IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION

ERIK MISHIYEV,

Plaintiff,

Case No.: 20-CA-8301
Division: K

v.

ORLANDO DAVIS and
BEASLEY MEDIA GROUP, LLC,

Defendants.
_____/

ORDER GRANTING DEFENDANTS' DISPOSITIVE ANTI-SLAPP MOTION AND DISMISSING FIRST AMENDED COMPLAINT WITH PREJUDICE

THIS CAUSE is before the Court on Defendants' Dispositive Anti-SLAPP Motion and Motion to Strike (Doc. 51). Plaintiff is a disc jockey and entertainment personality who alleges, among other things, that Defendants—a corporate media group and an individual radio personality—subjected him to a campaign of harassment and bullying over the course of two decades. The crux of Plaintiff's complaint concerns speech made in connection with radio broadcasts and related media.

The Court held a hearing on December 20, 2022, at which counsel and Plaintiff, proceeding *pro se*, argued their respective positions concerning whether this matter is subject to dismissal pursuant to Florida's anti-SLAPP law. Because that law prohibits persons from filing lawsuits aimed at free speech—and because Plaintiff's claims are without merit—the Court finds that Defendants' motion should be granted and dismissal with prejudice is warranted.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY.[1]

Plaintiff, Erik Mishiyev ("Plaintiff" or "Mishiyev"), is an entertainment personality and disc jockey ("DJ") who goes by the name "DJ Short-e." Stemming from his interest in the hip-hop industry as a teenager in Brooklyn, Plaintiff began training as a DJ in the early 1990s. He relocated to Tampa, Florida in 1996 to attend community college and pursue a job in the radio and music industry. Over the years, Plaintiff enjoyed a measure of success in this regard. By 1999, Plaintiff was working as an independent mix-cd and nightclub DJ in both the Tampa Bay and South Miami areas. Between 2000 and 2002, Plaintiff worked as the "Resident DJ" at the Rain Lounge in Tampa, where he continued making a name for himself.

Sometime in 2002, Plaintiff met Defendant Orlando Davis ("Davis"), then an on-air personality for WiLD 94.1, a radio station owned by Defendant Beasley Media Group, LLC ("Beasley").[2] In an effort to advance his career, Plaintiff tried for years to befriend Davis, to no avail. Regarding the relationship between the two, Plaintiff claims that Davis was jealous of Plaintiff's success and actively worked to have Plaintiff shunned from the DJ and radio community by, among other things, badmouthing him to club owners and others in the radio industry.

Over time, Plaintiff found that his success and ability to grow a support base was "hindered greatly" and that his opportunities in the local radio and music industry began to dry up. Plaintiff believes this is attributable to the "continuous public disrespect" he endured in connection with statements made by Davis, both on the radio and in related social media.

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[1] The facts are drawn from Plaintiff's First Amended Complaint ("FAC") and the exhibits attached thereto. (Doc. 46.)

[2] Davis and Beasley are referred to collectively as "Defendants." Davis is currently a program director for WiLD 94.1.

Plaintiff claims, for example, that Davis made Plaintiff the subject of an on-air "roast" during Davis's morning show on March 29, 2011, in which Davis allegedly called Plaintiff an "illicit drug user and bad DJ." (FAC, ¶ 16.) Plaintiff asserts that this broadcast "changed his career and life forever" and that he has not been booked as a DJ for approximately ten years on account of the broadcast and other statements made by Davis on the air and in social media. *Id.*, ¶¶ 16-17.

In addition, Plaintiff asserts that Davis and other Beasley employees were instrumental in getting Plaintiff "shadow banned, censored, then permanently terminated" by YouTube in January 2020, based on statements made to and by unspecified persons in late 2019. (FAC, ¶ 24.) To support these and other assertions, Plaintiff cites an Instagram video uploaded on April 17, 2020 in which Davis stated that he is "the reason DJ Short-E didn't make it the last 20 years." (FAC, ¶¶ 18, 44.) Plaintiff further contends that this mistreatment is rooted in religious and racial animus on the part of Davis. (*See, e.g.*, FAC, ¶¶ 69-72.) Plaintiff explains that he "stood out at most hip-hop events as one of the few Jewish people" and has suffered discrimination in and among the hip-hop scene as a result.

