor in Haiti but distanced itself in promotional material from the country for fear potential donors would confuse it with the disgraced charity run by his cousin, ex-Fugees frontman Wyclef Jean, said a Hope for Them insider.

Jean's Yele Haiti charity was shut after alleged mismanagement. It is under investigation by the state.

"Their whole basis is, 'Don't let anyone know that we're from Haiti,'" the insider said.

Hope for Them was founded in 2011 by Haiti native Mike Jean, a record producer and songwriter.

Michel was listed as a board member on the group's Web site early last week. By Friday, his name had disappeared, and Mike Jean told The Post the Grammy winner wasn't a board member.

The event, at Stage 48 in Hell's Kitchen last Sept. 11, was billed as "Fashion for Charity" to help New Yorkers. Tickets ranged from $40 to $2,000. In addition to a fashion show, Michel was to perform.

The well-established New York Cares charity was also brought in as a sponsor, the insider said.

MTV's logo was prominently featured on promo material. But the insider and MTV told The Post the network was never a sponsor.

The only connection was event hostess Lenay Dunn, a former host of the MTV show "10 on Top."

Organizers said Saturday that the event pulled in $6,000 but $5,600 went to expenses, with $1,100 for Stage 48 and $500 for NY Cares.

Hope for Them owed the venue $1,100 after patrons failed to cover a promised bar minimum, the source said. It bounced a check to the venue, which threatened legal action, according to e-mails from a Stage 48 staffer to Hope for Them.

Mike Jean told The Post the bill was paid late last week. Stage 48 refused to comment, but an e-mail indicated the tab had not been paid as of Friday afternoon.

He said Michel couldn't perform because he had the flu. Michel said NY Cares would be paid.

[DE 1-2 at 22-23.]

The Complaint alleges that Michel in fact "had nothing to do with the event and has no relationship" with Hope for Them. [DE 1-2 at 10.] Michel thus contends that Defendants libeled him when they reported that he "bailed" on the event and that Hope for Them was "his" foundation. [Id. at 13.] Specifically, Michel alleges that by stating that Hope for Them was "his" foundation, the Defendants falsely associated him with its failure to pay Studio 48 and NY Cares, its false claim to affiliation with MTV, its failure to register, and its bounced check. [Id.] Plaintiff alleges that the article has impugned his reputation, and threatened his efforts to purchase New York's Plaza Hotel and other similar business deals.

Defendants move to dismiss on several grounds. First, they argue that the article is true. [DE 8 at 15–20.] Second, they argue that characterizing Hope for Them as Michel's charity was protected opinion. [Id. at 21–23.] Third, they argue that Michel fails to allege that they acted with the requisite malice. [Id. at 23–25.] And, finally, they argue that the Court should dismiss Plaintiff's claims for Infliction of Emotional Distress as an improper end-run around the limits of defamation liability. [Id. at 25–26.] As discussed in more detail below, the Court finds dismissal appropriate because, under New York law, the entirety of the article qualifies as non-actionable opinion. The Court will therefore not address Defendants' other arguments.

III. Discussion

A. New York law applies.

The Court will apply New York law to Michel's claims. "The law is well settled that federal courts sitting in diversity cases must apply the forum state's conflict of law rules in order to resolve substantive legal issues." Johnson v. Occidental Fire and Cas. Co. of North Carolina, 954 F.2d 1581, 1583 (11th Cir. 1992). Since Bishop v. Florida

Specialty Paint Co., Florida has followed the "significant relationships test" in resolving conflicts of law issues. 389 So. 2d 999, 1001 (Fla. 1980). Accordingly, the Court should apply the law of the state that "has the most significant relationship to the occurrence [of] and the parties [to]" a tort claim. Id. In conducting this analysis, the Court considers "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered." Id. These factors should be evaluated "according to their relative importance with respect to the particular issue." Id.

