UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TROI TORAIN, Plaintiff,	:	MEMORANDUM DECISION AND ORDER
-against-	:	06 Civ. 5851 (GBD)
JOHN C. LIU, Defendant.	:	

GEORGE B. DANIELS, District Judge:

Defendant John Liu moves to dismiss, pursuant to Fed. R. Civ. P. 12(b)(6), plaintiff Troi Torain's complaint alleging state-law defamation for the statements made by defendant criticizing plaintiff's on-air radio broadcast. Because defendant's statements, in the context in which they were made, could only reasonably be considered expressions of opinion, the motion to dismiss is granted.

BACKGROUND

Plaintiff, a Pennsylvania resident, was a disk-jockey on the New York radio station WWPR-FM, otherwise known as Power 105.1. Compl. ¶ 1. In late April/early May 2006, a "war of words" developed between plaintiff and the morning crew at rival radio station WQHT-FM ("Hot 97"). Id. at ¶ 7. During the first week of May 2006, as part of this "war on words," plaintiff made several statements concerning the young daughter of one of Hot 97's disk-jockeys. Id. at ¶ 8.[1] In response to these comments, defendant, a member of the New York City Council,[2]

[1]Although plaintiff's exact statements are not cited in the complaint, they are referenced to therein. Specifically, plaintiff said he wanted to "do an R. Kelly" and "tinkle" on the rival disk-jockey's daughter. Plaintiff also said he wanted to ejaculate on the young girl, and he called her a "half a lo mein eater." Finally, plaintiff offered $500 to any listener who could tell plaintiff

held a press conference at City Hall to protest plaintiff's radio comments. During that press conference defendant called plaintiff a "sick pedophile loser," a "lunatic," and demanded that plaintiff be fired immediately for plaintiff's conduct. Id. at ¶ 10. Defendant further remarked that "these are real threats" and that "this isn't about being indecent, this is about being criminal." Id. at ¶ 15. According to the complaint, it is alleged that defendant also:

- called plaintiff a "racist pedophile";
- remarked that plaintiff should be "terminated from the face of the earth";
- stated on the New York 1 television program "Inside City Hall" that plaintiff "needs to be behind bars" and that he was a "sick racist pedophile";
- stated on the Fox News Channel's "O'Reilly Factor" that plaintiff had already been fired from a rival radio station "for making totally inexcusable remarks over the airwaves";
- sent letters to the Manhattan District Attorney and the New York City Police Commissioner demanding that plaintiff be criminally investigated;
- issued a statement to the media, after a criminal investigation into plaintiff's on-air comments commenced, stating that the investigation was "a real consequence for Torain and sends a real message to other would-be racist pedophile stooges that they are not immune from the law."

Id. at ¶¶ 12-18.

Plaintiff filed this lawsuit for state-law defamation, claiming defendant's statements were defamatory *per se* and that, as a result of these statements, he "has been held up to disgrace and

---

where the girl attended school, and, after noting on-air that he received that information, remarked that he "would come for your [the disk-jockey's] kid." Audio recording and transcript of plaintiff's radio program (attached as Exhibit C to the Affirmation of Kenneth Sasmor).

[2]Compl. ¶ 2. Defendant is not being sued in his official capacity as a New York City Councilman. Id. at ¶ 3.

ridicule and injured in his reputation." Compl. ¶¶ 20-21. Plaintiff seeks at least $5 million in compensatory damages, and at least $50 million in punitive and exemplary damages. Id. at ¶¶ 22-23.

MOTION TO DISMISS

In reviewing defendant's Rule 12(b)(6) motion to dismiss, the Court must presume as true all the factual allegations in the complaint and draw all reasonable inferences in plaintiff's favor. See McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 191 (2d Cir. 2007).

Defamation is defined as "a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society." Foster v. Churchill, 665 N.E.2d 153, 157 (N.Y. 1996) (citations and internal quotation marks omitted). Because "only assertions of fact are capable of being proven false," however, a defamation action "cannot be maintained unless it is premised on published assertions of *fact*." Brian v. Richardson, 660 N.E.2d 1126, 1129 (N.Y. 1995) (citations omitted) (emphasis in the original). Statements of pure opinion, conversely, cannot form the basis of a defamation claim. See Celle v. Filipino Reporter Enterprises Inc., 209 F.3d 163, 178 (2d Cir. 2000) (collecting cases). Whether a statement is one of fact or opinion is a question of law for the Court to decide. See Silverman v. Clark, 822 N.Y.S.2d 9, 19 (N.Y. App. Div. 1st Dep't 2006).

The New York Court of Appeals has identified three factors that help inform the Court's determination: "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether

either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal readers or listeners that what is being read or heard is likely to be opinion, not fact." Brian, 660 N.E.2d at 1129 (citations, alteration, and internal quotation marks omitted). This last factor requires the Court to examine the "over-all context in which the assertions were made," taking into consideration the communication as a whole, as well as its tone and purpose, and determine, on that basis, "whether a reasonable [listener] would have believed that the challenged statements were conveying facts about the [defamation] plaintiff." DiFolco v. MSNBC Cable L.L.C., No. 06 Civ. 4728, 2007 WL 959085, *6 (S.D.N.Y. Mar 30, 2007) (quoting Brian, 660 N.E.2d at 1129-30). Finally, even if a statement is one of opinion, it will nonetheless be actionable if it "implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it"—*i.e.*, it is a "mixed opinion." Guerrero v. Carva, 779 N.Y.S.2d 12, 18 (N.Y. App. Div. 1st Dep't 2004).