On October 22, 2020, Plaintiff, then represented by counsel, filed a two-count complaint alleging defamation and intentional interference with a business relationship. The Court denied Defendants' initial motion to dismiss following a hearing and the matter was stayed during the pendency of the appeal of that ruling. In June 2022, the Second District Court of Appeal remanded the case for a re-determination of the motion under the heightened standard applicable to dispositive motion brought pursuant to Florida's anti-SLAPP law, Florida Statute Section 768.295. *See Davis v. Mishiyev*, 339 So. 3d 449, 453–54 (Fla. 2d DCA 2022).

Following remand, Plaintiff—now proceeding *pro se*—filed a vastly-amended complaint—fairly characterized as a shotgun pleading—that contains a meandering litany of generalized grievances and adds additional counts against both Defendants, including new claims for assault, negligent supervision, and intentional infliction of emotional distress. (FAC, filed September 2, 2022.) Defendants have again moved to dismiss and, in the alternative, to strike the amended complaint based upon newly-added allegations that are immaterial and impertinent. Defendants also sought a discovery-related protective order and another stay of the proceedings, which the Court granted. (Doc. 39.) The Court heard argument on December 20, 2022 and took the matter under advisement.

II. FLORIDA'S ANTI-SLAPP LAW APPLIES TO THE INSTANT ACTION.

Florida law prohibits the filing of "strategic lawsuits against public participation," colloquially known as a "SLAPP" actions, to protect defendants from lawsuits that "are inconsistent with the right of persons to exercise such constitutional rights of free speech in connection with public issues." Fla. Stat. 768.295(1) & (3) (2021); *Gundel v. AV Homes, Inc*., 264 So. 3d 304, 310-311 (Fla. 2d DCA 2019); *Davis,* 339 So. 3d at 452. More specifically, the statute prohibits a person from filing "any lawsuit, cause of action, claim, cross-claim, or counterclaim against another person or entity without merit and primarily because such person or entity has exercised the constitutional right of free speech in connection with a public issue . . . ." Fla. Stat. § 768.295(3). In this regard, the anti-SLAPP law bears similarity to statutes that provide immunity from suit, in which the protection provided to the defendant is from the litigation itself. *See Baird v. Mason Classical Academy, Inc.*, 317 So. 3d 264, 268 (Fla. 2d DCA 2021); *Gundel*, 264 So. 3d at 311.

Courts must therefore decide—at an early stage—whether a plaintiff's lawsuit is one that is prohibited by the anti-SLAPP law and should be dismissed. *See* Fla. Stat. § 786.295(4) ("A person or entity sued by . . . another person in violation of this section has a right to an expeditious resolution of a claim that the suit is in violation of this section."); *WPB Residents for Integrity in Gov't, Inc. v. Materio*, 284 So. 3d 555, 556 (Fla. 4th DCA 2019).[3]

Relevant here, a motion to dismiss brought under the anti-SLAPP statute requires a more stringent analysis than that utilized on a typical motion to dismiss. *See Gundel*, 264 So. 3d at 312–14 (explaining that courts confronted with an anti-SLAPP dispositive motion must "do more than accept as true the factual allegations in the four corners of the complaint and draw all reasonable inferences therefrom in favor of the claimant"). This includes careful analysis of the facts alleged, the reason the lawsuit was brought, and the merits of the plaintiff's claims.

Further, the motion is considered under the anti-SLAPP law's burden-shifting paradigm. Defendant has the initial burden to set forth a prima facie case establishing that the anti-SLAPP statute applies. *See id*. at 314. If so, Plaintiff carries the burden to show that the action was not brought "primarily" because of Defendants' exercise of constitutionally-protected speech, and that his claims are not "without merit." *Id*. If Plaintiff cannot meet these burdens, the action is subject to termination.

