

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17**

YAN HUANG,**Plaintiff,****Index No.: 156552/2017****Motion Sequence No.: 001****- against -****DECISION/ORDER****WENGUI GUO, a/k/a, HAOYUN GUO, a/k/a,
MILES KWOK, a/k/a KWOK HO WAN, a/k/a,
KWOK HO, a/k/a, GWO WEN GUI, a/k/a,
WAN GUE HAOYUN, a/k/a, HAOYUN GUO,****Defendant.**

HON. SHLOMO S. HAGLER, J.S.C.:

In this action, plaintiff Yan Huang sues defendant Wengui Guo for defamation per se, defamation, and intentional infliction of emotional distress (NYSCEF Doc. No. 1). Plaintiff seeks injunctive and declaratory relief, along with \$10,000,000 in punitive damages. Defendant brings this pre-answer motion for dismissal under CPLR 3016, for failure to set forth “the particular words complained of,” and under CPLR 3211 (a) (7), for failure to state a cause of action (NYSCEF Doc. No. 5). Plaintiff opposes the motion. For the reasons stated below, this Court denies the motion as it relates to the first cause of action but grants the motion as it relates to the second and third causes of action.

Defendant “is a Chinese businessman living in New York” who is “determined to discuss Chinese government corruption in relation to the real estate market” (NYSCEF Doc. No. 15 at *8 [citing NYSCEF Doc. No. 1 (complaint)]). Plaintiff is a high-ranking government official in China (*see, e.g.*, NYSCEF Doc. No. 1 ¶¶ 9, 15, 23; NYSCEF Doc. No. 15 at *26). Around May 11, 2017, defendant uploaded a YouTube video to his YouTube channel in which he alleged that

plaintiff, is “a negative example of corrupt Chinese government officials” (NYSCEF Doc. No. 15 at *8). Plaintiff annexes Chinese and English language versions of the transcript (NYSCEF Doc. Nos. 2, 3). The video accuses plaintiff of avarice, promiscuity – in particular, of sexual relations with other government officials – cronyism, and graft. The 25-page transcript which plaintiff submitted has a number of underlined paragraphs highlighting the alleged defamation. The complaint alleges “[s]ome of Guo’s false and defamatory statements” (NYSCEF Doc. No. 1, ¶ 8).

For example, defendant states:

“In [then-vice-mayor Liu Azhigua’s] bedroom, we found a secret. Mr. Liu likes taking naps at noontime. . . . Who regularly and most frequently appeared in Mr. Liu’s bedroom half an hour before his nap? This person is . . . Ms. Huang Yan, from the Beijing Municipal Planning and Land Resources Management Committee. . . . After that, Mr. Liu would usually have sexual behavior with Ms. Huang. This occurred basically every time she visited. Accurately, each instance lasted 17 to 19 minutes, with changes in position.”

(*id.*, ¶ 8 [a]). Defendant also noted plaintiff’s expensive taste, her love of Hermes bags, scarves, and accessories, and her valuable calligraphy and painting collections (*id.* ¶ 8 [d]). The video asserts that defendant possessed tapes of these encounters and that he submitted them to Director Ling Jihua (“Ling”) of the Central Commission for Discipline Inspection (“CCDI”), but that Ling told defendant to hand over all copies of the video to him and never mention their substance again (NYSCEF Doc. No. 3 at *9).

In addition, the transcript states that one day:

“Liu Zhi Hua was unhappy in the bedroom. When Ms. Huang Yan entered the bedroom, Liu Zhi Hua said he wouldn’t do it today. Ms. Huang Yan just pulled his pants down, and said that I would do oral sex for you. Anyhow, Liu Zhi Hua enjoyed. Then he signed off a few documents for her, one of which is the modified planning approval proposal for a big real estate development company.”

(*id.* at *19 [quoted at NYSCEF Doc. No. 1 ¶ 8 (b)]). The complaint quotes a portion of the contract that accused plaintiff of retaining some of the houses in the Olympic Village after the Beijing Olympics and selling them for personal profit, favors, and gifts (NYSCEF Doc. No. 1 ¶ 8 [d]).

Next, the complaint quotes statements about plaintiff's accumulation of money:

"I currently believe that Huang Yan, her family, and her properties have all been taken care of, and her cash had been converted to euros and pounds. Huang Yan does not collect US dollars, she just loves to hold onto euros, and pounds, and also new bills, and bills in sequential numbers are her favorites, she especially likes those. If you searched her house you wouldn't just find two hundred million RMB, it would be more like billions or even hundreds of millions of UK pounds, and euros, large bills, bills in 500 denomination, all big ones. I suppose she needs to move it quickly so that the rats won't eat it."

