SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID BENJAMIN COHEN** **PART** **IAS MOTION 58EFM**

Justice

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WOJCIECH CIESZKOWSKI

Plaintiff,

- v -

ALEXANDER BALDWIN III,

Defendant.

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INDEX NO. 153324/2019

MOTION DATE 06/14/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion to/for DISMISS.

Defendant's motion to dismiss the slander *per* se cause of action is granted. Defendant is an actor known professionally as Alec Baldwin. The Amended Complaint alleges that on November 2, 2018, plaintiff Wojciech Cieszkowski was verbally and physically assaulted by defendant over a parking space. According to plaintiff, after he parked his car in a public space on the street, defendant approached him, shouted at him and accused plaintiff of stealing his parking spot. Plaintiff walked toward the muni-meter and defendant followed plaintiff and continued to yell at him. When approaching the meter, defendant shoved plaintiff in the chest and then struck plaintiff in the left jaw.

As a result of the incident with plaintiff, the Manhattan District Attorney's Office charged defendant with attempted assault in the third degree under Penal Law §§ 110 and 120.00(1) and harassment in the second degree under Penal Law § 240.26(1). On January 23, 2019, defendant pleaded guilty to harassment in the second degree under Penal Law § 240.26(1). Following his plea, defendant appeared on several talk shows and discussed the incident. Specifically, on

February 4, 2019, defendant appeared on "The Ellen Show" and said: "Did I have an argument with the guy? Yeah. I thought he was going to run my wife over with his car when he was stealing my parking spot." On March 27, 2019, defendant appeared on "The Howard Stern Show" and said: "[W]hen he aggressively takes this parking space, which was not the end of the world, I think he was going to hit my wife and my son. . . . I thought what he did was impolite, bordering on dangerous. He didn't walk up to me and say, 'Excuse me. I've been waiting here. I'd like to take this space.' He just went zip! – really fast, and really aggressive." Plaintiff filed the original Complaint on March 31, 2019 and filed the Amended Complaint on May 17, 2019. Plaintiff alleges four causes of action (1) assault; (2) battery; (3) attorneys' fees and costs pursuant to N.Y.C. Admin. Code § 10-403; and (4) slander *per se.* Defendant's current motion herein is solely to dismiss the fourth cause of action for slander *per se*.

When deciding a motion to dismiss pursuant to CPLR §3211, the court should give the pleading a "liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff the benefit of every possible favorable inference" (*Landon v. Kroll Laboratory Specialists, Inc.*, 22 NY3d 1, 5-6 [2013]; *Faison v. Lewis*, 25 NY3d 220 [2015]). Under CPLR § 3211(a)(7), the court "accepts as true the facts as alleged in the complaint and affidavits in opposition to the motion, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged manifest any cognizable legal theory" (*Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 199 [1st Dept 2013] quoting *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). Although on a motion addressed to the sufficiency of a complaint pursuant to CPLR 3211 (a) (7), the facts pleaded are presumed to be true and are accorded every favorable inference; "allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary

evidence are not entitled to such consideration" (*Caniglia v Chicago Tribune-New York News Syndicate, Inc.*, 204 AD2d 233, 233–34 [1st Dept 1994]; *see also Skillgames, LLC v Brody*, 1 AD3d 247 [1st Dept 2003]).

Defamation is the making of a false statement about a person that "tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him [or her] in the minds of right-thinking persons, and to deprive him [or her] of their friendly intercourse in society" (*Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 379 [1977], *rearg denied*, 42 NY2d 1015 [1977], *cert denied* 434 US 969 [1977]). The elements are a (1) false statement, (2) published without privilege or authorization to a third party, (3) constituting fault as judged by, at a minimum, a negligence standard, and (4) which cause special harm or constitute defamation per se (*Frechtman v Gutterman*, 115 AD3d 102 [1st Dept 2014]).

The falsity of a published statement is key to a defamation claim because only a statement that purports to convey facts about the plaintiff are actionable (*see Gross v New York Times Co.*, 82 NY2d 146 [1993]). Therefore, "[o]pinions, false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions, provided that the facts supporting the opinions are set forth" (*Rinaldi,* 42 NY2d at 380). A statement of "pure opinion," which is supported by the facts upon which the statement is based, is protected, "no matter how vituperative or unreasonable it may be" (*Steinhilber v Alphonse*, 68 NY2d 283, 289 [1986]). Importantly, "rhetorical hyperbole, vigorous epithets, and lusty and imaginative expression . . . imprecise language and [an] unusual setting . . . [which] signal [to] the reasonable observer that no actual facts were being conveyed about an individual" are not actionable (*Immuno AG*, 77 NY2d at 244; *Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999] [stating that "[l]oose, figurative or

hyperbolic statements, even if deprecating the plaintiff, are not actionable"]). Factors to consider in determining whether a statement constitutes fact or nonactionable opinion are:

> (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to "signal ... readers or listeners that what is being read or heard is likely to be opinion, not fact"

(*Brian*, 87 NY2d at 51, quoting *Gross*, 82 NY2d at 153, quoting *Steinhilber*, 68 NY2d at 292 [internal quotation marks omitted]).

