SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEVEN J. ROSEN Plaintiff v. AMERICAN ISRAEL PUBLIC AFFAIRS COMMITTEE, INC., *et. al.* Defendants	:	Case No.: 0001256-0-9

DEFENDANTS', AMERICAN ISRAEL PUBLIC AFFAIRS COMMITTEE, INC., KOHR, DOW, MANOCHERIAN, FRIEDMAN, WEINBERG, ASHER, LEVY, KAPLAN, WULIGER, FRIEDKEN AND DORTON'S, REPLY TO PLAINTIFF'S OPPOSITION TO THE MOTION TO DISMISS

I. FACTUAL BACKGROUND

Plaintiff filed this defamation action on March 2, 2009, against his former employer, the American Israel Public Affairs Committee, Inc. ("AIPAC") as well as AIPAC's Executive Director (Defendant Kohr), all of the volunteer members of AIPAC's Board of Directors ("the Board Member Defendants") and Patrick Dorton. Plaintiff's defamation claim is premised upon statements that Plaintiff alleges were made by or authorized by the Defendants in 2005 through 2007, and which appeared in the media either originally or by way of republication by the media in 2005, 2006, 2007, and 2008. The statements identified by Plaintiff in his Complaint and Opposition as defamatory, were statements made in response to media inquiries regarding a Federal investigation into Plaintiff's activities that resulted in a Federal grand jury indictment of the Plaintiff.

The only "statement" made within one (1) year of the Complaint's filing was an affirmation of AIPAC's opinion, and the opinion was supported by information and evidence

disclosed by the Department of Justice to AIPAC's criminal defense counsel. The "statement" is not, as a matter of law, defamatory. Moreover, the Complaint is entirely void of any factual allegations that establish that any Defendant acted with malice, a necessary prerequisite to recovery in light of the fact that Plaintiff was a public figure, as conceded in his Opposition, at the time the statements in question were made.

Accordingly, Plaintiff has failed to state a claim of defamation against all Defendants and, therefore, Plaintiff's Complaint should be dismissed in its entirety. With respect to the Board of Directors Defendants, Plaintiff's Complaint contains only conclusory allegations that are insufficient to support a claim against any volunteer Board Member Defendant. Further, if Plaintiff's Complaint is taken as true, Plaintiff cannot establish that the volunteer Board Members engaged in any willful misconduct by cooperating with the Department of Justice investigation, a fact that necessarily absolved such Defendants under the civil immunity provisions of D.C. Code § 29-301.113.

II. ARGUMENT

A. PLAINTIFF HAS NOT CITED THE CORRECT LEGAL STANDARD IN HIS OPPOSITION.

In his Opposition Brief Plaintiff incorrectly states the applicable legal standard. The moving party need not show "beyond doubt that the non-moving party is unable to prove any set of facts to support his claim." The moving party must only show that accepting the factual allegations as true and construing them in a light most favorable to the non-moving party, that the Plaintiff has not raised a right to relief above the speculative level. *See*, *Chamberlain v. American Honda Finance Corp.*, 931 A.2d 1018, 1023 (D.C. 2007) (citing *Jordan Keys & Jessamy, LLP v. St. Paul Fire & Marine Ins. Co.*, 870 A.2d 58, 62 (D.C. 2005); and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1965 (2007)).

In the recent Supreme Court case *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), the Court noted, "*Twombly* retired the *Conley* no-set-of-facts test." *Id. at* 1944 (citing *Conley v. Gibson,* 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). The Court reiterated the new plausibility standard and explained:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

Iqbal, 129 S.Ct. at 1949 (internal citations omitted). A "court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Iqbal*, 129 S.Ct. at 1950. Conclusory allegations or legal conclusions masquerading as factual allegations will not suffice to prevent a motion to dismiss. *Warren v. District of Columbia*, 353 F.3d 36, 39 (D.C. Cir. 2004); *Bender v. Suburban Hosp., Inc.*, 159 F.3d 186, 192 (4th Cir. 1998).

B. THE EQUITABLE TOLLING DOCTRINE IS NOT APPLICABLE TO THESE FACTS AND PLAINTIFF'S CLAIM FOR DEFAMATION IS TIME BARRED.

Instead of rebutting the legal arguments in the Motion to Dismiss that demonstrated that the Plaintiff is not entitled to any relief, the Plaintiff uses 11 pages of his 22 page Opposition Brief to reiterate the same facts alleged in the Complaint. In addition to stating the incorrect legal standard, the Plaintiff attempts to escape the statute of limitations by asserting, "the statute of limitations was equitably tolled with regard to those statements during the pendency of the criminal charges against" Plaintiff. *See*, Opposition Brief, at 12. As the doctrine is not

applicable under the wholly distinguishable facts of this case, Plaintiff's claims are overdue and barred by the statute of limitations.

