CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 73

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GARY SUSON,

Plaintiff,

INDEX NO.: 300605 TSN 2006

-against-

DECISION/ORDER

NYP HOLDINGS, INC.,
NEWS AMERICA INCORPORATED,
CYNTHIA R. FAGAN, MURRAY WEISS,
STEPHANIE GASKELL, and
JOHN DOES 1 AND 2,

Defendants.

----------X

HON. SHLOMO S. HAGLER, J.C.C.:

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of these motions and cross-motions:

Papers	**Numbered**
Plaintiff's Notice of Motion for Partial Summary Judgment and to Preclude Defendants from Offering Certain Testimony or Evidence at Trial with Plaintiff's Affidavit in Support and Exhibits 1through 65 Annexed	1
Affidavit of Slade R. Metcalf in Opposition to Plaintiff's Motion for Partial Summary Judgment and to Preclude with Exhibits 1 through 4 Annexed .	2
Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Partial Summary Judgment and to Preclude	3
Defendants' Notice of Motion for Summary Judgment with Affidavit of Slade R. Metcalf and Exhibits 1 through 7 Annexed	4
Exhibits 8 through 28 to the Affidavit of Slade R. Metcalf in Support of Defendants' Motion for Summary Judgment (Volume 2 of 3)	5
Exhibits 29 through 52 to the Affidavit of Slade R. Metcalf in Support of Defendants' Motion for Summary Judgment (Volume 2 of 3)	6
Affidavit of Cynthia R. Fagen in Support of Defendants' Motion for Summary Judgment with Exhibits 1 through 24 Annexed	7
Affidavit of Stephanie Gaskell in Support of Defendants' Motion for Summary Judgment with Exhibits 1 through 3 Annexed	8
Affidavit of Murray Weiss in Support of Defendants' Motion for Summary Judgment with Exhibits 1 and 2 Annexed	9

Preamble

This action forces us to reflect on the unforgettable and unforgivable tragedy that will always be etched in our collective memories, "9/11." This tragedy has had a tremendous human toll for the families of the fallen victims, but it also produced champions who saved the lives of tens of thousands of people trapped in the burning towers. These heroes, who risked their health and even their lives, deserve our deepest respect, admiration and praise. Among these heroes were brave uniformed officers from the Fire Department, Police Department and the Courts. Three valiant court officers, Captain William Harry Thompson, Thomas E. Jurgens, and Mitchel S. Wallace, sadly perished in the inferno, and were assigned at some point in their careers to this very courthouse at 111 Centre Street where a plaque is dedicated to their memories.

Motion Practice

In this round of voluminous motion practice, plaintiff Gary Suson ("plaintiff" or "Suson") moves for an order pursuant to CPLR § 3212, granting him partial summary judgment as to "liability" and "precluding the defendants from offering certain testimony or evidence at trial." Defendants NYP Holdings, Inc. and News America Incorporated ("Post" or "New York Post"), Cynthia R. Fagen ("Fagen"), Murray Weiss ("Weiss") and Stephanie Gaskell ("Gaskell") separately move for an order pursuant to CPLR § 3212, granting defendants summary judgment dismissing the complaint. Plaintiff also cross-moves for an order "granting sanctions for discovery violations pursuant to CPLR § 3214 and 3126." Plaintiff and defendants oppose the respective motions and cross-motion. The motions and cross-motion are consolidated herein for disposition.

Procedural History

Complaint/Answers

Plaintiff commenced this action in Supreme Court, New York County, on March 3, 2006 by filing of a summons and verified complaint. The parties then entered into a stipulation wherein defendants' counsel accepted service of a Supplemental Summons and Amended Verified Complaint dated March 23, 2006 that contained minor revisions. (Exhibit "1" to the Defendants' Motion). The Amended Complaint alleged four libel claims (First through Fourth Causes of Action) and a claim for intentional infliction of emotional distress (Fifth Cause of Action) stemming from four articles published in the New York Post in August and September 2005 ("Post Articles"). Defendants served separate verified answers to the amended complaint on April 12, 2006. (Exhibit "2" to the Defendants' Motion). Defendants asserted affirmative defenses including that the

complained-of articles published in the New York Post are "substantially true" and plaintiff, as a "public figure," cannot prove "actual" or "constitutional" malice by clear and convincing evidence. (Answers at ¶ 97 & 101, Second and Sixth Affirmative Defenses).

