THE TORTIOUS INTERFERENCE WITH CONTRACT AND DEFAMATION CAUSES OF ACTION WERE NOT REFUTED BY DOCUMENTARY EVIDENCE AND WERE ADEQUATELY PLED (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined that plaintiff had stated causes of action for tortious interference with contract and defamation and the actions should not have been dismissed on either the "documentary evidence" or "failure to state a cause of action" ground:

> Turning first to CPLR 3211 (a) (1), a motion to dismiss pursuant to this provision "will be granted only if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" ... . What may be deemed "documentary evidence" for purposes of this subsection is quite limited. "Materials that clearly qualify as documentary evidence include documents . . . such as mortgages, deed[s], contracts, and any other papers, the contents of which are essentially undeniable" ... . Here, Supreme Court relied upon the statements taken during defendant's investigation, as well as its non-harassment policy. As plaintiff argues, even sworn affidavits have been held inadequate to meet this statutory standard, and defendant's submissions here do not qualify as documentary evidence ... .
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> The grounds for dismissal under CPLR 3211 (a) (7) are also strictly limited; the court is not allowed to render a determination upon a thorough review of the relevant facts adduced by both parties, but rather is substantially more constrained in its review, examining only the plaintiff's pleadings and affidavits ... .
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> To establish a claim for tortious interference with a contract, the plaintiff must allege "the existence of [his or her] valid contract with a third party, [the] defendant's knowledge of that contract, [the] defendant's intentional and improper procuring of a breach, and damages" ... . Here, plaintiff's complaint alleged that a valid contract existed between plaintiff and the distributor, that defendant intentionally spread "false, specious and salacious accusations against [p]laintiff," and that such conduct "had no good faith or justifiable cause" and did not "protect an economic interest." Liberally construing these allegations, as we must, taking all of the alleged facts as true, and giving plaintiff every favorable inference ... , they do not fail to state a claim.
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> The defamation claim will ultimately require "proof that the defendant made 'a false statement, published that statement to a third party without privilege, with fault measured by at least a negligence standard, and the statement caused special damages or constituted defamation per se'" ... . Here, the complaint sets forth the particular words complained of and the damages plaintiff allegedly sustained ... . Carr v Wegmans Food Mkts., Inc., 2020 NY Slip Op 02141, Third Dept 4-2-20

TORTIOUS INTERFERENCE WITH EMPLOYMENT AND DEFAMATION CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED; INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CAUSE OF ACTION PROPERLY DISMISSED; ELEMENTS EXPLAINED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff stated causes of action for tortious interference with employment and defamation against a fellow employee of the Central New York Society for the Prevention of Cruelty to Animals (CNYSPCA), The intentional infliction of emotional distress cause of action was properly dismissed. The Fourth Department explained the elements of each cause of action and noted that the documents submitted to prove the truth of the allegedly defamatory statements were not "essentially undeniable" and did not "utterly refute" the allegations:

> Plaintiff commenced this action to recover damages for tortious interference with employment, defamation, and intentional infliction of emotional distress (IIED). According to the complaint, at all times relevant to this appeal, plaintiff was the Executive Director of the Central New York Society for the Prevention of Cruelty to Animals (CNYSPCA) and defendant Stacy Laxen, DVM was a veterinarian for the CNYSPCA. During her tenure with the CNYSPCA, plaintiff directed that several cats be euthanized due to an outbreak of ringworm. Soon thereafter, and based on plaintiff's decision to approve euthanasia without input from a veterinarian, defendant Board of Directors of the CNYSPCA terminated plaintiff's employment. ...
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> "[A]n at-will employee may assert a cause of action alleging tortious interference with employment where he or she can demonstrate that the defendant utilized wrongful means to effect his or her termination . . . In such cases, the plaintiff is required to show: (1) the existence of a business relationship between the plaintiff and a third party; (2) the defendants' interference with that business relationship; (3) that the defendants acted with the sole purpose of harming plaintiff or used dishonest, unfair, improper or illegal means that amounted to a crime or an independent tort; and (4) that such acts resulted in the injury to the plaintiff's relationship with the third party" ... .
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> ... [W]e conclude that plaintiff sufficiently alleged that Laxen's statements constituted defamation per se inasmuch as they purportedly injured plaintiff in her "professional standing"... . Furthermore, despite the court's determination that plaintiff was a

limited purpose public figure and Laxen was protected by the common interest qualified privilege, accepting the facts as alleged in the complaint as true, and according plaintiff the benefit of every possible favorable inference, we conclude that the complaint sufficiently alleged that Laxen acted with the requisite malice necessary to overcome those defenses … . Conklin v Laxen, 2020 NY Slip Op 00958, Fourth Dept 2-7-20