Equitable tolling is not applicable here because Plaintiff was acutely aware of all information regarding his alleged defamation claim prior to the running of the statute of limitations. Most notably, the Plaintiff was on notice of the alleged defamatory statements through their publication in mass media and newspapers. *See, e.g., Mullin v. Washington Free Weekly, Inc.*, 785 A.2d 296, 298 n. 2, 299 (D.C. 2001) (adopting the "virtually unanimous rule" that in a case alleging defamation through a mass media outlet such as a book, magazine, or newspaper, the limitations period begins to run when the publication "is first generally available to the public"). Unlike the plaintiff in *Chung v. U.S. Dept. of Justice*, 333 F.3d 273 (D.C. Cir. 2003), Plaintiff Rosen was not under investigation by those he intended to sue. The doctrine of equitable tolling is also not applicable here because there were no circumstances that impeded Plaintiff Rosen's timely bringing his claim against AIPAC. The timing in which Plaintiff actually did bring his claim plainly underscores this fact.

In *East v. Graphic Arts Industry Joint Pension Trust*, 718 A.2d 153, 161 (D.C. 1998), the Court of Appeals discussed its view of the appropriate use of the equitable tolling doctrine. Where a plaintiff was generally aware of her right to be free from discrimination in employment decisions for approximately one (1) year after she was terminated but waited another year before actually filing her discrimination suit in federal court, the District Court dismissed her suit. The District Court "[would] not toll the time limit for the approximately two years, following her termination, it took [p]laintiff to obtain legal counsel and file her lawsuit." *Id.* at 160. "Statutes of limitations are not arbitrary obstacles to the vindication of just claims, and therefore they should not be given a grudging application. They protect important social interests in certainty,

accuracy, and repose." *Graphic Arts Industry*, 718 A.2d at 161 quoting *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 453 (7th Cir.1990) (plaintiff gained enough information to bring suit two (2) months after cause of action arose but waited eight (8) months to file his complaint, which was outside limitation period measured from the time the cause of action arose)).

The Plaintiff in *Chung v. U.S. Dept. of Justice* pleaded guilty and agreed to be a cooperating witness in a Department of Justice ("DOJ") investigation into violations of election laws. *Chung*, 333 F.3d at 275. Between Chung's guilty plea and prior to his sentencing, the media learned of his involvement in the larger secret investigation through alleged leaks from the DOJ. *Id.* Chung claimed this placed his family at risk and violated the Privacy Act. Chung claimed that he could not timely sue the Department of Justice as it would have jeopardized his request for leniency, and because "[h]e was at the mercy of the subjective opinion of the very government agency that violated his rights secured by the Privacy Act." *Id.* at 278.

Unlike the *Chung* case, equitable tolling is not applicable to this Plaintiff because AIPAC and the other Defendant were not prosecuting the criminal case against Plaintiff. Plaintiff has misdirected his anger. Plaintiff has not sued the federal agency that directly investigated him and indicted him for purported criminal activities, which the government subsequently dropped; instead, he has sued a third party, AIPAC and members of its volunteer Board of Directors. Here, Plaintiff claims in his Opposition that his criminal investigation and prosecution in the Eastern District of Virginia "made it practicably impossible for him to file his claim against" AIPAC for the "statements made in 2005-2007." Opposition, at 13. Plaintiff further claims that suing AIPAC would have jeopardized his ability to defend his criminal charges. Opposition, at

13.[1] The doctrine of equitable tolling, however, only allows a plaintiff to delay filing his claims if "despite all due diligence [he] is unable to obtain vital information bearing on the existence of his claim." *Chung*, 333 F.3d at 278. Nothing in the government's investigation or subsequent prosecution barred Plaintiff from obtaining a single fact necessary to bring his defamation claim. Because the Plaintiff was aware of the alleged defamatory statements on which he bases his claims during the time of their initial publication and well before he filed suit, the Plaintiff could have brought his claims against AIPAC within the proper one (1) year statute of limitations but simply failed to do so.

