20-0642-cv

United States Court of Appeals
for the
Second Circuit

CHARLES OAKLEY,

Plaintiff-Appellant,

– v. –

JAMES DOLAN, in his individual capacity, in his professional capacity, MSG NETWORKS, INC., MADISON SQUARE GARDEN COMPANY, MSG SPORTS & ENTERTAINMENT, LLC,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK (NEW YORK CITY)

BRIEF FOR PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

Plaintiff-Appellant Charles Oakley respectfully submits this brief in support of his appeal of the district court's decision and judgment dismissing all of his claims against Defendants-Appellees James Dolan, MSG Networks, Inc., The Madison Square Garden Company and MSG Sports & Entertainment, LLC (together, "Defendants") for failure to state a claim under Federal Rule of Civil Procedure ("Rule") 12(b)(6).

It is axiomatic that on a motion to dismiss, the district court's sole function is to determine whether, accepting all of the allegations in the complaint as true, the plaintiff pled sufficient facts to plausibly state a claim for relief. Here, however, the lower court ignored its role as gatekeeper, instead substituting its own judgement for decisions ultimately reserved for the *jury* and resolving factual disputes in *Defendants'* favor. The lower court also held Plaintiff to a higher pleading standard than required under the law. These errors warrant reversal.

By way of example, the lynchpin of the analysis underlying any assault and battery claims is whether the amount of force used was reasonable under the circumstances. This requires resolution of such factual issues as the nature of the plaintiff's behavior, the level of force used by the defendant and whether the plaintiff's conduct justified that force. Notwithstanding the fact that this analysis is fact-intensive and properly left for the jury to resolve *at trial*, the lower court

decided that the force used by Defendants' personnel was reasonable as a matter of law and denied the Plaintiff the opportunity to even take discovery on this matter. The lower court's reasoning on this point is especially inexplicable given that Defendants themselves submitted video evidence demonstrating that Plaintiff did not engage in any behavior to incite violence of any sort. Rather, it was Defendants' personnel who attacked Mr. Oakley, forcing him to act in self-defense.

Similarly, this Court has previously held that it is reversible error for a court to fail to consider the totality of the statements made by a defendant and the full context in which they were made in adjudicating a defamation claim. Elias v. Rolling Stone LLC, 872 F.3d 97, 109 (2d Cir. 2017). Despite acknowledging that this was the appropriate legal framework, the lower court inexplicably proceeded to parse Defendants' statements individually to determine if each separate statement, standing alone, stated a claim for defamation.

This Court has also cautioned that discrimination claims should not be dismissed at the pleading stage because the standard for pleading a claim requires only facts supporting a *minimal* plausible inference of discrimination. Doe v. Columbia University, 831 F.3d 46, 53-54 (2d Cir. 2016). The lower court ignored precedent, as well as the allegations in the Amended Complaint demonstrating that Defendant Dolan acted with discriminatory animus, to find that Plaintiff had failed to plead a disability discrimination claim as a matter of law.

As fully set forth below, the lower court's dismissal of the claims in this case was predicated on a series of legal errors, as well as misconceptions about the factual allegations pled in the Amended Complaint. Accordingly, the lower court's decision warrants reversal and this case should be remanded to the district court to proceed with discovery.

STATEMENT OF JURISDICTION

The district court had original jurisdiction pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction over the related state law claims pursuant to 28 U.S.C. § 1367(a). This Court's jurisdiction is based upon 28 U.S.C. § 1291, as this is an appeal from a final decision of the district court. The district court's judgment was entered on February 20, 2020. (A-222). Plaintiff timely appealed by filing a notice of appeal on February 20, 2020. (A-233-234).

STATEMENT OF ISSUES

I. Whether the lower court erred in granting Defendants' motion to dismiss.

II. Whether the lower court erred in holding that the facts alleged in the Amended Complaint were insufficient, as a matter of law, to demonstrate that Defendants used unreasonable force in violently ousting Plaintiff from Madison Square Garden.

III. Whether the lower court erred in holding that Defendants' statements were not defamatory as a matter of law.

IV. Whether the lower court erred in holding that Plaintiff failed to allege a claim for disability discrimination under federal and state law.

V. Whether the lower court erred in holding that Plaintiff failed to allege a claim for perceived disability discrimination under federal and state law.

VI. Whether the lower court erred in holding that Defendants' detention of Plaintiff was privileged such that Plaintiff could not allege a false imprisonment claim.

VII. Whether the lower court erred in refusing to grant Plaintiff leave to amend his complaint.

STATEMENT OF THE CASE

I. THE FEBRUARY 8, 2017 INCIDENT

Plaintiff Charles Oakley is a former all-star power forward for the New York Knicks. (A-35, ¶ 6). At all relevant times, Defendants MSG Networks, Inc., The Madison Square Garden Company and MSG Sports & Entertainment, LLC (collectively, the "MSG Defendants") owned and operated Madison Square Garden ("MSG") and the New York Knicks, and Defendant Dolan was Executive Chairman of the MSG Defendants. (Id., ¶¶ 7-10).

Once Defendant Dolan inherited the New York Knicks from his father, he inexplicably singled out Mr. Oakley for harassment. (A-38, ¶¶ 27-28). This pattern of harassing behavior reached a crescendo on February 8, 2017, when Plaintiff attended a New York Knicks game at MSG. (Id., ¶ 30). Notably, Mr. Oakley was neither intoxicated nor behaving inappropriately when he arrived at MSG. (Id., ¶31). Given that he had no reason to believe that Defendant Dolan

would be at that game, Mr. Oakley had no idea where he would be seated and never acknowledged Defendant Dolan in any way. (A-38-39, ¶¶ 31-33).

Within a few minutes of arriving, Mr. Oakley was approached by three members of Defendants' security team, who ordered him to leave MSG without explanation. (A-39, ¶ 34). When Mr. Oakley calmly sought clarification as to why he was being treated with such hostility, the security personnel made it clear that Defendant Dolan had ordered Plaintiff be ejected from MSG. (Id., ¶¶ 35-36).

Mr. Oakley proceeded to attempt to defuse the situation by patiently explaining that he had done nothing wrong and simply wanted to watch the game. (Id., ¶ 37). To emphasize this point, as he spoke with the security guards, Mr. Oakley raised his arms in a purely defensive posture. (Id., ¶ 38). Two of the security guards inexplicably responded by grabbing Mr. Oakley and forcibly pushing him to the ground. (A-40, ¶¶ 40, 42-43).

When Mr. Oakley stood up, the security guards continued to demand that Mr. Oakley leave MSG immediately, and physically seized Mr. Oakley in an effort to forcibly compel him to leave. (Id., ¶¶ 44-45). When he attempted to defend himself, the guards turned Mr. Oakley around, grabbed him and threw him to the ground. (Id., ¶ 47). Mr. Oakley was thereafter placed in restraints and roughly thrown out of MSG, after which he was arrested. (A-41, ¶¶ 51, 55; A-53, ¶¶ 123, 127; A-54, ¶ 130).

II. DEFENDANTS' DEFAMATORY STATEMENTS CONCERNING MR. OAKLEY

A. The MSG Defendants' Defamatory Statements

Shortly after Mr. Oakley was violently expelled from MSG, the MSG Defendants' Twitter account (@NY_KnicksPR) tweeted:

> Charles Oakley came to the game tonight and ***behaved in a highly inappropriate and completely abusive manner***. He has been ejected and is currently being arrested by the New York City Police Department. He was a great Knick and ***we hope he gets some help soon***.

