SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

SANDRA PETERSON,	:	
	:	
Plaintiff,	:	Index No. 51254/16
	:	
–against–	:	
MARY ELLEN MAUN,	:	
Defendant.	:	

DEFENDANT'S MEMORANDUM OF LAW
IN SUPPORT OF HER MOTION TO DISMISS THE COMPLAINT

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This Memorandum of Law is submitted by Defendant Mary Ellen Maun in support of her Motion, pursuant to CPLR 3211(a)(1) and (a)(7), to Dismiss the Complaint, as a matter of law, and on the documentary evidence.

PRELIMINARY STATEMENT

This is an action for defamation and intentional infliction of emotional distress. The action arises out of communications circulated among unit owners of a condominium in the ordinary course of a regular, democratically-held election of the condominium Board in the Spring of 2015.

Plaintiff is the former Board President who was defeated in the election.

Defendant is a unit owner in the condominium who opposed Plaintiff's election.

The action is concocted out of whole cloth based on emails circulated by Defendant to other unit owners, in the course of the Board election, successfully opposing Plaintiff's

candidacy. The allegedly defamatory emails should be understood for what they were: political communications and commentary by Defendant of a kind that are staples of the normal – and accepted – give-and-take of a democratically-held election.

We will not speculate on Plaintiff's motivation in bringing this action against a political opponent. In any event, we need not speculate because – as is established in this Memorandum of Law, supported by the accompanying Affidavit – there is a veritable menu of grounds, apart from retaliatory motive,[1] for putting an end to this baseless and abusive action by dismissing it on the pleadings, as a matter of law, based on the fact that any allegedly defamatory statements either lack defamatory meaning, are constitutionally protected expressions of opinion, or, to the extent that they would be understood by the reasonable reader as assertions of fact, are conclusively proven true by the documentary evidence.

SUMMARY OF ARGUMENT

The documentary evidence, contained in board minutes and other official documents that are part of the Edgemont Condominium's official records, conclusively substantiate the truth of most of the statements contained in the five allegedly defamatory emails. To that extent, therefore, the First Cause of Action for defamation is ripe for dismissal, pursuant to CPLR 3211 (a) (1). (Point I)

Any statements remaining, after consideration of the documentary evidence, are either non-actionable, constitutionally-protected statements of opinion (Point II.A.) or they are

[1] In very similar circumstances, New York State has implemented a system for protecting the free speech of citizens who speak out on issues of concern, from retaliatory defamation and related actions, often referred to as SLAPP'S - i.e., "Strategic Lawsuits Against Public Participation." See New York Civil Rights Law §§70-a and 76-a. Although the remedies provided for by New York's anti-SLAPP statute are at the present time applicable only to retaliatory lawsuits in the course of proceedings involving "public permittees," Defendant urges this Court to recognize the parallel public interest presented by this case in protecting "open and robust" debate about candidates for all offices – public or, as here, private but semi-regulated entities such as the Edgemont Condominium. At this juncture in the action, the most apt recognition of these principles would be to grant this Motion to Dismiss the Complaint.

statements of fact that lack defamatory meaning. As to both categories of those statements as well, the Complaint fails to state a cause of action for defamation and is ripe for dismissal pursuant to CPLR 3211 (a) (7). (Point II.B.)

All of the allegedly defamatory emails sent by Defendant to unit owners are also protected by the qualified privileged applicable to communications among persons with a "common interest," such as the unit owners of a Condominium. The First Cause of Action is therefore also ripe for dismissal pursuant to CPLR 3211 (a) (7). (Point III)

The Second Cause of Action for Intentional Infliction of Emotional Distress meets none of the requirements of an IIED claim and is thus categorically and totally inapplicable to the facts of this case. (Point IV)

Finally, in considering the pervasive deficiencies of Plaintiff's Complaint, this Court should also be cognizant of the potential impact of unduly extending the pendency of a meritless defamation action such as this one. New York courts have for decades now recognized that the threatened abridgment of constitutional rights is best avoided by early dismissal of such claims, whenever appropriate. (Point V)

I.

"DOCUMENTARY EVIDENCE" CONCLUSIVELY ESTABLISHES THE TRUTH OR SUBSTANTIAL TRUTH OF ALL STATEMENTS OF FACT IN DEFENDANT'S EMAILS

Under CPLR 3211(a)(1), a party defendant may move for judgment dismissing one or more causes of action based upon "documentary evidence". While pleaded facts must ordinarily be taken as true and afforded all favorable inferences, "factual claims flatly contradicted by documentary evidence are not entitled to any such consideration." *Maas v. Cornell Univ.*, 94 N.Y.2d 87, 91, 699 N.Y.S.2d 716, 718 (1999).

