(27)

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss. **SUPERIOR COURT**
CIVIL ACTION
NO. 20-00135

BARRY CLAIRMONT
Plaintiff

v.

MELISSA MAZZEO
Defendant

MEMORANDUM OF DECISION AND ORDER ON THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This case arises out of statements made by the losing candidate of the 2019 Pittsfield mayoral election. The plaintiff, Barry Clairmont, brought this complaint against the defendant, Melissa Mazzeo, alleging defamation and intentional infliction of emotional distress (IIED). The defendant now moves for summary judgment pursuant to Mass. R. Civ. P. 56 on the grounds that her statements were not defamatory as a matter of law and her conduct does not rise to the level of severity necessary to state a claim for IIED. A hearing was held on February 23, 2023.

BACKGROUND

The following is taken from the consolidated statement of facts, the affidavits, and the exhibits attached thereto, with some facts reserved for later discussion. As the motion is one for summary judgment, the facts are taken in the light most favorable to the non-moving party.

The plaintiff is an accountant, a former city council member, and husband to the current Pittsfield Mayor, Linda Tyer. He also served as Tyer's campaign treasurer for the 2019 mayoral election. In November 2019 mayoral election, the defendant ran against Tyer. Pittsfield held in-person absentee voting for the mayoral election from approximately October 15, 2019 through November 4, 2019. A citizen could cast an absentee ballot by appearing in person at the Registrar of Voters' Office (Registrar's Office).

On October 28, 2019, the plaintiff went to the reception area of the Registrar's Office to request a copy of the absentee voter report. The plaintiff waited approximately thirty seconds before the Clerk, Michele Benjamin, escorted him through a swinging door into the non-public area of the Registrar's Office, and then further to her office within the City Clerk's Office. The distance between the swinging door, which separates the public and non-public area of the Registrar's Office, and Benjamin's office is approximately ten paces. Benjamin provided the plaintiff with the requested absentee voter report and had a brief exchange about it. Benjamin then escorted the plaintiff out the way he came, through the Registrar's Office. The plaintiff

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spent less than one minute in the Registrar's Office. He was never alone with or touched any ballots and was in view of the voters on the other side of the counter the whole time. The Registrar's Office kept absentee ballots in boxes on the conference room table in plain view for all to see.

Also on October 28, 2019, Debra Courtney was at the Registrar's Office filling out her absentee ballot with her husband. She observed the plaintiff walk out of the swinging door that separates the public and non-public areas of the office with Michele Benjamin, the Clerk. Later Ms. Courtney texted the defendant the following:

Ms. Courtney:	Saw [the plaintiff] slithering out of micheles office from the back from voters. I thought was odd. Why not front office. He would not look at me. Watch those absentees ballots.
The defendant:	Ugh. That scares me. U need to go hand out there daily to watch them.
Ms. Courtney:	Yup. John and I voted today. I questioned where they go and are they locked up. My gut tells me not good. Michele is not one to handle these ballots. I am thinking of going in on Wednesday and asking for my ballot back. Just to check.
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The defendant:	Did you see [the plaintiff] there when you voted? I'm hearing he is in there a lot.
Ms. Courtney:	Yes. Coming from micheles office from the back. He looked like he swallowed a canary. Ask Doreen she tells me [the plaintiff] and the chief in there. All the time.

The defendant contacted Chris Keohan, a member of her campaign team, to discuss the information she received through text. Keohan called the Secretary of State Elections Division to place a complaint.

Michele Tassinari, Chief Legal Counsel with the Elections Division, contacted Benjamin about the complaint. Benjamin told Tassinari what occurred on October 28th.

On November 5, 2019, Mayor Tyer defeated the defendant by 528 votes. On November 22, 2019, the defendant issued a press release titled "Melissa Mazzeo addresses upcoming election recount." The press release included the following statement at issue: "An individual closely related to the Tyer Campaign had unauthorized direct access to ballots inside City Hall." The defendant later confirmed in an interview that the individual referenced was the plaintiff and added "[b]eing the husband of the candidate, I think it would be the last place you would want to find yourself."