Transfer from Supreme Court to Civil Court

After several preliminary conferences, Justice Richard Braun, J.S.C., by order dated October 17, 2006, transferred this action from Supreme Court to Civil Court pursuant to CPLR § 325(d). (Exhibit "4" to Defendants' Motion).

Discovery

The parties have aggressively pursued discovery which is now complete. Specifically, defendants conducted the deposition of plaintiff on March 13, 2007, March 15, 2007 and March 30, 2007. (Exhibit "5" to Defendants' Motion).

Defendants also conducted the depositions of ten non-party witnesses who either served as sources for the Post Articles, or who had specific information regarding Suson and/or the Museum. Defendants took the depositions of: (1) Michael Coan, currently a Deputy Chief in the New York City Police Department (the "NYPD"), but also the former Executive Officer in the NYPD's Information Division in August/September 2005, and an alleged source for the Post Articles (Exhibit "6" to Defendants' Motion); (2) Francis X. Gribbon, the deputy commissioner for public information for the New York City Fire Department ("FDNY") and an alleged source for the Post Articles (Exhibit "7" to Defendants' Motion); (3) Michael Block, a partner with the law firm of Sullivan Papain Block McGrath & Cannavo P.C., the general counsel for the Uniformed Firefighters Association ("UFA") for more than 20 years, and an alleged source for the Post Articles ("Block

EBT," Exhibit "8" to Defendants' Motion); (4) Rudy Sanfilippo, the former Manhattan Trustee of the UFA, a friend of Suson and an alleged source for the Post Articles (Exhibit "9" to the Defendants' Motion); (5) Kevin Gallagher, the former President of the UFA ("Gallagher EBT," Exhibit "10" to the Defendants' Motion); (6) Michael Bellone, a former rescue and recovery worker at Ground Zero and a friend of Suson (Exhibit "11" to Defendants' Motion); (7) Stephen Cassidy, the current President of UFA ("Cassidy EBT," Exhibit "12" to Defendants' Motion); (8) Brian Bonsignore, a retired FDNY Lieutenant and friend of Suson's (Exhibit "13" to Defendants' Motion); (9) Thomas P. Butler, President of Butler Associates, LLC, the spokesman for the UFA since approximately 1996, and an alleged source for the Post Articles (Exhibit "14" to Defendants' Motion); and (10) Peter L. Gorman, the former President of the Uniformed Fire Officers Association ("UFOA") ("Gorman EBT," Exhibit "15" to the Defendants' Motion).

Plaintiff conducted the depositions of Post reporter Fagen on April 24, 2007 and May 8, 2007; Post reporter Weiss on May 16, 2007; and former Post reporter Gaskell on September 19, 2007. In addition, on June 12, 2007, plaintiff conducted the depositions of Jesse Angelo, the Post's Metropolitan Editor, Gregg Birnbaum, the Post's Political Editor, and David Boyle, the Post's former Photo Editor.

Factual Background

Suson Begins Photographing Ground Zero

Suson is an "actor, writer and photographer." (Amended Complaint at ¶ 13). When the attacks occurred on the World Trade Center on September 11, 2001, Suson began photographing the rescue and recovery efforts at Ground Zero. A day later, Suson created a website, September Eleven.net, to publish his photos to the world. Almost immediately, Suson garnered national and

international media coverage, including Fox, New York 1, CNN, CBC, NBC, Court TV, BBC and ABC (Exhibit "8" to plaintiff's Motion and Exhibits "22-24, 28, 30 and 31" to Defendants' Motion) for his "stunningly poignant photographs" that documented the rescue and recovery efforts at Ground Zero. (Amended Complaint at ¶ 16).