Embarking on the first inquiry— that is, whether the speech underlying Plaintiff's complaint is within the purview of the statute—the Court notes as an initial matter that Plaintiff fundamentally misunderstands the meaning and scope of Florida's anti-SLAPP law. As a result,

[3] Mindful that Florida's anti-SLAPP law is intended to nip meritless lawsuits in the bud in the early stages to protect defendants from the irreparable harm of litigation, at all relevant times this matter was stayed to prevent undue burden to Defendants while the Court engaged in a careful review of the amended complaint and surrounding legal issues.

Plaintiff continues to press the erroneous argument that the anti-SLAPP law does not apply to the instant action because it does not involve speech made in connection with "governmental activity."[4] While the Court is mindful that Plaintiff has been proceeding *pro se* following the withdrawal of his counsel, it is not the role of the Court to educate Plaintiff on the applicable law, or to advise Plaintiff regarding the burden he must meet to avoid dismissal.

Turning to the analysis, the Court finds that the principal thrust of Plaintiff's complaint concerns free speech in connection with a public issue within the purview of the anti-SLAPP statute. Relevant here, "free speech in connection with public issues" means "any written or oral statement that is protected under applicable law" that is "made in or in connection with a play, movie, television program, radio broadcast, audiovisual work, book, magazine article, musical work, news report, or other similar work." Fla. Stat. § 768.295(2)(a). It is beyond dispute that the alleged written or oral statements at issue were made in—or in connection with—Davis's radio broadcasts, or in social media related to such broadcasts.[5] Accordingly, Defendants have set forth a prima facie case that the anti-SLAPP applies.

III. PLAINTIFF'S LAWSUIT IS SUBJECT TO DISMISSAL UNDER THE ANTI-SLAPP AND OTHER APPLICABLE LAWS.

It is clear from the amended complaint that Plaintiff filed this lawsuit primarily because Defendants have exercised the constitutional right of free speech in connection with a public issue; *i.e*., in or in connection with a radio broadcast or other similar work. Virtually all the allegations in the amended complaint concern speech made in or in connection with Davis's

[4] In 2015, the Florida Legislature amended and expanded Florida's anti-SLAPP statute to cover private plaintiff suits and specified speech activities beyond speech before a government entity.

[5] The Court finds that the statute applies to the alleged statements posted on social media platforms. *See, e.g.*, *Mac Isaac v. Twitter, Inc.*, 557 F. Supp. 3d 1251, 1261 (S.D. Fla. 2021) (applying Florida's anti-SLAPP law in case involving statements made on Twitter).

radio broadcasts. Indeed, Plaintiff sued Davis in his capacity as a radio personality for Beasley, and essentially concedes that he filed this lawsuit to stop the "continuous public disrespect" by Davis, both on air and in related media.

Significant here, Plaintiff complains that his life changed forever and his career was stunted as a direct result of Davis's March 29, 2011 on-air roast of Plaintiff. In complaining of the April 17, 2020 Instagram video, Plaintiff's amended complaint states, in relevant part, that "[i]f Mr. Davis is not stopped, Mr. Mishiyev will never recover from his losses and is concerned that Mr. Davis will feel even more emboldened . . . ." (FAC, ¶ 19.) With respect to whether Plaintiff's lawsuit was brought "primarily because" of Davis's speech, Plaintiff's own words speak for themselves. In sum, Plaintiff failed to show that his lawsuit was not brought primarily because of Defendants' free speech. To the contrary, the Court finds that Plaintiff's lawsuit was brought in an effort to chill Defendants' constitutionally-protected speech.

Further, Plaintiff also failed to show that his claims are "not without merit." In this regard, Plaintiff's response in opposition to the motion to dismiss is entirely devoid of legal argument regarding his specific causes of action. Defendants, on the other hand, have presented extensive analysis and authority to support their contention that Plaintiff's amended complaint must be dismissed in its entirety because: (1) the alleged defamatory statements are time-barred, non-defamatory, not published, or otherwise without legal merit; (2) the ancillary tort claims are impermissibly duplicative of Plaintiff's defamation claim in violation of Florida's single-action rule; and (3) each of Plaintiff's claims independently fails on its merits. The Court agrees that dismissal is warranted for the reasons discussed below.