Dismissal pursuant to CPLR 3211(a)(1) is warranted when the "documentary evidence definitively contradicts the plaintiff's factual allegations and conclusively disposes of the plaintiff's claim." *Berardino v. Ochlan*, 2 A.D.3d 556, 557, 770 N.Y.S.2d 75, 76 (2d Dept. 2003). See also *Reno v. Westchester*, 289 A.D.2d 216, 734 N.Y.S.2d 464 (2d Dept. 2001); *Chrien v. Horn*, 278 A.D.2d 178, 718 N.Y.S.2d 334 (1st Dept. 2000), appeal denied, 96 N.Y.2d 778, 725 N.Y.S.2d 633 (2001); *Borger v. Weiss*, 2016 N.Y. Misc. LEXIS 903; 2016 NY Slip Op 30463(U) (N.Y. Co. 2016).

The term "documentary evidence" has broad application and includes, inter alia, "[m]inutes of directors' meetings, letters, demands, receipts, emails, releases, contracts, leases, judicial records, mortgages and deeds, as well as public records such as court judgments." Weinstein Korn & Miller, New York Civil Practice § 3211.06.

It is well established that board minutes may constitute documentary evidence. *See Buttitta v. Greenwich House Coop. Apts., Inc.,* 11 A.D.3d 250, 250 (1st Dept. 2004) ("The documentary evidence, consisting of the minutes of shareholder and board meetings, conclusively establishes . . ."); *Borger v. Weiss*, 2016 N.Y. Misc. LEXIS 903; 2016 NY Slip Op 30463(U), at 3-4 ("The court finds that Weiss is entitled to dismissal of the complaint on the ground that the documentary evidence he has submitted, which consist of board minutes . . .").

In *Buttitta*, *supra*, plaintiffs, shareholders in a residential cooperative ("co-op"), challenged the co-op bylaw requiring them to first offer their shares to the co-op at below market value. Reversing the trial court's denial of defendants' motion to dismiss based upon §3211(a)(1), the appellate court held "the documentary evidence, consisting of the minutes of shareholder and board meetings, conclusively establishes that plaintiffs . . . ratified the bylaw in issue by their votes at meetings where the cooperative's right of redemption was either exercised

or waived with the specific proviso that the waiver was without prejudice, and are therefore precluded from challenging it." 11 A.D.3d at 251.

In *Borger v. Weiss*, the plaintiff member and director of the Applebaum Foundation, Inc. (the "Foundation") commenced a suit against two fellow officers and directors to remove them from the board, alleging, *inter alia,* that Weiss had violated the Foundation's bylaws or his fiduciary duties by making contributions without consent of the board members. The court granted Weiss's motion to dismiss under CPLR §3211(a)(1) on the ground that the documentary evidence, consisting inter alia of board minutes "conclusively establishes that plaintiff ratified, confirmed and approved the contributions made by Weiss on behalf of the Foundation which she is now attempting to challenge."

In *Berardino*, the plaintiff brought claims for fraud, negligent misrepresentation and violation of various statutes following his exchange of an existing life insurance policy for one with a lower cash value. The defendant's motion to dismiss all claims was granted on the basis of documentary evidence consisting of a policy comparison form and various policy illustrations that, when analyzed in relation to the plaintiff's factual claims, conclusively established that the reduction in the cash value of the policy had been disclosed to the plaintiff. *Id*., 2 A.D.3d at 557, 770 N.Y.S.2d at 76.

The plaintiff in *Chrien* brought suit against his former wife regarding certain marital assets. The trial court granted the defendant's motion to dismiss on the basis of documentary evidence consisting of the stipulation entered into in the parties' divorce action and certain letters signed by the plaintiff. The stipulation had provided, *inter alia*, for the transfer of certain assets to the defendant and the letters established that the plaintiff had had access to his client files at all pertinent times. The appellate court affirmed the dismissal and awarded the defendant $5,000 as

her reasonable attorneys' fees incurred in responding to the appeal. Id., 278 A.D.2d at 178, 718 N.Y.S.2d at 334.

In *Reno*, the Second Department affirmed the dismissal of plaintiffs' complaint for intentional infliction of emotional distress and intentional tort on the ground that plaintiffs' claim failed to state a cause of action. In affirming the dismissal of plaintiffs' claim for negligence the court relied on a transcript of testimony given by one of the plaintiffs, in a separate notice of claim proceeding pursuant to General Municipal Law § 50-h, that established he had already received Workers' Compensation benefits for his injuries. *Id*., 289 A.D.2d at 217, 734 N.Y.S.2d at 464.

Here, as reviewed in the accompanying Affidavit (¶¶ 13-31, based on Exhibits A-E), the undisputed documentary evidence consists of the official minutes of board of directors meetings; official minutes of unit owners meetings; written communications regarding Condominium business, to and from Board members and to and from management of the Condominium; official information posted on the Condominium's Website; official reports, bylaws, etc. of the Board and/or the Condominium; letters from and/or to the attorney for the Condominium; official report of court decision in which the Condominium was a party; and photographs of the Condominium property. These are all examples of the kinds of documents that the cases recognize as documentary evidence that may be considered on a motion to dismiss under CPLR 3211 (a) (1).

When examined, the documentary evidence adduced on this motion, and available to this Court to examine for itself in Exhibits A-E, annexed to the accompanying Affidavit,

conclusively establishes the truth (or the "substantial truth"[2]) of the factual statements in the five emails at issue in this action.