The April 15, 2002 Letter

During his time spent at Ground Zero, Suson became friendly with certain fire fighters and other recovery personnel. Suson befriended Rudy Sanfilippo, the Manhattan Trustee of the UFA, who had survived both tower collapses. Sanfilippo had seen the photos that Suson posted on his website and admired Suson's work. Since Sanfilippo was impressed with Suson's photos, he allegedly offered to make Suson the "Official Photographer" of the UFA at Ground Zero on three conditions: (1) Suson would not photograph any body parts, (2) no images would be released until the recovery was over or until permission was granted, and (3) proceeds from the sale or publication of the photos, if any, would be shared with the UFA's charities. (Amended Complaint at ¶ 21). Suson alleges that this oral agreement was memorialized in a letter dated April 15, 2002 (Exhibit "10" to plaintiff's Motion) that was signed by both Peter Gorman, president of UFOA and Kevin B. Gallagher, President of UFA as follows:

> We are writing this letter of introduction for Gary Suson, a professional photographer who was enormously supportive of our members who were working at the World Trade Center site after September 11th.
>
> We permitted Mr. Suson access to the site and to our members who were engaged in rescue and recovery operations. He assembled over many months an extraordinary collection of photographs of the rescue/recovery and other workers at the site.
>
> We hope that you find these photographs are as special and

> moving as we do. In the event that Mr. Suson receives any proceeds for the sale or publication of these photographs, he has made arrangements to share his earnings with the Widows and Childrens Fund that we administer on behalf of families of firefighters and fire officers lost in the line of duty.
>
> We appreciate your attention to Mr. Suson's work.

However, Gallagher, who was president from 1996 to July 2002, testified that he did not know Suson, he did not appoint him the official photographer, and the UFA has never had an official photographer. (Gallagher EBT at 14, 22, 52-53, 61-66). Gallagher also disputed that he signed the April 15, 2002 letter and the signature on the letter is an unauthorized stamp of his signature. (Id. at 54, 56, 58, 107). The other signatory to the letter, Gorman, testified that he told Suson that he never authorized him to be the official photographer for the UFOA and that it never had an official photographer. (Gorman EBT at 12-13, 49-50, 55-56, 72). On April 30, 2005, Block, the general counsel of the UFA, told Fagen that the UFA never had an "official photographer" and the April 15, 2002 letter did not authorize such a designation. (Block EBT at 19-20, 43-46, 81-82). On the same date, Block sent Suson a "cease and desist" letter demanding that Suson "immediately cease and desist from referring to yourself or representing yourself as the "official photographer" for the Uniformed Fighters Association in any context." (Exhibit "27" to Defendants' Motion).

Suson was given "virtually unfettered access to the recovery site and access to officers on the scene [at Ground Zero]." (Complaint at ¶ 20). Suson took many stunning photos that capture the essence of the herculean rescue and recovery efforts that were often undertaken by dedicated firefighters. It vividly displays the triumphant spirit and grief of the rescue workers. (Exhibit "36" to Plaintiff's Motion).

Barnes & Noble Book Deal/CNN Licensing Agreement

As a result of his notoriety and reputation as a noted photographer of the 9/11 rescue efforts, Barnes & Noble Publishing, Inc. ("Barnes & Noble") offered Suson a book deal. Suson agreed, inter alia, to provide Barnes & Noble with 225 "high-quality photographs of Ground Zero and other images related to the attack on the World Trade Center" and "4,000 words about the photographs in the book." (Exhibit "26" to Defendants' Motion). Suson received a $55,000 advance from Barnes & Noble. (Amended Complaint at ¶ 28). The Suson book, entitled "Requiem: Images of Ground Zero," was published and released in September, 2002. (Amended Complaint at ¶ 32). Suson engaged in several interviews with the media to promote his book. (Exhibit "28" to Defendants' Motion). Suson also licensed certain photographs to CNN for $6,000. (Exhibit "32" to Defendants' Motion).

Minimal Donations to UFA's Charity

On August 30, 2005, Suson provided Fagen with a "thank you" note from the UFA regarding a $100 donation "from book sales," along with 9 checks written by various individuals to the UFA's Widows and Children's Fund related to their purchase of Suson's book. Those sums added up to $525 in total donations, which seemed to Fagen to be a "nominal amount." (Affidavit of Cynthia R. Fagen in support of Defendants' Motion, sworn to on December 5, 2007 ["Fagen Affidavit"] at ¶ 24, and Exhibit "8" attached thereto). The proceeds of Suson's book did not go to 9/11 relief efforts. (Id., and Exhibit "21" annexed thereto). Other than the above $525, Suson did not and has not provided proof that the $61,000, or a portion thereof, he received for his photographs at Ground Zero was donated by him to the UFA's Widows and Children's Fund. This was not

meaningfully disputed by Suson and was confirmed by UFA's current president and general counsel. (Cassidy EBT at 88-90; Block EBT at 82-83).

