SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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INDEX NO. 157550/2020

MICHAEL CISNEROS INDIVIDUALLY, ALEX HANSON INDVIDUALLY, MICHAEL CISNEROS, ALEX HANSON, ERICA MCKENNA INDIVIDUALLY, DANIEL MCKENNA INDIVIDUALLY, ERICA MCKENNA, and DANIEL MCKENNA,

MOTION SEQ. NO. 001 and 002

Plaintiffs,

- v -

DECISION + ORDER ON MOTION

LOGAN COOK, DONALD TRUMP, and DONALD J. TRUMP FOR PRESIDENT, INC., JOINTLY AND SEVERALLY,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 45, 47, 48, 49, 52, 53, 55

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 46, 50, 51, 54

were read on this motion to/for DISMISS.

In this tort action commenced by Michael Cisneros, individually ("Cisneros"), Alex Hanson, individually ("Hanson"), Michael Cisneros and Alex Hanson as parents and legal guardians of M.H., a minor, Erica McKenna, individually ("E. McKenna"), Daniel McKenna, individually ("D. McKenna"), and Erica McKenna and Daniel McKenna as parents and legal guardians of F.M., a minor, defendants Donald J. Trump ("Trump") and Donald J. Trump for President, Inc. ("TFP") move (motion sequence 001), pursuant to CPLR 3211(a)(1), (a)(5), (a)(7), and (g), to dismiss the complaint. Defendant Logan Cook ("Cook") also moves (motion sequence 002), pursuant to CPLR 3211(a)(7) and (g), to dismiss the complaint. Plaintiffs

oppose the motions. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

In September 2019, Cisneros and D. McKenna recorded video of their two year old sons, M.H. and F.M., respectively, hugging each other on a New York City sidewalk ("the video"). Doc. 1 at par. 11. The video of M.H., who is black, and F.M., who is white, went viral as a symbol of racial unity. Id. at par. 12.

Cook, who on his Instagram account, "carpedonktum", describes himself as a "[s]arcastic [m]emesmith specializing in the creation of memes to support [Trump]", allegedly: shared the video with Trump, who was then President of the United States, as well as Trump's campaign, TFP, and misappropriated the video by altering it and intentionally using it out of context to create "an extremely distorted and false message" Id. at par. 13-15. Specifically, Cook added a simulated CNN chyron reading "breaking news" to the footage, changed it to show F.M., the white child, running after M.H., the black child, and added captions reading "Terrified Todler [sic] Runs From Racist Baby" and "Racist Baby Probably A Trump Voter." Id. at pars. 16-17. The shot then fades to a black screen with text stating "what actually happened", and then shows F.M. and M.H. running towards each other and then embracing. The shot then fades to a black screen with the following message in all capital letters:

> AMERICA IS NOT THE PROBLEM . . . FAKE NEWS IS. IF YOU SEE SOMETHING, SAY SOMETHING. ONLY YOU CAN PREVENT FAKE NEWS DUMPSTER FIRES.

On June 18, 2020, Trump, using his personal Twitter page, @realDonaldTrump, tweeted Cook's manipulated video of the children without the consent of any of the plaintiffs. Id. at par. 22. TFP then retweeted Trump's post of the altered video, again without the consent of any

plaintiff. Id. at par. 23. Trump's tweet and TFP's retweet have been viewed over 20 million times. Id. at par. 35.

On June 19, 2020, Facebook and Twitter removed the altered video from Trump's and TFP's postings on the ground that it violated their copyright rules, lacked approval of the plaintiffs, and was "likely to cause harm" to the plaintiffs. Id. at par. 37. On June 23, 2020, Twitter permanently banned Cook and carpedonktum from its platform. Id. at par. 38. Nevertheless, Cook continued to feature the video on Instagram and other social media platforms. Id. at par. 30.

On September 17, 2020, plaintiffs commenced the captioned action by filing a summons and verified complaint. Doc. 1. As a first cause of action, plaintiffs alleged that, by using the video of the children without their consent, and by using it for "advertising purposes and/or for the solicitation of patronage for Trump in the State of New York", the defendants violated New York Civil Rights Law ("CRL") §§ 50 and 51, causing them pain and suffering and mental anguish. Id. at pars. 42-45. As a second cause of action, plaintiffs alleged intentional infliction of emotional distress ("IIED"), asserting that the defendants' conduct was shocking and outrageous and either intended to cause harm or recklessly disregarded the substantial probability that it would cause such harm. Id. at pars. 47-48. As a third cause of action, plaintiffs alleged negligent infliction of emotional distress ("NIED"), asserting that the defendants improperly used the video without their consent and added words to the video which would harm plaintiffs simply to profit from it. Id. at pars. 50-52. As a fourth cause of action, plaintiffs claimed that the defendants were negligent since they breached their duty to act reasonably and "avoid using the video without [the] written consent of [p]laintiffs and changing the video, adding words to it that would harm [p]laintiffs."

