SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT D. KALISH** **PART** **IAS MOTION 29EFM**

Justice

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LENNY DYKSTRA,

Plaintiff,

- v -

ST. MARTIN'S PRESS LLC, MACMILLAN PUBLISHING GROUP, LLC, RONALD DARLING and DANIEL PAISNER,

Defendants.

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INDEX NO. 153676/2019

MOTION DATE 03/09/2020

MOTION SEQ. NO. 003, 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 37, 38, 39, 40, 41, 42, 62, 66, 67, 69

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 63, 68, 70

were read on this motion to/for DISMISSAL.

Motion (Seq. 003) by defendant Ronald "Ron" Darling, Jr. ("Darling") to dismiss the Amended Complaint served upon him by plaintiff Lenny Dykstra ("Dykstra"), pursuant to CPLR 3211 (a), is granted.

Motion (Seq. 004) by defendants St. Martin's Press LLC ("St. Martin's Press"), Macmillan Publishing Group, LLC ("MacMillan Group"), and Daniel Paisner ("Paisner") (collectively "Publisher Defendants") to dismiss the Amended Complaint served upon them by Dykstra, pursuant to CPLR 3211 (a), is also granted.

BACKGROUND

Dykstra, a former Major League Baseball player, brings this action for (1) defamation and (2) intentional infliction of emotional distress, as set forth in the Amended Complaint, against his former New York Mets teammate Darling and against Publisher Defendants based upon allegedly defamatory statements about him in the undermentioned book.

In 2019, Darling and his ghostwriter Paisner, through St. Martin's Press, published a book entitled *108 Stitches: Loose Threads, Ripping Yarns, and the Darndest Characters from My Time in the Game* (the "book"). The book contains a story regarding an alleged interaction between Dykstra and Boston Red Sox pitcher Dennis "Oil Can" Boyd ("Boyd") during Game 3 of the 1986 World Series (the "Series"). (Amended Complaint ["AC"], Ex A, NYSCEF 40, ¶¶ 7, 9, 10, 15, 30-47, 48-52.) Dykstra and Darling were teammates on the Mets during the Series.

In the book, Darling provides the following reference about Dykstra (the "reference"):

"I only played a few hot minutes with Dennis 'Oil Can' Boyd, the momentarily great Red Sox pitcher who featured significantly in the team's turnaround in the late 1980s. We were teammates on the Montreal Expos for a couple weeks in 1991 – but we had a history before that, of course. Dennis was one of the workhorse stars of the Red Sox 1986 pitching staff. He'd won 16 games that year for Boston and was slated to start Game 7 of the World Series against yours truly, before a rainout pushed the game back another day and left-hander Bruce Hurst, on closer-to-full rest, was tabbed instead – here again, against yours truly.

In Game 3 of the 1986 World Series, though, Oil Can was on the receiving end of the ugliest piece of vitriol I've ever heard – in a bar, on a baseball diamond ... anywhere. It was right up there with one of the worst, most shameful moments I ever experienced in the game, and one of the great shames of the exchange was that I sat there with my teammates and didn't do a damn thing about it. In fact, it resulted in a momentum shift that probably turned the Series around for us, and like most of the other guys on the bench, I stood and cheered at the positive outcome.

Recall, the Mets had dropped the first two games at home in that Series – a nailbiter and a laugher. Going into Game 3 at Fenway Park, on the heels of that lopsided loss at Shea, we were feeling the pressure. I was tempted to write that we were really feeling the pressure, but this team wasn't like that. This team was arrogant, always believed it would win it all, never mind what it said on the scoreboard or in the box score. Still and all, it was a must-win for the good guys, only we didn't exactly come across as good guys on this.

The hero of Game 3 for us was also the asshole of the game – Lenny Dykstra, one of baseball's all-time thugs. You know how there always seems to be a guy in every organization, in every walk of life, who gets away with murder – murder being a figurative term in this case? That was Lenny. He was a criminal in every sense, although during his playing days his crimes were mostly of an interpersonal nature. He treated people like shit, walked around like his shit didn't stink and was generally a shitty human being – and, just maybe, the most confident, cocky player I would ever encounter. It was after he left the game, though, that his behavior took a truly criminal tum; he ended up being sentenced to house arrest on a bankruptcy fraud indictment, and he was also up on drug possession and grand-theft-auto charges, for which he received a three-year prison sentence.