II.

UPON EXAMINATION, ALL REMAINING ALLEGATIONS OF DEFAMATION INVOLVE CONSTITUTIONALLY-PROTECTED EXPRESSIONS OF OPINION OR STATEMENTS OF FACT THAT LACK DEFAMATORY MEANING

A. Constitutional Protection for Statements of Opinion

Under Article I, Section 8 of the New York State Constitution, as well as under the First Amendment, statements of opinion (as opposed to statements of fact) are absolutely protected from a claim of defamation. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 256, 566 N.Y.S.2d 918, *cert. denied*, 500 U.S. 954 (1991).

Indeed, as the Court of Appeals has made clear, for two and a half decades now, the New York State Constitution is if anything even more protective of speech than the First Amendment:

> [T]his Court . . . under our own State Constitution . . . has embraced a test for determining what constitutes a nonactionable statement of opinion that is more flexible and is decidedly more protective of the cherished constitutional guarantee of free speech.

Gross v. New York Times Company, 82 N.Y.2d 146, 152, 603 N.Y.S.2d 813, 816 (1993) (*citing Immuno*, 77 N.Y.2d at 256).

[2] In evaluating truth or falsity for purposes of a claim of defamation the issue is not whether the publication was precisely accurate in every minor particular. As the Supreme Court has instructed: "The common law of libel takes but one approach to the question of falsity …. It overlooks minor inaccuracies and concentrates upon substantial truth," *Masson v. New Yorker Magazine, Inc.,* 501 U.S. 496, 517 (1991). To establish substantial falsity, then, a plaintiff's burden is more than simply proving the literal falsity of a publication. The falsity must go to what has been described as the "gist" or "sting" of the defamation. The test is whether the alleged defamation, as published, "would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Masson, supra*, 501 U.S. at 517. *See Fleckenstein v. Freedman*, 266 N.Y. 19, 23 (1934) ("When the truth is so near to the facts as published that fine and shaded distinctions must be drawn and words pressed out of their ordinary usage to sustain a charge of libel, no legal harm has been done.") And, finally, omission of immaterial details, not significant enough to substantially alter the conclusions to be reasonably "drawn from the episodes reported," is not actionable, as this is "largely a matter of editorial judgment in which the courts and juries have no proper function." Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 383 (1977).

Whether a potentially actionable statement is one of fact or opinion is a question of law to be decided by the Court. *Rinaldi v. Holt, Rinehart & Winston*, 42 N.Y.2d 369, 381, 397 N.Y.S.2d 943, 950 (1977). To aid courts in the "difficult task" of separating constitutionally protected expression of opinion from potentially actionable statements of fact, the Court of Appeals has set forth the following factors to be considered:

> (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 as to signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact.

Mann v. Abel, 10 N.Y.3d 271, 276, 856 N.Y.S.2d 31, 33 (2008) (*quoting Brian v Richardson*, 87 N.Y.2d 46, 51, 637 N.Y.S.2d 347 (1995), *quoting Gross v New York Times Co*., 82 N.Y.2d 146, 153, 603 N.Y.S.2d 813 (1993), *quoting Steinhilber v. Alphonse*, 68 N.Y.2d 283, 292, 508 N.Y.S.2d 901, 905 (1986).

In conducting the required analysis the Court of Appeals has repeatedly emphasized the importance of first "looking at the content of the whole communication, its tone and apparent purpose." *Immuno*, 77 N.Y.2d at 254, N.Y.S.2d at 917; *Brian,* 87 N.Y.2d at 51, 637 N.Y.S.2d at 350-51; *Mann*, 10 N.Y.3d at 276, 856 N.Y.S.2d at 33. Consideration of the "context" within which the allegedly defamatory comments were published is critical, and the Court of Appeals has repeatedly directed courts to begin, rather than end, the analysis with context:

> [S]tatements must first be viewed in their context in order for courts to determine whether a reasonable person would view them as expressing or implying *any* facts.

Immuno, 77 N.Y.2d at 254, N.Y.S.2d at 917 (emphasis in original); *Mann*, 10 N.Y.3d at 276, 856 N.Y.S.2d at 33 (courts must "look to the over-all context in which the assertions were made and determine on that basis whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff" (internal citations and quotations

omitted); *Brian*, 87 N.Y.2d at 51, 637 N.Y.S.2d at 351 ("Rather than sifting through a communication for the purpose of isolating and identifying assertions of fact, the court should look to the over-all context in which the assertions were made and determine on that basis whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff").

The difference, as the Court of Appeals cautions, is more than theoretical:

> Isolating challenged speech and first extracting its express and implied factual statements, without knowing the full context in which they were uttered, indeed may result in identifying many more implied factual assertions than would a reasonable person encountering that expression in context.

