SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

ERIC W. PAYNE,	:	
Plaintiff,	:	
v.	:	**2012 CA 006163 B**
	:	**Judge Cordero**
THE DISTRICT OF COLUMBIA, *et al.*,	:	**Next Event: Initial Sched. Conf.**
	:	**Date: March 8, 2013, 9:30 a.m.**
Defendants.	:	
	:	

REPLY TO OPPOSITION TO SPECIAL MOTION TO DISMISS PURSUANT TO D.C. CODE § 15-5502(a) OR, IN THE ALTERNATIVE, MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)

Defendants' motion to dismiss demonstrated that plaintiff has failed to state a claim on which relief can be granted and that he cannot show any likelihood of success on the merits of his claims. Rather than provide cogent arguments to the contrary, plaintiff expects the Court to assume the truth of his conclusory assertions. Plaintiff's approach, however, is legally infirm and not sufficient to defeat defendants' motion. When reviewed under the proper legal standards, plaintiff's rickety claims against the District of Columbia and Dr. Natwar Gandhi collapse.

I. THE D.C. ANTI-SLAPP ACT APPLIES TO PLAINTIFF'S CLAIMS WHICH RELATE TO DR. GANDHI'S REMARKS ABOUT A MATTER OF PUBLIC INTEREST.

In his opposition, plaintiff ignores the legal test for applicability of the D.C. Anti-SLAPP Act ("the Act"), claiming instead that his suit is exempt because it is against a government official. Plaintiff is wrong. In fact, the Act applies whenever any defendant is sued for "acts in furtherance of the right of advocacy on issues of public interest." *See* D.C. Code § 16-5502(a). Thus, because plaintiff's complaint is based on Dr. Gandhi's

comments on a matter of public interest, the Act squarely applies. *Id.* The Act makes no distinction between government officials (high-ranking or otherwise) and defendants generally. *See* D.C. Code § 16-5501, *et seq.* Indeed, although the statute explicitly defines "government entity" (D.C. Code § 16-5501(4)), and explicitly includes certain exceptions (D.C. Code § 16-5505), it *does not include* an exception for defendants who are government officials.[1]

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language he has used." *Tippett v. Daly*, 10 A.3d 1123, 1126 (D.C. 2010) (en banc). Ignoring this basic principle, plaintiff offers a tortured interpretation of the legislative history to support his claim that the Anti-SLAPP Act does not apply here. Without any citation, plaintiff asserts that "the legislative intent behind the Anti-SLAPP Act explains [that] the D.C. Council did not enact the Anti-SLAPP Act to protect high-ranking government officials from the repercussions associated with purposefully and maliciously lying about a private citizen." *See* Pl.'s Opp., at 4. Not only is plaintiff's assertion founded on self-serving hyperbole—that Dr. Gandhi purposefully and maliciously lied about plaintiff—plaintiff's own arguments, including reliance on the California statute and cases thereunder, work against him on this issue.

Plaintiff acknowledges that the D.C. Anti-SLAPP Act was modeled on similar legislation from California. *Id.* at 3. As demonstrated in defendants' motion to dismiss, California Courts interpreting their statute have found that it applies to government entities and employees. *See Vargas v. City of Salinas*, 205 P.3d 207, 216-17 (Cal. 2009);

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[1] The only exception in the Act is for claims based on representations made to customers brought against "a person primarily engaged in the business of selling or leasing goods or services." *See* D.C. Code § 16-5505. This exception is clearly inapplicable here.

Defs.' Spec. Mot. To Dismiss, at 9. Plaintiff made no attempt to distinguish *Vargas* or otherwise explain why its logic does not apply here. Indeed, "[j]ust as SLAPPs filed against individuals have a 'chilling' effect on their participation in government decision making, SLAPPs filed against public officials... may likely have a similarly 'chilling' effect on their willingness to participate in governmental processes." *Vargas*, 205 P.3d at 216-17.

Fear of additional lawsuits, like this one, deprives the public of valuable information and suppresses Dr. Gandhi's (and other government officials') right to participate in the public discourse that plaintiff has created by touting his claims in the press.[2] Indeed, it would turn the law on its head to accept the notion that plaintiff can say anything he wants to the press, thereby creating an issue of public interest, but that if a public official dares to respond he is faced with a lawsuit for which there is no legal recourse. This is exactly the kind of suit that the Act was designed to address.