A viable slander claim requires allegations of special damages, i.e., economic or pecuniary loss unless the claim is slander *per se (Galasso v Saltzman*, 42 AD3d 310 [1st Dept 2007]). Slander *per se* is one where the alleged false statement (1) charges the plaintiff with a serious crime; (2) tends to injure the plaintiff in his or her trade, business or profession; (3) imputes to the plaintiff a "loathsome disease"; or (4) imputes unchastity to a woman (*Nolan v State*, 158 AD3d 186 [1st Dept 2018]). Not every charge of unlawful behavior, however, is slanderous *per se*. There are many minor offenses that have a criminal element, but do not constitute a serous crime. In *Liberman v Gelstein* (80 NY2d 429 [1992]), the Court of Appeals wrote

> With the extension of criminal punishment to many minor offenses, it was obviously necessary to make some distinction as to the character of the crime, since a charge of a traffic violation, for example, would not exclude a person from society, and today would do little, if any, harm to his [or her] reputation at all (Prosser § 112, at 789). Thus, the law distinguishes between serious and relatively minor offenses, and only statements regarding the former are actionable without proof of damage *(see,* Restatement § 571, comment *g* [list of crimes actionable as per se slander includes murder, burglary, larceny, arson, rape, kidnapping]).

Id., at 435.

Here, plaintiff argues that the two statements on the "Ellen" and "Howard Stern" shows are slanderous *per se*. Specifically, the statements made by defendant that "I thought he was going to run my wife over with his car when he was stealing my parking spot" and "I think he was going to hit my wife and my son … He just went zip! – really fast, and really aggressive" imputed to plaintiff a serious crime—specifically reckless endangerment (see Penal Law § 120.20), and reckless driving (see Vehicle & Traffic Law § 1212).

As stated by the *Liberman* Court, not every imputation of unlawful behavior is actionable as slander *per se* (*id.*) Statements will fall into one of the four categories of slander *per se* if the statements are "commonly recognized as injurious by their nature, and so noxious that the law presumes that pecuniary damages will result" (*Yonaty v Mincolla*, 97 AD3d 141 [3d Dept 2012]). As relevant here, "slander per se" includes "statements ... charging [a] plaintiff with a serious crime," but "the law distinguishes between serious and relatively minor offenses, and only statements regarding the former are actionable without proof of damage" (*Martin v Hayes*, 105 AD3d 1291 [3d Dept 2013] *citing Liberman* 80 NY2d at 435). Here, although there is no precise definition of "serious crime," the *Liberman* Court has provided guidance as to the type of crimes that would be serious, which included murder, burglary, larceny, arson, rape, kidnapping.[1] The language of the Court of Appeals and Appellate Divisions emphasizes that the crimes must be those of a very serious nature and not of a minor nature. Even putting aside the *Liberman* wording, (and their easy comparison to this matter) that traffic violations do not constitute a serious crime in this slander *per se* context, crimes of a very serious nature means crimes that would exclude a person from society. Defendant's statements that plaintiff allegedly drove fast

[1] The complete, non-exhaustive list stated in the Restatement Comment includes treason, espionage, murder, burglary, larceny, arson, rape, criminal assault, abortion, perjury, selling mortgaged chattels, selling diseased meat, kidnapping, wife beating, malicious mischief, indecent exposure, bootlegging, operating a bawdy house, and uttering a criminal libel.

and aggressively do not rise to that level. They constitute every day words used to describe driving by the public. Similarly, a review of the listed crimes articulated reveals that the crimes that have been found to constitute serious crimes for slander *per se* purposes have at least a general intent to do harm or demonstrate depravity. Nothing in defendant's statements indicates anything rising to such a level. Accordingly, defendant has not alleged that plaintiff has committed a serious crime for slander *per se* purposes.

In addition, defendant's use of the words "really fast," "aggressive," "zip" and "almost hit/run over my wife and child" are hyperbole. As there is no precise meaning to these statements, they were rhetorical illustrations. Further, although plaintiff is correct that simply putting the words "I thought" before a statement does not convert a statement from fact to opinion (*see Gross v New York Times Co.*, 82 NY2d 146, 155 [1993]), a review of the videos and the transcripts of the two shows demonstrates that defendant was indeed describing his impressions, his state of mind, and his thought process during the occurrence. Hence, as defendant was describing his own opinion of what he saw, no action for defamation under a slander *per se* theory lies (*Rinaldi*, 42 NY2d at 380]).

Finally, although plaintiff would like that the words used by defendant be understood as accusing plaintiff of recklessness, the word reckless or something similar is not contained in the statements. In fact, defendant described the situation as "I thought what he did was impolite, bordering on dangerous." Being impolite is not accusing someone of recklessness, and, at most, the statements accused plaintiff on something not "dangerous" but merely "bordering on dangerous." A properly pleaded complaint for slander *per se* requires either (1) a specific crime alleged; or (2) a crime that is readily apparent from innuendo (*Burdick v Verizon Communications, Inc.*, 305 AD2d 1030 [4th Dept 2003] *citing Privitera v Town of Phelps*, 79

AD2d 1 [4th Dept 1981] *abrogated on other grounds*). Courts will not strain to find a defamatory interpretation where none exists (*Sprecher v Dow Jones and Co., Inc.*, 88 AD2d 550, 551 [1st Dept 1982], *affd*, 58 NY2d 862 [1983]). Here, the words stated by defendant are not words that accuse plaintiff of a specific crime or ones that are easily understood to accuse of a crime. They are words of frustration with someone's driving and while the words do not necessarily appear favorable to plaintiff, taking into account their natural meaning, and under all of the circumstances of this case, none of them are such as would "expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of [plaintiff] in the minds of a substantial number of the community" (*McCart v Morris*, 58 AD2d 700, 701 [3d Dept 1977] *citing Mencher v. Chesley*, 297 NY 94 [1947]). Accordingly, it is

ORDERED that defendant's motion to dismiss the slander *per se* cause of action is granted; and it is further

ORDERED that the parties are to appear for a preliminary conference on February 19, 2020 at 9:30 a.m. in Part 58, 111 Centre Street, Room 574, New York, New York.

This constitutes the decision and order of the Court.

12/26/2019
DATE

DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE

HON. DAVID B. COHEN J.S.C.