(A-42, ¶ 58) (emphasis added in Amended Complaint). Defendants knew this statement was completely false when they made it, as at no point while being attacked at MSG had Mr. Oakley acted inappropriately or abusively. (Id., ¶ 59). Defendants' public statement that they hoped Mr. Oakley would "get[] some help soon" was similarly defamatory, as it obviously insinuated that Mr. Oakley had a substance abuse problem of some kind. (A-43, ¶60).

On February 9, 2017, the MSG Defendants continued to falsely claim that Mr. Oakley had somehow deserved to be physically attacked by tweeting:

> Updated statement (2/9): There are dozens of security staff, employees and NYPD that witnessed Oakley's abusive behavior. It started when he entered the building and continued until he was arrested and left the building. Every single statement we have received is consistent in describing his actions. Everything he said since the Incident is pure fiction.

(Id., ¶62). The Amended Complaint alleges that, in reality, Defendants intentionally misrepresented the statements of their security guards and of witnesses, several of whom supported Mr. Oakley's account of the events but were silenced. (Id., ¶ 63).

B. Defendant Dolan's Defamatory Statements

On February 10, 2017, Defendant Dolan gave a radio interview explaining why he had ordered Mr. Oakley violently thrown out of MSG. (Id., ¶ 65). Defendant Dolan confirmed that Mr. Oakley had been banned from MSG indefinitely and proceeded to defame Mr. Oakley by knowingly making false statements regarding his purported alcoholism and violent propensities, including:

- I think the most important thing with that is we need to keep the Garden safe for anybody who goes there . . . So anybody drinking too much alcohol, looking for a fight, they're going to be ejected and they're going to be banned.

- To me, Charles has got a problem. We've said it before; he's his own worst problem. People have to understand that. **He has a problem with anger. He's both physically and verbally abusive. He may have a problem with alcohol.**

- We know he said on TV that he was drinking beforehand. We heard statements from police that he appeared to be impaired. Our staff clearly could see that.

- When you have issues like this, the first step for anybody is to ask for help.

(A-43, ¶¶ 68-69). Defendant Dolan was fully aware that his comments were not true, as Mr. Oakley has never suffered from an alcohol problem. (Id., ¶ 70).

Mr. Dolan further falsely stated that Mr. Oakley had put both Knicks fans and MSG security guards at risk:

- We'll probably hear chants [in support of Mr. Oakley] tonight. But I would like for those people to look around and look at the people working at Madison Square Garden and realize that the guy they're chanting for might have been a great Knick player, but he was terribly abusive to them.

- There were security people there who were abused. There were service people who were abused. The same people who help fans get to their seats, they were abused. With racial overtones, sexual overtones. How do you bring your kids to a game if you think that's going to happen?

- It's very clear to us that Charles Oakley came into the Garden with an agenda. From the moment he stepped into the Garden, he began with this behavior. Abusive behavior, stuff you wouldn't want to say on the radio . . . It just accelerated and accelerated and accelerated . . . I'm not inside of Charles Oakley's mind. He did say a bunch of things along the way that looked like he was headed in my direction. I didn't hear them myself but we heard from our employees that he was using my name a lot. But this isn't because I'm nervous. This is because you can't do what he did and stay.

(A-45-46, ¶¶ 72-73). Mr. Dolan was aware that these statements were also untrue, and he made them with actual malice. (A-46, ¶¶ 74-76).

III. MR. OAKLEY'S DAMAGES

As a result of Defendants' defamatory statements, Mr. Oakley has suffered both reputational harm and specific, identifiable monetary damages. (A-47-49, ¶¶ 82-95). Defendants' defamatory statements caused Plaintiff to lose significant business opportunities, as he had previously been retained to make guest

appearances at drug and alcohol rehabilitation clinics to speak with patients and provide them other services. (A-48-49, ¶¶ 91-92). However, as a direct result of Defendants' statements accusing Mr. Oakley of alcoholism, one such rehabilitation clinic, the Rebound Institute, no longer thought it was appropriate for someone with his reputation to interact with their patients, and cancelled appearances from which Plaintiff was scheduled to earn precisely $40,000. (A-49, ¶¶ 93-95).

PROCEDURAL HISTORY

On March 30, 2018, Defendants moved to dismiss Mr. Oakley's Amended Complaint pursuant to Rule 12(b)(6). (A-58-59). In making their motion, Defendants relied primarily on video footage (the "Video") that they falsely claimed demonstrated that Mr. Oakley instigated the violent altercation that occurred at MSG and therefore deserved the treatment that he suffered. (Dkt. 42, at pp. 5-8, 13-14, 32-34). Almost two years later, on February 19, 2020, the district court granted Defendants' motion to dismiss. (A-200-221). The district court found that the Amended Complaint: (i) failed to allege claims for assault and battery claim because Defendants' use of force had been reasonable as a matter of law; (ii) failed to allege a defamation claim because Defendants' statements were statements of opinion and were not defamatory *per se* and Plaintiff had not alleged that they were made with actual malice or caused him special damages; (iii) failed to allege a claim for perceived disability discrimination because Defendants'

decision to throw Mr. Oakley out was not motivated by their perception that he was disabled; and (iv) failed to allege a false imprisonment claim because Defendants' conduct was privileged. The lower court further denied Plaintiff leave to amend the Amended Complaint to cure any deficiencies it contained. Judgment was entered on February 20, 2020 and Mr. Oakley timely appealed. (A-222-234).

SUMMARY OF THE ARGUMENT

In granting Defendants' motion to dismiss, the lower court held Plaintiff to a higher pleading standard than required under the law, resolved legitimate factual disputes in *Defendants'* favor and ignored the Amended Complaint's well-pled allegations, warranting reversal.

First, the lower court held that the Amended Complaint failed to state claims for civil assault and battery. In doing so, the lower court ignored explicit allegations in the Amended Complaint relevant to the fact-intensive inquiry about whether the amount of force used by Defendants' personnel was reasonable, misstated the law and made findings that were properly reserved for the jury. By holding that Defendants were allowed to immediately resort to force once Mr. Oakley even *questioned* why he was asked to leave and that *any* force they used was *presumptively* reasonable, the lower court's decision effectively overruled binding precedent from New York's Court of Appeals. See Noonan v. Luther, 206 N.Y. 105, 108 (1912). Indeed, as the lower court was aware, there is video

evidence depicting the relevant events that, during discovery, would have demonstrated that nothing Mr. Oakley did or said warranted Defendants' violent response. In refusing Plaintiff the opportunity to even proceed to discovery and develop such an evidentiary record, the lower court committed clear error.

Second, the lower court misapplied the law in dismissing Plaintiff's defamation claims, parsing each statement individually to find that Defendants' statements accusing Plaintiff of committing assault were statements of opinion, that the statements accusing Plaintiff of being an alcoholic did not damage him in his trade or profession and that none of Defendants' statements were made with actual malice. When properly examined together and in context, as is required under the law, there is no question that Defendants' statements were factual in nature. Likewise, the Amended Complaint explains the manner in which Defendants' statements damaged Plaintiff in his trade or business, and even sets forth a specific dollar amount resulting from that damage. Thus, these allegations state causes of action for both defamation *per se* and *per quod*. Lastly, the question of whether Defendants acted with actual malice is also an intensely factual issue not ripe for adjudication on the pleadings. Church of Scientology Int'l v. Behar, 238 F.3d 168, 173 (2d Cir. 2001). This, too, warrants reversal.