Not exactly the poster boy for America's game, huh?

Lenny was leading off for us that night, as he did most nights when he was in the lineup, and as Oil Can was taking his final warmups on the mound, Lenny was in the on-deck circle shouting every imaginable and unimaginable insult and expletive in his direction – foul, racist, hateful, hurtful stuff. I don't want to be too specific here, because I don't want to commemorate this dark, low moment in Mets history in that way, but I will say that it was the worst collection of taunts and insults I'd ever heard – worse, I'm betting, than anything Jackie Robinson might have heard, his first couple times around the league. Way worse than the Hollywood version of opposing players' mistreatment of Jackie that was on display in The Jackie Robinson Story. Way worse than whatever Kevin Garnett had famously said to get under Carmelo Anthony's skin the night Melo went looking for KG in the locker room after a Celtics-Knicks game in 2013.

And yet whatever Lenny shouted at Oil Can out there on the mound that night might have had the desired effect, because Dennis looked rattled. It's amazing to me, looking back, that there's no footage from the game revealing Lenny's treachery. He was out here shouting this stream-of-unconscionable shit in plain sight, in earshot of anyone in one of the front rows and certainly in range of the cameras and microphones that had been set up to record the game, but I guess the attention was elsewhere.

To be clear, bench-jockeying has a long and fine tradition in the game, and there's a fine art to it, but there are lines that are not meant to be crossed. Wives and girlfriends are usually off-limits, except if a taunt is offered in a benign, nonspecific way – as in, "Tell your wife to stop calling my room!" (In popular usage, offered by a beer-soaked fan taunting you from the stands.) Racial or religious or sexual slurs are typically out-of-bounds as well. For the most part, the razzing is limited to the target's physical appearance or his skills as a ballplayer – as in, "You can't even run to first without getting gassed." Or, on an attempted bunt: "Who's gonna run for you." Or, apropos of pretty much anything: "You ain't got shit today."

But this stuff coming out of Lenny's mouth was beyond the pale. Unprintable, unmentionable, unforgettable. And, like I said, he was landing his punches: First at-bat of the game, Lenny smoked a 1-1 pitch deep down the right-field line for a home run, igniting a four-run rally and setting us up to take back some of the momentum we'd lost in the opening games at Shea.

Lenny came back to the dugout and collected the high-fives and huzzahs that came his way, and for all I know, I was right there with my teammates, thrilled to be back in this thing. It's only in retrospect that I started to feel somewhat complicit and that by accepting the gifts that fell

> Lenny's way as a result of his ugly treatment of the opposing pitcher, I was an accomplice of a kind."

(*Id.* ¶ 15; *see also* Dykstra Memo in Opp at 2-4, NYSCEF Doc No 67.)

Dykstra alleges that the reference tarnishes "the New York Mets' 1986 World Series championship, by falsely claiming that [Dykstra's] legendary home run that sparked the Mets' comeback was the result of racist taunts." (AC ¶ 22.)[1] Dykstra alleges that the reference has "forever branded [him] a racist" and that it was "maliciously stated to attack [him] and his abilities as a professional athlete, person, and ability to earn a living going forward." (*Id.* ¶¶ 14, 32, 37.) Dykstra further alleges that the reference subjected him to "emotional distress, mental anguish, shame, disgrace, ridicule, loss of standing in the entertainment community, and irreparable harm to his professional reputation." (*Id.* ¶ 50.) He seeks an unspecified monetary sum to compensate him for "loss of opportunities, financial damages, emotional distress and mental anguish," as well as attorney fees and punitive damages. (*Id.* ¶ 52 & Prayer for Relief.)

I. Darling's Motion to Dismiss (Seq. 003)

Darling moves to dismiss the Amended Complaint, pursuant to CPLR 3211 (a) (1) based on documentary evidence, and (a)(7) for failure to state a cause of action. The basis of Darling's motion is not whether the statements were defamatory in nature but rather whether Dykstra's reputation precludes this action. First, Darling argues that Dykstra is a "classic libel-proof plaintiff, whose reputation is so bad that he simply cannot be defamed." Second, Darling argues that "the [r]eference is substantially true, and any alleged incremental harm would be nominal and non-actionable." Third, Darling argues that Dykstra's emotional distress claim is duplicative of his defamation claim. (Darling Memo in Supp at 6, NYSCEF Doc No 38.)