Immuno AG. V. Moor-Jankowski, 77 N.Y.2d at 255, 566 N.Y.S.2d at 917; *accord*, *Mann v. Abel*, 10 N.Y.3d at 276, 856 N.Y.S.2d at 33 (Court of Appeals has "declined to adopt an analysis that would require courts first to search the article for particular factual statements and then to hold such statements actionable unless couched in figurative or hyperbolic language"). Such "hypertechnical parsing of a possible 'fact' from its plain context of 'opinion' loses sight of the objective of the entire exercise, which is to assure that . . . the cherished constitutional guarantee of free speech is preserved." *Immuno*, 77 N.Y.2d at 256, 566 N.Y.S.2d at 918.

In addition, under the long-settled common law of New York, a statement of "pure opinion" is not actionable. *Steinhilber*, 68 at N.Y.2d at 289, 508 N.Y.S.2d at 903.

> A "pure opinion" is a statement of opinion which is accompanied by a recitation of the facts upon which it is based. An opinion not accompanied by such a factual recitation may, nevertheless, be "pure opinion" if it does not imply that it is based upon undisclosed facts.

Id.

Plaintiff's failure to quote in the Complaint from any of the allegedly defamatory emails in their entirety makes it impossible to begin by "by looking at the content of the whole

communication."[3] That said, both "the tone and apparent purpose" of each of Defendant's emails – as well as the broader social context surrounding them – clearly "signal to readers that what is being is read is likely to be opinion, not fact."

The tone and purpose of the emails is apparent, and indeed is expressly acknowledged by Plaintiff. That is, Plaintiff concedes that the emails were published by Defendant "with the specific intent … to prevent the plaintiff from being re-elected to the Edgemont Board of Managers." (Cplt. ¶20.[4]) Thus, to support her arguments against Peterson's candidacy, Defendant provided examples of what she argued were "questionable" policies or uses of condominium resources and urged recipients to view and to judge for themselves, which "clearly signals the reader that the piece is likely to be opinion, not fact." *Mann*, 10 N.Y.3d at 277, 856 N.Y.S.2d at 34.

The broader social context, of course, is the Board election. Elections – whether for political office or for seats on cooperative or condominium boards – are often if not always hotbeds of highly charged, highly critical, and highly opinionated commentary and advocacy. Board elections are arguably even more contentious than political campaigns, as the results have a direct impact on what often represents the biggest investment any shareholder or unit owner will make in her or his lifetime. Again, the recipients of Defendant's emails would naturally expect them to contain highly opinionated commentary. And in *Rosenthal v. Roberts*, 10 Misc. 3d 1057A, 1057A; 809 N.Y.S.2d 484, 484 (N.Y. Co. 2005), the Supreme Court recognized that

[3] To assist the Court, in the accompanying Affidavit the full text of each of the five allegedly defamatory emails is reproduced as the first document in each of the Exhibits.

[4] To be complete, Plaintiff also identifies another intent in ¶20, namely, "to damage the plaintiff's good name and reputation," although that is present in any libel complaint (unless the plaintiff is asserting that the alleged defamation was negligent or otherwise unintentional) and it adds nothing to an inquiry into whether readers will believe that they are encountering fact or opinion.

(“ [t]he mere fact that the statements are not flattering to plaintiff does not make them actionable. Under such a standard most campaign literature would be subject to defamation liability.”)

Moreover, and as the Court of Appeals concluded in *Mann v. Abel*, in the light of the overall tone and apparent purpose of the emails, and viewing their content as a whole, it is simply irrelevant even if some kind of “hyper-technical” parsing could arguably identify some isolated instance of a false factual assertion:

> Although one could sift through the article and argue that false factual assertions were made by the author, viewing the content of the article as a whole, as we must, we conclude that the article constituted an expression of protected opinion.

Mann, 10 N.Y.3d at 277, 856 N.Y.S.2d at 886.

Ferguson v. Sherman Square Realty Corp., 30 A.D.3d 288, 288-289, 817 N.Y.S.2d 272, 273 (1st Dept. 2006). is instructive in this regard. In *Ferguson*, the First Department reversed a trial court’s refusal to dismiss a complaint brought by the former president of a cooperative apartment and his girlfriend against other shareholders who had circulated flyers that “essentially sought to remove the co-op’s board of directors and replace it with a board willing to conduct an independent investigation of alleged mismanagement and financial improprieties.” 30 A.D.3d at 288-289, 817 N.Y.S.2d at 273. Notwithstanding charges arguably far more serious than those leveled in this case, the First Department concluded that the “offending statements” were either “not susceptible to a defamatory meaning or are opinions about plaintiffs’ actions accompanied by a recitation of the facts upon which they were based.” *Id.*

Similarly, in *Simms v. Marquez*, also involving a dispute among owners and board members in a condominium, the trial court dismissed a complaint in which the defendant was alleged to have published the following statements about plaintiff:

> (1) Simms removed, without authorization, a very large quantity of replacement bricks (Belgian stone pavers) from the Condominium, and the stones are now lining the driveway of his house on Long Island; (2) Simms has a ceiling fan in his apartment that