Third, the lower court dismissed Plaintiff's disability discrimination claims by finding that Plaintiff had failed to allege that Defendants were motivated by a

discriminatory animus. Here, the Defendants made repeated statements accusing Mr. Oakley of having a purported "problem" with alcohol, and referencing his need to get "help," all accusations closely associated with substance abuse. Instead of analyzing whether the alleged facts were sufficient to proceed to discovery, the district court acted as a factfinder and wrongly framed its analysis to "evaluate the truth as to what really happened." Doe, 831 F.3d at 59.

Fourth, the lower court dismissed Plaintiff's false imprisonment claim on the grounds that Defendants' decision to detain Mr. Oakley was privileged. However, the ADA explicitly prohibits a property owner from taking action against a patron because of a perceived disability. To the extent that Defendants detained Plaintiff based on their perception that he was an alcoholic, there is no privilege and Defendants are liable under the law.

Fifth, the lower court denied Plaintiff leave to amend his complaint because any such amendment would supposedly have been futile. However, under the law, Plaintiff should have been afforded the opportunity to make necessary amendments to cure any deficiencies in the Amended Complaint.

For all of the above reasons, the lower court erred in dismissing the Amended Complaint without leave to amend, warranting reversal.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's grant of a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. Famous Horse Inc. v. 5th Ave. Photo Inc., 624 F.3d 106, 108 (2d Cir. 2010).

This Court reviews a district court's refusal to grant leave to amend a complaint for abuse of discretion. Grullon v. City of New Haven, 720 F.3d 133, 140 (2d Cir. 2013).

ARGUMENT

I. THE LOWER COURT IMPROPERLY DISMISSED PLAINTIFF'S ASSAULT AND BATTERY CLAIMS

In dismissing Plaintiff's claims for civil assault and battery, the lower court misstated the allegations in the Amended Complaint. Specifically, the lower court explained its decision to dismiss Mr. Oakley's assault and battery claims by finding that Plaintiff "grossly misunderstands the law" and that "Defendants had the right to expel Oakley from [MSG]." (A-214-215). Even assuming that this were true, but see infra at Section III, it would ultimately be irrelevant to Plaintiff's assault and battery claims. Rather, the only relevant inquiry is whether the amount of force used was *reasonable given the circumstances*. Though the lower court acknowledged this fact, it erred by deciding that the amount of force used by MSG's security personnel was reasonable as a matter of law.

According to the lower court, the Amended Complaint "argues [] that *any* use of force was unreasonable, because it was unreasonable to ask [Plaintiff] to leave in the first place." (A-216) (emphasis in original). Tellingly, however, the lower court does not cite to any allegation in the Amended Complaint that stands for such a broad proposition. This is because Plaintiff has *never* made such a sweeping generalization. Instead, as clearly alleged in the Amended Complaint, the *amount* of force used by Defendants' security personnel was unreasonable, *given the circumstances*. See (A-40, ¶ 43) ("***In forcibly shoving Mr. Oakley to the ground*** within seconds of first approaching him, and without any physical threat or provocation from Mr. Oakley, the security guards clearly exceeded the bounds of reasonable behavior and instigated a physical altercation where there otherwise ***was no need for such violent conduct***) (emphasis added); (A-41, ¶ 50) ("In grabbing Mr. Oakley, restraining him, dragging him to the ground and refusing his repeated requests that he be allowed to stand up, ***Defendants greatly exceeded the amount of force that was necessary in the situation***") (emphasis added).

Thus, the relevant inquiry in assessing Plaintiff's assault and battery claims is not whether it was appropriate to ask him to leave in the first instance. It is whether Defendants' employment of excessive force immediately upon asking Mr. Oakley to leave MSG – notwithstanding the fact that Plaintiff never actually refused to leave – was reasonable. Both the facts and the law are clear – it was not.

The lower court's finding – that a property owner asking someone to leave automatically triggers his right to proceed directly to violent conduct – would establish a dangerous precedent. Anyone who buys a ticket to any event would naturally be expected to ask for a reason if approached without warning and told that she must leave. According to the lower court, receiving such a request for an explanation standing alone would trigger the property owner's right to immediately engage in violence to effectuate the ejection. New York law does not provide property owners such unfettered discretion to resort to force without any legitimate provocation. To the contrary, as the Court of Appeals has explained:

> Defendant had the right to withdraw the license to the plaintiff to remain on his premises; and if***, after having afforded her a reasonable opportunity to leave, or while she was behaving in a disorderly manner, she refused to go***, he had the right to use ***reasonable*** force to eject her.

Noonan, 206 N.Y. at 108 (emphasis added).

Here, the Amended Complaint clearly alleges that Mr. Oakley neither refused to leave nor was behaving in a disorderly manner prior to being assaulted. (A-39-41, ¶¶ 37-53). Indeed, the Video submitted by Defendants in this case, which the lower court did not consider, shows that Mr. Oakley engaged in *no* conduct warranting the excessive force employed by Defendants' personnel. See Dkt. No. 50 at pp. 14-16. Thus, under the law, Defendants had no right to resort to force at all given Mr. Oakley's conduct. At the very least, in light of the Amended

Complaint's allegations, whether the amount of force used by Defendants was reasonable cannot be decided in Defendants' favor on the pleadings, and Plaintiff should have been permitted to rely on the Video and other similar evidence produced during discovery to support his claim. See McKinnon v. Bell Sec., 268 A.D.2d 220, 221-22 (1st Dep't 2000) ("The trier of fact must determine whether *plaintiff's demeanor and behavior aggressively precipitated the confrontation*, to the extent of relieving defendant of responsibility") (emphasis added).

Furthermore, even assuming, *arguendo*, that Defendants had the right to use *some* force in ejecting Mr. Oakley from MSG, the question of whether the amount of force used was reasonable is a fact intensive inquiry. This inquiry requires, at a minimum, discovery concerning the nature of the violence, the plaintiff's behavior in precipitating it and whether the former was reasonable in light of the latter. As a result, such an analysis is squarely in the province of the jury at trial and is certainly not appropriate to be made on the pleadings alone. See, e.g., Hernandez v. Denny's Corp., 177 A.D.3d 1372, 1375 (4th Dep't 2019) (reversible error for court to rule on whether force was reasonable given circumstances). This Court has repeatedly explained that such fact intensive questions should not be resolved on the pleadings and require a full evidentiary record developed during discovery. See, e.g., Mandarino v. Mandarino, 180 F. App'x 258, 261 (2d Cir. 2006) (finding that district court erred in resolving "fact-specific" issue on motion to dismiss);

Staron v. McDonald's Corp., 51 F.3d 353, 356 (2d Cir. 1995) (same); Aguas Lenders Recovery Grp. v. Suez, S.A., 585 F.3d 696, 703 (2d Cir. 2009) (same).

Here, the lower court's decision to deny Plaintiff discovery is particularly troubling since it knew that there were other videos depicting the events that precipitated Mr. Oakley's violent ouster from MSG. (A-174-175). Thus, despite being aware that there was other evidence that would be relevant to the issue of whether the force used was reasonable, the lower court denied Plaintiff even the opportunity to develop the evidentiary record required in assault and battery cases. In doing so, the lower court improvidently chose to substitute its own judgement for the jury's, denying a fact finder the opportunity to resolve factual disputes that are solely within its ambit. See, e.g., Combs v. City of New York, 130 A.D.3d 862, 864-65 (2d Dep't 2015) ("Because of its intensely factual nature, the question of whether the use of force was reasonable under the circumstances is *generally best left for a jury to decide*") (emphasis added).