Plaintiff also asserts that the Act should not apply because he "is hardly attempting to tie up Defendants' resources" and is "not attempting to deter or punish Defendant Gandhi for exercising any of his political or legal rights." *See* Pl.'s Opp., at 4. Plaintiff's intent in filing his suit is irrelevant. Plaintiff can only avoid dismissal under the Act by proving that he is *likely to succeed on the merits*. *See* D.C. Code § 16-

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[2] To apply, the Act does not require that a lawsuit *actually* chill defendants' speech. *See generally* D.C. Code § 16-5501, *et seq.* However, it is instructive to note that this lawsuit has already had that effect. On December 13, 2012, Dr. Gandhi testified before the D.C. Council's Committee on Finance and Revenue. Because plaintiff has demonstrated—through this lawsuit—his willingness to file suit based on Dr. Gandhi's public statements, Dr. Gandhi could not provide live public answers to dozens of questions asked by the Committee. *See* On-Line Video Recording of 12/13/12 Committee on Finance and Revenue Hearing at http://dc.granicus.com/MediaPlayer.php?view_id=2&clip_id=1544, starting at 2:27:00.

5502(b). Nothing in his opposition to defendants' motion shows that he can meet this standard.

II. PLAINTIFF FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND CERTAINLY FAILED TO SHOW ANY POSSIBLITY OF SUCCESS ON THE MERITS.

As the District explained in its initial motion, none of plaintiff's claims have merit, and could not survive even a traditional motion to dismiss. Seizing on this assertion, plaintiff ignores his higher evidentiary burden under the Anti-SLAPP Act, and instead cites the motion to dismiss standard throughout his opposition. But, instead of just showing that he has "stated a claim" with "all inferences drawn in his favor (the standard for a motion to dismiss), under the Act plaintiff must prove that he is *likely to succeed on the merits of his claim.* *See* D.C. Code § 16-5502(b). Plaintiff's flimsy claims crumble under either standard.

A. Plaintiff has failed to plead a defamation claim and has not shown he could succeed on the merits of any claim based on Dr. Gandhi's allegedly false statements about his termination.

Plaintiff continues to play word games in an attempt to spin a defamation claim out of nothing. Dr. Gandhi's statements about plaintiff which form the basis of this suit were neither false, nor defamatory. *See* Defs.' Spec. Mot. To Dismiss at 19. Plaintiff's entire claim is premised on comparing deposition testimony where Dr. Gandhi said that it was not his decision to fire plaintiff with a remark to the press where, according to plaintiff, Dr. Gandhi claimed it was "his" decision. *See* Pl.'s Opp. at 7-8. As the District has explained, this purported contradiction is irrelevant because *there is nothing offensive* about whether Dr. Gandhi terminated Mr. Payne himself, or through intermediaries. *See* Defs.' Spec. Mot. To Dismiss at 21, n.14.

Further, the Court is not required to accept plaintiff's conclusion that one of these statements is necessarily false. The context of the deposition testimony raised the question of whether Dr. Gandhi himself, *as opposed to Mr. Payne's direct supervisors*, made the final decision to fire Mr. Payne.[3] Dr. Gandhi truthfully answered that he did not make the final decision. The comment to Mr. DeBonis, on the other hand, responded to whether Dr. Gandhi was pressured into firing Mr. Payne *by actors outside of the OCFO.*[4] Dr. Gandhi, again truthfully, answered that nobody outside the OCFO had pressured him into firing Mr. Payne, and that instead it was "his" decision. Consistent with his prior deposition testimony, Dr. Gandhi carried out his decision through delegation to Mr. Payne's direct supervisors, who made the final call to terminate Mr. Payne.

Regardless, this entire analysis by plaintiff is a red-herring[5] given that a statement about the individual or individuals who fired Mr. Payne—true or false—cannot possibly

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[3] The District will be happy to provide the deposition transcript for the Court if it wishes to examine the context directly.