DEFAMATION ACTION BASED UPON A REPORTER'S NAMING THE WRONG TEACHER AS HAVING BULLIED A FIFTH-GRADER PROPERLY DISMISSED; THE REPORTER HAD SUFFICIENT REASON TO RELY ON THE STUDENT'S MOTHER AND ANOTHER SOURCE BOTH OF WHOM PROVIDED THE WRONG NAME (FIRST DEPT).

The First Department determined defendant WPIX was not liable for an article about the bullying of a fifth-grader by a teacher. The teacher allegedly involved in the bullying had the last name "Rainbow," but plaintiff, Starlight Rainbow, also a teacher, had no involvement with the student. The article misidentified the involved teacher as Starlight Rainbow. The First Department explained the standard of proof and found that the WPIX reporter had sufficient reason to rely on the wrong name provided by the student's mother and another source. The court further found that there was no duty to retract the story:

> The parties … agree that the article concerned a matter of public concern, and that plaintiff is not a public figure. Thus, to prevail on a defamation claim, plaintiff must show, by a preponderance of the evidence, that WPIX was "grossly irresponsible" in publishing the article on its website, in that it acted "without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties" (Chapadeau v Utica Observer-Dispatch, 38 NY2d 196, 199 [1975]). The gross irresponsibility standard of Chapadeau is more lenient than the actual malice standard applicable to public figures … . * * *
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> … .WPIX could not be held liable for failure to retract the article during the nearly seven months that elapsed from her August 2014 retraction demand to its removal of the article from its website in March, 2015 upon her commencement of this case. Plaintiff provides "no authority to support [her] argument that the Chapadeau standard imposes a duty to correct previously-acquired information — and the law does not recognize such an obligation" … . Rainbow v WPIX, Inc., 2020 NY Slip Op 00499, First Dept 1-23-20

PLAINTIFF DID NOT ELIMINATE QUESTIONS OF FACT ABOUT WHETHER PLAINTIFF'S PUBLIC STATEMENTS CALLING DEFENDANTS CON ARTISTS, SCAMMERS AND THIEVES WERE DEFAMATORY; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT DISMISSING THE COUNTERCLAIMS ALLEGING DEFAMATION PROPERLY DENIED; THE LAW OF DEFAMATION CONCISELY AND COMPLETELY EXPLAINED (SECOND DEPT).

The Second Department determined defendants' counterclaims alleging defamation properly survived plaintiff's motion for summary judgment. The law of defamation is concisely and completely explained in the decision:

> … [D]uring a Sabbath gathering at the parties' synagogue, the plaintiff allegedly stood up at the center podium, asked for the congregants' attention, and, pointing to the Nissanis, stated that he wanted "to make an announcement for everyone to know" that "[w]e have in our synagogue two NOCHLIM," which the Nissanis claim is a Hebrew word for "scammers or con artists." The plaintiff allegedly continued: "They are David Nissani and Ronen Nissani," and "if they ask you to do any business with them, or to invest with them, then you definitely should not." After services had concluded, while the Rabbi was admonishing the plaintiff for bringing business affairs to the synagogue, the plaintiff allegedly stated in the presence of the Rabbi and the synagogue's president, "But these people are Nochlim and Ganavim," a Hebrew word for "thieves." As Ronen Nissani began to walk home from the synagogue, the plaintiff allegedly shouted at him in front of the synagogue in the presence of others that "I'm going to be on your ass until I get my money! I'm not going to leave you alone! You will see! You are thieves!" * * *
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> The plaintiff failed to establish, prima facie, that these statements did not constitute false assertions of fact … . Viewed in the context in which the allegedly defamatory statements were made, a reasonable listener would likely understand those statements to imply that the Nissanis swindled the plaintiff out of money in connection with their business … . The statements can readily be proven true or false and, given the tone and overall context in which the statements were made, signaled to the average listener that the plaintiff was conveying facts about the Nissanis … .