A. Plaintiff's Defamation Claims Are Without Merit.

As the Court has touched upon, Plaintiff's amended complaint boils down to an airing of grievances against Davis and others for "making fun" of Plaintiff, refusing to be friends, and failing to support Plaintiff's potential "to become a super star and to become very successful in hip hop." (FAC, ¶ 44.) While the distress Plaintiff feels may be understandable, the so-called "malicious pattern" of sabotage, disrespect, and bullying about which Plaintiff complains is not actionable from a legal standpoint. Specifically, none of the alleged defamatory statements is actionable because (1) almost all the statements are time-barred by the two-year statute of limitations governing defamation claims, *see* Fla. Stat. § 95.11(4)(g); and (2) Plaintiff failed to provide the required pre-suit notice for one of the remaining statements not time-barred, *see* Fla. Stat § 770.01.[6]

Of the remaining alleged defamatory statements at issue, some were not published by Defendants in the first instance and are not actionable as a result; the rest do not convey any defamatory meaning. In sum, not one alleged defamatory statement at issue in the amended complaint meets the substantive elements required to support a claim for defamation. *See Jews For Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1106 (Fla. 2008) (plaintiff must show (1) a false and

[6] That section provides:

> Notice condition precedent to action or prosecution for libel or slander.—Before any civil action is brought for publication or broadcast, in a newspaper, periodical, or other medium, of a libel or slander, the plaintiff shall, at least 5 days before instituting such action, serve notice in writing on the defendant, specifying the article or broadcast and the statements therein which he or she alleges to be false and defamatory.

Id. Section 770.01's "other medium" clause applies to Defendants' online presence. *See, e.g.*, *Five for Entm't S.A. v. Rodriguez*, 877 F. Supp. 2d 1321, 1327 (S.D. Fla. 2012) (citing cases).

defamatory statement (2) of and concerning the plaintiff that is (3) published to a third party with (4) fault on the part of the publisher, and (5) damages).[7]

In reaching the conclusion that none of the alleged statements is defamatory, the Court is guided by the well settled principle that alleged defamatory statements must be considered in context. *See Smith v. Cuban American Nat'l Found*., 731 So. 2d 702, 705-06 (Fla. 3d DCA 1999). Applying that principle here, the Court agrees with Defendants that—when viewed in their context—the alleged speech at issue is nothing more than the typical banter expected in the radio industry. Indeed, the social media posts reflect back-and-forth exchanges between rival DJs and others in which Plaintiff himself engages.

It is without question that pure opinion cannot be be defamatory. *See Demby v. English*, 667 So. 2d 350, 355 (Fla. 1st DCA 1995); *From v. Tallahassee Democrat, Inc*., 400 So. 2d 52, 57 (Fla. 1st DCA 1981). Nor can the rhetoric hyperbole peppered throughout Plaintiff's amended complaint support a claim for defamation. *See, e.g.*, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) (observing that rhetorical hyperbole is protected speech). Protection of such hyperbole recognizes that exaggeration has become an "integral part of social discourse," and thus even statements that can be viewed as being highly insulting and hyperbolically suggestive of criminal activity are not actionable. *See, e.g., Horsley v. Rivera*, 292 F.3d 695, 701–02 (11th Cir. 2002) (statement made on national television that plaintiff was "an accomplice to murder" was rhetorical hyperbole); *Pullum v. Johnson*, 647 So. 2d 254, 257 (Fla. 1st DCA 1994) (calling

[7] Attached to Defendants' Motion is a summary chart setting forth an analysis of the alleged defamatory statements and the reason each fails as a matter of law. (Defs.' Mot., Ex. A.) Upon review, the Court finds no error in Defendants' analysis.

the plaintiff a "drug pusher" was nondefamatory in context). And while the offensive epithets alleged may be reprehensible, such words also do not convey a defamatory meaning.[8]

Because the alleged statements at issue in Plaintiff's amended complaint could not possibly have a defamatory effect, Plaintiff's defamation claims fail.[9] And because Plaintiff's suit fails to state a claim for defamation, it is also without merit under Florida Statute § 768.295(3).