Suson Opens Ground Zero Museum Workshop

In late August, 2005, Suson opened the Ground Zero Museum Workshop ("Museum") to the media for a preview to display his photographs, videos and remnants from Ground Zero. (Amended Complaint at ¶ 41). He also issued a press release touting the opening of his Museum. (Exhibit "1" to the Fagen Affidavit). At about that time, a Post photographer, Catherine Nunce, took photographs at the Museum which included a teddy bear, a pair of mangled eyeglasses and their case, a rag doll, a make-up case, a cellular telephone, and a Polaroid photograph depicting two individuals. (Exhibit "2" to the Fagen Affidavit). The Museum opened to the public on September 7, 2005.

The August 31, 2005 Article

After reviewing the press release and the photographs from the Museum, Fagen began ground work for a potential article on Suson. Fagen believed that the "appearance of these Ground Zero items in a Museum started by a civilian raised several questions, including how Suson obtained the items, who gave him permission to obtain the items, and whether or not anyone had attempted to return them to their owners." (Fagen Affidavit at ¶ 14). Fagen next went to the Museum's website and reviewed Suson's "Introduction" section where he described the items that were displayed as follows:

> Back in New York, I went to my storage facility on a Sunday afternoon to retrieve some items but before I left, something caught my eye. It was a plastic box of 'artifacts' from Ground Zero. Artifacts is a bit of a fancy word for what can really be deemed as

> 'junk sitting in the garbage pile' at Ground Zero during the recovery. The plastic box contained an odd assortment of items that I retrieved from a larger dumpster just on the outskirts of the Ground Zero site. . . . I didn't see what some would deem 'garbage." I saw remnants of another period; artifacts that would one day be appreciated and speak volumes to its viewers. The items did in fact hit home for me because I knew someone owned them: they meant something to someone and represented the humanity that existed up high in those beautiful towers. . . . I saw a muddy doll, a shattered make-up case and a woman's broken business shoe. . . . I loaded up what I could in a plastic bag, informed a Chief that I had taken some 'garbage' (he chuckled) and brought them home.

(Exhibit "4" to the Fagen Affidavit).

Fagen also caused a search of past articles regarding Suson and other individuals charged with crimes or implicated in incidents where items were removed from Ground Zero. (Fagen Affidavit at ¶ 17, Exhibit "5" annexed thereto). She then contacted Butler, the long-time spokesperson for the UFA, who she previously relied upon as a reliable source. Butler told Fagen to contact Block, the UFA's general counsel which she did. Fagen next interviewed Suson for the article. Suson's conversation led to Fagen contacting the deputy commissioner for public information for the FDNY, Francis X. Gribbon ("Gribbon"). Gribbon informed Fagen that "No one was authorized to take artifacts whether they were personal belongings or dangling from a dumpster." ("Fagen Affidavit at ¶ 27).

Fagen collaborated with Weiss, who conducted his own independent investigation for the article. Weiss contacted Michael Coan ("Coan"), who was then the Executive Officer with the Public Information Division at the NYPD, and a reliable source in the past. Coan told Weiss that Ground Zero was a crime scene and removing items from it could be illegal. (Affidavit of Murray Weiss in Support of Defendants' Motion for Summary Judgment, sworn to on December 6,

2007 ["Weiss Affidavit"] at ¶ 10). Weiss spoke to a "confidential source" in the FDNY, who he had relied upon numerous times in the past and was an accurate source of information, that informed him Suson "was not authorized or sanctioned to remove items from Ground Zero." (Weiss Affidavit at ¶ 15). Finally, Weiss relied on Kenneth Maxwell ("Maxwell"), the former head of the FBI's Counter terrorism Division in the New York Field Office, and was a an important and reliable source for Weiss' book, "The Man Who Warned America." Maxwell reiterated the collective opinion that "Ground Zero was considered the world's greatest crime scene" and, therefore, it "could be a crime to possess items removed from Ground Zero." (Weiss Affidavit at ¶ 16).