> Even if the challenged statements had not conveyed assertations of fact, they would nonetheless be actionable as mixed opinion, since a reasonable listener would have inferred that the plaintiff had knowledge of facts, unknown to the audience, which supported the assertions he made … . Levy v Nissani, 2020 NY Slip Op 00113, Second Dept 1-8-20

WHETHER PLAINTIFFS WILL BE ABLE TO ESTABLISH THE CLAIMS IN A COMPLAINT IS NOT CONSIDERED ON A MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM; HERE THE DEFENDANTS' ARGUMENT THAT PLAINTIFFS WILL NOT BE ABLE TO LEARN AN ESSENTIAL ASPECT OF THEIR CASE IN DISCOVERY BECAUSE OF STATUTORY IMMUNITY WAS NOT RELEVANT TO WHETHER THE COMPLAINT STATED CAUSES OF ACTION (FIRST DEPT).

The First Department determined defendant school's motion to dismiss the complaint was properly denied. Plaintiffs alleged the school retaliated against them after they complained about race-related issues by making a false child neglect report to Child Protective Services (CPS). The school argued the plaintiffs will not be able to learn the identity of the person who reported the alleged neglect because of the immunity provided by the Social Services Law. The 2nd Department explained that the immunity question is not relevant to whether the complaint states causes of action:

> … [P]laintiffs assert causes of action for intentional infliction of emotional distress, defamation, violations of the New York State and City Human Rights Laws, and negligent hiring, training and supervision … .
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> Defendants moved to dismiss all of these causes of action on the basis that plaintiffs would be unable to prove any of these claims because they did not know the identity of the CPS reporter and would be unable to learn it in discovery. …
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> … [I]n the context of this motion to dismiss, the Court does not assess the relative merits of the complaint's allegations against defendant's contrary assertions or to determine whether or not plaintiffs can produce evidence to support their claims … . Whether plaintiffs "can ultimately establish [their] allegations is not a part of the calculus in determining a motion to dismiss" … . Thus, regardless of whether plaintiffs will be able to obtain disclosure concerning the identity of the CPS reporter (Social Services Law § 422[4][A] …), defendants have not demonstrated entitlement to dismissal of the well-pleaded complaint for failure to state a cause of action … . M.H.B. v E.C.F.S., 2019 NY Slip Op 08276, First Dept 11-14-19

DOCTOR'S REPORTING PLAINTIFFS' CHILD'S INJURIES TO CHILD PROTECTIVE SERVICES IS PROTECTED BY THE QUALIFIED IMMUNITY PROVISION IN THE SOCIAL SERVICES LAW, PLAINTIFFS' DEFAMATION ACTION SHOULD HAVE BEEN DISMISSED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined defendant doctor's (Bludorn's) and hospital's motion for summary judgment in this defamation case should have been granted. The injury to plaintiffs' child had been reported to Child Protective Services which ultimately determined the report to be unfounded:

> Social Services Law § 413 requires certain individuals, including physicians like Bludorn, to make a child protective report whenever "they have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child." Where these mandated reporters discharge their reporting duties in good faith, they are accorded qualified immunity from civil liability (see Social Services Law § 419). A mandated reporter's good faith "shall be presumed, provided [that] such person . . . was acting in the discharge of [his or her] duties and within the scope of [his or her] employment, and . . . such liability did not result from the willful misconduct or gross negligence of such person" … . "The reporting requirements [that] trigger the qualified immunity provision in Social Services Law § 419 are not predicated upon actual or conclusive proof of abuse or maltreatment. Rather, immunity attaches when there is reasonable cause to suspect that the infant might have been abused and when the party so reporting has acted in good faith in discharging the obligations and duties imposed by the statute" … . …
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> The child's medical records and the social worker's written assessment confirmed that plaintiffs had expressed uncertainty as to what had caused the child's skull fracture and that they had offered two different possible explanations, both of which involved incidents that had occurred several days before they sought medical treatment for the child. Bludorn averred that he made the child protective report in good faith and that, in so reporting, he had no intent other than discharging his statutory duties under Social

Services Law § 413 and protecting the interests of his patient. Hunter v Lourdes Hosp., 2019 NY Slip Op 05831, Third Dept 7-25-19

STATEMENTS POSTED ON AN ELECTION-RELATED FACEBOOK PAGE ABOUT THE OPPOSING CANDIDATE ARE NOT SHIELDED BY IMMUNITY AND ARE ACTIONABLE IN THIS DEFAMATION CASE; TO APPEAL THE DENIAL OF A MOTION TO STRIKE PORTIONS OF A COMPLAINT A MOTION FOR LEAVE TO APPEAL MUST BE MADE (THIRD DEPT).