(*id.* ¶ 8 [e]).

The complaint alleges that the statements in the video are false and defamatory, and that they accuse plaintiff of lacking integrity in her government position, lacking good moral character, and disregarding her professional ethical obligations. They also indicate plaintiff is unfit for her government job (*id.* ¶ 9). According to the complaint, the video has been viewed on YouTube "at least 505,000 times" (*id.* ¶ 11).

Plaintiff asserts in her first cause of action of the complaint that the statements impugning plaintiff's integrity and reputation are defamatory per se, that defendant either knew they were false or had a reckless disregard for the truth, and that they resulted in extensive ongoing special damages and have cast doubt on plaintiff's fitness for office (*id.* ¶¶ 15-19). The second cause of action, based on the same allegations, is for defamation. The complaint's third and final cause of action, for intentional infliction of emotional distress, assert that defendant uploaded the May 11,

2017 video with the purpose of causing plaintiff severe emotional distress, shame, and the loss of enjoyment of life, along with other non-pecuniary damages (*id.* ¶¶ 27-30).

Defendant's motion to dismiss states that to the extent that plaintiff asks for an injunction which bars him from making future comments about her, the complaint seeks an impermissible prior restraint on his future speech and must be dismissed. Defendant contends that plaintiff cannot recover attorney's fees, as there is no statute, rule, or contract that permits such relief for defamation claims. Moreover, defendant states, punitive damages are not available here, as this case involves a private dispute. Therefore, defendant claims, virtually all the relief plaintiff requested should be dismissed (NYSCEF Doc. No. 8 at **4-8).

Next, defendant points out that a successful defamation claim must plead (1) that a defendant made a false and defamatory statement of fact, (2) that the statement related to the plaintiff, (3) that the defendant must publish or broadcast the statement to a third party "with the requisite level of fault," and (4) that the plaintiff sustained damage due to the publication (*id.* at *9). Moreover, he contends that plaintiff is a public figure, and the complaint does not satisfy the accompanying requirement that she plead actual malice with particularity (*id.* at **11, 17). The defamation per se claim must be stricken, according to defendant, because none of the challenged statements allege "facts" such that "a reasonable reader [or listener] would conclude any statement was factual or true" (*id.* at *18). Defendant also contends statements that use the word "would" when referring to plaintiff's actions refer to future intent and are not actionable (*id.* at **19-20).

In opposition, plaintiff notes the liberal standard with which this court must evaluate her complaint. Plaintiff argues that her application for injunctive relief is "narrowly tailored to assure Plaintiff's right[s]" as it only seeks to restrain defendant from repeating the defamatory statements, and that a ruling on her right to such relief is premature (NYSCEF Doc. No. 15 at *9, 10). Contrary

to defendant's contention, she states, injunctive relief may be warranted in certain circumstances (*id.* at *10 [citing *Tory v Cochran*, 544 US 734, 739 (2005); *Dennis v Napoli*, 148 AD3d 446, 446-447 (1st Dept 2017)]). Plaintiff notes that punitive damages are also awardable in certain defamation cases. Plaintiff contends that the trier of fact must determine whether a defendant's conduct warrants this relief, and therefore dismissal is premature.

In addition, plaintiff challenges defendant's argument that her first of action requires an allegation of special damages. For defamation per se, special damages are not necessary. Plaintiff argues that a viable cause of action for defamation per se exists because defendant "unequivocally stated that Ms. Huang slept with Zhi Hua Liu to obtain approval for projects of [sic] real estate company," accused plaintiff of "routinely soliciting bribery," and stated that plaintiff "exchanged favorable treatment for sex" (NYSCEF Doc. No. 15 at *14).

Plaintiff also rejects defendant's contention that she is a public figure and therefore subject to heightened pleading standards. Plaintiff argues that she is a public official of a foreign country and not the United States, that defendant does not specifically call her a public figure in his comments, that her government position is not a prominent one, and that her name is not commonly recognized. Plaintiff claims that she did not seek publicity and that defendant's statements about her alleged extramarital relationships are irrelevant to her government work.

Even if plaintiff is deemed to be a public figure, plaintiff argues that she has satisfied the pleading requirements for malice. Plaintiff quotes several passages in the complaint which accuse defendant of knowingly making false, misleading statements, of making such comments with ill will toward plaintiff, and which allege that defendant made false statements with knowledge they were false or, at the very least, with reckless disregard of the truth. Plaintiff states that this is

sufficient to withstand dismissal in the context of a pre-answer motion to dismiss, in which the court accepts the allegations in the pleadings as true (*id.* at **18-21).