[4] *See* http://www.washingtonpost.com/blogs/mike-debonis/post/gandhi-lashes-out-at-fired-deputy-now-suing-him/2012/07/03/gJQAnEpWLW_blog.html. (Dr. Gandhi makes the context clear later in the same article by saying "I am insulted by the comment that I was told *by people in the political arena* to fire [Payne]. . . . I would not compromise my integrity as a CFO and take a word *from a political [figure]* to hire and fire people. I don't do that.") (emphasis supplied). Plaintiff cites this same article in his opposition. *See* Pl.'s Opp. at 9. Plaintiff's omission of the context of Dr. Gandhi's comments (context that even Mr. DeBonis felt was necessary for the public to understand the quotes in his article) is misleading.

[5] Equally specious is plaintiff's urging for the Court "to consider two (2) critical underlying questions in its review of Defendants' Motion: Did [Dr.] Gandhi actually terminate Payne? And why was Payne terminated?" Pl.'s Opp. at 9. The Court should reject plaintiff's invitation to enter a paranoid world of conspiracy and supposition. The only question that this Court need consider, especially on this motion, is whether the remarks that plaintiff has alleged Dr. Gandhi spoke were false and defamatory—and they were not.

be defamatory. *Id.* But even more importantly, because this deeply flawed and deceptive analysis is the only proffer that plaintiff makes to support his allegation that Dr. Gandhi's statements were false, his failure here means that he cannot show a likelihood of success on the merits of his defamation claim. Plaintiff's defamation claim, and his related false light claim,[6] must be dismissed.

B. Plaintiff has not alleged the type of outrageous, extreme or intolerable conduct required to show intentional infliction of emotional distress.

It is undisputed that plaintiff raised intentional infliction of emotional distress ("IIED") in his previously-filed D.D.C. Case, and that allegation was dismissed by the District Court for failure to state a claim. *Payne v. District of Columbia*, 773 F.Supp.2d 89, 101 (D.D.C. 2011). Plaintiff's only argument that his instant claim is more meritorious is that more time has passed, and that he has since been evicted from his home. Pl.'s Opp. at 14. This assertion adds nothing to the analysis. The District Court found that nothing in defendants' conduct, as alleged by plaintiff, was the type of "outrageous," "extreme," and "utterly intolerable" behavior required to state an IIED claim." *Payne v. Dist. of Columbia*, 773 F. Supp. 2d at 102 (D.D.C. 2011). That has not changed.

C. Plaintiff's constitutional defamation claim has no merit.

Plaintiff essentially ignores the District's argument on his constitutional defamation claim. The District has pointed out that Plaintiff cannot simultaneously assert in the D.D.C. Case that certain remarks by the OCFO at the time of his firing permanently prevented him from obtaining employment in his chosen field, and that Dr.

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[6] Plaintiff appears to concede that where both defamation and false light are alleged, that the entire case is evaluated under the more stringent defamation standard. *See* Pl.'s Opp. at 6-7.

Gandhi's instant remarks—four years subsequent—*also* permanently deprived him of employment. Defs.' Spec. Mot. To Dismiss at 27. Simply put, if plaintiff already was permanently deprived of employment due to the District's earlier actions as alleged in the D.D.C. Case, he has failed to show any causal connection to damages in the context of his constitutional defamation claim in this case. Plaintiff offers no rejoinder to this argument, except to allege that Dr. Gandhi's recent comments have "further affected" his employment. Pl.'s Opp. at 16. But to survive a motion to dismiss plaintiff must offer "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009).

Here, plaintiff offers nothing except conjecture that Dr. Gandhi's remarks have further harmed his already admittedly non-existent employment prospects. This is not enough to survive a motion to dismiss, and certainly not enough to meet the heightened requirement to show a likelihood of success under the Anti-SLAPP Act.

III. CONCLUSION.

Plaintiff's opposition to the District's Special Motion to Dismiss must fail. He has not shown that the D.C. Anti-SLAPP Act does not apply to this case. Nor has he shown that there is any possibility that he could prevail in this suit. He has certainly failed to show the likelihood of success necessary to prevent dismissal under the Act. For these reasons, the District requests that plaintiff's complaint be dismissed with prejudice.

DATE: January 7, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2013, a true copy of the foregoing was filed using the Court's electronic filing system, thereby electronically serving copies on all counsel of record.

/s/ Keith D. Parsons
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