The lower court's remaining arguments in dismissing Plaintiff's assault and battery claims are similarly flawed. First, the lower court claimed that Plaintiff failed to allege that Defendants' employees "intended to injure" him. (A-216). Here, the lower court conflated its definition of *criminal* assault with *civil* assault. Compare A-208 with Zgraggen v. Wilsey, 200 A.D.2d 818, 819 (4th Dep't 1994) (claims for assault and battery can be sustained "without a showing that the actor

intended to cause injury as a result of the intended contact"). Here, the Amended Complaint alleges that Defendants "intentionally placed Plaintiff in imminent fear of harmful and/or offensive conduct" and that they "intentionally and wrongfully physically contacted Plaintiff without his consent." (A-53, ¶¶ 123, 127). This is sufficient to state claims for civil assault and battery.[1] United Nat. Ins. Co. v. Waterfront New York Realty Corp., 994 F.2d 105, 108 (2d Cir. 1993) (civil assault requires "an intentional placing of another person in fear of imminent harmful or offensive contact." A civil claim for battery requires "an intentional wrongful physical contact with another person without consent").

Second, the lower court found that Plaintiff did not allege that any of the contact was "unnecessary or malicious." (A-216). This is simply not true. Plaintiff specifically alleged that Defendants' conduct was unnecessary. (A-41, ¶ 50) ("Defendants greatly exceeded the amount of force that was necessary in the situation"); (A-53, ¶ 124) (Defendants' "conduct was unwarranted"). Moreover, once again, malice, or an intent to injure, is not required to plead a cause of action for assault or battery in the civil context.

[1] In any event, by alleging that the security guards "forcibly" threw Mr. Oakley to the ground, the Amended Complaint alleges facts sufficient to show that Defendants' personnel should have at least been aware that their conduct was likely to injure Plaintiff. (A-40, ¶¶ 42-46).

Third, the lower court claimed that Plaintiff's failure to allege that he was injured by Defendants' conduct warranted dismissal. (A-216). However, under New York law, an action for assault "need not involve physical injury."[2] Di Gilio v. Burns Int'l Detective Agency, 46 A.D.2d 650, 650 (2d Dep't 1974).

II. THE LOWER COURT IMPROPERLY DISMISSED PLAINTIFF'S DEFAMATION, LIBEL AND SLANDER CLAIMS

Under New York law, to state a claim for defamation, the plaintiff must allege "(i) a defamatory statement of fact, (ii) that is false, (iii) published to a third party, (iv) of and concerning the plaintiff, (v) made with the applicable level of fault on the part of the speaker, (vi) either causing special harm or constituting slander per se, and (vii) not protected by privilege." Albert v. Loksen, 239 F.3d 256, 265-266 (2d Cir. 2001) (internal quotations omitted).

Here, the lower court found that the Amended Complaint had failed to state a claim for either defamation *per se* or defamation *per quod.* The lower court

[2] The case law cited by the lower court does not support its decision to dismiss Plaintiff's assault and battery claims. To the contrary, where the plaintiff alleged the use of unnecessary force, none of the cases upon which the lower court relied was decided on the pleadings. See, e.g., Kalfus v. NY Presbyterian Hosp., 476 F.App'x. 877, 880-81 (2d Cir. 2012) (decision at summary judgment); Mathews v. N.Y. Racing Ass'n, Inc., 193 F.Supp. 293, 295 (S.D.N.Y. 1961) (same); Walsh v. Hyde & Behman Amusement Co., 113 A.D. 42, 44 (2d Dep't 1906) (evaluating sufficiency of evidence after jury verdict); Mitchell v. New York Univ., No. 150622/13, 2014 WL 123255 (N.Y. Sup. Ct. Jan. 8, 2014) (dismissing claims where no allegation of unnecessary force).

overreached in making this finding at the pleading stage. As New York's Court of Appeals has explained in similar circumstances:

> All that is before us is plaintiff's verified amended complaint and defendants' motion to dismiss on the law. . . . we recognize as well ***a plaintiff's right to seek redress, and not have the courthouse doors closed at the very inception of an action, where the pleading meets a minimal standard necessary to resist dismissal of a complaint***.

Armstrong v. Simon & Schuster, Inc., 85 N.Y.2d 373, 379 (1995) (emphasis added and internal citations omitted).

A. The Amended Complaint States a Claim for Defamation *Per Se*

In order to set forth a claim for defamation *per se*, a plaintiff needs to allege that the defendant made statements falling in one of three classifications: "(1) statements charging the plaintiff with a serious crime; (2) statements that tend to injure the plaintiff in her trade, business or profession; [or] (3) statements that impute to the plaintiff a 'loathsome disease.'" Nolan v. State, 158 A.D.3d 186, 195 (1st Dep't 2018). Here, the Amended Complaint alleged that Defendants' various statements, when viewed together and in their full context, satisfied all three categories of *per se* defamation.

The lower court disagreed, finding that none of Defendants' statements were defamatory. The error in the lower court's reasoning stemmed from how it reached its conclusion. Specifically, the lower court parsed each statement separately to determine whether the language used in each individual statement

gave rise to a defamatory meaning. (A-208-210). In doing so, the lower court violated the cardinal rule of analyzing a defamation claim, namely, that the court "must give the disputed language a fair reading in the context of the *publication as a whole*." Celle v. Filipino Reporter Enterprises Inc., 209 F.3d 163, 177 (2d Cir. 2000) (emphasis in original and internal citations omitted). The error in the lower court's reasoning is obvious from its incorrect assertion that Plaintiff was "misleading" because he "join[ed] statements as connected that were originally uttered at different times and in different contexts." (A-208).

As a threshold matter, the Amended Complaint explicitly acknowledged that Defendants' statements were made at different times. Compare (A-42-43, ¶¶ 59, 62) (describing tweets made by the New York Knicks Twitter Account) with (A-44-46, ¶¶ 68-73) (describing statements made by Defendant Dolan on a radio show). Additionally, far from being misleading, examining these statements as a whole is *precisely* what is required under the law as it was how Defendants intended their salacious claims to be understood. All of the statements were made within a 48-hour period and addressed Defendants' purported defenses for violently throwing Mr. Oakley out of MSG. To find, as the lower court did, that the statements were completely unrelated simply because they were made at different times creates a distinction which is not supported by the facts. As this Court has explained, in any defamation case, a district court errs when it examines

statements "in isolation, rather than considering them in the context of the article as a whole." See Elias v. Rolling Stone LLC, 872 F.3d 97, 109 (2d Cir. 2017). When viewed in totality, there is no question that Defendants' statements defamed Plaintiff.

1. Defendants' Statements Accused Plaintiff of Committing a Serious Crime

The lower court's reasoning concerning whether Defendants' statements accused Mr. Oakley of a serious crime – assault – is instructive on this point. In holding that Defendants' allegations were not *per se* defamatory, the lower court first set forth the elements of a criminal claim for assault. (A-208). It then proceeded to examine each statement *standing alone* and found that, because none of them accused Mr. Oakley of having committed "a physical injury," Defendants' statements could not have been defamatory. (A-208-210). However, the fallacy in the lower court's reasoning is underscored by this Court's admonition that the:

> Challenged statements are not to be read in isolation, but must be perused as the average reader would against the whole apparent scope and intent of the writing… [T]he words are to be construed not with the close precision expected from lawyers and judges but as they would be read and understood *by the public to which they are addressed.*

Celle, 209 F.3d at 177 (emphasis in original and internal quotations omitted).

Obviously, the average reader would not know each of the elements of criminal assault charge. Nor would she, as the lower court did, read each statement in isolation before moving on to the next statement and considering it as an entirely

separate matter. Rather, she would look at all of Defendants' statements *together* and believe, as Defendants intended, that Mr. Oakley had committed assault.