Finally, plaintiff argues that, contrary to defendant's position, the challenged statements are statements of fact, capable of being proven true or false. Moreover, defendant presented his statements in a context which signaled to viewers that he was asserting facts rather than opinions. Among other things, she points out that in speaking of plaintiff's purported sexual encounters, defendant provides specific details, such as the amount of time for each encounter; that defendant implied plaintiff's sexual activity with the former mayor was in exchange for government favors; and that she illegally retained possession of houses from the Olympic Village and sold them to her friends at a discount.

In reply, defendant reiterates that the complaint fails to satisfy the pleading standards for defamation. Defendant reasserts that plaintiff, "a high-ranking government official in China, . . . indisputably is a public figure" and thus the complaint must clear a higher threshold (NYSCEF Doc. No. 29 at *8). According to defendant, plaintiff's allegations of malice are "boilerplate" and conclusory, and plaintiff provides no context from which malice can be inferred (*id.* at *9). Defendant points out that in the challenged video he expressly stated that plaintiff was a public official. Defendant claims that his allegations about plaintiff's criminal activities will not harm her reputation because they "are part of an overall pattern of corruption among Chinese government officials, a pattern that is condoned and perpetrated by the Chinese government as a whole to the detriment of the average Chinese citizen" (*id.* at **13-14). Defendant argues that plaintiff, therefore, did not commit any crimes in the eyes of the government by accepting bribes, making "adjustments to the floor-area ratio" of houses at the request of her friends, and committing

other wrongful acts (*id.* at 14). Defendant contends that he did not directly accuse plaintiff of accepting bribes, but of owning Hermes bags, at least some of which were gifts from officials (*id.*).

Similarly, defendant states, because plaintiff's sexual activities were commonplace among Chinese officials, there is no merit to "the second category of damages – alleged statements impugning Huang's chastity as a woman" (*id.* at *15). Furthermore, defendant argues, reliance on this argument is consistent with an archaic model of thinking. Despite the fact that numerous cases have alleged that such activity is defamation per se, defendant states, "the time has come to recognize the equality of men and women" by breaking with this outmoded precedent (*id.*).

Analysis

Prior to the date of this decision and order, several issues were resolved. First, plaintiff has not opposed defendant's motion insofar as the motion seeks to dismiss the second cause of action for failure to plead special damages. Furthermore, defendant is correct that special damages are required to sustain a general defamation claim (*see Nolan v State of New York*, 158 AD3d 186, 191 [1st Dept 2018]). Accordingly, the second cause of action alleging general defamation is dismissed. Second, at oral argument, this Court granted the motion to dismiss the cause of action for intentional infliction of emotional distress, as it is duplicative of plaintiff's defamation claim (tr of oral argument at 5, line 25; at 6, lines 1-13). As such, this Court rejected plaintiff's argument that she was entitled to plead these claims in the alternative. Third, several of defendant's challenges revolved around the fact that the translation from Chinese to English was not accompanied by an affidavit. In her opposition, however, plaintiff supplemented her response with the required affidavits. Therefore, this Court rejected defendant's argument on the record (*see* tr of oral argument at 9, lines 21-25). Accordingly, this Court considers only whether plaintiff's first cause of action for defamation per se survives dismissal under CPLR § 3211 (a) (7).

For the purposes of this motion, the court accepts the allegations in the complaint as true and interprets the complaint liberally (*see Alden Global Valley Recovery Master Fund, L.P. v KeyBank N.A.*, 159 AD3d at 621-622). Moreover, it gives plaintiff “the benefit of every . . . favorable inference” and “determine[s] only whether the facts as alleged fit within any cognizable legal theory” (*Gottlieb v Wynne*, 159 AD3d 799, 800 [2nd Dept 2018]). A defamation claim must assert that the defendant made “a false statement which tends to expose the plaintiff to public ridicule, aversion or disgrace, or induce an evil opinion of [her] in the minds of right-thinking persons, and to deprive [her] of their friendly intercourse in society” (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014] [internal quotation marks and citation omitted]). If a false statement of fact “charges another with a serious crime or tends to injure another in his or her trade, business or profession,” a claim of defamation per se exists (*Mayer v Riordan*, 55 Misc 3d 1203 [A], 2017 NY Slip Op 50357 [U], *9 [Sup Ct, NY County 2017] [internal quotation marks and citations omitted]). Finally, where the plaintiff is a public figure she must “allege that defendant published the statements at issue with actual malice, that is, with either knowledge that they were false, or reckless disregard of the truth” (*Winklevoss v Steinberg*, 170 AD3d 618, 619 [1st Dept 2019]). This Court considers the statements “in the context of the entire publication” (*Stepanov*, 120 AD3d at 34).