The Third Department determined statements posted on an election-related Facebook page by defendant, a Sheriff running for County Executive, concerning plaintiff, a Deputy County Executive also running for County Executive, were actionable in this defamation case. The court noted that the defendant's appeal of the denial of his motion to strike certain paragraphs of the complaint (CPLR 3024) was not before the court because a motion for leave to appeal had not been made (CPLR 5701 [b] [3]):

> … [W]e reject defendant's contention that he is shielded from liability due to absolute immunity. This immunity protects government officials, such as defendant, "with respect to statements made during the discharge of those responsibilities about matters which come within the ambit of those duties" … . As such, plaintiff cannot maintain a defamation claim against defendant based upon statements "emanating from official reports and communications" … . Although defendant was commenting about an investigation being conducted by his office, as well as responding to attacks on the credibility of his office, the documentary evidence in the record establishes that the challenged statements were not posted on the official site of the Chemung County Sheriff. Rather, they were posted on defendant's campaign Facebook page and another Internet website. Under these circumstances, defendant cannot rely on absolute immunity … .
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> … The statement that plaintiff was "pilfering free gas from taxpayers" is "susceptible to a defamatory meaning, inasmuch as [it] convey[s], at a minimum, serious impropriety and, at worst, criminal behavior" … . Such statement also "has a precise meaning that is capable of being proven true or false" … . …
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> The complaint alleged that defendant published the false statements and that they "were made in bad faith, with reckless disregard for the truth" and "tend[ed] to subject plaintiff to public contempt, ridicule, aversion, and disgrace." In view of these allegations, as well as the specific statements at issue, we are satisfied that plaintiff sufficiently pleaded malice … . Krusen v Moss, 2019 NY Slip Op 05733, Third Dept 7-18-19

STATEMENT MADE BY BANK EMPLOYEE TO THE EFFECT THE BANK WAS CLOSING THE ACCOUNT BECAUSE OF CONCERNS ABOUT MONEY LAUNDERING WAS NON-ACTIONABLE OPINION, THE BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS DEFAMATION CASE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court in this defamation action, determined that defendant-bank's (Capital One's) motion for summary judgment should have been granted. The statement at issue, made by a bank employee named Mukhi, was deemed to be non-actionable opinion:

> The plaintiff is a shareholder of a nursing home business, Parkview Care and Rehabilitation Center, Inc. (hereinafter Parkview), that maintained a bank account at the defendant, Capital One … . Ann Gottlieb, who provided administrative and back-office services to Parkview, received a letter from Capital One indicating that Parkview's account would soon be closed. When Gottlieb contacted Capital One about the closure, Sanjay Mukhi, a Capital One employee, told her that if Parkview removed the plaintiff as a signatory on the bank account, the account would not be closed. … The complaint alleges that Mukhi stated to Gottlieb that the issue was one of corporate compliance and that, as to "anyone who was a signatory on an account with Western Union or a pawn shop or check cashing business, they [Capital One] did not know who they were dealing with and [the plaintiff] was working with a check cashing business and they [Capital One] were therefore concerned that [the plaintiff] was engaged in money laundering." * * *
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> The allegedly defamatory statement was made in the context of Mukhi's explanation for the closure of Parkview's account due to a corporate compliance issue. The overall content of the communication suggested that Capital One would be "concerned" about money laundering whenever "anyone" was a signatory on an account with a check cashing business, not that Capital One was actually accusing the plaintiff of this crime. Based upon the content of the communication and the overall context in which it was

made, the average listener would take the statement to be one of opinion … .

Moreover, contrary to the plaintiff's contention, the allegedly defamatory statement was not one of actionable mixed opinion. Instead, it was "a statement of opinion which is accompanied by a recitation of the facts upon which it is based" … . There was no implication that Mukhi knew " certain facts, unknown to [the] audience, which support [the speaker's] opinion and are detrimental to the person' being discussed" … . Landa v Capital One Bank (USA), N.A., 2019 NY Slip Op 03779, Second Dept 5-15-19