Plaintiff does not state what made it "practicably impossible" or "not feasibl[e]" for him to timely file other than the mere existence of the criminal charges. As noted by the Court of Appeals in *East v. Graphic Arts Industry Joint Pension Trust*:

> Equitable tolling, when applicable, does not extend the statute of limitations indefinitely. Plaintiff is required to bring suit within a reasonable time after [he] obtains, or by due diligence could obtain, the information necessary to pursue the claim; unless the plaintiff does so, [he] cannot avoid the bar of limitations.

718 A.2d at 161. The criminal charges do not provide justification for his delay in bringing his suit. Had Plaintiff timely filed his suit within the statute of limitations, such suit would presumably have been a help to his criminal case because Plaintiff would have been attempting to prove on both claims that he allegedly did nothing wrong. His defenses to the criminal charges would have been in line with the defenses to the alleged defamatory remarks of AIPAC he seems to claim were more injurious to him than the Espionage Act charges brought against him.

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[1] Plaintiff does assert that his ability to defend himself during the pendency of the criminal charges would have been jeopardized because AIPAC was speaking for him while those charges were pending. Opposition at 13. As Plaintiff's complaint makes clear, however, he was represented by his own counsel throughout the criminal proceedings and, as attested by the numerous articles cited in his complaint and papers, had little difficulty speaking out on his own behalf.

The absurdity of the Plaintiff's equitable tolling argument is answered by the Plaintiff's own actions in actually filing his suit while his criminal investigation and prosecution were still pending. Plaintiff's filing date shows that the criminal charges *were not* a hindrance to his filing suit. By Plaintiff's own admission, the criminal charges against him were dropped on May 1, 2009, yet Plaintiff filed his defamation suit on March 2, 2009, *two (2) months before* his criminal prosecution and investigation were dismissed. The equitable tolling "doctrine [does] not operate under the circumstances presented here, where plaintiff failed to file [his] action in court within a reasonable time after [he] obtained, or by due diligence could have obtained, the information necessary to file [his] complaint. *East*, 718 A.2d at 161. The Plaintiff *could have* timely brought his claims of defamation regarding the 2005-2007 statements. He did not do so. As equitable tolling does not apply and the claims fall outside the one-year statute of limitations, his claims are untimely and must be dismissed.

C. THE MARCH 2008 ALLEGED "STATEMENT" IS NOT DEFAMATORY.

Given the context of the March 2008, New York Times article and the information known to AIPAC and cited within the article, AIPAC's opinion was not, as a matter of law, a defamatory statement. *See*, Plaintiff's Attachment 2. By 2008, the Plaintiff was indicted under the Espionage Act. By any objective or subjective measure, being subject of a criminal indictment is not conduct an employer expects of any employee. That the Plaintiff's indictment did not conform to standards AIPAC expects of its employees is nothing more than a reasonable statement of opinion by AIPAC.

As is plain from the Complaint, when the March 3, 2008, Article was published the Plaintiff had been indicted. Through the indictment, AIPAC learned considerably more, and surprisingly new details of the extent of the Plaintiff's meetings with individuals named in the

indictment. Also, as detailed in Plaintiff's own exhibit, "federal prosecutors in Virginia played part of surreptitiously recorded conversations" for AIPAC's criminal defense counsel, Nat Lewin, after which Mr. Lewin immediately went back to AIPAC and advised AIPAC to terminate the Plaintiff. *See*, Plaintiff's Attachment 2[2]. While not able to disclose what specific information Mr. Lewin heard or received, the evidence was of conduct Mr. Lewin concluded AIPAC could not condone and was further grounds to warrant the recommendation to terminate the Plaintiff's at-will employment in 2005. There is no legal justification in Plaintiff's attempt, set forth in his own complaint, to penalize AIPAC for its reliance on advice of counsel, rendered only after reviewing serious, credible evidence and information received from the Department of Justice.

"Assertions of opinion on a matter of public concern receive full constitutional protection if they do not contain a provably false factual connotation." *Guilford Transp. Industries, Inc. v. Wilner*, 760 A.2d 580, 597 (D.C. 2000) (citing *Washington v. Smith*, 80 F.3d 555, 80 (D.C. Cir. 1996). As stated in the Motion to Dismiss, the New York Times article "contains an affirmation that AIPAC stands by its reasons for terminating the Plaintiff ... especially in light of the new developments in the Federal case." Motion to Dismiss, at 11. Defendant Dorton confirmed AIPAC's opinion that Plaintiff's conduct, as of March 2008, was *still* not what AIPAC expected of its employees in light of all the allegations stated in the federal indictment against the Plaintiff and information learned by AIPAC's counsel. *See*, Plaintiff's Attachment 2.