In arguing for the applicability of New York Law, Defendants observe that they are based in New York and that the allegedly defamatory article is about a failed charity event that took place there. [DE 8 at 14.] Defendants Klein and Vincent researched and wrote the article in New York. [Id.] Additionally, much of Plaintiff's claimed damages revolve around the article's threat to Plaintiff's business dealings in New York. [Id.] Defendant does not object to the application of New York law. [See DE 22 at 8 n.2 ("Plaintiff will leave it up to the Court to decide the state law that will apply to the case at hand.").] While recognizing that Plaintiff is a Florida resident, the Court agrees that New York bears the most significant relationship to this case for the reasons that Defendants articulate. Further, the Court notes that applicability of New York defamation law to a New York publication encourages "certainty, predictability and uniformity of result" and "ease in the determination and application of the law to be applied." Bishop, 389 So. 2d at 1001 (citing Restatement (Second) of Conflict of Laws § 6 (1971)).

B. Plaintiff fails to state a claim for defamation because Defendants' article is non-actionable opinion under New York law.

To state a claim for defamation under New York law, a plaintiff must allege the following: (1) a "false statement;" (2) published to a third party; (3) special damages or per se harm; and (4) the requisite level of fault on behalf of the publisher. Epifani v. Johnson, 65 A.D. 3d 224, 233 (N.Y. App. Div. 2009). Plaintiff's claims fail because Defendants' article is protected opinion, and is therefore not a "false statement" within the meaning of New York's defamation law.

New York provides broad free speech protection, beyond even that provided by the United States Constitution. Immuno AG. v. Moor-Jankowski, 77 N.Y.2d 235, 249 (N.Y. 1991). Indeed, New York's Court of Appeals has spoken emphatically of the state's tradition of providing "the broadest possible protection to the sensitive role of gathering and disseminating news of public events." Id. at 249 (internal quotation marks omitted).

Importantly, New York defamation law provides absolute immunity for statements of opinion. It also takes a broad view of what qualifies as opinion for the purposes of this rule. The New York Court of Appeals "has embraced a test for determining what constitutes a nonactionable statement of opinion that is more flexible and decidedly more protective" than that under the United States Constitution. Gross v. New York Times Co., 82 N.Y.2d 146, 152 (N.Y. 1993). Whether a statement is protected opinion does not turn on "whether the writing contains assertions that may be understood to state facts." Sandals Resorts Int'l Ltd. v. Google, Inc., 86 A.D.3d 32, 41 (N.Y. App. Div. 2011). "[E]ven apparent statements of fact may assume the character of statements of opinion, and thus be privileged, when made in public debate, heated labor dispute, or

other circumstances in which an audience may anticipate [the use] of epithets, fiery rhetoric or hyperbole." Id. at 41–42 (internal citation omitted). Categorizing a defendant's statements as either fact or opinion "is often not an easy task." Levin v. McPhee, 119 F.3d 189, 196 (2d Cir. 1997). It is, however, a matter of law appropriate for the Court to decide on a motion to dismiss. Id. at 195; Gross, 82 N.Y.2d at 154.

In parsing the distinction between fact and opinion, the Court considers three things:

> (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such to signal . . . readers or listeners that what is being read or heard is likely to be opinion.

Davis v. Boeheim, 24 N.Y.3d 262, 270 (N.Y. 2014). The third of these factors often controls. Id. at 271. It "lends both depth and difficulty to the analysis," and "requires that the court consider the context of the communication as a whole, its tone and apparent purpose." Id. at 270. Importantly, the Court should not sift through an allegedly defamatory statement and isolate potential assertions of fact. Id. Instead, the court should look to the overall context in which the assertions were made and determine on that basis whether a "reasonable reader would have believed that the challenged statements were conveying facts about the . . . plaintiff." Id. (citing Brian v. Richardson, 87 N.Y.2d 46, 51 (N.Y. 1995)). Further, "in determining whether a particular communication is actionable, [New York courts] continue to recognize and utilize the important distinction between a statement of opinion that implies a basis in facts which are not disclosed to the reader or listener, and a statement of opinion that is

accompanied by a recitation of the facts on which it is based." Gross, 82 N.Y.2d at 153 (internal citations omitted).