For each cause of action, plaintiffs sought compensatory and punitive damages; injunctive relief barring the defendants from using the video; attorneys' fees; and an accounting for all proceeds derived by Trump and TFP as a result of their use of the video. Id. at par. 45.

Plaintiffs claimed that, by creating the video and sharing it with Trump and TFP, Cook, who earned money by creating memes, used pictures of M.H. and F.M. without their consent, for advertising purposes, and/or to for his own economic benefit or for the economic benefit or Trump and/or TFP (Id. at pars. 15, 19-26, 34), and that he created the video meme knowing it was false and/or with reckless disregard for the true nature of the video. Id. at par. 18.

Additionally, plaintiffs claimed that that Trump and TFP published the video with knowledge of its falsity and/or with reckless disregard for the truth of its contents, for commercial gain, and to advance their political goals. Id. at pars. 27 – 34.

Trump and TFP now move (motion sequence 001), pursuant to CPLR 3211(a)(1), (a)(5), (a)(7), and (g), to dismiss the complaint. Docs. 11-36, 43. Cook also moves (motion sequence 002), pursuant to CPLR 3211(a)(7) and (g), to dismiss the complaint. Docs. 40-42.

In support of their motion, Trump and TFP argue that the claims against them must be dismissed since the "[p]arody [m]eme unequivocally involves a topic of significant public concern." Doc. 12 at 9, 11-12. They further assert that the video is protected because it is satirical (Id. at 10) and that it was not directed at any of the plaintiffs, whom they did not even know. Id. at 12.

Next, Trump and TFP argue, relying on CRL sections 70-a and 76-a, that this action must be dismissed pursuant to CPLR 3211(g) because it is a strategic lawsuit against public participation ("SLAPP") improperly designed to prevent them from exercising "their right to publicly petition and participate." Id. at 12. Additionally, the defendants maintain that, because

each of plaintiffs' causes of action is predicated on state tort liability and is related to a matter of public concern, they fall within the free speech protections of the First Amendment to the United States Constitution. Id. at 15-16.

Trump and TFP further assert that plaintiffs' claims of privacy violations pursuant to CRL §§ 50 and 51 must fail since it was they (plaintiffs) who initially posted the video online. Id. at 16. Relying on *Hampton v. Guare*, 195 AD2d 366 (1st Dept 1993), they also contend that "works of…satire do not fall within the narrow scope of statutory phrases 'advertising' and 'trade'" under New York Civil Rights Law §§ 50 and 51. Doc. 12 at 18-20. Further, they contend that there can be no recovery under these statutes since the meme was newsworthy. Doc. 12 at 20-21. Finally, they maintain that the claims for negligence, IIED, and NIED must be dismissed for failure to state a claim. Doc. 12 at 24-29.

In support of the motion, Michael Glassner, Senior Advisor to TFP, submits an affidavit in which he states, inter alia, that TFP is not a commercial enterprise which sells products or services for the purpose of receiving a profit. Doc. 13 at par. 3.

Cook also moves (motion sequence 002), pursuant to CPLR 3211(a)(7), to dismiss the complaint for failure to state a cause of action, and pursuant to CRL §§70-a and 76-a and CPLR 3211(g) based on the fact that this is a SLAPP action involving an issue of public interest, i.e., race relations. Docs. 40-41. In support of the motion, Cook argues that the complaint must be dismissed since plaintiff fails to state a cause of action for negligence, IIED, and NIED. Doc. 41. He also maintains that plaintiffs fail to state a claim pursuant to CRL §§ 50 and 51.

In opposition, plaintiffs argue, inter alia, that defendants' motions must be denied since they have set forth meritorious claims pursuant to CRL Law §§ 50 and 51, as well as for

negligence, IIED, and NIED. Doc. 50. They further assert that the instant action is not a SLAPP suit. Doc. 50.

In reply, Cook, Trump, and TFP essentially reiterate their initial arguments regarding why the complaint should be dismissed. Docs. 54-55.

LEGAL CONCLUSIONS

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" and the court is to "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Civil Rights Law Sections 50 and 51

CRL §50 provides that:

> A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

CRL §51 provides, in pertinent part, that:

> Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained... may maintain an equitable action in supreme court...