Gregg Birnbaum, the Post's Political Editor, was Fagen's supervisor and assisted her throughout the investigation and editing of the first article. Fagen then wrote an article partly headlined "9/11 Cam Scam," which was published in August 31, 2005 issue of the Post (Exhibit "26" to Plaintiff's Motion).

The September 1, 2005 Article

Fagen began to obtain reaction to the first article from family members of victims of the 9/11 attacks. Fagen first spoke to Anthony Gardner ("Gardner"), a spokesperson for the Coalition of 9/11 families, who lost his brother on 9/11. Gardner told Fagan that "items removed from Ground Zero, including those Suson removed, should be returned to the Port Authority to be included in an inventory of artifacts." (Fagen Affidavit at ¶ 36). Fagen then spoke to another victim's family member, Patricia Reilly, who also reiterated Gardner's thoughts and noted that "anyone exhibiting [these items] should be sanctioned by the memorial foundation." (Id. at ¶ 37). Fagen also obtained Suson's reaction who told her to contact Lee Ielpi ("Ielpi"), one of the many firefighters that

supported him, and who had lost his firefighter son in the 9/11 attacks. Fagen claims Ielpi told her that "should he [Suson] have turned them [the items] over, yeah probably." (Id. at ¶ 2). Ielpi, however, states that Fagan misrepresented the statement attributed to him which was merely a hypothetical scenario which did not apply to Suson. (Ielpi Affidavit, sworn to on December 31, 2007, at ¶¶ 4-5, Exhibit "D" to Plaintiff's Cross-Motion and in Opposition to Defendants' Motion).

On August 31, 2005, Weiss again contacted a confidential source in the FDNY, which he relied on several times in the past and was known to be accurate. The confidential source informed Weiss that the FDNY had dispatched two marshals to investigate the Museum, but they could not gain entry. The marshals planned to return to the Museum on the next day. (Weiss Affidavit at ¶ 19).

Fagen then wrote a follow-up article headlined "2nd Hit on 9/11 Photog 'Grave-Rob' Museum" which was published in the September 1, 2005 issue of the Post. (Exhibit "27" to Plaintiff's Motion).

The September 2, 2005 Article

Fagen's next article focused on Mayor Bloomberg's response to the Post's first two articles about Suson. On September 1, 2005, Gaskell asked Mayor Bloomberg at a press conference the following questions regarding Suson:

> Mayor - I'd like to ask this of you and the commissioner - and it's the question I asked you yesterday. This photographer that's claiming to be the official FDNY photographer. What's your reaction to this...?
>
> Mayor Bloomberg answered:
> It's a disgrace. I can answer for everybody. I don't know what you want - what you want us to say. It's a disgrace. You know, there are always some sick people that are trying to exploit others, other people's tragedies and I just never wanted to give them any more publicity. I think that makes it worse.

(Gaskell Affidavit in support of Defendants' Motion, sworn to on December 6, 2007 ["Gaskell

Affidavit"] at ¶ 13).

Gaskell attempted to contact Suson for his reaction to Mayor Bloomberg's comments. Gaskell initially was unable to do so, but then incorporated his statements in a later version of the third article. Gaskell wrote and Fagen contributed to the article headlined "Mike Rips Sept. 11 'cur'ator" and later re-headlined, "9/11 'cur'ator [line break] Mike rips 'sick' scavenger" which was published in the September 2, 2005 issue of the Post. (Exhibit "28" to Plaintiff's Motion).

The September 28, 2005 Article

On September 27, 2005, Fagen learned that Michael Bellone ("Bellone"), who had worked in the recovery effort at Ground Zero and was the founder of a 9/11 charity, Trauma Response Assistance for Children ("TRAC"), had been arrested by FDNY marshals for possession of certain FDNY items. Fagen believed that Bellone was a friend of Suson and they worked together at Ground Zero. Suson listed TRAC as one of the six charities that his Museum would support. (Fagen Affidavit at ¶ 53, Exhibit "1"annexed thereto). Fagen then wrote a fourth article regarding Bellone and his connection to Suson and his Museum headlined "9/11 - charity big busted" which was published in the September 28, 2005 issue of the Post. (Exhibit "29" to Plaintiff's Motion).