Following this analysis, the New York Court of Appeals has absolved speakers of liability for very serious allegations. For example, in Brian v. Richardson, the Court of Appeals upheld the dismissal of a libel claim against an Op Ed writer who wrote that a plaintiff schemed with colleagues in the justice department to steal software from a private company and sell it to foreign governments to fund covert operations without congressional approval. 87 N.Y. 2d at 49. The writer further suggested that participants in the scheme murdered a journalist for investigating the story. Id. In so concluding, the Court of Appeals observed that readers expect an Op Ed to "contain considerable hyperbole, speculation, diversified forms of expression and opinion." Id. at 53. Further, the Court of Appeals looked to the Op Ed's content and observed that "the predominant tone of the article, which was rife with rumor, speculation and seemingly tenuous inferences, furnished clues to the reasonable reader that [the piece] was something less than serious, objective reportage." Id.

This analysis is not limited to Op Ed pieces. The Brian Court referenced several other notable cases in which an article's forum mattered:

> In Immuno [AG. v. Moor-Jankowski], for instance, the challenged communication was a letter to the editor of a professional journal—a medium that is typically regarded by the public as a vehicle for the expression of individual opinion rather than "'the rigorous and comprehensive presentation of factual matter.'" 77 N.Y.2d [235, 253 (1991) (quoting 145 A.D.2d 114, 129).] Similarly, in 600 W. 115th St. Corp. v. Von Gutfeld, [80 N.Y.2d 130, 143–44], the alleged defamatory remarks were made at a public hearing, where the listeners presumably expect to hear vigorous expressions of personal opinion. In the same vein, the disputed statements in Steinhilber v. Alphonse [68 N.Y.2d

> 283, 294 (1986),] were made by the defendant union official as part of a recorded telephone message that was calculated to punish a "scab" in the aftermath of an acrimonious labor conflict. In that context, where the "'audience may anticipate [the use of] epithets, fiery rhetoric or hyperbole,'" we opined that statements which might otherwise be viewed as assertions of fact may take on an entirely different character. Id. (quoting Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781, 784.)

87 N.Y.2d at 51–52.

Other courts applying New York defamation law agree. In Couloute v. Ryncarz, 11-cv-5986 (HB), 2012 WL 541089 (S.D.N.Y. Feb. 17, 2012), the Southern District of New York held that a plaintiff could not sue a jilted ex-lover for stating on an internet forum that the plaintiff "uses people," that he "rents or finances everything and owns nothing," and that he is "great at lying." Id., at *2. The Couloute Court noted that the website "liarscheatersrus.com is specifically intended to provide a forum for people to air their grievances about dishonest romantic partners" and that the reasonable reader would know that the comments are "emotionally charged rhetoric and the opinions of disappointed lovers." Id., at *6 (citations omitted). Similarly, the Second Circuit has held protected "conjecture and speculation" in a non-fiction book that implicated its subject in a murder. Levin v. McPhee, 119 F.3d 189, 197 (2d Cir. 1997).

In light of these cases, the Court concludes that Defendants' article is non-actionable opinion under New York law. Both the "tone of the article," see Brian, 87 N.Y. 2d at 53, and the article's "broader social context," Davis, 24 N.Y.3d at 270, lead the Court to this determination. As to the latter, the New York Post's Page Six traffics in celebrity gossip. Its reputation is well-known, and is captured succinctly in the lede to a December 2004 profile published in another prominent New York publication—Vanity Fair:

> Anonymous tips, political agendas, raging lawyers, outrageous sex stories—so goes life at "Page Six," the New York Post gossip column Rupert Murdoch ordered up in 1977. The Page has since broken news of Donald and Marla's affair, Woody Allen's relationship with his "stepdaughter," and Kirstie Alley's possum-nursing fetish. Listening to staffers, sources, and subjects, an alumnus chronicles the feuds, scoops, and characters that have made the column as powerful as the boldfaced names it covers.