Specifically, Defendants started by stating that Mr. Oakley was "arrested." (A-42, ¶58). That alone is sufficient to communicate to the average reader that Mr. Oakley committed a crime; otherwise, there would have been no occasion to arrest him in the first instance. The obvious follow up question is the precise nature of the crime Mr. Oakley was alleged to have committed.

Defendants purported to answer that inquiry themselves when they claimed that Mr. Oakley was arrested because he "behaved in a highly inappropriate and completely abusive manner" and was "**looking for a fight**." (Id.; A-44, ¶¶ 68-69) (emphasis added). Defendant Dolan expounded further, claiming that Mr. Oakley was "both physically and verbally abusive," that security people and fans "were abused" and that Mr. Oakley's purported "abusive behavior" began "the moment he stepped into the Garden." (A-45-46, ¶¶ 72-73). He left no doubt about what he was accusing Mr. Oakley of doing, stating that Defendants ejected Plaintiff because his conduct endangered the "**safety** . . . of [the] fans" and that the fans needed to understand that "he was ***terribly abusive*** to them." (A-45, ¶¶ 71-72) (emphasis added).

This last statement, claiming that Mr. Oakley's behavior somehow endangered the "safety" of the fans in the building, coupled with Mr. Dolan's

claim that Mr. Oakley was "looking for a fight" and Defendants' reference to his subsequent arrest, must all be read together to fully understand the message that Defendants sought to convey. When read this way, it is clear that Defendants were alleging that Mr. Oakley had violently assaulted fans and security, and was arrested as a result. As this Court has explained, where such a defamatory meaning even *exists*, the issue of whether the statements were defamatory is a question of fact that only a jury can resolve. Purgess v. Sharrock, 33 F.3d 134, 140 (2d Cir. 1994) ("If any defamatory construction is possible, it is a question of fact for the jury whether the statements were understood as defamatory").

Contrary to the lower court's reasoning, there is no requirement that the statements "explicitly" claim that Mr. Oakley engaged in assault. (See A-208). Rather, such statements are actionable even where their defamatory meaning is implied. As New York's Court of Appeals has explained, "Defamation by implication is premised not on direct statements but on false suggestions, impressions and implications arising from otherwise truthful statements." Armstrong v. Simon & Schuster, Inc., 85 N.Y.2d 373, 380-81 (1995).

Accordingly, courts have routinely found that statements could be defamatory *per se* when they neither explicitly name the crime or the elements of a crime, so long as they describe conduct that could be criminal. See, e.g., Sprewell

v. NYP Holdings, Inc., 772 N.Y.S.2d 188, 192-93 (N.Y. Sup. Ct. 2003)[3] (an article which said that the plaintiff threw a punch at someone and "*missed*" was defamatory *per se* because "defamatory language need not consist of the technical words of a criminal indictment provided that it is reasonably susceptible to a connotation of criminality"); LeBlanc v. Skinner, 103 A.D.3d 202, 214 (2d Dep't. 2012) (finding that description of "conduct that would constitute serious crimes" is defamatory *per se* even where the specific crimes are not set named).

Finally, the lower court held that these statements were not defamatory because any allegation that Mr. Oakley was "abusive" was a non-actionable statement of opinion. (A-208). It then set forth a four-factor test to determine whether calling someone "abusive" is a statement of opinion. Id. (citing Kirch v. Liberty Media Corp., 499 F.3d 388, 402 n.7 (2d Cir. 2006)). Notably, it never actually applied the test in its reasoning, instead simply citing to case law finding

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[3] In attempting to distinguish the holding in Sprewell, the lower court found that because the newspaper article in the Sprewell case referred to the plaintiff "punching a wall," it contained a description of "specific physical action." See A-208 at n.4. In contrast, the lower court held that because Defendants did not accuse Mr. Oakley of engaging in specific physical conduct, their words do not rise to the level of an assault allegation. Id. Tellingly, this reasoning undercuts the lower court's earlier statement that for a statement to allege assault, it must contain some allegation of a physical injury. Id. at p. 9. Obviously, "punching a wall" is not injuring anyone. Moreover, for the reasons stated herein, there is at least the implication that Mr. Oakley engaged in some kind of "physical action" that led to his arrest. Again, the question is not the specific words a defendant uses, it is what they communicate to an average reader, which the lower court failed to recognize.

that the term "abusive" is "a nonactionable statement of opinion." (A-209) (internal quotations omitted). Under New York law, a statement is considered non-actionable opinion *only* where it is "accompanied by a full recitation of the facts on which it is based." Clark v. Schuylerville Cent. Sch. Dist., 807 N.Y.S.2d 175, 176-77 (3d Dep't 2005). However, where the statement "implies a basis in undisclosed facts [it] is actionable 'mixed opinion.'" Id. Thus, New York's Court of Appeals has explained:

> The actionable element of a "mixed opinion" is not the false opinion itself—it is the implication that the speaker knows certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking. . . ***the essential task*** is to decide whether the words complained of, considered in the context of the entire communication and of the circumstances in which they were spoken or written, may be reasonably understood as implying the assertion of undisclosed facts justifying the opinion.

Steinhilber v. Alphonse, 68 N.Y.2d 283, 290 (1986).

Here, this "essential task" has been rendered moot by Defendants' *admission* that they were relying on undisclosed facts to bolster their version of events. Specifically, Defendants explicitly stated that:

> There are dozens of security staff, employees and NYPD that ***witnessed Oakley's abusive behavior***. It started when he entered the building and continued until he was arrested and left the building. ***Every single statement we have received is consistent in describing his actions***.

(A-43, ¶ 62) (emphasis added).

Defendants' reference to the "statements" from people who purportedly

"witnessed" Mr. Oakley's "abusive behavior" takes their comments from non-actionable opinion to actionable mixed statements of fact and opinion.[4] The lower court's finding to the contrary warrants reversal.[5]

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[4] Additionally, it bears repeating that Defendants did not use the term "abusive" in isolation. Rather, they used it in conjunction with their claims that Mr. Oakley was "arrested" for endangering the "safety" of New York Knicks fans and has a history of being "physically . . . abusive." When read *in context*, as is required in a defamation analysis, the totality of Defendants' language is sufficient to take it outside the realm of statements of opinion. See, e.g., Enigma Software Grp. USA, LLC v. Bleeping Computer LLC, 194 F. Supp. 3d 263, 284 (S.D.N.Y. 2016) (finding that even words that could be non-actionable opinion when "viewed in isolation" can be "made more concrete and reasonably precise" when considering the "surrounding commentary").

[5] All of the case law relied upon by the lower court for the proposition that the term abusive is a statement is of opinion is readily distinguishable. In none of these cases did the defendant refer to undisclosed facts underlying their statements. For example, Rotondi v. The Madison Square Garden Co., No. 150097/2015, 2017 WL 4083093 (N.Y. Sup. Ct. Sep. 12, 2017), the only case which actually considered the use of the word "abusive," the plaintiff's supervisor witnessed the conduct that was the subject of the defamatory statements and was therefore independently aware of all of the relevant facts. Id. at *3. In both Colantonio v. Mercy Med. Ctr., 73 A.D.3d 966 (2d Dep't 2010) and Farrow v. O'Connor, Redd, Gollihue & Sklarin, LLP, 51 A.D.3d 626 (2d Dep't 2008) the defendants each provided their "***subjective*** characterization of the plaintiff's behavior and an evaluation of her job performance." Farrow at 627 (emphasis added). Here, rather than claim that they were providing their own opinions about Mr. Oakley's behavior, Defendants emphasized the fact that they were relying on supposed undisclosed witness statements.