Summary Judgment

Plaintiff and defendants seek summary judgment. Summary judgment is particularly favored in deciding libel cases. Immuno AG. v J. Moor-Jankowski, 77 NY2d 235 (1991), cert denied, 500 US 954 (1991); Khan v New York Times Co., Inc., 269 AD2d 74 (1st Dept 2000).

Standard for Defamation Action

To establish a cause of action for defamation, plaintiff must demonstrate the following elements:

1) a false statement on the part of the defendants concerning the plaintiff;
2) published without privilege or authorization to a third party;
3) with the requisite level of fault on the part of the defendants; and
4) causing damage to plaintiff's reputation by special harm or defamation per se.

See Restatement (Second) of Torts § 558; Dillon v City of New York, 261 AD2d 34, 38 (1st Dept 1999).

CPLR § 3016(a) requires that the alleged false and defamatory words be specified with particularity in the complaint. The complaint must also allege the "time, place and manner of the false statement and to specify to whom it was made. (Citations omitted)." Dillon v City of New York, 251 AD2d at 38.

Plaintiff sets forth 14 statements in the four Post Articles that he alleges are false and defamatory:

(1) Plaintiff is "scamming the public"

(2) Plaintiff is "billing himself as the official photographer for the firefighters union"

(3) Plaintiff [may have] "illegally taken artifacts from Ground Zero"

(4) Plaintiff "has not honored his pledge to donate thousands of dollars in proceeds from 9/11 artwork"

(5) Plaintiff's actions constituted "grave robbing," and are "akin to stealing from a graveyard"

(6) Plaintiff is "despicable"

(7) Plaintiff is "exploiting the dead"

(8) That the Post article alludes to "two FDNY marshals who were 'dispatched' to the museum in order to view the artifacts and states that they 'could not gain entry to the building,' " but fails to mention the outcome of any eventual visit from the FDNY marshals and that plaintiff was never found or accused by any authority to have committed any wrongdoing

(9) "The photographer who is displaying personal items he took from Ground Zero at his downtown museum is a 'disgrace,' an angry Mayor Bloomberg said yesterday, lashing out at the 'sick people' who have exploited the tragedy ... 'There are always some sick people that are trying to exploit tragedy.' "

(10) "Bloomberg said Suson doesn't deserve attention. 'I've never wanted to give them any more publicity,' he said. 'I think that just makes it worse.' "

(11) The Post headline prints the work curator as " 'cur'ator," meaning that Suson is a cur, or 'mongrel dog'

(12) That the article was placed next to the police blotter "to further smear the plaintiff's good name ..."

(13) That plaintiff is "further portray[ed] ... as a criminal" because Plaintiff is mentioned in the same article as Michael Bellone, who was "busted" by the FDNY marshals; and

(14) The article claims plaintiff "came under criticism for allegedly removing victims' personal effects" from Ground Zero.

(Amended Complaint at ¶¶ 51-71).

Actual or Constitutional Malice

In the landmark decision of New York Times Co. v Sullivan, 376 US 254 (1964), the United States Supreme Court created a qualified constitutional privilege for public officials in defamation actions. The plaintiff who is a public official must prove by clear and convincing evidence that the defamatory publication was made with "actual malice" or constitutional malice. The U.S. Supreme Court defined "actual malice" as knowledge of falsity or reckless disregard for the truth. Id. at 280.

The U.S. Supreme Court further elaborated on this standard as follows:

> [R]eckless conduct is not measured by whether a reasonably prudent [person] would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his [or her] publication.

St. Amant v Thompson, 390 US 727, 731 (1968).

The reckless disregard standard requires a plaintiff to prove a subjective awareness of probable falsity. Id. at 737; Gertz, 418 US at 334, n. 6. The failure to properly investigate a story alone (St Amant, 390 US at 733) or "a showing of ill-will or 'malice' in the ordinary sense of term" (Harte-Hanks Communications, Inc. v Connaughton, 491 US 657, 666 [1989]) is insufficient to demonstrate constitutional malice.

The United States Supreme Court provided some helpful examples to support a finding of constitutional malice where the story is:

(1) "fabricated" or the product of defendant's imagination;

(2) based solely on an "unverified anonymous telephone call" or the reporter doubts the veracity of the information; or

(3) "inherently improbable that only a reckless [person] would have put them in circulation"

St. Amant, 390 US at 732.