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[2] The March 3, 2008, New York Times article states that Lawrence A. Franklin, who was arrested in 2004 and pled guilty to passing on sensitive information, wore a wire to meetings with Plaintiff Rosen's colleague as part of his cooperation with the FBI. The surreptitiously made recordings played for AIPAC's counsel were of "conversations in which Mr. Rosen and Mr. Weissman passed on information about the Middle East they had received from government officials to Mr. Kessler at The Washington Post." The Article further stated that Plaintiff Rosen's "boastful tone, [] may have been used to suggest that [Plaintiff Rosen's] knowledge reflected [Rosen's] great influence within the administration." *See*, Plaintiff's Attachment 2.

Plaintiff has failed to show how the March 2008, alleged statement contains a provably false connotation because he has not shown, and cannot ever show, that AIPAC's opinion was false. Being the subject of a criminal indictment was not and still is not conduct AIPAC expects of any employee. If anything, this makes the statement true, and thus *not defamatory*. As the March 2008, "statement" is an assertion of opinion and is not defamatory, the Plaintiff is not entitled to any relief from Defendants and his claim must be dismissed.

D. PLAINTIFF CONCEDES HE IS A PUBLIC FIGURE AND HIS COMPLAINT FAILS TO ALLEGE FACTS SUFFICIENT TO ESTABLISH THE LEGAL BURDEN OF MALICE REQUIRED TO PREVAIL IN A DEFAMATION CLAIM.

In the Opposition, Plaintiff argues that his allegations are sufficient to support a finding of malice, thereby conceding that he is a public figure and that he must establish malice to meet his burden of proof. Opposition, at 18. Malice is only required for public and limited purpose public figures to establish a defamation claim. Even with the heightened standard required of public figures, Plaintiff has not shown any plausible facts showing the March 2008, "statement," was so "extreme, unreasonable, or abusive" to give rise to malice. As cited in Plaintiff's opposition, "the fact finder must look to the primary purpose behind the statement when determining if there is malice." Opposition, at 18 (citing *Columbia First Bank v. Ferguson*, 665 A. 2d 650, 656 (D.C. 1995)). Plaintiff also cites that "a qualified privilege exists only if the publisher believes, with reasonable grounds, that his statement is true." Opposition, at 19 (citing *Ingber v. Ross*, 479 A.2d 1256, 1264 n. 9 (D.C. 1984)).

Plaintiff claims that AIPAC had no reasonable grounds to believe that the March 2008, allegedly defamatory statement was true. Plaintiff plainly overlooks the evidence supporting AIPAC's opinion, evidence he actually provides with his own pleadings to the Court. As described in Plaintiff's Attachment 2, AIPAC's counsel met with the Department of Justice. At

that meeting, the Department of Justice shared specific evidence with AIPAC's counsel. When AIPAC's counsel, following that meeting, recommended that AIPAC terminate Plaintiff's at-will employment, AIPAC acted upon its recommendation of counsel. *See*, Attachment 2, p 3. Having acted upon the advice of counsel, who only made his recommendation following the review of evidence provided by the Department of Justice, there are no grounds to believe that AIPAC's opinion was based upon anything other than a reasonable manifestation that their opinion was true. In 2008, AIPAC still held the view that Plaintiff's actions did not comport with conduct AIPAC expects of its employees because by then, AIPAC had read and reviewed the federal indictment (let alone obtained additional information through news articles and other pleadings filed in Plaintiff's criminal case)[3], which stated that Plaintiff knowingly accepted classified information. This all supported AIPAC's continued belief that the Plaintiff's conduct did not exemplify what AIPAC or any other employer expected from an employee. As a matter of law, AIPAC's opinion was neither a malicious statement nor a falsity because AIPAC believed it to be true. Accordingly, the Plaintiff's claim must be dismissed.