More specifically, Darling argues that the record shows "overwhelming and uncontradictable public record evidence, by authors, journalists, and Dykstra himself in an autobiography and in interviews" that, prior to the publication of the book, Dykstra's reputation was that of a "convicted felon, a liar, a fraud, . . . a drug abuser[,] . . . cheat and extortionist who has publicly bragged, in his 2016 autobiography and in interviews, that he used steroids and blackmail to enhance his baseball performance." (*Id.* at 2-3, 7-8, 11, citing LENNY DYKSTRA, A MEMOIR OF LIFE ON THE EDGE: HOUSE OF NAILS [2016], NYSCEF Doc No 41, at 97-102 [steroids], 125 [using private investigator's findings against umpires and blackmailing them in the batter's box].)

Further, Darling argues that "Dykstra has also been repeatedly referred to in public as a violent person and a sexual predator. … Dykstra has been publicly referred to for years as a homophobe, misogynist, and racist whose bigotry is undeniable." (*Id.* at 3.) Specifically, Darling argues that Dykstra's reputation for abusive conduct and racially charged language was well-

[1] Dykstra states in his opposition papers that the reference "painted him as a racist and overall 'shitty human being' whose greatest (arguably) moment of professional success came about not from his skill in a fair competition, but instead as a result of a 'virulent' racial tirade." (Dykstra Memo in Opp at 1, NYSCEF Doc No 67.)

documented before the publication of the book. (*Id.* at 3; citing co-defendant Publisher Defendants Memo in Supp, Exhibits H-P, NYSCEF Doc Nos 53-61, including *Lenny Dykstra, formerly of the Mets, is 'nailed' as racist in mag*, N.Y. DAILY NEWS, [Mar. 17, 2009, 1:33 AM], https://www.nydailynews.com/entertainment/gossip/lenny-dykstra-mets-nailed-racist-mag-article-1.372313, NYSCEF Doc No 59; Joel Mathias, *Lenny Dykstra is Grosser, More Racist, More Self-Destructive than You Thought,* PHILADELPHIA MAGAZINE: NEWS [Mar. 27, 2013, 8:02 AM], NYSCEF Doc No 55.)

Additionally, Darling argues that Dykstra's misconduct, foul mouth and bigotry are detailed by two of his former employees who worked closely with him. (Darling Memo in Supp at 4, citing Publisher Defendants Memo in Supp, Ex I, CHRISTOPHER FRANKIE, NAILED!: THE IMPROBABLE RISE AND SPECTACULAR FALL OF LENNY DYKSTRA [20l3], at 135, 159, 168, 170, NYSCEF Doc No 54; Publisher Defendants Memo in Supp, Ex H, Kevin Coughlin, *You Think Your Job Sucks? Try Working for Lenny Dykstra*, GQ [March 1, 2009], https://www.gq.com/story/lenny-dykstra-magazine, NYSCEF Doc No 53.)

Moreover, Darling argues that the reference is substantially true because it "truthfully and accurately described Dykstra as a foul-mouthed, drug-abusing thief, fraud, and convicted felon, none of which is challenged or actionable." (Darling Memo in Supp at 6.) Darling adds that "even if the challenged portion [of the reference] characterizing Dykstra's insults to Boyd as a racist was maliciously false, and even if Dykstra was not libel-proof, Dykstra could not suffer any incremental harm" due to his already tarnished reputation. (*Id.*; *see also id.* at 11-12.)

Lastly, Darling argues that Dykstra's emotional distress claim is duplicative of his defamation claim. (*Id.* at 6, 12-14.)

In opposition, Dykstra argues against the application of the libel-proof plaintiff doctrine, reasoning that "there is no definitive record (something akin to a criminal conviction) sufficient to establish that as a matter of law Mr. Dykstra's reputation could suffer no harm as a result of [the reference]." (Dykstra Memo in Opp at 7-8, NYSCEF Doc No 67.) Specifically, Dykstra argues two points. First, he argues that his reputation is not as poor as Darling makes it out to be and that the assertions from his two former employees are not "representative of the entire universe of reputation evidence available[.]" (*Id.* at 9.) Second, Dykstra argues that even assuming his reputation is as poor as the assertions by his two former employees make it seem, the reference nonetheless further tarnished his reputation in the following ways: It has delegitimized the 1986 New York Mets' World Series' championship, sullied his reputation all around the country as a racist, exposed Dykstra to public ridicule and disgrace as a racist, and resulted in the loss of business opportunities and standing in the entertainment and sports communities. (*Id*. at 7, citing AC ¶¶ 1, 27, 29, 45, 47.)