Although CRL §§50 and 51 do not define advertising or trade purposes, "[a] name, portrait or picture is used 'for advertising purposes' if it appears in a publication which, taken in its entirety, was distributed for use in, or as part of, an advertisement or solicitation for patronage of a particular product or service" (*Beverly v Choices Women's Med. Ctr.*, 78 NY2d 745, 751 [1991] [citations omitted]). "Trade purposes" is more difficult to define (*see, Davis v High Socy.*

Mag., 90 AD2d 374, 379 [2d Dept 1982]). In determining whether one's image was used for the purposes of trade, a court must consider whether it attracted customers to the defendant (*see, Flores v Mosler Safe Co.*, 7 NY2d 276, 284 [1959]) and/or whether it helped the defendant make a profit (see *Delan v CBS, Inc.*, 91 AD2d 255, 259 [2d Dept 1983]). The application of the CRL is "strictly limited to nonconsensual commercial appropriations of the name, portrait or picture of a living person" and "these sections do not apply to reports of newsworthy events or matters of public interest" (*Messenger v Gruner + Jahr Print. & Publ.*, 94 NY2d 436, 441 [2000] [citations omitted]). A person's likeness "illustrating an article on a matter of public interest is not considered used for the purpose of trade or advertising within the prohibition of the statute" *unless* "it has no real relationship to the article" (*Dallesandro v Henry Holt & Co.*, 4 AD2d 470 [1st Dept 1957]) "or unless the article is an advertisement in disguise" (*Velez v VV Pub. Corp.*, 135 AD2d 47 [1st Dept 1988]).

This Court finds that plaintiffs' claims pursuant to CRL §§50 and 51 are subject to dismissal on several grounds. Initially, as defendants assert, the video was newsworthy. (*Messenger v Gruner + Jahr Print. & Publ.*, 94 NY2d at 441). To promote freedom of expression, the meaning of "newsworthiness" has been broadly construed and includes "not only descriptions of actual events . . . but also articles concerning political happenings, social trends, or any subject of public interest". (Id at 441-442). "Although the boundaries of what constitutes speech on matters of public concern are not well defined, ... [the U.S. Supreme] Court has said that speech is of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' or when it 'is a subject of general interest and of value and concern to the public'" (*Snyder v Phelps*, 562 U.S. 443, 444 [2011] [citations omitted]). It is common knowledge that one of the principal tactics of Trump's presidential

campaigns, as well as his presidency, was to incessantly attack the mainstream media as purveyors of "fake news", including his claim that the media exaggerates the extent of racial division in this country. Thus, the video's references to "fake news" and its depiction of race relations, however distorted, are clearly newsworthy and, thus, the plaintiffs are not afforded the protections of CRL §§50 and 51. Nor is there any indication in plaintiffs' motion papers that F.M. and M.H. have no real relationship to the video or that the video was an advertisement in disguise.

Additionally, "works of fiction and satire do not fall within the narrow scope of the statutory phrases 'advertising' and 'trade'" (*Hampton v Guare*, 195 AD2d 366, 366 [1st Dept 1993], *lv denied* 82 NY2d 659 [1993]; *see also* *Gravano v Take-Two Interactive Software, Inc.*, 142 AD3d 776, 777-778 [1st Dept 2016]). Here, the video not only contained the portion altered by Cook, but also the original footage of M.H. and F.M. accompanied by a graphic reading "what actually happened." Thus, any reasonable person watching the video knew, or should have known, that at least a portion of its contents was not real. Since the video is therefore a satire, albeit one which some may consider to be rather distasteful, this Court is constrained to find that it is not actionable pursuant to CRL §§50 and 51.

Further, since the video was not used to solicit "patronage of a particular product or service", it was not used for advertising purposes (*Beverly v Choices Women's Med. Ctr.*, 78 NY2d at 751). Nor was the video used for the purposes of trade, since the motion papers do not contain anything other than speculation that it attracted customers to Trump and TFP (*see, Flores v Mosler Safe Co.*, 7 NY2d at 284) and/or helped those defendants make a profit (see *Delan v CBS, Inc.*, 91 AD2d at 259).

Intentional Infliction of Emotional Distress

The Court of Appeals has held that "[t]he tort [of IIED] has four elements: (1) extreme and outrageous conduct; (2) intent to cause or disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and the injury; and (4) severe emotional distress" (*Howell v. New York Post Co.*, 81 NY2d 115, 121 [1993]). With respect to the element of "extreme and outrageous" conduct, a plaintiff must allege conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency", and establishing this type of conduct requires a showing which is "rigorous" and "difficult to satisfy" (*Howell v. New York Post Co.*, 81 NY2d at 122). Although the plaintiffs allege that the defendants' conduct was outrageous, they do not allege that it went beyond all possible bounds of decency. Additionally, since the creation, posting and/or retweeting of the video do not rise to the level of extreme and outrageous conduct necessary to establish this claim, plaintiffs' claim for IIED must be dismissed.

Negligent Infliction of Emotional Distress

"Extreme and outrageous conduct [is also] an essential element of a cause of action alleging intentional infliction of emotional distress" (*Xenias v Roosevelt Hosp.*, 180 AD3d 588, 589 [1st Dept 2020]). Since defendants did not engage in such conduct, this claim must be dismissed as well.