The U.S. Supreme Court has extended this constitutional privilege to "public figures." Curtis Publishing Co. v Butts, 388 US 130 (1967). The U.S. Supreme Court further defined public figures into two distinct classes of individuals: (1) public figures for all purposes and (2) limited purpose public figures. Gertz v Robert Welch, Inc., 418 US 323 (1974). The first designation applies

to an individual who "achieve[s] such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts." Id. at 351. The more common limited purpose figure is an individual who "voluntarily injects himself [or herself] or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." Id. The court must determine as a matter of law whether the evidence shows the plaintiff to be a public official or public figure. Rosenblatt v Baer, 383 US 75 (1966).

Suson is a "Limited Purpose Public Figure"

Suson does not seriously dispute that he is a limited purpose public figure. Suson describes himself as a "nationally and internationally renowned photographer." (Exhibit "42" to Defendants' Motion). Suson touts his extensive press coverage which included interviews and news stories about him both nationally and internationally on all major news networks. (Amended Complaint at ¶ 16). Inasmuch as Suson has taken affirmative steps to attract extensive media attention to document his activities at Ground Zero and the opening of his Museum, this Court finds as a matter of law that he is a limited purpose public figure.

Suson Fails to Demonstrate "Actual Malice"

In order to prevail, Suson as a limited purpose public figure must demonstrate "actual" or constitutional malice. Plaintiff asserts that he has satisfied this high standard. The thrust of plaintiff's argument is that defendants had a "baseline knowledge" that the articles were false because there were prior articles (including several in the Post) that acknowledged and reported Suson's bona fides. Specifically, Suson points to many articles and interviews where he is referred as the "official photographer" of the UFA. (Exhibit "18" to plaintiff's Motion). Suson attacks the myriad of sources

the defendants utilized to conclude that Ground Zero was declared a crime scene and removing items from it could be illegal. In this regard, Suson produces the sworn statement of his friend, Ielpi, to show that Fagen intentionally misquoted him in the second article. Suson also claims that defendants knew the statement that he failed to honor his "pledge to donate thousands of dollars in proceeds from his 9/11 artwork" was false because he could not have done so since the Museum had not opened prior to the publication of the first article. Suson takes issue with the sensational headlines, charging that they were not a "fair index" of the related articles. Suson also generally challenges the lack of "meaningful investigation" undertaken by defendants.

The very basis of plaintiff's argument that defendants had "baseline knowledge" of the falsity of the articles because of the prior publications, including several in the Post, was effectively rejected by the U.S. Supreme Court in New York Times Co. v Sullivan, supra. The U.S. Supreme Court specifically held that prior stories or articles in the defendant's own files was insufficient to show actual or constitutional malice. Id. at 287. Plaintiff's claim that defendants improperly relied upon unreliable sources that Ground Zero was a crime scene and that taking items from it could be illegal similarly does not rise to the level of demonstrating defendants' subjective intent by clear and convincing evidence of constitutional malice. Sweeney v Prisoners' Legal Services of New York, Inc., 84 NY2d 786 (1995) (defendant's reliance on a source, a convicted felon who presumably lacked credibility, did not satisfy actual malice standard); Farrakhan v N.Y.P. Holdings, 238 AD2d 197 (1st Dept 1997) (defendant New York Post's partial reliance "on the affidavit of a confessed and convicted assassin" was insufficient to show actual malice); Khan v New York Times Co., Inc., 269 AD2d 74 (1st Dept 2000) (defendant's false and defamatory mis-statements which resulted from a reporter's misreading of reputable news sources did not rise to the

level of actual malice); Gross v New York Times Co., 281 AD2d 299 (1st Dept 2001) (defendant may rely on sources "who may have borne plaintiff ill-will"); Robart v Post-Standard, 74 AD2d 963 (3d Dept 1980) affd 52 NY2d 843 (1981) (defendant's reliance on false information received by telephone from the New York State barracks at Tupper Lake did not demonstrate "gross irresponsibility" because the reporter had no reason to doubt the accuracy of the information).