> was purchased together with the lobby fans; (3) Simms circulated a groundless document filled with negative assessments about the Condominium that are at odds with the Condominium's auditors, managing agent, and the rest of the board; (4) Simms now resorts to cries of fraud; (5) Simms attempts to dictate how and when other board members should resign; (6) Simms could have, as president, withheld final payment to the building's agent; (7) Simms cost the building money in the form of increased audit fees as the auditors felt that they had to investigate all of his claims; (8) Simms attempted to cause the Condominium auditors to issue a qualified opinion which [*3] could jeopardize the Condominium's ability to refinance the mortgage; (9) Simms has a habit of running for the board, being president, being removed, resigning, running again, complaining, becoming president again, being removed, etc.; (10) Simms is primarily responsible for many building projects which have not worked, such as eliminating the double doors in the lobby and installing the revolving doors that cause staff to freeze during wintertime; (11) Simms decided to line the elevator floors with granite, so he tore off the old floor in one elevator and put stone in and then realized that the added weight made the elevator inoperative; (12) Simms installed equipment that caused several apartments to have dirty water; (13) Simms has a doomsday agenda that would lead to more assessments for capital projects that are unnecessary and may not even work, but which he would like to manage, as a substitute career; and (14) Simms interfered with Marquez, and threatened him several times.

2008 N.Y. Misc. LEXIS 9489 *2 (N.Y. Co. May 21, 2008).[5] Notwithstanding the severity of many of these accusations, the court dismissed all claims.

Also in the context of a dispute among common owners of residential property, a court dismissed a defamation claim brought by a board against one of the shareholders (a 90-year-old woman) based on a flyer that alleged the following:

> I should like to apprize [sic] you of the fact that I have had to place a police complaint against Board Member Greg Cooper. ****
>
> This complaint was necessary since I have grown increasingly frightened by his harassing and menacing postures directed at me several times. We live in the same building and our encounters are unavoidable and frightening. His method of harassment is to elbow me, something that can easily throw me off balance. I am now 90 years old and use a cane while walking. He has even spread his arms across a railing to keep me from holding on, or meting in a narrow passageway, pushed me up against the wall always followed by jeers or nasty remarks.

Cooper v. Lipschutz, N.Y.L.J., March 23, 2004, p. 18, col. 3 (N.Y. Co. Civil Court 2004).[6]

B. Lack of Defamatory Meaning

[5] For the convenience of the Court, a copy of this opinion is attached in the Appendix to this Memorandum of Law.

[6] For the convenience of the Court, a copy of this opinion is attached in the Appendix to this Memorandum of Law.

A defamatory statement is one which tends to expose a person to hatred, contempt or aversion or to induce an evil or unsavory opinion of her in the minds of a substantial number of people in the community. The essence of the tort is damage to reputation. *Mencher v. Chesley*, 297 N.Y. 94 (1947).

It is for the court to make the threshold determination whether a statement is capable of defaming the plaintiff. This decision is made by construing the words in their accepted ordinary meaning and by taking into consideration the average reader. *James v. Gannett Co.*, 40 N.Y.2d 415, 386 N.Y.S.2d 871 (1976) ("The court must decide whether there is a reasonable basis for drawing the defamatory conclusion."); *Tracy v. Newsday, Inc.*, 5 N.Y.2d 134, 182 N.Y.S.2d 1 (1959); *Matherson v. Marchello*, 100 A.D.2d 233, 473 N.Y.S.2d 998 (2d Dept. 1984); *Alfajr Printing & Pub. Co. v. Zuckerman*, 230 A.D.2d 879, 646 N.Y.S.2d 858 (2d Dept. 1996); *Mondello v. Newsday, Inc.*, 774 N.Y.S.2d 794 (2d Dept. 2004).

As with construing what the reasonable reader will understand as opinion, in order to assess defamatory meaning it is crucial that the words be analyzed in their context and that the court not pick out and isolate particular phrases but that it will consider the publication as a whole.

> The construction which it behooves a court of justice to put on a publication which is alleged to be libellous is to be derived as well from the expressions used as from the whole scope and apparent object of the writer.

James, 40 N.Y.2d at 419, 386 N.Y.S.2d at 875 (internal quotations and citations omitted).

Applying these principles, this Court can readily determine, as a matter of law, that among the allegedly defamatory communications here, summarized in the Complaint ¶ SIXTEENTH, are largely statements that on their face, and in context, clearly lack defamatory meaning. For example, "restriction of owner communication with the Board" is self-evidently a matter of debatable policy and not an accusation that would "tend[ ]to expose [Plaintiff] to

hatred, contempt or aversion or to induce an evil or unsavory opinion of her in the minds of a substantial number of people in the community." A similar conclusion is evident with respect to "insistence on amateur self-direction of daily property management" as well as to "engagement in 'frivolous' and 'baseless' litigation (as per the Court)" – at least with respect to a layperson.

In sum, to the extent Defendant's emails are properly understood as constitutionally-protected statements of opinion, or to the extent they are factual statements but lack defamatory meaning, Plaintiff's first cause of action must be dismissed for failure to state a cause of action, pursuant to CPLR 3211(a)(7), on their face and as a matter of law.