E. PLAINTIFF CANNOT SHOW WILLFUL MISCONDUCT BY VOLUNTEER BOARD MEMBERS.

As stated in the Motion to Dismiss, the Board Member Defendants have statutory immunity to civil liability under DC Code Ann. § 29-301.113. As confirmed by the Plaintiff's own complaint, the Plaintiff cannot establish any willful misconduct on the part of AIPAC's volunteer Board Members. As such, the Board Member Defendants cannot be liable to the Plaintiff. Notably, the Plaintiff alleges that the Board Member Defendants were "ultimately

[3] AIPAC's knowledge of additional information such as discrepancies in the Plaintiff's story as told to AIPAC at the outset of the investigation and the facts ultimately revealed in the indictment, the Plaintiff's use of AIPAC computers for improper purposes and revelations of the Plaintiff's conduct by the Department of Justice need not, in connection with the motion to dismiss, be considered by the Court to conclude that the Plaintiff cannot prevail on his defamation claim. Rather, the Plaintiff's reference in

responsible for AIPAC's *response to the pressure from the Justice Department* in its treatment of Steven Rosen, including the issuing of the false and hurtful statements." Opposition, at 21 (emphasis added). Plaintiff further alleges that AIPAC, with the approval of the Board Member Defendants, terminated him in response to their desire to conform to the "Thompson Memorandum" dictates as required by the Department of Justice. Opposition, at 5.

Plaintiff's own Complaint and factual allegations supports the dismissal of claims against the Board Member Defendants. If accepted as true for the purposes of the Motion to Dismiss, the Board Member Defendants could only have been acting to fulfill their superior duty to the organization as a whole by taking the steps necessary to ensure AIPAC's compliance with the Department of Justice's mandates, including the Thompson Memorandum. Willfulness is "something worse than good intentions coupled with bad judgment." *Sherman v. Commission on Licensure to Practice Healing Art.*, 407 A.2d 595, 599 (D.C. 1979). Having exercised their fiduciary duties to the corporation for whom they volunteered their time, none of the directors could have, under the plain meaning of Section 29.301.113, engaged in "willful misconduct" by cooperating with the government[4]. Evaluated under the motion to dismiss standard, these assertions taken as true with all inferences made in favor of the non-moving party, show that the Board Member Defendants could not have engaged in willful misconduct, and therefore are statutorily immune from his defamation claims.

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his complaint to the indictment alone is sufficient to further underscore that as of March 3, 2008, Plaintiff had been involved in conduct that AIPAC could fairly and truthfully assert was not conduct AIPAC expected of its employees.

[4] The Defendants do not adopt the Plaintiffs' assertions concerning "government pressure" in their decisions regarding Mr. Rosen's termination. For the purposes of this motion, however, the Plaintiffs assertions must be taken as true, and if taken as true, the allegations are self-defeating in their effort to characterize any willful misconduct on the part of volunteer members of the Board of Directors.

III. CONCLUSION

Were one to construct a law school exam question on defamation meant to describe the host of infirmities that plague a defamation action, law school professors would be wise to take note of this action that is chock-full of reasons to deny the Plaintiff's claim. For here, the Plaintiff, a self-described public figure, has pled facts that are facially barred by the statute of limitations, involving statements that constitute non-actionable opinion or truthful statements asserted by Defendants who are not only immune from civil liability, but were also made without any actionable malice necessary to sustain a claim for a defamation.

Here the Plaintiff has failed to meet his burden of establishing anything other than a speculative right to relief. All of the statements Plaintiff allegedly claims are defamatory are time barred, particularly given the inapplicability of the equitable tolling doctrine to the facts of this case. Further, the March 2008, "statement" is only an affirmation of AIPAC's opinion on a public matter that is constitutionally protected. By March 2008, with Rosen's criminal indictment having been issued and the Department of Justice sharing additional information with AIPAC's counsel, there can be little doubt that AIPAC's statements were not only legitimate opinions, but also non-defamatory truthful statements upon which the Plaintiff cannot prove either the falsity of the statement or any malice behind its issuance.

Lastly, the Board Member Defendants are immune from liability because, as attested to by Plaintiff in his recitation of the facts and taken as true for a motion to dismiss, the Board Member Defendants cooperated with the Department of Justice in their investigation. They did not engage in willful misconduct by carrying out their duty of care and loyalty to AIPAC.

For the foregoing reasons, these Defendants respectfully requests that this Honorable Court dismiss Plaintiff's Complaint in its entirety with prejudice, and award the Defendants costs and other such relief as this Honorable Court deems just and proper.

Respectfully submitted,

CARR MALONEY P.C.

By: /s/

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the7th day of August 2009, I will electronically file the foregoing with the Clerk of the Court using the CaseFile Express system, which will then send a notification of such filing to David H. Shapiro, attorney for Plaintiff.

/s/
Thomas L. McCally