B. Plaintiff's Ancillary Tort Claims Are Barred By The Single-Action Rule.

In addition to the defamation claims, Plaintiff included several additional counts in his amended complaint, including tortious interference with a business relationship (Davis and Beasley); infliction of emotional distress (Davis); negligent supervision (Beasley); and assault (Davis). The Court has considered each claim in the context of the action as a whole and finds that these claims are barred by Florida's single-action rule.

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[8] Because the Court finds that the alleged statements lack defamatory nature, it need not squarely address Defendants' argument that Plaintiff is a public figure in the Tampa Bay area, subject to a heightened standard of fault. Plaintiff argues that he is not a public figure and therefore a showing of actual malice on Defendants' part is not required. The record belies Plaintiff's assertion concerning his status. Among other things, Plaintiff alleges that he is a "very popular" and "well known" DJ who won various awards and at one time garnered millions of views for his YouTube videos. (FAC ¶¶ 11, 24.) Plaintiff further attached a *Tampa Bay Times* article to his complaint, detailing his fame and notoriety as a disc jockey, celebrity interviewer, and television host and creator. In any event, because the Court finds that the statements at issue are otherwise nonactionable as nondefamatory hyperbole and opinion, the Court need not engage further in a fault-standard analysis.

[9] The Court notes also that the amended complaint contains alleged statements that lack the requisite specificity required for pleading defamation. *See Edward L. Nezelek, Inc. v. Sunbeam Television Corp*., 413 So. 2d 51, 55 (Fla. 3d DCA 1982) (requiring "sufficient particularity to enable the court to determine whether the publication was defamatory"). For example, Plaintiff complains that "[w]henever [he] would gain the attention of the local or national press or get some sort of momentum in his music television career, Mr. Davis *or one of his employees* would do *or say something* to knock him back down again, it would take several years for [him] to recover . . . ." (FAC ¶ 22) (emphasis added). These and numerous other statements in the amended complaint lack the specificity required to support a colorable claim for defamation and further would be time-barred according to Plaintiff's amended pleading. In this regard, it is clear that Plaintiff cannot otherwise cure the defects in the amended complaint by being more specific.

Florida's single-action rule prohibits defamation claims from being recast as additional, separate torts, *e.g.*, intentional infliction of emotional distress.[10] In other words, where tort claims filed alongside defamation claims are premised upon the same general facts, the defamation claim absorbs and eliminates all other counts. *See Callaway Land & Cattle Co. v. Banyon Lakes C. Corp.*, 831 So. 2d 204, 208 (Fla. 4th DCA 2002). As explained in *Callaway*, "[t]he rule is designed to prevent plaintiffs from circumventing a valid defense to defamation by recasting essentially the same facts into several causes of action all meant to compensate for the same harm." *Id.* at 208.[11]

Here, each of the non-defamation claims in the amended complaint is premised upon the same facts alleged in connection with Plaintiff's defamation claims. (*See* FAC ¶¶ 85, 92, 101, 106, 112.) Accordingly, those claims are subject to dismissal under the single-action rule.

C. Plaintiff's Ancillary Tort Claims Independently Fail As A Matter of Law.

In addition to being barred by the single-action rule, each of Plaintiff's additional tort claims fails as a matter of law for various reasons. As an initial matter, in the amended complaint, every count incorporates by reference all the preceding allegations. This is problematic for a number of reasons, as Plaintiff failed to identify which factual allegations are meant to support each cause of action, leaving the Court with the difficult task of combing through the 21-page

[10] *See also, e.g.*, *Boyles v. Mid-Fla. Television Corp.*, 431 So. 2d 627, 636 (Fla. 5th DCA 1983), *approved*, 467 So. 2d 282 (Fla. 1985) (claim for intentional infliction of emotional distress subject to dismissal as duplicative where "outrageous conduct" alleged is defamation).