2. Defendants' Statements Accusing Plaintiff of Committing Assault were Made with Actual Malice

The lower court also found that the Amended Complaint did not plead that Defendants' statements falsely accusing Mr. Oakley of committing assault were made with actual malice.[6] The lower court's finding that the Amended Complaint did not allege sufficient facts to satisfy the active malice showing at the pleading stage was fundamentally in error.

As a threshold matter, this Court has repeatedly explained that, "resolution of the . . . actual malice inquir[y] typically requires discovery." Church of Scientology Int'l v. Behar, 238 F.3d 168, 173 (2d Cir. 2001); see also Karedes v. Ackerley Grp., Inc., 423 F.3d 107, 118-19 (2d Cir. 2005) (observing that, "[g]iven th[e] opportunity [for discovery], [the plaintiff] may be able to adduce facts establishing the speaker's subjective doubts about the truth of the publication"). In keeping with this Court's jurisprudence, the Federal Rules of Civil Procedure confirm that, at the pleading stage, "malice, . . . and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b).

Ultimately, the question of whether a defendant acted with actual malice in a defamation case is a question of intent, which is simply not ripe at the pleading

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[6] A defendant acts with actual malice when he acts "with knowledge that [the defamatory statement] was false or with reckless disregard of whether it was false or not." New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

stage. See, e.g., Grayson v. Ressler & Ressler, 271 F. Supp. 3d 501, 515 (S.D.N.Y. 2017) ("[t]he nature and extent of defendants' *mens rea* is a question of fact not appropriate for disposition under Rule 12(b)(6)") (internal citations omitted). Despite this fact, the lower court held that the Amended Complaint was deficient because (a) Plaintiff's allegations that Defendant Dolan harbored personal animosity towards him were irrelevant to show actual malice, and (b) the Amended Complaint "does not provide any factual grounds to support" a finding of actual malice. (A-208-209). The lower court was wrong on both points.

First, while evidence of animosity between the parties is not alone sufficient to support a finding of actual malice, it is certainly relevant to the inquiry. See, e.g., Celle, 209 F.3d at 183 ("Evidence of ill will combined with other circumstantial evidence indicating that the defendant acted with reckless disregard of the truth or falsity of a defamatory statement may also support a finding of actual malice"). The Amended Complaint contains detailed allegations concerning Defendant Dolan's hostility towards Mr. Oakley, extending over several years. (A-37-38, ¶¶ 23-29). The Amended Complaint also provided other circumstantial evidence explaining Defendants' motivation in making the defamatory statements about Mr. Oakley. Defendants wanted to shift the blame for their hugely unpopular decision to violently throw him out of MSG from Defendant Dolan to Mr. Oakley himself. (A-42, ¶¶ 56-57; A-45-46, ¶¶ 73-76). Demonstrating a

history of ill-will between the parties, coupled with an explanation for the defendants' motive, has been found to sufficiently plead actual malice. See, e.g., Celle, at 186 ("evidence indicating ill will and personal animosity" between parties and similarity between ill-will and content of defamatory statement demonstrated actual malice); Grayson, 271 F. Supp. 3d at 515 (allegations summarizing history between parties and that statements were designed to injure the plaintiff's reputation satisfied actual malice pleading standard).

Second, and contrary to what the lower court held, the Amended Complaint also contained a basis for believing that Defendants' statements claiming that Plaintiff committed an assault were made with reckless disregard of their falsity. The Amended Complaint alleges, and the lower court ***was required to accept as true***, that Mr. Oakley never assaulted anyone while he was at Madison Square Garden. (A-41-42, ¶¶ 42-50; A-42-43, ¶¶ 59, 63-64; A-44, ¶ 70; A-46, ¶¶ 74-75). Notably, Defendants were present for the events that occurred, so they necessarily knew that claiming otherwise was false. (A-42, ¶ 59; A-46, ¶¶ 74-76). Even the alleged third-party statements that Defendants claimed supported their version of events were complete fabrications. (A-43, ¶¶ 62-64). In light of these allegations, Plaintiff was entitled to at least take discovery to further develop evidence of actual malice. See, e.g., Herlihy v. Metro. Museum of Art, 214 A.D.2d 250, 260 (1st Dep't. 1995) (finding that the plaintiff pled actual malice where the defendants,

based on their firsthand knowledge, accused plaintiff of making statements that she denied making); Giuffre v. Maxwell, 165 F. Supp. 3d 147, 156 (S.D.N.Y. 2016) (finding that the where the defendants' statements contradicted the allegations in the Amended Complaint, plaintiff pled actual malice because such allegations "must" be taken as true by the court at the pleading stage); Manno v. Hembrooke, 120 A.D.2d 818, 819 (3d Dep't 1986) (finding that actual malice was alleged where statements "were made with knowledge that they were false or with reckless disregard as to whether they were false").

3. Defendants' Statements Concerning Plaintiff's Alleged Alcoholism were Made with Actual Malice

As with their claims accusing Mr. Oakley of committing assault, the lower court found that Defendants' statements accusing Plaintiff of being an alcoholic were not made with actual malice. In so holding, the lower court held that "Oakley never pleads that the MSG Defendants or Dolan knew" Mr. Oakley was not an alcoholic. (A-211). However, the Amended Complaint does *precisely* that when it alleges Defendant Dolan:

> was fully aware that his comments were and are entirely without basis in fact and/or made the comments with a reckless disregard for their truth [because] Mr. Oakley has never had a problem with excessive anger nor has he ever abused alcohol or any other drug.

(A-44, ¶70). See also (A-43, ¶61) (Defendants' statements accusing Mr. Oakley of being an alcoholic were "designed to propagate ***the lie*** that Mr. Oakley is an

alcoholic.") (emphasis added); (A-50, ¶108) (Defendants "were at all times aware that none of the statements [accusing Plaintiff of being an alcoholic] were true"). Thus, the lower court's analysis ignores the clear allegations set forth in the Amended Complaint and warrants reversal on those grounds alone.

Moreover, for the reasons set forth above, see Section II(A)(2), the lower court's decision was premature and Mr. Oakley is entitled to discovery to prove that Defendants should have known that their accusations concerning Mr. Oakley's purported alcoholism were false at the time they were made. Given the fact that Mr. Oakley was not, and has never been, an alcoholic, Defendants' comments to that effect were made, at a minimum, with a reckless disregard for the truth. To hold otherwise would be to allow a defendant to accuse a plaintiff of committing the most salacious of crimes without any repercussions. The law does not allow such defamation to go unpunished.

4. Defendants' False Statements Claiming that Plaintiff was an Alcoholic were Defamatory *Per Se*

Contrary to the lower court's finding, Defendants' statements accusing Plaintiff of being an alcoholic were defamatory *per se* as they also clearly disparaged Mr. Oakley in his trade or business.[7] In order to allege such a claim, a

[7] Defendants' comments also imputed that Plaintiff suffered from the loathsome disease of alcoholism. Specifically, while speaking about Mr. Oakley, Mr. Dolan stated that "anybody drinking too much alcohol . . . [is] going to be

plaintiff must demonstrate that he "imputes incompetence, incapacity or unfitness in the performance of one's profession or trade." Allen v. CH Energy Grp., Inc., 58 A.D.3d 1102, 1103 (3d Dep't. 2009). Here, the Amended Complaint alleges that Plaintiff made "guest appearances at a drug and alcohol rehabilitation clinics to speak with patients and provide other services" and that Defendants' statements accusing him of being an alcoholic damaged his ability to perform such work. (A-49, ¶ 92; A-50, ¶¶ 105-106).