Frank DiGiacomo, The Gossip Behind the Gossip, Vanity Fair, Dec. 2004. As such, Page Six is just the place that a reasonable reader would "anticipate [the use] of epithets, fiery rhetoric or hyperbole." See Sandals Resorts, 86 A.D.3d at 41–42; see also Brian, 87 N.Y.2d at 53 (reaching a similar conclusion about the comparatively austere New York Times Op Ed page).

The article's tone and content also support the Court's decision. As with the Op Ed at issue in Brian, the article is "rife with rumor, speculation and seemingly tenuous inferences," and thereby furnished clues to the reader that it is "something less than serious, objective reportage." 87 N.Y.2d at 53. Further, the article does state that Plaintiff "bailed on" and "was a no show" at the referenced Hope for Them charity event, and it describes Hope for Them as "his" foundation. But it also provides the sources of these allegations: the statements of an anonymous Hope for Them "insider," and Plaintiff's listing as a board member on Hope for Them's website.[1] Thus, "the accusations about [P]laintiff that [Defendants] recounted were identified in the article as

[1] By reciting the basis for their report, Defendants distinguish their article from the defamatory statements at issue in Davis v. Boeheim, 24 N.Y.3d 262 (N.Y. 2014). Davis concerned statements by Syracuse basketball coach James Boeheim, defending an associate head coach accused of sexual misconduct. Id. at 265. Boeheim stated that a university inquiry had cleared the suspect coach and suggested that the accusers lied in pursuit of financial gain. Id. at 266–67. The New York Court of Appeals held Boeheim's statements actionable because they "contained information about [the] allegations and the University's investigation, which a reader could understand was based on Boeheim's access to factual details unavailable to the public." Id. at 273.

mere 'claims' that had been made" by unidentified sources. Id. at 53. Although the article suggests that the authors found these allegations at least somewhat credible, it also set out the basis for that opinion, "leaving it to the readers to evaluate it for themselves." Id. at 53–54. Under New York law, this is enough to avoid defamation liability.

C. Plaintiff's claims for Infliction of Emotional Distress will also be dismissed.

A plaintiff may not plead negligent or intentional infliction of emotional distress as an end-run around the limitations of defamation liability. New York case law squarely addresses this matter. A plaintiff may not maintain an action for negligent infliction of emotional distress if "the facts alleged by plaintiff are, in essence, inseparable from the tort of defamation." Butler v. Delaware Ostego Corp., 203 A.D.2d 783, 785 (N.Y. App. Div. 1994). Similarly, "[i]t is well settled that a cause of action for intentional infliction of emotional distress should not be entertained where the conduct complained of falls well within the ambit of other traditional tort liability." Id. at 784–85 (internal quotation marks and emphasis omitted).

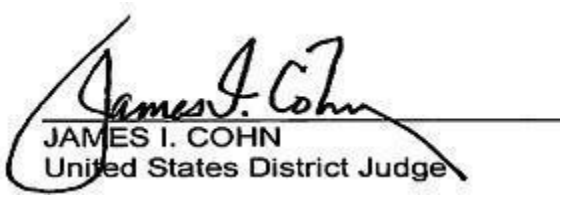
In response, Plaintiff cites to Florida law and argues that the Court should only dismiss his emotional distress claims if Defendants could thwart his claims for defamation. [DE 22 at 23.] New York law does not support this position and Plaintiff abandoned it at oral argument. Moreover, as detailed above, the Court does conclude that Plaintiff fails to state a valid claim for defamation. Accordingly, Plaintiff's claims for emotional distress shall also be dismissed.

IV. Conclusion

For the foregoing reasons, it is **ORDERED AND ADJUDGED** as follows:

1. Defendants' Motion to Dismiss [DE 8] is **GRANTED**.
2. Plaintiff's Complaint [DE 1-2] is **DISMISSED with prejudice**.
3. The Court will enter separate final judgment.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 4th day of March, 2015.



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