III.

ALL OF THE ALLEGEDLY DEFAMATORY COMMUNICATIONS AMONG UNIT OWNERS ARE ALSO PROTECTED UNDER THE "COMMON INTEREST" PRIVILEGE

Even assuming, *arguendo*, that Plaintiff were able to identify a statement that (1) possessed defamatory meaning, (2) would be understood by the reasonable reader to have been a factual assertion that (3) was not already proven true, or substantially true, by the documentary evidence, this Motion to Dismiss should be granted under the qualified privilege that applies to communications on matters of "common interest." *Liberman v. Gelstein*, 80 N.Y.2d 429, 439, 590 N.Y.S.2d 857, 863 (1992) ("One such conditional, or qualified, privilege extends to a "communication made by one person to another upon a subject in which both have an interest").

A condominium owner's email to other owners falls easily within this qualified privilege. *Ferguson*, *supra*, 30 A.D.3d at 288, 817 N.Y.S.2d at 273 (1st Dept. 2006) (common interest privilege applied to flyers circulated among shareholders in a cooperative apartment building); *Pusch v. Pullman*, 11 Misc. 3d 1074(A); 816 N.Y.S.2d 700 (N.Y. Co. 2003) (privilege applied to documents circulated among shareholders); *Simms v. Marquez*, N.Y. Misc. LEXIS 9489, 2008

N.Y. Slip Op. 31689(U) (N. Y. Co. 2008) (privilege applied to a series of documents circulated to unit owners in a condominium).

The privilege can only be defeated if a plaintiff demonstrates that the defendant spoke with either "common law" or "constitutional malice, that is, either with "ill will" or with actual knowledge of the falsity of her claims, or with a high degree of awareness of their probable falsity. *Liberman*, 80 N.Y.2d at 437-38, N.Y.S.2d 857 at 862-63. Mere conclusory allegations of malice are insufficient to sustain the plaintiff's burden of overcoming the privilege, once it has been asserted. *Ferguson*, 30 A.D.2d at 288, 817 N.Y.S.2d at 273 (reversing trial court and granting defendants' motion to dismiss); *M.V.B. Collision Inc. v. Kirchner*, 2012 N.Y. Misc. LEXIS 2311; 2012 N.Y. Slip Op. 31284(U) (Nassau Co. 2012)[7] (applying qualified privilege and granting defendant's motion to dismiss).

Moreover, in order to defeat a qualified common interest privilege, the plaintiff must also establish that the defendant was motivated *solely* by malice:

> If the defendant's statements were made to further the interest protected by the privilege, it matters not that defendant also despised plaintiff. Thus, a triable issue is raised only if a jury could reasonably conclude that "malice was the one and only cause for the publication."

80 N.Y.2d at 439, N.Y.S.2d 857 at 862-63.

Here, Plaintiff has already herself pleaded, and has thus acknowledged, a motive other than ill will:

> The contents of the above emails were published by the defendant with the specific intent to damage the plaintiff's good name and reputation in the community and to prevent the plaintiff from being re-elected to the Edgemont Board of Managers.

Cplt. ¶ 20.

[7] For the convenience of the Court, a copy of this opinion is attached in the Appendix to this Memorandum of Law.

Accordingly, Plaintiff's first cause of action must also be dismissed for failure to sufficiently plead "malice" and thus for failure to state a cause of action with respect to "privileged communications," pursuant to CPLR 3211(a)(7).

IV

THE SECOND CAUSE OF ACTION, FOR "THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS," IS INSUFFICIENT ON THE FACE OF THE COMPLAINT AND MUST BE DISMISSED AS A MATTER OF LAW

On the face of the pleading, the one remaining claim, for "the intentional infliction of emotional distress" (sic) (Second Cause of Action), has no merit as a matter of law and must also be dismissed.

The Restatement (Second) of Torts provides the fundamental definition of the tort of intentional infliction of emotional distress, a definition which has been adopted by the New York Court of Appeals: "One who by extreme or outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." *Id.*, §46 (1997).

In the leading New York case, *Fischer v. Maloney*, 43 N.Y. 2d 553 (1978), the Court of Appeals approved and embraced the stringent requirements set out in the Restatement regarding intentional infliction of emotional distress. Indeed, in its opinion the *Fischer* Court consistently refers to the tort as one for the infliction of "severe" or "extreme" distress, holding that "[A] n action may lie for intentional infliction of severe emotional distress 'for conduct exceeding all bounds usually tolerated by decent society,'" *citing* Prosser, Torts [4th ed], § 12, p 56.

The Court of Appeals in *Fischer* further elaborated on the requisite severity of the conduct encompassed by the intentional infliction tort, citing and quoting from the classic formulation in Comment d of §46 (1) of the Restatement: "Liability has been found only where

the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."

This power of the "outrage" requirement is to be contrasted with what Comment d of the Restatement characterizes as clearly not actionable as intentional infliction, namely "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." (Rest. 2d Torts, § 46, Comment d.)