The lower court held that Defendants' statements were not *per se* defamatory because the Amended Complaint did not explicitly say that Mr. Oakley's work with drug and alcohol rehabilitation clinics is his trade or profession.[8] (A-212). However, the Amended Complaint specifically states that

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ejected and [is] going to be banned." (A-44, ¶ 68). Mr. Dolan further stated that "Charles has a problem," that "[h]e may have a problem with alcohol," that he "was drinking beforehand," and that there were "statements from police that he appeared to be impaired." (Id., ¶ 69). These allegations are sufficient to support an inference that Mr. Dolan's statements were *per se* defamatory. See Hayes v. Sweeney, 961 F. Supp. 467, 481 (W.D.N.Y. 1997) ("[A]n imputation of alcohol consumption is defamatory when accompanied by some aggravating factor, such as the suggestion that conduct is habitual or that the person is 'a drunk'").

[8] Notably, the lower court did find that Plaintiff's allegations that he earned income from his appearances at drug and alcohol rehabilitation programs were relevant to the issue of whether he was a public figure. (A-209). Surely, if Mr. Oakley's work with individuals suffering from substance abuse was of such general knowledge that it contributed to making him a public figure, it would also be known to Defendants that their comments would damage him in this same profession.

Mr. Oakley frequently made these appearances, that Defendants knew this fact and that he was denied an income opportunity based on Defendants' defamatory statements. Here, the lower court's attempt to impose a formulaic pleading requirement, effectively asking that Plaintiff prove an element of his claim, is not required at the pleading stage.[9] The allegations in the Amended Complaint are certainly sufficient to give Defendants "fair notice of what the plaintiff's claim is," which is all that is required to overcome a motion to dismiss. Swierkiewicz v. Sorema N. A., 534 U.S. 506, 512 (2002). See also Fed. R. Civ. P. (8)(a)(2) (merely requiring that a complaint provide "a short and plain statement of the claim showing that the pleader is entitled to relief").

The lower court further held that Defendants' statements could not injure Mr. Oakley in his trade or business because the statements "must have been spoken of him in his business." (A-212). Again, however, this is not required under the law. Indeed, many courts have found that statements impugning a person's characteristics that are relevant to his trade or profession are defamatory *per se* even if they do not contain an explicit reference to his behavior in the profession. By way of example only, in Giuffre v. Maxwell, 165 F. Supp. 3d 147 (S.D.N.Y.

[9] To the extent that the Court believes that Plaintiff need comply with the lower court's formulaic pleading requirement, this is a minor factual issue that can be easily rectified. Indeed, fixing such pleading oversights is precisely why Plaintiff should have been provided with an opportunity to amend his complaint. See infra at Section V.

2016), the Court held that statements accusing the plaintiff of telling "obvious lies" in connection with her history of sexual abuse was defamatory *per se* where the plaintiff worked with victims of sexual crimes. Id. at 154. Other courts have similarly found statements to be defamatory *per se* even where they do not explicitly speak of the plaintiff's business or profession. See, e.g., Jones v. Crisis Servs. of Erie Cty., No. 16 Civ. 234 (FPG), 2018 WL 3708494, at *10 (W.D.N.Y. Aug. 3, 2018) (general statements about a plaintiff's alleged conduct that reflected a "lack of character" injured her in the legal field).

Finally, the lower court held that Defendants' statements were not defamatory because "they were general reflections upon Oakley's character or qualities," and not specifically related to his trade. (A-212) (citing Walker v Urban Compass, Inc., No. 652554/2016, 2017 WL 608308, at *2 (N.Y. Sup. Ct. Feb. 15, 2017) for the proposition that accusations of alcohol abuse were not defamatory *per se*). However, courts have found that whether accusations of alcoholism can be defamatory turns on the profession itself. See, e.g., Sadowy v. Sony Corp. of Am., 496 F. Supp. 1071, 1077 (S.D.N.Y. 1980) (statement that the plaintiff was an alcoholic alleged defamation *per se*); Hayes v. Sweeney, 961 F. Supp. 467, 481 (W.D.N.Y. 1997) (same). This underscores why it is critical to examine the statements in their *full context* rather than in isolation as the lower court did.

The court's decision in Giuffre v. Maxwell is instructive. In denying the defendants' motion to dismiss the defamation claim, the court explained:

> publication of a false narrative of sex trafficking would tend to disparage that individual in the way of her profession. Defendant's argument that Plaintiff may not take advantage of this second ground on the basis that "victim" is not a profession ***ignores the valid profession of non-profit advocacy, and the very real importance of perceived competence and integrity in the conduct of that profession.***

Giuffre v. Maxwell, 165 F. Supp. 3d 147, 154 (S.D.N.Y. 2016) (emphasis added).

Here, by falsely claiming that Mr. Oakley was an alcoholic, Defendants clearly disparaged his ability to perform in his capacity as an advocate providing services to individuals with substance abuse problems. Accusing an individual who provides such services of being an alcoholic strikes to the heart of that individual's fitness to continue to work with the substance abuse community. See Allen at 1103 (finding that a statement defamed the plaintiff's business reputation where "a person who engaged in the conduct described by [the defendant] would not be qualified to continue in [the plaintiff's] position").

B. Defendants' Statements Constituted Defamation *Per Quod*

The lower court further erred by finding that Plaintiff did not adequately plead the existence of special damages necessary to sustain a claim for defamation *per quod*. Special damages are merely those contemplating "the loss of something having economic or pecuniary value." Wadsworth v. Beaudet, 267 A.D.2d 727, 728 (3d Dep't 1999). A claim for defamation *per quod* only requires "special

damages [] be pleaded with sufficient particularity." Ithaca Coll. v. Yale Daily News Pub. Co., 85 A.D.2d 817, 818 (3d Dep't 1981).

The allegations in the Amended Complaint, coupled with additional factors, support an inference that Defendants' statements are susceptible to a defamatory meaning which resulted in special damages. Defendants' statements that they "hope [Mr. Oakley] gets some help soon," that "Charles has got a problem," that he was "drinking too much alcohol," that "he appeared to be impaired" and that "the first step for anybody is to ask for help" all suggest that Mr. Oakley is an alcoholic. (A-42, ¶ 58; A-43, ¶ 60; A-44, ¶ 69). Plaintiff further alleges that as a result of these defamatory statements, he lost exactly $40,000 in appearance fees that he had previously been scheduled to earn. (A-48-49, ¶¶ 91-95).

The lower court held that the Amended Complaint did not adequately plead special damages because it did not "proffer any facts to support a direct causal connection between Defendants' statements" and Mr. Oakley's damages. (A-212). This is simply not true. As alleged in the Amended Complaint, the Rebound Institute decided that it could not be associated with someone who was publicly referred to as being an alcoholic. (A-49, ¶¶ 92-95). Of course, during discovery, the parties would be able to adduce evidence about the basis for the Rebound Institute's decision from the decisionmakers themselves. However, there is no requirement that Plaintiff has to *plead* such detail at this early stage in the

proceeding. See, e.g., Privitera v. Town of Phelps, 79 A.D.2d 1, 6 (4th Dep't 1981) (reversing grant of motion to dismiss because by "identifying a specific sale and naming the parties to it, plaintiffs have sufficiently itemized the special loss so that defendants may meet the claim and defend against it").