Further, Dykstra argues that the application of the incremental harm doctrine is unsuitable to resolution at the pleadings stage, reasoning that the doctrine requires a court to measure the harm flowing from the challenged statement as compared to the harm flowing from the unchallenged statement. (*Id.* at 12.)

Moreover, Dykstra adds in a footnote that, "[w]hile Defendants invoke the words 'substantial truth' in the context of their Incremental Harm arguments, they do not argue that the story of the [reference] itself is true or substantially true; instead they to seek compare the relative impact of truth and falsity, i.e. the Incremental Harm defense." (*Id.* at 11, n. 6.)

Lastly, Dykstra argues that his damages from the intentional infliction of the emotional distress claim are separate and apart from the damages that are "narrowly attributable to the [reference]" and cover more extensively those assertions that are non-actionable. (*Id.* at 15.)

In reply, Darling reiterates that the libel-proof plaintiff and incremental harm doctrines apply to the present case, explaining that "Dykstra has a long, detailed and eminently public reputation for bigotry and unsportsmanlike conduct. Critically, much of this public image was created and actively shaped by Dykstra himself. In many instances, he appears to enthusiastically detail his misbehavior in an effort to create a 'bad-boy' image[.]" (Darling Memo in Reply at 4, NYSCEF Doc No 69.) Darling adds, "Dykstra's tarnished reputation is the product of *his* own public actions and statements." (*Id.* at 8.)

Darling argues that "to the extent the statements at issue here may have suggested to some readers that Mr. Dykstra's Game 3 home run was attributable to his taunting, that is impossible for anyone to know and clearly a matter of conjecture or non-actionable opinion, and it was articulated as such." (*Id.* at 11, citing the reference ["[W]hatever Lenny shouted at Oil Can out there on the mound that night *might* have had the desired effect, because Dennis *looked* rattled."] [emphasis added].)

Further, Darling states that to the extent Dykstra argues that he was "harmed by the reference's implications for his reputation with regards to sportsmanlike conduct[,]" this argument should be rejected, as his reputation was "already ruined by numerous public record findings and admissions of steroid use and blackmailing umpires." (*Id.* at 11-12; 13.) Darling argues that Dykstra wants the Court to allow him to go on "a fishing expedition, in which Dykstra issues subpoenas to third parties to see if he can (a) find someone who thinks less of him because of the book than they did because of his crimes and foulmouthed and bigoted conduct, and in the unlikely event that he could find such a person, (b) show how he was somehow damaged by the change in the person's view of him." (*Id.* at 2.)

Moreover, Darling asserts that the reference is limited to "an anecdote that is clearly described as occurring in 1986" and does not make "any representations whatsoever about the present-day Lenny Dykstra." (*Id.* at 6.)

Darling asserts that the Court has been presented with "a wealth of statements from Dykstra himself as well as other broadly-circulated and uncontested news reports that illustrate Dykstra's ubiquitously negative reputation." (*Id.* at 6.) Darling argues that Dykstra should not be able to "state a defamation claim for alleged damages caused by an anecdote that depicted him in a fashion that was entirely consistent with that public image." (*Id.* at 4.)

II. Publisher Defendants' Motion to Dismiss (Seq. 004)

Publisher Defendants move to dismiss the Amended Complaint, pursuant to CPLR 3211 (a)(1) based on documentary evidence, and (a)(7) for failure to state a cause of action for three reasons that are somewhat similar to those of Darling. Publisher Defendants' primarily argue however that the Amended Complaint does not sufficiently allege facts that, if proven, would establish that the Publisher Defendants published the challenged statements in the book with actual malice. (Publisher Def Memo in Support, NYSCEF Doc No 44, at 3, 5-9.) They further argue that the allegations against Paisner are mere surmise and conjecture. (*Id.* at 3.)