DISCUSSION

Our courts favor summary judgment in defamation cases, "in light of the chilling effect that the threat of litigation can have on activities protected by the First Amendment to the United States Constitution." *Butcher v. Univ. of Massachusetts*, 483 Mass. 742, 746-47 (2019). "Nonetheless, to prevail on a motion for summary judgment in a defamation action, the moving party must meet the usual burden under Mass. R. Civ. P. 56 (c) . . . ." *Id.*

The standard that this Court applies to the summary judgment motion is well established. "[A] party moving for summary judgment in a case in which the opposing party [has] the burden of proof at trial is entitled to summary judgment if he [or she] demonstrates . . . that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case." *Brooks v. Peabody & Arnold, LLP*, 71 Mass. App. Ct. 46, 50 (2008), quoting *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991). The opposing party cannot simply rest on the pleadings or mere assertions that there are disputed facts. See, e.g., *Chang v. Winklevoss*, 95 Mass. App. Ct. 202, 214 (2019) (court may not credit factual assertions "not supported by the summary judgment record"). Although this Court must draw all reasonable inferences in favor of the nonmovant, that does not require the Court to accept conclusory allegations, draw improbable inferences, or engage in unsupported speculation. A party cannot avoid or obtain summary judgment by making factual assertions unsupported by evidence.

A. Defamation

"To withstand a motion for summary judgment on a defamation claim, a plaintiff must have a reasonable expectation of proving four elements: first, the defendant made a statement, of and 'concerning the plaintiff, to a third party'; second, the 'statement could damage the plaintiff's reputation in the community'; third, the defendant was at fault for making the statement; and fourth, the statement caused economic loss or, in four specific circumstances, is actionable without economic loss" (footnote omitted). *Scholz v. Delp*, 473 Mass. 242, 249 (2015), citing *Ravnikar v. Bogojavlensky*, 438 Mass. 627, 629-30 (2003).

The defendant argues that the plaintiff has no reasonable expectation for proving his defamation claim because none of the referenced statements are actionable for defamation. First, she argues her statements were substantially true and on a topic of public concern which places the burden on the plaintiff to demonstrate the statements were false. Second, she argues that her statements were opinions based on nondefamatory facts which are non-actionable. Finally, she argues that even if her statements are actionable, the plaintiff cannot establish that she acted with actual malice.

The plaintiff counters that he has a valid defamation claim that should survive summary judgment. He argues that the defendant made an actionable defamatory statement published in a press release that accused him of election fraud. He argues that the summary judgment record establishes that the defendant's statements were not true, and that her statements were not opinions when viewed in their totality and in the context in which they were published. Alternatively, the plaintiff argues that the question of whether the defendant's statements are factual or opinion should be left to the jury.

1. False Statements

The plaintiff claims that the defendant defamed him, and attempted to undermine the 2019 Pittsfield mayoral election, by publicly declaring that he engaged in election fraud. In support of this claim, he points to the defendant's press release that stated, among other things: "An individual closely related to the Tyer Campaign had unauthorized direct access to ballots inside City Hall." The press release explained that the defendant was seeking a recount of the election results due to the "significant concerns my campaign has about the integrity of the election here in Pittsfield." She also stated in the press release:

> "As a candidate and voter in Pittsfield, I am seeking to ensure that issues like this are brought to light and never happen again. Until we are provided answers to these issues, I will continue to pursue every avenue necessary to ensure that the people of Pittsfield can be certain that their votes are protected and counted properly."

Subsequently, the defendant stated to the media that the individual closely related to the Tyer campaign in the press release was the plaintiff. She further stated that "being the husband of the candidate, I think that is the last place you would want to find yourself."

The defendant is correct that her statements about the Pittsfield's mayoral election are a matter of public concern. Therefore, the plaintiff has the burden of demonstrating that the statements are capable of being proven false. See *Jones v. Taibbi*, 400 Mass. 786, 797 (1987); *Shaari v. Harvard Student Agencies, Inc.*, 427 Mass. 129, 132 (1998). The defendant claims that the plaintiff has no reasonable expectation meeting this burden because her statements are either true or substantially true, and are also matters of personal opinion.

"[T]o be actionable, the statement must be one of fact rather than of opinion." *Scholz v. Delp*, 473 Mass. 242 (2015); see *King* v. *Globe Newspaper Co.*, 400 Mass. 705 (1987) ("Statements of pure opinion are constitutionally protected"). Similarly, "[s]tatements that are merely 'rhetorical hyperbole,' or which express a 'subjective view,' are not statements of actual fact.'" *Lawless v. Estrella*, 99 Mass. App. Ct. 16 (2020). "The determination whether a statement is one of fact or opinion is generally considered a question of law." *Cole v. Westinghouse Broadcasting Co.*, 386 Mass. 303, 309 (1983), cert. denied, 770 U.S. 1037. "If 'the allegedly libelous remarks could have been understood by the average reader in either sense [i.e., as fact or as opinion], the issue must be left to the jury's determination.'" *Reilly v. Associated Press*, 59 Mass. App. Ct. 764, 770 (2003), quoting *Lyons* v. *New Mass Media, Inc.*, 390 Mass. 51, 59 (1983).