III. THE LOWER COURT ERRED IN DISMISSING PLAINTIFF'S DISABILITY DISCRIMINATION CLAIMS

To state a claim for discrimination based on a perceived disability under Title III of the ADA or the NYSHRL,[10] the plaintiff "must allege (1) that she is disabled within the meaning of the ADA; (2) that defendants own, lease, or operate a place of public accommodation; and (3) that defendants discriminated against her by denying her a full and equal opportunity to enjoy the services defendants provide." Camarillo v. Carrols Corp., 518 F.3d 153, 158 (2d Cir. 2008).

The lower court held that Plaintiff had failed to allege facts sufficient to demonstrate that Defendants had acted with a discriminatory intent in ejecting him from MSG. (A-218). This is simply not true. Defendant Dolan stated that Mr. Oakley "may have a problem with alcohol" and that "***When you have issues like this, the first step for anybody is to ask for help***." (A-44, ¶ 69). As a recovering alcoholic himself, Defendant Dolan was no doubt aware that referencing "the first

[10] Relevant here, this Court has observed that alcoholism qualifies as a disability under the ADA and the NYSHRL. Makinen v. City of New York, 857 F.3d 491, 495 (2d Cir. 2017).

step" is to "ask for help" would immediately bring to mind the 12-step program associated with Alcoholics Anonymous. See https://www.alcohol.org/alcoholics-anonymous/step-2/ (last visited April 21, 2020). Similarly, the MSG Defendants tweeted "we hope [Mr. Oakley] gets some help soon." (A-42, ¶58). These statements, referencing Mr. Oakley's alleged "problems" with alcohol, and his need to "get[] some help," support an inference of discriminatory intent. See, e.g., Kelly v. N. Shore-Long Island Jewish Health Sys., 166 F. Supp. 3d 274, 287 (E.D.N.Y. 2016) (finding that allegation that the plaintiff has a "problem" sufficiently demonstrates discriminatory intent to survive motion to dismiss).

The lower court denied the discriminatory import of these statements, claiming that "Dolan in no way connected that comment to Oakley's ejection from the Garden on February 8." (A-218-219). Again, this finding was in error. These statements were made when discussing *why* Defendants violently threw Mr. Oakley out of MSG in the first instance. (A-42, ¶ 58; A-44-46, ¶¶ 68-74).

The lower court also claimed that it needed "additional facts, such as similar instances of discriminatory treatment toward perceived alcoholics or other statements reflecting Defendants' discriminatory animus," before finding that the Amended Complaint stated a claim for disability discrimination. (A-219). Incredibly, the Amended Complaint provides exactly that information. Defendant Dolan has a history of accusing individuals of alcoholism in an attempt to smear

their reputations. (A-46-47, ¶¶ 78-81). Indeed, based on Defendant Dolan's prior behavior, he clearly associates inappropriate behavior with alcoholism. Plaintiff therefore alleges that Defendant Dolan harbors an animosity to those he perceives to be alcoholics, which is sufficient to sustain his pleading burden.[11] See Holcomb v. Iona Coll., 521 F.3d 130, 140-142 (2d Cir. 2008) (finding that comments about others in protected class raised inference of discriminatory intent).

IV. THE LOWER COURT ERRED IN DISMISSING PLAINTIFF'S FALSE IMPRISONMENT CLAIM

In order to state a cause of action for false imprisonment, a plaintiff must allege "(1) the defendant intended to confine the plaintiff, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement and (4) the confinement was not otherwise privileged." Hernandez v. United States, 939 F.3d 191, 199 (2d Cir. 2019). Here, the lower court found that the Amended Complaint did not plead a valid false imprisonment claim because it

[11] The lower court also pointed to the fact that Plaintiff's defamation claim pleads that Defendants did not believe that Mr. Oakley was an alcoholic. According to the lower court, such allegations are inconsistent with his claims that Defendants discriminated against him because of a perception that he was an alcoholic, and therefore, the latter claim must fail. (See A-219). To be clear, they are not. As this Court has explained, inconsistent pleadings "may lie either in the statement of the facts or the legal theories" and, pursuant to the Federal Rules of Civil Procedure, "we may not construe [the plaintiff's] first claim as an admission against another alternative or inconsistent claim." Henry v. Daytop Vill., Inc., 42 F.3d 89, 95 (2d Cir. 1994) (internal citations omitted).

failed to allege the last factor, namely, that the imprisonment was not privileged. This is clear error warranting reversal of the lower court's decision.

The lower court held that because Defendants had an unfettered right to force Mr. Oakley to leave MSG, their decision to detain him against his will was permissible under the law. However, as explained above, Defendants had no right to eject Mr. Oakley from MSG if they did so based on their perception that he was disabled. See Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 31 (2d Cir. 1999), opinion amended on denial of reh'g, 204 F.3d 392 (2d Cir. 2000) (explaining that the ADA "bars a 'place of public accommodation' from 'discriminat[ing] against [an individual] on the basis of disability in the full and equal enjoyment of [its] *goods* [and] *services.*'") (quoting 42 U.S.C. §12182). In the instant case, the Amended Complaint alleges that Mr. Oakley was thrown out of MSG based on Defendants' perception that he was an alcoholic. See supra at Section V. If Plaintiff is ultimately able to prove that claim, he will also be able to prove that his imprisonment was unlawful and, consequently, not privileged. Thus, Plaintiff's false imprisonment claim should also be allowed to proceed to discovery in parallel with the disability discrimination claim. See, e.g., Broughton v. State, 37 N.Y.2d 451, 456 (1975) (holding that false imprisonment undertaken for unlawful reasons was actionable).

V. THE LOWER COURT ERRED BY DENYING PLAINTIFF LEAVE TO AMEND THE COMPLAINT

Finally, even if the lower court were correct that the Amended Complaint did not sufficiently allege the causes of action contained therein, the deficiencies identified by the lower court were all factual in nature. All of them could have been cured with a simple and straightforward amendment of the Amended Complaint. By way of example, to the extent that the lower court was correct in finding that Plaintiff needed to specifically identify that providing services to drug and alcohol rehabilitation centers was his trade or profession, this requires a simple additional factual allegation. Similarly, if the lower court was correct that Plaintiff needed to provide more detail about the Rebound Institute's decision to refuse to pay Mr. Oakley to make additional appearances, a single factual paragraph would rectify this issue. Plaintiff can also amend his assault claim to further clarify that, *inter alia,* Defendants acted with an intent to injure him, Defendants used excessive or unreasonable force and Plaintiff suffered injuries. At heart, all of these pleading issues require Plaintiff to provide additional simple and straightforward *factual* allegations, not legal ones.

This Court has repeatedly held that leave to amend a Complaint shall be freely granted when justice so requires, as it unquestionably does here. See Ricciuti v. N.Y.C. Transit Auth., 941 F.2d 119, 123 (2d Cir. 1991) ("as a matter of procedure, when a complaint is dismissed pursuant to Rule 12(b)(6) and the

plaintiff requests permission to file an amended complaint, that request should ordinarily be granted. . . and it is a rare that such leave should be denied") (internal citations omitted); Davis v. Goord, 320 F.3d 346, 351 (2d Cir. 2003) (where the complaint did not allege all elements of the claim, "the district court should have given [plaintiff] leave to amend his complaint to allege such an injury."). Here, given the fact that many of the deficiencies identified by the lower court could readily be cured with an amendment, such an amendment would not be futile and should have been permitted.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant Oakley respectfully requests that this Court reverse the district court's decision granting dismissal pursuant to Rule 12(b)(6) and denying Plaintiff leave to amend the Amended Complaint.

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New York, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). It contains 10,623 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally spaced typeface using MS Word in 14 pt Times New Roman.

Dated: May 1, 2020