In the case at hand, defendant’s statements are “reasonably susceptible of a defamatory connotation” (*Davis v Boenheim*, 24 NY3d 262, 268 [2014]) and are, at the very least, “defamatory by implication” (*Martin v Daily News L.P.*, 121 AD3d 90, 99-100 [1st Dept 2014], *lv denied*, 24 NY3d 908 [2014] [internal quotation marks and citation omitted]). Even where defendant did not accuse plaintiff of a specific illegal act, the context of his statements made his accusations implicit. Immediately before he described plaintiff’s alleged activities, for example, defendant stated that

the Beijing Municipal Planning Committee, where plaintiff has worked, awarded financing to those who “gain[ed] favor” with its members; that the planning committees members are “[t]he biggest beneficiar[ies] of the real estate economy”; and that the “use of corruption to fight corruption, is most embodied by the Planning Committee” (NYSCEF Doc. No. 3 at **6-7). Defendant describes the illegal “tricks” real estate developers use to obtain greater profits, such as altering the floor-area ratio, suggesting that plaintiff’s use of these “tricks” is similarly illegal (*id.* at *12-13).

Defendant also made more direct statements about plaintiff’s alleged corruption, including his description of her as “the most typical example” of government corruption and criminality (*see id.* at *7). For example, he stated, “if someone wants to ask for Ms. Huang to approve the plot ratio, you have to pay three thousand for one square meter or you give 30% equity of the project to Ms. Huang” (*id.* at *15). Defendant mentioned that plaintiff’s husband is a real estate developer who is under his wife’s control, implying that they implemented plaintiff’s nefarious plans together (*id.* at *10-11). Defendant stated that one of his own former friends, the government official Yue Wenhai, is corrupt (*id.* at *20), and he stated that plaintiff slept with Yue Wenhai and also bribed him so that she would not be arrested (*id.* at *21). Defendant described plaintiff’s “insatiable greed” as “clan-style, schoolmate-style corruption” (NYSCEF Doc. No. 3 at *14). Defendant also stated that “[w]hen she meets the leaders, [plaintiff] drags their arms, pulls their sleeves, touches their hands and rubs their bodies with her ass. And she will arrive before the leaders take a nap, and comfort them after the afternoon nap” (*id.* at *16). Plaintiff is correct that these statements can lead reasonable people to conclude that she lacks integrity as a government official and disregards her professional ethics, and that she is unfit for her job (NYSCEF Doc. No. 1, ¶ 9; *see Frechtman v Gutterman*, 115 AD3d 102, 104 [1st Dept 2014]).

Furthermore, the statements, if false, are defamatory per se. The disparagement of an individual's profession is defamation per se if the defendant asserts "false statements of fact, rather than opinion" (*Frechtman*, 115 AD3d at 104-105). Although defendant alleges that plaintiff's conduct is typical of government officials in China generally, this does not remove the stigma associated with these types of claims (*see also* tr at 21, lines 13-25; 22, lines 1-16 [rejecting defendant's argument that because the alleged corruption is typical among government officials, it is not defamatory to accuse plaintiff of corruption]).

Additionally, many of the allegedly defamatory statements appear not to be expressions of opinion or speculations as to plaintiff's future conduct.¹ On the contrary, defendant went to great lengths to suggest that he was setting forth facts. With respect to plaintiff's activities generally, for example, defendant asserted that [t]here is only one person who would know the truth, and that person is me, Wengui" (NYSCEF Doc. No. 3 at *7). In addition, defendant asserted that he knew about plaintiff's affair with Mr. Liu because he once possessed videotapes which proved that the two were having sex (NYSCEF Doc. No. 1, ¶ 8 [b]). Similarly, when he described plaintiff's activities with respect to the housing in Beijing's Olympic Village, defendant stated, "I have a pile of evidence much of which I had forgotten about. Yesterday I remembered that I've had this thing locked in a safety box . . . I should really take them out and tell everyone about it" (*id.*, ¶ 8 [d]). Other statements that defendant made also appear to be alleged statements of fact because they are "susceptible of being proven true or false, since [plaintiff] either did or did not engage in the alleged behavior" (*see Zervos v Trump*, 171 AD3d 110, 128 [1st Dept 2019]). In addition, this Court rejects defendant's argument that his allegations of unchasteness are not defamatory because

¹ Defendant's arguments about the use of "would" lack merit, as he used the word when discussing past rather than future activities.

it is based on an outdated and chauvinistic way of thinking. Plaintiff alleges that the defamation arises from the statement that she had sex with the former deputy mayor in exchange for political and financial favors, not due to allegations of unchasteness.