In this case, defendant's statements were clearly statements of opinion made in direct response to what he considered to be plaintiff's outrageous and offensive on-air comments. Plaintiff's own allegations acknowledge as much.[3] Indeed, plaintiff has alleged no instance where one of defendant's statements—whether made during a press conference, in a press release, or to the media—was a factual accusation made outside of the context of responding to

---

[3]See, e.g., Compl. ¶ 9 (alleging that "defendant took it upon himself to announce feigned affront and chagrin, asserting that he *truly believed plaintiff's remarks* were genuine threats") (emphasis added); id. at ¶ 10 (alleging that defendant stated, at a press conference: "This guy [plaintiff] is a sick pedophile loser who obviously has self-esteem issues. These kinds of *threats broadcast on major radio stations* over our public airwaves *cannot go unanswered*.") (emphasis added); id. at ¶ (alleging that defendant stated "[w]e will simply not allow racist pedophiles to *use the airwaves to harass children and families*") (emphasis added); id. at ¶ 15 (alleging that defendant stated that "the guy who put this *over the radio* is clearly a loser pedophile" and that "[y]ou can't *broadcast threats* against people like this") (emphasis added).

or commenting on plaintiff's on-air comments. Defendant did not accuse plaintiff of committing any act or engaging in any specific conduct based on a false assertion of fact.

Plaintiff readily admits that his own public comments were made during a "war of words" that "was the subject of *extensive madia coverage and commentary*." Compl. ¶¶ 7-8 (emphasis added). Thus, even assuming that defendant, at some point, called plaintiff a "racist pedophile" without first specifically referencing the content of plaintiff's statements, the "extensive media coverage" surrounding plaintiff's comments makes it impossible that an informed listener would think that defendant was accusing plaintiff of being a pedophile based on some undisclosed information known only to him. Even an uninformed listener would have no reasonable basis to conclude that defendant was independently making factual assertions capable of being proved true or false.

Accordingly, considering the over-all context and the circumstances in which defendant's statements were made, no reasonable person would have believed that defendant was conveying a fact about plaintiff—*i.e.*, that plaintiff was engaging in acts of pedophilia—rather than defendant's opinion.

Plaintiff, however, relying on Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369 (1977), argues that context is irrelevant here because defendant accused him of being a pedophile, and accusations of criminal conduct, even if in the form of an opinion, constitutes defamation *per se*. See Brief in Opposition at 23-24; Transcript of Oral Argument at 25 ("my position is that if you call someone a pedophile and they're not a pedophile, it's defamatory . . . . [i]n any instance"); id. ("My argument is if you call someone a pedophile, it's defamatory, period, if it's not true."); see also Rinaldi, 42 N.Y.2d at 382 ("Accusations of criminal activity,

even if in the form of opinion, are not constitutionally protected.”). Plaintiff’s argument is unavailing.

For sure, accusing another of committing a serious crime is one of four recognized categories of slander *per se*. See Liberman v. Gelstein, 605 N.E.2d 344, 347 (N.Y. 1992).[4] And “mixed opinions,” because they imply that the opinion is based on undisclosed facts not know to the listener, can, in some instances, be interpreted as factual accusations and thus constitute slander *per se*. See, e.g., Arts4All, Ltd. v. Hancock, 773 N.Y.S.2d 348, 352 (N.Y. App. Div. 1st Dep’t 2004) (holding that defendant’s opinions were actionable as slander *per se* because they “impl[ied] that defendant . . . knows undisclosed, detrimental facts about” how plaintiff’s business was run); Kelleher v. Corinthian Media, Inc., 617 N.Y.S.2d 726, 727 (N.Y. App. Div. 1st Dep’t 1994) (finding that plaintiff had a valid claim of defamation *per se* because defendants’ statements were “mixed opinion” rather than protected “pure opinion”). But a statement of pure opinion is not an accusation, and pure opinions are immune from all defamation claims, even claims of *per se* defamation. See, e.g., Treppel v. Biovail Corp., No. 03 Civ. 3002, 2004 WL 2339759, *15 (S.D.N.Y. October 15, 2004) (finding that because defendant’s statements were pure opinion, they could not support claims for defamation or defamation *per se*); see also Celle, 209 F.3d at 178 (stating that “the New York Constitution provides for absolute protection of opinions”) (citations omitted).

Rinaldi is not to the contrary. Indeed, the court there found that the statements at issue were defamatory accusations of criminal conduct only in light of the over-all context in which

[4]The other categories of slander *per se* are statements “that tend to injure another in his or her trade, business or profession”; “that plaintiff has a loathsome disease”; or “imputing unchastity to a woman.” Liberman, 605 N.E.2d at 347 (citations omitted).

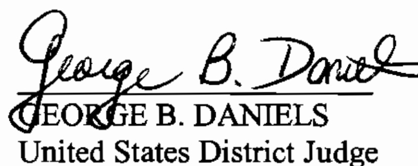
they were made: "The ordinary and average reader would likely understand the use of these words, *in the context of the entire article*, as meaning that plaintiff had committed illegal and unethical actions." Rinaldi, 42 N.Y.S.2d at 382 (emphasis added). Clearly then, context is still relevant when considering whether a statement is a factual accusation rather than a pure opinion. And as already discussed, no reasonable listener, considering the entire context of defendant's comments, would conclude that defendant was accusing plaintiff of committing an act of pedophilia.

CONCLUSION

Considering the over-all context in which they were made, defendant's statements about plaintiff were clearly non-actionable opinion. Therefore, plaintiff cannot state a claim for defamation. The motion to dismiss is GRANTED and this case is DISMISSED.

Dated: New York, New York
August 16, 2007

SO ORDERED:



GEORGE B. DANIELS
United States District Judge