Publisher Defendants next argue that the libel claim must be dismissed on the ground that Dykstra is a libel-proof plaintiff and that any harm from the reference was incremental. (*Id.* at 9, 10.)

Lastly, Publisher Defendants argue that Dykstra's intentional infliction of emotional distress claim is duplicative of the libel claim. (*Id.* at 14-15.)

In opposition, Dykstra repeats the arguments that he makes against Darling. Additionally, in opposition to Publisher Defendants' actual malice argument, Dykstra argues that Publisher Defendants purposefully avoided the truth in publishing the reference. (Dykstra Memo in Opp at 12-13, NYSCEF Doc No 68.) Specifically, Dykstra argues that the lack of "footage from the game revealing Lenny's treachery despite Mr. Dykstra supposedly being out near the on-deck circle shouting this stream-of-unconscionable" insults in plain sight "in range of the cameras and microphones that had been set up to record the game" amounts to "purposeful avoidance." (*Id.* at 13.)

In reply, Publisher Defendants argue that, "as Darling states in the book, the broadcast microphones appear not to have been tuned into Dykstra—who was off-camera while Boyd took his warm-up pitches, while the crowd roared and while the announcers spoke—at the moment Dykstra delivered his alleged torrent of obscenities." (Publisher Defendants Reply Memo at 4, NYSCEF Doc No 70.) Further, they argue that the broadcast might have chosen and was indeed legally required to avoid airing such obscenities. (*Id.*) Publisher Defendants also argue that Darling's recounting of the racially-charged rant is consistent with the story of the same game in a previous 2017 Darling-authored sports memoir—titled *Game 7, 1986*—and published by the Publisher Defendants, which Dykstra never claimed was false. (*Id.* at 2.)

DISCUSSION

I. Standard of Review

When considering a CPLR 3211 (a)(7) motion to dismiss for failure to state a cause of action, "'the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" (*Peery v United Capital Corp.*, 84 AD3d 1201, 1201-02 [2d Dept 2011] [internal quotations omitted].) Thus, "'a motion to dismiss made pursuant to CPLR 3211 (a)(7) will fail if, taking all facts alleged as true and according them

every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law.'" (*E. Hampton Union Free Sch. Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122, 125 [2d Dept 2009] [internal quotations omitted].) "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005].)

When considering a CPLR 3211 (a)(1) motion to dismiss, where a defense is founded upon documentary evidence, dismissal "is only appropriate where the documentary evidence presented conclusively establishes a defense to the plaintiff's claims as a matter of law." (*Dixon v 105 W. 75th St. LLC*, 148 AD3d 623, 626-27 [1st Dept 2017] [internal citations omitted].) "In considering the documents offered by the movant to negate the claims in the complaint, a court must adhere to the concept that the allegations in the complaint are presumed to be true, and that the pleading is entitled to all reasonable inferences. However, while the pleading is to be liberally construed, the court is not required to accept as true factual allegations that are plainly contradicted by documentary evidence." (*Id.* at 626-27 [internal citations and quotations omitted].) Notwithstanding the high standard a document must meet to establish a basis for dismissal, there is no bright-line rule for the types of documents that will qualify as documentary evidence, and emails and letter correspondence have been held to qualify as such. (*See Amsterdam Hosp. Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432 [1st Dept 2014]; *Sheffield v Pucci*, 63 Misc 3d 1216(A), at *9 [Sup Ct, NY County 2019].)

Furthermore, in defamation actions, courts may consider the documentary evidence for their context, rather than for their truth. (*See Greenberg v Spitzer*, 155 AD3d 27, 45 [2d Dept 2017] ["The point is that such material is *not* offered for the truth of its contents, but solely for the purpose of establishing the *context* in which the allegedly defamatory statement was made—an inquiry that bears directly on whether the statement is actionable as a matter of law."].)

Defamation must be pled with sufficient particularity to withstand a motion to dismiss. Pursuant to CPLR 3016 (a), "[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally." (*See also Three Amigos SJL Rest., Inc. v CBS News Inc.*, 132 AD3d 82, 92 n 1 [1st Dept 2015].)