This Court next considers whether plaintiff is a public figure. “Public figures for . . . defamation purposes include limited purpose public figures, those who have thrust themselves to the forefront of particular public controversies. . .” (*Huggins v Moore*, 94 NY2d 296, 301-302 [1999] [internal quotation marks and citations omitted]) or “become[] influential in a single issue” (*Horowitz v Mannoia*, 10 Misc 3d 467, 470 [Sup Ct, Nassau County 2005]). Plaintiff acknowledges that she is a high-ranking official in China (NYSCEF Doc. No. 15 at *26). Thus, through her public office she has become a limited purpose public figure within the world of Chinese government. Plaintiff’s lack of fame in the United States is not critical here, where (1) defendant posted the videos on YouTube, thus making them available to people worldwide, and (2) defendant posted his videos in Chinese and focuses on the alleged corruption in Beijing among officials, thus directing the videos to Chinese-speaking people concerned with that country’s politics.

Since plaintiff is a limited purpose public figure, she must allege in the complaint that defendant acted with “actual malice” or “gross irresponsibility” (*Farber v Jefferys*, 103 AD3d 514, 515 [1st Dept 2013], *lv denied*, 21 NY3d 858 [2013]). Here, the plaintiff alleges in the complaint that defendant “knew the statements made by him on above said video were false and misleading” and that defendant posted the video on his popular YouTube channel “maliciously for the sole purpose of impugning [plaintiff’s] reputation and standing and casting aspersions upon [her]” (NYSCEF Doc. No. 1, ¶ 14). Plaintiff further alleges that defendant was motivated by “spite and ill-will” (*id.*, ¶ 15) and that defendant intended to cause plaintiff emotional distress (*id.*, ¶ 30).

Plaintiff repeatedly states in the complaint that, at the very least, defendant recklessly disregarded both the truth and the substantial probability that plaintiff would be harmed by his statements. This showing is sufficient to withstand the pre-answer motion to dismiss the complaint.

Defendant also alleges that plaintiff's request for punitive damages are impermissible in the context of a defamation claim. The Court rejects this argument because, as plaintiff argues, punitive damages are awardable where the alleged conduct is "sufficiently willful, wanton, or reckless" (*Kalia v Rutkin*, 162 AD3d 614, 615 [1st Dept 2018] [the First Department affirmed trial court's adoption of JHO's determination, after hearing, that defendant's counterclaim lacked merit]). Plaintiff's complaint sufficiently alleges reckless conduct by defendant. Thus, dismissal at this juncture would be premature.

The Court reaches a different conclusion with respect to plaintiff's request for injunctive relief and attorney's fees. "Prior restraints on speech are the most serious and the least tolerable infringement on First Amendment rights, and any imposition of prior restraint, whatever the form, bears a heavy presumption against its constitutional validity" (*Brummer v Way*, 166 AD3d 475, 476 [1st Dept 2018] [internal quotation marks and citations omitted]). Even "highly offensive, repulsive and inflammatory" speech cannot be restrained unless it "communicate[s] a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals" (*id.* [internal quotation marks and citations omitted]). Applying this principle, courts have found that "[p]rior restraints are not permissible . . . merely to enjoin the publication of libel" (*Rosenberg Diamond Dev. Corp. v Appel*, 290 AD2d 239, 239 [1st Dept 2002]). Plaintiff's complaint does not assert facts sufficient to justify such relief. Defendant is also correct that attorney's fees are not awarded in this State unless there is statutory or contractual authority (*see*

Gotham Partners, L.P. v High Riv. Ltd. Partnership, 76 AD3d 203, 204 [1st Dept 2010], *lv denied*, 17 NY3d 713 [2011]).

Conclusion

Based on the foregoing, it is

ORDERED that the defendant's pre-answer motion to dismiss is granted to the extent of dismissing the second and third causes of action, and striking the requests for injunctive relief and attorney's fees; and it is further

ORDERED that the remainder of the case shall continue; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 30 days after service of a copy of this order with notice of entry.

Dated: July 3, 2019

ENTER:


H.S. THELOMO S. HAGLER, J.S.C.