Substantial truth is also a defense to a libel claim. Leibowitz v St. Luke's - Roosevelt Hosp. Center, 281 AD2d 350 (1st Dept 2001). Plaintiff seemingly argues that the statement, "Current union official ... charge [sic] Suson has not honored his pledge to donate thousands of dollars in proceeds from his 9/11 artwork" is not true. However, this statement is amply supported by the record and has not been controverted by plaintiff other than by his future promise to donate certain proceeds from his Museum. Simply stated, plaintiff has not come forward with any proof that he donated any portion of the sales of his photographs to UFA's charity from the time he obtained at least $61,000 from Barnes & Noble and CNN in or about 2002 through August 31, 2005 (the date of the first article). At the time of the first publication, it is undeniable that the plaintiff did not fulfill his pledge, even though he expressed a laudatory and yet unfulfilled intent to donate the proceeds of the Museum in the future.[1] In addition, the headlines, while provocative, appear to be a "fair index" of the truthful matter contained in the accompanying four articles. Gunduz v New York Post Co., Inc., 188 AD2d 294 (1st Dept 1992) (headline "Public Enemy No. 1" as amplified with an adjacent sub-headline "City moves to yank license of Apple's 'worst taxi driver' " was a "fair index" of the related article reporting that plaintiff had received more summonses and violations than any other cab

1. Plaintiff also has not come forward with any evidence that he donated a portion of the proceeds of his Museum which opened in September, 2005 to UFA's charity through the submission of this round of motion practice on January 29, 2008.

driver in New York City).

The thread that runs through plaintiff's argument is that defendants' purported failure to investigate demonstrates actual malice. Notwithstanding this challenge, the reporters, who have a wealth of experience in journalism, meticulously documented their extensive investigation and provided a reliable source of information for each of the fourteen alleged defamatory statements. Even assuming the veracity of the challenge, a failure to investigate does not in itself establish bad faith amounting to actual malice. St. Amant v Thompson, 390 US 727 (1968).

Plaintiff may take some solace that the actual malice standard enunciated by the U.S. Supreme Court was developed to protect our prized First Amendment rights to free speech and press. As the Court recognized, an "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.' " New York Times Co. v Sullivan, 376 US at 271-272, citing N.A.A.C.P. v Button, 371 US 415, 433 (1963). "The interest of the public here outweighs the interest of the [plaintiff] or any other individual." Id. at 271. In sum, plaintiff has not presented sufficient proof to establish by clear and convincing evidence that the complained-of statements in the four Post Articles were published with actual or constitutional malice. Sprewell v N.Y.P. Holdings, Inc., 43 AD3d 166 (1st Dept 2007) (defendant New York Post's reliance on confidential witnesses coupled with extensive investigation efforts to confirm the information in the article shielded it from liability as plaintiff failed to come forward with evidence of constitutional malice).

Intentional Infliction of Emotional Distress

Plaintiff asserted a fifth cause of action for intentional infliction of emotional distress

premised on the same facts underpinning the libel claims. In order to prove such a cause of action, plaintiff must demonstrate the following elements:

(i) extreme and outrageous conduct;

(ii) intent to cause, or disregard of a substantial probability of causing severe emotional distress;

(iii) a causal connection between the conduct and injury; and

(iv) severe emotional distress.

Howell v. New York Post Co., Inc., 81 N.Y.2d 115, 121 (1993); Restatement (Second) of Torts § 46.

In this case, plaintiff has not come forward with any evidence to meet the above elements. It also appears that plaintiff can not recover for intentional infliction of emotional distress caused by duplicative claims of libel alleged in the complaint. Manno v Hembrooke, 120 AD2d 818, 820 (3d Dept 1986); Levin v McPhee, 917 F Supp 230, 242 (SDNY 1996), affd 119 F3d 189 (2d Cir 1997).

Conclusion

Based on the foregoing, plaintiff's motion for partial summary judgment and to preclude defendants from offering certain evidence at trial is denied. Defendants' motion for summary judgment dismissing the complaint is granted. Plaintiff's cross-motion to impose sanctions for purported discovery violations is denied as being moot.

The clerk shall enter a judgment dismissing the complaint accordingly. Courtesy copies of this decision and order have been mailed to counsel for the parties. The foregoing constitutes the decision and order of this Court.

Dated: New York, New York
March 31, 2008

Hon. Shlomo S. Hagler, J.C.C.