Negligence

Although the plaintiffs' fourth cause of action is "framed to allege negligence", it actually "alleges nothing more than permitting the violation of [CRL §§50 and 51], for which, as

discussed above, there is no right of action" (*Carpenter v Plattsburgh*, 105 AD3d 295, 299 [3d Dept 1985]). Thus, the negligence claim is dismissed as well.

SLAPP

> In 1992, legislation was enacted to address "a rising concern about the use of civil litigation, primarily defamation suits, to intimidate or silence those who speak out at public meetings against proposed land use development and other activities requiring approval of public boards. Termed SLAPP suits—strategic lawsuits against public participation—such actions are characterized as having little legal merit but are filed nonetheless to burden opponents with legal defense costs and the threat of liability and to discourage those who might wish to speak out in the future" (*600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d 130, 137 [1992]; *see* L 1992, ch 767; [CRL] §§ 70-a, 76-a). The legislation was specifically aimed at broadening the protection of citizens facing litigation arising from their public petition and participation (*see* L 1992, ch 767, § 1; *600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d at 137 n 1).

(*Mable Assets v Rachmanov*, 192 AD3d 998, 999-1000 [2d Dept 2021]).

On November 10, 2020, CRL §§ 70-a and 76-a were amended "to broaden the scope of the law and afford greater protections to citizens facing litigation arising from their public petition and participation (*see* L 2020, ch 250)" (*Mable Assets v Rachmanov*, 192 AD3d at 1000). The amendment, which is retroactive in order to further the remedial and beneficial purposes of the statute (*see Sackler v American Broadcasting Cos., Inc*., 2021 N.Y. Misc. LEXIS 1035 [Sup. Ct. New York County 2021])[1], expands the definition of an "action involving public petition and participation" set forth in CRL §76-a to include: "1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or 2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition" (CRL § 76-a[1], [2]). The statute provides that "'[p]ublic interest' shall be construed broadly, and shall mean any subject other than a purely private matter" (CRL § 76-

[1] Since this action was commenced prior to the retroactive amendment, the amendment is applicable herein.

a[1][d]). Additionally, the amendment increases the difficulty of prevailing in a SLAPP suit, stating that "damages may only be recovered if the plaintiff, in addition to all other necessary elements, shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false…" (CRL § 76-a[2]).

CRL §70-a was also amended to create an affirmative cause of action to recover damages from plaintiff, including attorneys' fees, as well as other damages in certain circumstances, if the defendant can show that the action "was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law" (CRL §70-a[1][a]).

Further, CPLR 3211(g) was amended to provide that, where a motion to dismiss is made by a defendant pursuant to CPLR 3211(a)(7) for failure to state a cause of action, and the moving party has demonstrated that the action involves "public petition and participation" as defined in CRL §76-a, the motion "shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law" (CPLR 3211[g][1]).

Since this action involves free speech concerns which are not purely private in nature, it qualifies as a SLAPP suit and is thus subject to dismissal pursuant to CPLR 3211(g). However, despite finding that the complaint is subject to dismissal on this ground, as well as for the reasons set forth above, this Court also finds that plaintiffs are not subject to the penalties set forth in CRL § 70-a since their claims are supported by a substantial argument for the extension of existing law. Specifically, although this Court determines that the video was not used for the purposes of advertising or trade within the contemplation of CRL §§ 50 and 51, plaintiffs argue

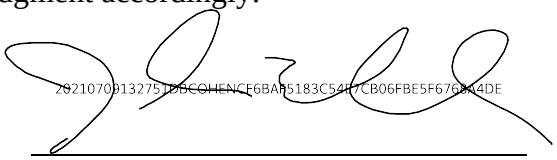
that defendants use the video as a means of advertising for Trump and TFP. Although this Court rejected plaintiffs' argument, it finds that they set forth a good faith basis for the extension of existing law and, thus, plaintiffs should not be penalized by the draconian language set forth in CRL §§ 70-a and 76-a.[2]

Accordingly, it is hereby:

ORDERED that the motion by defendants Donald J. Trump and Donald J. Trump for President, Inc. seeking dismissal of the complaint (motion sequence 001) is granted; and it is further

ORDERED that the motion by defendant Logan Cook seeking dismissal of the complaint (motion sequence 002) is granted; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.



7/7/2021
DATE

DAVID BENJAMIN COHEN, J.S.C.

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

[2] Even assuming, arguendo, that defendants were entitled to damages pursuant to CRL 70-a and 76-a, they may not recover them herein given that they did not commence "an action" or assert a "claim, cross claim or counterclaim" seeking the same. (see CRL 70-a [1]).