PLAINTIFF DEMONSTRATED STATEMENTS MADE BY DEFENDANT TO MANAGEMENT COULD BE INTERPRETED TO CLAIM THAT PLAINTIFF FILED A FALSE TAX RETURN USING DEFENDANT'S SOCIAL SECURITY NUMBER AND THAT PLAINTIFF STOLE FUNDS FROM THE COMPANY, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS DEFAMATION ACTION SHOULD HAVE BEEN GRANTED, DECISION INCLUDES A SUBSTANTIVE DISCUSSION OF THE ELEMENTS OF DEFAMATION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the statements made by defendant about plaintiff constituted actionable defamation and plaintiff's motion for summary judgment should have been granted. The decision includes substantive explanations of the elements of defamation which are too detailed to fairly summarize here. In essence, defendant made statements which could be fairly interpreted to claim that plaintiff filed a false tax return using defendant's social security number and plaintiff stole money from the company they both worked for. The statements were made in emails and in phone calls to the payroll administrator, the president and general manager of the company:

> The precise meaning of the defendant's statements that "someone tried to file a 2014 tax return using [her] name, [her] info and . . . [her social security number]" and that she "[had] reason to believe [the plaintiff] is responsible for this attack on [her] credit, [her] finances and [her] LIFE!" is that the plaintiff used the defendant's social security number to file a fraudulent tax return … . The statements can readily be proven true or false and, given the tone and overall context in which the statements were made, signaled to the average reader or listener that the defendant was conveying facts about the plaintiff … . This includes the defendant's statement that she had "learned of the story of [the plaintiff] stealing funds, for her deposit from [Skyline's] accounts to purchase her condo in 2013." Alternatively, the challenged statements are mixed opinion, which is actionable, as a reasonable reader may infer that the defendant had knowledge of facts, unknown to the audience, which support the assertions she made ,,, . The plaintiff also established, prima facie, that the statements were defamatory per se since they charged the plaintiff with the commission of a serious crime and would tend to injure the plaintiff in her profession by imputing "fraud, dishonesty, misconduct, or unfitness in conducting [her] profession" … . Kasavana v Vela, 2019 NY Slip Op 03777, Second Dept 5-15-19

INCLUSION OF CLAIMANT'S PHOTOGRAPH ON A WALL OF SHAME DEPICTING PERSONS ARRESTED DURING OPERATION SAFE INTERNET, AN INVESTIGATION INTO THE USE OF THE INTERNET FOR THE SEXUAL EXPLOITATION OF CHILDREN, CONSTITUTED ACTIONABLE DEFAMATION BY IMPLICATION SUPPORTING A $300,000 DAMAGES AWARD (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Pritzker, determined the Court of Claim's decision awarding claimant $300,000 in this defamation-by-implication action against the state was supported by the evidence. Claimant had been arrested during Operation Safe Internet, but only because of the alleged Internet communication by claimant's roommate. Claimant was arrested solely for possession of drugs and his case was subsequently adjourned in contemplation of dismissal and ultimately dismissed with the record sealed. In a televised news conference about an initiative to "investigate and prosecute crimes involving the online sexual exploitation of children, " under a sign saying "Internet Crimes Against Children," claimant's photograph was one of 61 on a "wall of shame" depicting those who had been arrested during the investigation:

> … [W]e now adopt a two-part test to determine whether the first element is met in causes of action alleging defamation by implication, requiring proof (1) that the language of the communication as a whole reasonably conveys a defamatory inference, and (2) that such language affirmatively and contextually suggests that the declarant either intended or endorsed the inference … . * * *
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> … [W]ithout providing more information to the public regarding the underlying facts of claimant's case, to a reasonable viewer, the

communication as a whole falsely implied that claimant, whose photograph was on the wall of shame, had engaged in a sexual crime against a child … . * * *

… [W]e find that claimant has established that the context of defendant's communication as a whole can be reasonably read to affirmatively suggest that defendant intended or endorsed the defamatory inference that claimant was arrested for a crime involving the online sexual exploitation of a child … . In fact, the very placement of claimant's photo in the array strongly suggested to the public that defendant intended and endorsed the message that claimant belonged on the "wall of shame" because of his fictional crime against children. Further, the use of a small, unreadable label listing the crime for which claimant was actually arrested, which was the particular manner in which the true facts were conveyed, supplied "additional, affirmative evidence suggesting that the defendant intend[ed] or endorse[d] the defamatory inference" that claimant had been arrested for a crime involving the sexual exploitation of a child … . Partridge v State of New York, 2019 NY Slip Op 03715, Third Dept 5-9-19