Here, the defendant's statement that the plaintiff had unauthorized direct access to absentee ballots is not presented as an opinion but as an actual event that she claims contributed to her concerns over the election results. A reasonable reader would not expect or recognize this statement as opinion uttered by a distraught losing mayoral candidate. See *Reilly*, 59 Mass. App. Ct. at 771 (pet owner's statements about veterinarian's treatment of deceased pet could be understood by reader as opinion and generalizations uttered by distraught pet owner). The context surrounding the defendant's statement would suggest to a reasonable reader that she

thought the plaintiff committed election fraud (an opinion) based on his unauthorized direct access to absentee ballots (a statement of fact).

The plaintiff has successfully demonstrated that the defendant's statement is capable of being proven false through his deposition, the deposition of the defendant, and the deposition of Michele Benjamin. The plaintiff's and Benjamin's account of his presence in the Registrar's Office is enough evidence from which a jury could find that the plaintiff did not have "unauthorized direct access to ballots." The defendant's argument that the word "access" referred only to the plaintiff's presence in the Registrar's Office, and not the actual handling of ballots in and of itself, demonstrates the differing potential effects of a true or false statement in this context: it is a very different matter for an unauthorized individual to have access to the general area in which ballots are kept, than it is for such an individual to have access to the ballots themselves. See *Masson v. New Yorker Magazine*, 501 U.S. 496, 517 (1991) ("[A] statement is not considered false unless it would have a different effect on the mind of the reader from that which the pleaded truth would have produced").

The plaintiff further claims the defendant's statements defamed him by implication and innuendo. He argues that a reasonable person would find that the press release implies that he committed election fraud by tampering with the absentee ballots. "[D]efamation can occur by innuendo as well as by explicit assertion . . . ." *Brown v. Hearst Corp.*, 54 F.3d 21, 25 (1st Cir. 1995). "The existence of defamatory innuendo is a question of fact for a jury to consider." *Reilly*, 59 Mass. App. Ct. at 774.

Here, a reasonable reader could infer that defendant's statements suggest the plaintiff committed election fraud. Therefore, a factual dispute exists as to whether the press release and additional statements by the defendant, taken together with fair inferences that might be drawn from them, constituted false and defamatory statements.

2. Potential Harm to Reputation

"The determination whether the communication complained of is capable of a defamatory meaning is for the court." *Jones*, 400 Mass. at 792. The statements made in the press release and later by the defendant to the media are capable of conveying a defamatory meaning. A jury could find the defendant's statement to imply criminal conduct by the plaintiff, making it defamatory per se. See *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 853 (1975).

In addition, a reader of the press release could reasonably infer that the plaintiff tampered with absentee ballots, which could subject him to contempt, hatred, scorn, or ridicule and damage his reputation within the community. See *Grande & Son, Inc. v. Chace*, 333 Mass. 166, 168 (1955) (words are defamatory "if they hold the plaintiff up to contempt, hatred, scorn, or ridicule or tend to impair his standing in the community"). "Once the court has determined that a statement is capable of a defamatory meaning, it is for a jury to decide whether the statement was so understood by its recipient." *Reilly*, 59 Mass. App. Ct. at 778.

3. Fault

"In order to impose liability for the publication of unprivileged, false, and defamatory statements, the plaintiff must demonstrate some degree of fault on the part of the publisher." *Jones*, 400 Mass. at 797. "Public officials and public figures may recover for publication of a defamatory falsehood upon proof of actual malice. . . . With respect to private persons, however, liability may be imposed upon proof of negligent publication of a defamatory falsehood" (citations omitted). *Id.* "The determination of the plaintiff's status, whether public official or public figure or private person, as is the case with questions of privilege generally, . . . is for the trial judge in the first instance" (quotations omitted). *Stone*, 367 Mass. at 862.