II. Defamation

Defamation is "the making of a false statement that '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.'" (*Manfredonia v Weiss*, 37 AD3d 286, 286 [1st Dept 2007], quoting *Sydney v. MacFadden Newspaper Publ. Corp.*, 242 NY 208, 211-212 [1926].) An action for defamation seeks to compensate the plaintiff for the injury to his or her reputation caused by the defendant's written expression, which is libel, or oral expression, which is slander. (*Intellect Art Multimedia, Inc. v Milewski*, 24 Misc 3d 1248(A), at *3 [Sup Ct 2009]; *Idema v Wager*, 120 F Supp 2d 361, 365 [SDNY 2000], *affd*, 29 Fed Appx 676 [2d Cir 2002].)

To state a claim for defamation, a plaintiff must allege: (1) a false statement that is (2) published to a third party (3) without privilege or authorization (4) constituting fault as judged by, at a minimum, a negligence standard and that (5) causes harm, unless the statement constitutes defamation per se (in which case damages are presumed). (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014]; *Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999].) There are four categories of statements that constitute defamation per se: "(1) statements charging plaintiff with a serious crime; (2) statements that tend to injure plaintiff in her trade, business or profession; (3) statements that plaintiff has a loathsome disease; or (4) imputing unchastity to a woman." (*Harris v Hirsh*, 228 AD2d 206, 208 [1st Dept 1996].) "The allegedly defamatory passages must be considered in the context of the entire article and the words taken as they are commonly understood." (*Cianci v New Times Pub. Co.*, 639 F2d 54, 60 [2d Cir 1980].)

III. Actual Malice

Defamation actions require courts to balance "the individual's interest in guarding his good name with cherished First Amendment considerations." (*Frank v Natl. Broadcasting Co., Inc.*, 119 AD2d 252, 256 [2d Dept 1986].) In seeking to protect free speech interests, courts require that a public figure suing for defamation must plead that the allegedly defamatory statements were made with actual malice. (*Id.* at 256-57.) Actual malice means that the statement was made knowing its falsity or with reckless disregard for the truth. (*Suozzi v Parente*, 202 AD2d 94, 101-02 [1st Dept 1994] [internal citations omitted].) Reckless disregard for the truth has been interpreted to mean a "high degree of awareness of . . . probable falsity[,]" (*Id.* at 101, citing *Gertz v Robert Welch, Inc.*, 418 US 323, 332 [1974]), or that the defendant "must have entertained serious doubts as to the truth of his publication." (*Prozeralik v Capital Cities Communications, Inc.*, 82 NY2d 466, 474 [1993], citing *Harte-Hanks Communications, Inc. v Connaughton*, 491 US 657, 667 [1989].) "Accordingly, actual malice cannot be established merely because reliance on a source's information is negligent; the mere failure to conduct further investigation is insufficient to establish actual malice. … The focus of inquiry is on the subjective state of mind of the defendant." (*Id.* at 101-102 [citing *St. Amant v Thompson*, 390 US 727, 731-33 [1968]; *Time, Inc. v Hill*, 385 US 374, 387-88 [1967]; *Herbert v Lando*, 441 US 153, 170 [1979].)[2]

[2] Distinguishing between opinion and factual statements is another means by which society balances its interests in protecting individual reputations against promoting free speech. Generally speaking, opinion statements are considered non-actionable whereas statements asserting facts are actionable—however, discerning opinion from fact is often a complicated process. (*Brian v Richardson*, 87 NY2d 46, 51 [1995]; *Thomas H. v Paul B.*, 18 NY3d 580, 584 [2012].)

"In defamation cases involving allegations of racism, labeling a person with an epithet such as 'racist' or 'Nazi,' without more, has generally been found to be a nonactionable expression of opinion and/or rhetorical hyperbole." (*Bacon v Nygard*, 2019 N.Y. Slip Op. 32103[U], 18 [N.Y. Sup Ct, New York County 2019] [internal citations omitted].) "However, falsely attributing specific biased statements or actions to a plaintiff may give rise to a claim for defamation." (*Id*. at 18, citing *Herlihy v Metro. Museum of Art*, 214 AD2d 250, 254 [1st Dept 1995]; *Como v Riley*, 287 AD2d 416, 416 [1st Dept 2001].)