Finally,"[t]he emotional distress must in fact exist, and it must be severe." (Prosser, Law of Torts, *supra*, p. 51; Rest.2d Torts, *supra*, § 46, Comment j.)

Notably, the underlying facts of the *Fischer* case – in which the Court of Appeals reversed the Appellate Division and dismissed the claim of intentional infliction of emotional distress as a matter of law – are not dissimilar to those of this case, as set forth in the Second Cause of Action. Similar to here, the *Fischer* case arose in the context of a dispute between tenant-shareholders and the board of directors of a residential co-operative corporation. The tenant-shareholders sought to obtain "financial, managerial and operational information with respect to the management and operations of the co-operative." As summarized by the Court of Appeals, "[f]riction ensued and an action in defamation was brought in the name of the co-operative against plaintiff tenant charging that in the course of circulating the petition he had falsely accused the vice-president of the co-operative of having had her apartment painted at a cost of $4,000 to the co-operative." *Id*. at 556.[8]

The Court in *Fischer* reasoned as follows: "We do not undertake here to delineate the boundaries of this emerging ground of tort liability. It suffices for present purposes to note that

[8] The *Fischer* Court reported that the underlying defamation action had been dismissed "for failure to state a cause of action." Id.

the conduct charged to defendants in the present case does not give rise to liability under this doctrine by any proper definition. It is only claimed that they commenced the defamation action deliberately to malign, harass and intimidate plaintiff, thereby intentionally to inflict great mental and emotional distress. Whatever may be alleged as to motivation, the institution of the defamation action in the circumstances disclosed in this record does not constitute conduct within the rule described by Dean Prosser and the Restatement." *Id*. at 557.

Notably, in *Fischer*, the Court of Appeals also "questioned whether the doctrine of liability for intentional infliction of extreme emotional distress should be applicable where the conduct complained of falls well within the ambit of other traditional tort liability." Here, under that rule, there can be no question that the conduct at issue – the publication and circulation of negative comments about a living person to third parties – "falls well within the ambit" of the tort of defamation.

Indeed, in this case, it is evident on the face of the complaint that the very same conduct, alleged in the First Cause of Action to state a claim for defamation, is also the conduct that, in the Second Cause of Action, is claimed to amount to intentional infliction of emotional distress. Thus, paragraph TWENTY-EIGHTH simply "repeats, reiterates and realleges" the facts alleged in the first cause of action; paragraph TWENTY-NINTH solely references "the acts described above;" paragraph THIRTIETH specifically references only "the false, defamatory and misleading statements published by the defendant;" and finally, paragraph THIRTY-FIRST once again references only the damage said to have been caused by "defendant's statements," without in any way adding any new facts (beyond the "defamations" alleged in the First Cause of Action) or otherwise describing any separate act(s) by Defendant that could possibly rise to the level of intentional infliction of emotional distress.

Cases subsequent to the seminal *Fischer* case have time and again upheld – and indeed extended – its stringent requirements. And, following *Fischer*, New York courts "have consistently held that a plaintiff may not maintain a separate claim for intentional infliction of emotional distress grounded in the same facts as a libel claim." See *Restis v. Am. Coalition against Nuclear Iran, Inc.*, 2014 U.S. DIST [Dissed] LEXIS 139402, at*56 (S.D.N.Y., September 30, 2014); see also *Trachtenberg v. FailedMessiah.com*, 2014 U.S. DIST. LEXIS 121275, at*14 (E.D.N.Y., August 29, 2014); and *Abakporro v. Sahara Reporters*, 2011 U.S. DIST LEXIS 109056, at*18 (E.D.N.Y., Sept 26, 2011) (collecting cases).

To the same effect, where a libel claim fails, so too must a related claim for intentional infliction of emotional distress. *Diaz v. NBC Universal, Inc.*, 536 F. Supp. 2d 337 (S.D.N.Y. 2008), affd, 337 F. app'x 94 (2 Cir. 2009).

Moreover, the communications must result not only in emotional distress, but the emotional distress must itself be "severe." See *Richard L. v. Armon*, 144 A.D. 2d 1, 536 N.Y.S 2d 1014 (2d Dept. 1989) ("This element must be established to make out liability and does not go merely to damages … In order to give rise to liability, the distress inflicted must be 'so severe that no reasonable man could be expected to endure it.'" Id. at 4 (quoting Restatement §46, Comment J). On the face of the Second Cause of Action, it is simply impossible to conceive of how Plaintiff could suffer such severe distress in the course of running for election to a condominium board and to having her Condominium-related policies and activities questioned or criticized.

In addition, the infliction of such extraordinarily severe distress must be "intentional" or "reckless," in the sense that it was "made with conscious disregard of a high degree of probability that severe emotional distress would result."

Moreover, the conduct must lack any reasonable justification. *Martin v. Citibank*, N.A, 762 F. 2d 212, 220 (2d Cir. 1985). In this case, Plaintiff's own pleadings once again foreclose any claim of unjustifiable infliction of emotional distress. Thus, Plaintiff candidly acknowledges the obvious – i.e., that just as with regard to the defamation claim of the First Cause of Action, one of Defendant's motives in circulating the emails at issue is acknowledged in the Complaint to have been to influence the outcome of the Board election.[9] Such an admitted freestanding justification – separate and apart from any alleged intent to inflict emotional distress – clearly takes this case out of the ambit of actionable IIED.