The defendant argues that the plaintiff's status is that of a limited issue public figure, and, therefore, he must meet the actual malice standard. "[A] limited issue public figure is one who voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues, and consequently has achieved special prominence in the resolution of public questions" (quotations omitted). *Id.* at 798. "In determining the plaintiff's status as a limited issue public figure, this court must look to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation" (quotations omitted). *Id.*

Here, the plaintiff is a private person and not a limited issue public figure. "[A] private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." *Bowman v. Heller*, 420 Mass. 517, 525 (1995), quoting *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 167 (1979). Although the plaintiff is the spouse of a mayoral candidate and involved himself in the election as a member of her campaign, he did not voluntarily inject himself into the public controversy created by the defendant. "[T]he attention that a defendant's alleged wrong itself generates does not create a public controversy necessary for limited purpose public figure status." *Bownman*, 420 Mass. at 524, citing *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979) ("Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure"). Therefore, the plaintiff under these circumstances is considered a private person.

The summary judgment record is sufficient to raise a genuine issue of material fact as to whether the defendant was negligent in the publication of her press release. The defendant did not witness the plaintiff's alleged actions and instead relied upon vague information she received from two people. A jury could find that the defendant negligently published her press release before taking any steps to corroborate the information she relied upon in stating that the plaintiff had direct, unauthorized access to absentee ballots.

4. Damages

"Statements that prejudice one's professional standing or that charge one with a crime are actionable without proof of actual damages." *Reilly*, 59 Mass. App. at 779, citing *Ravnikar*, 438 Mass. at 630. The defendant's press release damages the plaintiff's professional reputation by calling into question his honesty, integrity, and credibility, and accused him of a crime which is defamatory per se. *Stone*, 376 Mass. at 853. The plaintiff has stated that he has lost some clients

and spent hours explaining to others what really happened. These are questions of fact for a jury on the issues of damages.

B. Intentional Infliction of Emotional Distress

To prevail on an IIED claim, the plaintiff would have to show: "(1) that the actor intended to inflict emotional distress or that [she] knew or should have known that emotional distress was the likely result of [her] conduct . . . ; (2) that the conduct was 'extreme and outrageous,' was 'beyond all possible bounds of decency' and was 'utterly intolerable in a civilized community' . . . ; (3) that the actions of the defendant were the cause of the plaintiff's distress . . . ; and (4) that the emotional distress sustained by the plaintiff was 'severe.'" *Howell*, 455 Mass. 641, 672 (2010), quoting *Agis v. Howard Johnson Co.*, 371 Mass. 140, 144-45, (1976).

The defendant argues that the plaintiff's IIED claim must fail as it is derivative of the defamation claim. Alternatively, she offers that no reasonable jury could find her actions so extreme and outrageous to rise to the very high standard required for an IIED claim.

The plaintiff counters that the defendant's statements, viewed in the totality of the circumstances in a light most favorable to him and putting as harsh of a face on her actions, summary judgment is not appropriate. The plaintiff claims that the defendant published the press release with no evidence to support her clear allegations about his conduct. He contends that reasonable people could differ as to whether the question of fact as to whether defendant's conduct was extreme and outrageous.

Putting "as harsh a face on [the defendant's] actions ... as the basic facts would reasonably allow," *Richey* v. *American Auto. Ass'n, Inc.*, 380 Mass. 835, 839 (1980), a trier of fact could reasonably find that the press release insinuated that the plaintiff committed election fraud to help his spouse win the mayoral election, and that this insinuation was so "'extreme and outrageous,' was 'beyond all possible bounds of decency' and was 'utterly intolerable in a civilized community' . . ." *Howell*, 455 Mass. at 672. Moreover, "[t]here is an issue for the jury if reasonable people could differ on whether the conduct is 'extreme and outrageous.' " *Brown v. Nutter, McClennen & Fish*, 45 Mass. App. Ct. 212, 219, 696 N.E.2d 953 (1998).

Reasonable people might well see the defendant's conduct as extreme and outrageous and, accordingly, summary judgment is not appropriate on this count of the complaint. See *Banks v. Town of Plainville*, 2020 WL 7320996, at *8 (D. Mass. Dec. 11, 2020)(assertions suggesting a detective improperly used his position to threaten baseless prosecution to exploit the plaintiff into cooperating is sufficient evidence of extreme and outrageous conduct to survive summary judgment.

ORDER

For the foregoing reasons, the Defendant's Motion for Summary Judgment is **DENIED**.

John A. Agostini
Associate Justice, Superior Court

Date 3/31/23

ENTERED
THE COMMONWEALTH OF MASSACHUSETTS
BERKSHIRE S.S. SUPERIOR COURT
MAR 31 2023