IV. The Libel-Proof Plaintiff Doctrine

The libel-proof plaintiff doctrine bars relief in a defamation action, as a matter of law to a plaintiff whose "reputation with respect to a specific subject may be so badly tarnished that he cannot be further injured by allegedly false statements on that subject." (*Guccione v Hustler Mag., Inc.*, 800 F2d 298, 303 [2d Cir 1986] *cert. denied*, 479 U.S. 1091 [1987] [reversing a district court verdict and finding that the plaintiff was "libel-proof" as to adultery because widely published articles were probative of the plaintiff's notoriety for adultery].)

The libel-proof plaintiff doctrine was first articulated by a federal district court in *Simmons Ford, Inc. v Consumers Union* in 1981 and achieved further support when the Second Circuit cited and discussed it with approval in *Herbert v Lando in 1986*. (*Jewell v NYP Holdings, Inc.*, 23 F Supp 2d 348, 388 [SDNY 1998], citing S*immons Ford, Inc.v Consumers Union of U.S., Inc.*, 516 F Supp 742, 750-51 [SDNY 1981] ["Given this background, plaintiffs' reputational interest in avoiding further adverse comment regarding the safety and performance of CitiCar is minimal when compared with the First Amendment interests at stake."]; *Herbert v. Lando*, 781 F.2d 298, 310 [2d Cir.], *cert. denied*, 476 U.S. 1182 [1986].)

Although criminal convictions were the first recognized basis for declaring plaintiffs to be libel-proof, "the doctrine is not limited to plaintiffs with criminal records." (*Guccione*, 800 F2d at 303, citing *Wynberg v. National Enquirer, Inc.*, 564 F.Supp. 924, 928-29 [CD Cal 1982]; *see also Stern v Cosby*, 645 F Supp 2d 258, 270, 271 [SDNY 2009].) The doctrine has also been adopted and applied by New York state courts. (*See, e.g., 161 Ludlow Food, LLC v L.E.S. Dwellers, Inc.*, 60 Misc 3d 1221(A) [Sup Ct, NY County 2018], *affd*, 176 AD3d 434 [1st Dept 2019]; *Jones v. Plaza Hotel*, 249 AD2d 31 [1st Dept 1998]; *Baines v Daily News L.P.*, 51 Misc 3d 229, 239-40 [Sup Ct, NY County 2015] [incremental harm doctrine].) The New York Supreme Court has recently applied the libel-proof doctrine and its cousin the incremental harm doctrine in a non-criminal context at the motion to dismiss stage. (*161 Ludlow Food, LLC v L.E.S. Dwellers, Inc.*, 60 Misc 3d 1221(A) [Sup Ct, NY County 2018] [dismissing complaint pursuant to CPLR 3211 [g]], *affd*, 176 AD3d 434 [1st Dept 2019].) By its nature, the libel-proof plaintiff doctrine is only applied in rare circumstances. (*Da Silva v Time Inc.*, 908 F Supp 184, 187 [SDNY 1995].)

The rationale behind the doctrine is that free speech interests should prevail over the interests of an individual who, due to an already soiled reputation, would not be entitled to recover anything other than nominal damages. (*Simmons Ford, Inc.*, 516 F Supp at 750-51.)

"Whether a plaintiff is libel-proof is a question of law for the Court to decide." (*Stern*, 645 F Supp 2d at 270 [internal citations omitted].)

V. The Defenses of Substantial Truth & Incremental Harm

"The substantial truth defense is often confused with the incremental harm defense, but the two are distinct[.]" (*Jewell v NYP Holdings, Inc.*, 23 F Supp 2d 348, 393 [SDNY 1998].) "[T]he substantial truth defense dismisses a libel claim because a statement is not false and, therefore, an element of the cause of action has not been met." (*Id.* at 393.) "[A] statement is

substantially true if the statement would not 'have a different effect on the mind of the reader from that which the pleaded truth would have produced." (*Franklin v Daily Holdings, Inc.*, 135 AD3d 87, 94 [1st Dept 2015].)

"Although the [substantial truth] defense is concerned with truth, it appears to have been confused with the incremental harm doctrine because of the manner in which truth is determined." (*Jewell*, 23 F Supp 2d at 393.) "Under the incremental harm analysis, a viable claim is dismissed even though the statement it is based on may be maliciously false because a court determines that the incremental benefit to plaintiff from continuing a suit [is] outweigh[ed] [by] the harm to the defendant and society." (*Id*. at 394.)