Assessed in light of the above multiple, stringent criteria, it is obvious that, on the face of the Complaint, this case has absolutely nothing to do with any of the requisite elements of an intentional infliction of emotional distress claim.

Thus, here, an action whose subject matter is limited to emails sent in the ordinary course of a democratically-held Condominium Board election, from one owner of a unit in the condominium to other owners, discussing essentially mundane governance and condominium business issues of a kind typically presented and debated in that context, and in which the condominium owners have a common interest – even if those emails are highly critical of, or perhaps even upsetting to, the Plaintiff – but by the Complaint's own terms lacking any singular motive to inflict distress and lacking any other extreme or outrageous characteristics, intentional or reckless motives or severe and damaging consequences as required above – quite simply cannot be sustained as a matter of law.

V.

[9] See Complaint, paragraph TWENTIETH: the allegedly defamatory emails "were published by the defendant with the specific intent to … prevent the plaintiff from being re-elected to the Edgemont Board of Managers."

IN DEFAMATION ACTIONS, A DISPOSITIVE MOTION SHOULD BE GRANTED, WHERE APPROPRIATE, AT THE EARLIEST STAGE IN ORDER TO AVOID CHILLING THE EXERCISE OF CONSTITUTIONAL RIGHTS

Finally, New York courts have recognized the particular importance of the early resolution of defamation cases in order to protect constitutional rights. Citing the threats posed by unduly extended defamation litigation to the exercise of First Amendment rights, the First Department has eloquently reasoned that:

> "To unnecessarily delay the disposition of a libel action is not only to countenance waste and inefficiency but to enhance the value of such actions as instruments of harassment and coercion inimical to the exercise of First Amendment rights."

Immuno AG v. Moor-Jankowski, 145 A.D.2d 114, 537 N.Y.S.2d 129, 137 (1st Dept. 1989) (internal citation omitted)

The Court of Appeals has also strongly supported early disposition of defamation actions because of "[t]he chilling effect of protracted litigation." Immuno *AG v. Moor-Jankowski*, 77 N.Y.2d 235, 256, 566 N.Y.S.2d 918, cert. denied, 500 U.S. 954 (1991), and its recognition that "[t]he threat of being put to the defense of a lawsuit … may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself." *Karaduman v. Newsday*, Inc., 51 N.Y.2d 531, 545, 435 N.Y.S.2d 556, 563 (1980) (citation omitted). See also *Rinaldi v Holt, Rinehart & Winston*, 42 N.Y.2d 369, 384-85 (1977) "[in] areas of doubt and conflicting considerations, it is thought better to err on the side of free speech."

In many of these cases, early disposition of constitutionally-sensitive defamation actions has come at the summary judgment stage. But many of those same goals and considerations are applicable on a CPLR Rule 3211 motion to dismiss, particularly one based not merely on the pleadings but on undisputed documentary evidence under 3211(a)(1).

The leading commentators on the federal rules have noted, for example, that "[w]hen the claim alleged is a traditionally disfavored cause of action, such as … libel, or slander, the courts tend to construe by a somewhat stricter standard and are more inclined to grant a Rule 12(b)(6) motion to dismiss." 5B Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure 2d §1357. See also *Ramsey v. Fox News Network, L.L.C.*, 351 F.2d 1145, 1153 (D. Colo. 2005) (granting motion to dismiss in reliance, inter alia, on underlying state law recognition "that the threat of protracted litigation in defamation cases could have a chilling effect upon constitutionally protected rights of free speech."

Judge Wilkinson of the Fourth Circuit U.S. Court of Appeals has addressed head on the constitutional importance of early disposition of a libel action, to protect freedom of expression, even at the motion to dismiss stage:

> "It makes little sense to acknowledge the special sensitivity of speech to defamation actions and then to say that speech interests matter little or not at all because of the procedural posture of the action. While a heightened pleading standard in defamation cases may be inappropriate ***, there is no reason why an action of this kind cannot frequently be resolved on a motion to dismiss. The critical part of the record – the speech itself – is available prior to any discovery. Whether the statements are defamatory as a matter of law will therefore be ripe for decision

Hatfill v. The New York Times Company, 427 F.3d 253 (4th Cir. 2005) (emphasis supplied) dissenting to the denial of rehearing en banc).

In any event, whether or not such special considerations are always appropriate at the motion to dismiss stage, under the unique circumstances presented here, where the documentary evidence definitively resolves a dispositive defense, and where the pleadings are on their face – and on multiple grounds – insufficient as a matter of law, it requires no special treatment, and is thus most appropriate, for the Court to evaluate this motion with the avoidable threat to free expression of protracted litigation in mind.

CONCLUSION

For all of the foregoing reasons, Defendant's Motion to Dismiss the Complaint should be granted in its entirety.

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