[11] Florida's single-action rule is both longstanding and well settled. *See Fridovich v. Fridovich*, 598 So. 2d 65, 70 (Fla. 1992); *Ovadia v. Bloom*, 756 So. 2d 137, 140–41 (Fla. 3d DCA 2000) ("the single publication/single action rule does not permit multiple actions to be maintained when they arise from the same publication upon which a failed defamation claim is based"); *Orlando Sports Stadium, Inc. v. Sentinel Star Co.*, 316 So. 2d 607, 609-10 (Fla. 4th DCA 1975) (barring the "simple expedient of redescribing the libel action to fit a different category of intentional wrong").

amended complaint to determine whether Plaintiff alleged sufficient facts to support his respective claims. Following careful consideration of the amended complaint, the Court concludes that Plaintiff has failed to state any colorable claim for relief as a matter of law.

With respect to the interference claim, Plaintiff principally alleges that Davis and Beasley interfered with its own historical relationship with Plaintiff. (FAC, ¶ 87.) As Defendant correctly argues, a tortious interference claim is not colorable where the interference involves the relationship between the parties. *See, e.g.*, *Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 742 So. 2d 381, 386 (Fla. 4th DCA 1999) "(For the interference to be unjustified, the interfering defendant must be a third party, a stranger to the business relationship.") Moreover, Plaintiff spends considerable time lamenting over relationships he could have had, but for Davis's verbal harassment. But, as is plain from the law surrounding tortious interference, wished-upon relationships cannot support a claim for tortious interference.[12]

Finally, nothing in the amended complaint supports a claim for assault, *see, e.g.*, *Shaw v. Scerbo*, 2022 WL 3028076, at *3 (M.D. Fla. Aug. 1, 2022) (plaintiff failed to plausibly allege a claim for assault where defendants stepped within a foot in an aggressive manner toward plaintiff); intentional infliction of emotional distress, *Williams v. Worldwide Flight Services*, 877 So. 2d 869, 870 (Fla. 3d DCA 2004) (explaining that reprehensible, objectionable, and offensive behavior does not give rise to intentional infliction of emotional distress); or negligent supervision, *Lee v. Harper*, 328 So. 3d 384, 387 (Fla. 1st DCA 2021) (claim for negligent supervision requires existence of a legal duty to plaintiff).[13]

[12] Further, as evidenced by Plaintiff's own statement attached to the FAC, it appears that the vague accusations concerning interference with respect to YouTube lack a good-faith basis.

[13] Given the separate grounds for dismissal, the Court finds that further discussion of the additional reasons why each claim fails is not warranted.

IV. AMENDMENT WOULD BE FUTILE AND PREJUDICIAL.

As set forth herein, Plaintiff took a second bite at the apple with his amended complaint following remand, and wholly failed to state or substantiate a legally sufficient claim. Moreover, given the circumstances and the context in which this case arises, the Court finds that allowing Plaintiff to re-plead would be futile, prejudicial, and in contravention of the protections Section 786.285 is intended to provide. The Court therefore finds that the matter should be dismissed without leave to amend.

V. CONCLUSION

Based on the foregoing, it is hereby **ORDERED** and **ADJUDGED** as follows:.

1. Defendants' Dispositive Anti-SLAPP Motion is **GRANTED**.
2. Plaintiff's First Amended Complaint (Doc. 46) is **DISMISSED WITH PREJUDICE.**
3. All pending motions are **DENIED** as moot.[14]
4. As the prevailing party, Defendants are entitled reasonable attorney fees and costs pursuant to Section 768.295(4), Florida Statutes.
5. The Court reserves jurisdiction to determine the amount of attorneys' fees and costs to be awarded.

DONE AND ORDERED in Chambers in Hillsborough County, Florida this ____ day of May, 2023.

Electronically Conformed 5/20/2023
Caroline Tesche Arkin

HON. CAROLINE TESCHE ARKIN
Circuit Court Judge

[14] In light of the dismissal with prejudice, the Court need not make a determination regarding Defendants' Motion to Strike. However, the Court notes that the extraneous material in Plaintiff's amended complaint, as identified in Defendants' Motion to Strike, is impertinent, immaterial and scandalous within the meaning of Florida Rule of Civil Procedure 1.140(f).

Copies furnished to:

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