The incremental harm defense is also different from the libel-proof plaintiff doctrine. A libel-proof plaintiff cannot be further harmed due to his or her already tarnished reputation with regard to a particular subject. The incremental harm defense differs in that "a plaintiff is harmed, but the question is whether the ability to recover for that harm, when it is incremental to non-actionable harm, is justified." (*Id*. at 394.) The rationale behind this doctrine is that the society "is better off avoiding the costs associated with litigation where the harm suffered is incremental." (*Jewell*, 23 F. Supp. 2d at 392.)

VI. Application of Law to Facts

As a preliminary matter, this Court notes that neither Darling nor Publisher Defendants argue that the reference is not defamatory as a matter of law based on the content of the reference alone. Rather, they both argue that notwithstanding the reference's presumably negative nature, it is non-actionable because Dykstra's reputation for bigotry and unsportsmanlike conduct is so poor that his reputation cannot suffer further damage from the reference's publication. Publisher Defendants further argue that the defamation action must be dismissed as against them because they did not publish the reference with actual malice. Lastly, both Darling and Publisher Defendants argue that Dykstra's second cause of action for intentional infliction of emotional distress must be dismissed.

The Court will first examine the Publisher Defendants' argument regarding actual malice. Next, it will address Darling's arguments regarding the libel-proof plaintiff doctrine and incremental harm defense. Lastly, it will analyze Defendants' arguments regarding the intentional infliction of emotional distress.

A. Actual Malice with Regard to Publisher Defendants

Since Dykstra has conceded that he is a public figure, he must set forth sufficient factual allegations to support that the reference was published with actual malice. (*Rivera v Time Warner Inc.*, 56 AD3d 298 [1st Dept 2008].)

The Amended Complaint alleges that St. Martin's Press and Macmillan Group knew that: (1) any comparison to the racist threats that were made against Jackie Robinson would be false due to the alarming nature of the remarks against Jackie Robinson; (2) Darling had previously published another book entitled *Game 7* in which he discussed Game 3 of the 1986 World Series

against Boston Red Sox that is the subject of the reference in this action yet without any mention of any of the the subject racist statements; and (3) there was no video evidence of these racist statements. It further alleges that Darling (1) knew that there was no video evidence "given his position at SNY, the television network indirectly owned by the New York Mets," and (2) conspired with Paisner to defame Dykstra to sell books and took revenge against Dykstra for some previous dispute between them. (AC ¶¶ 34, 42, 44.) The Amended Complaint further alleges that St. Martin's Press and Macmillan Group failed to independently investigate and verify the assertions in the reference and were grossly irresponsible by not following the proper standards for information gathering. (AC ¶ ¶ 34, 39, 40.)

These allegations alone are insufficient to constitute actual malice. "Failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard." (*Harte-Hanks Communications, Inc.*, 491 US at 688; *Hotchner v Castillo-Puche*, 551 F2d 910, 914 [2d Cir 1977]; *Stern*, 645 F Supp 2d at 284 ["[A] book publisher has no independent duty to investigate an author's story unless the publisher has actual, subjective doubts as to the accuracy of the story."]; *Suozzi*, 202 AD2d at 101-02, citing *St. Amant v Thompson*, 390 US 727, 731-33 [1968]; *Time, Inc. v Hill*, 385 US 374, 387-88 [1967]; *Herbert v Lando*, 441 US 153, 170 [1979]; *see also Rivera*, 56 AD3d 298 ["Gross irresponsibility applicable to private-person plaintiffs."].)

For the first-time in opposition to the instant motions to dismiss, Dykstra argues that Publisher Defendants "purposefully avoided" the truth because, as the reference acknowledges, "[i]t's amazing to me, looking back, that there's no footage from the game revealing Lenny's treachery." However, the mere fact that there is no video footage documenting the alleged "treachery," does not mean that the Publisher Defendants acted with actual malice in publishing the reference. To the contrary, the reference goes out of its way to acknowledge this discrepancy and offers an explanation for it: that the attention of the cameras and the crowd might have been elsewhere. By doing so, the reference allows the reader to take this discrepancy into account when determining whether to believe Darling or Dykstra. Furthermore, as Publisher Defendants note in their reply papers, even if Dykstra's "treachery" was captured by some cameras, FCC regulations and societal taboos could explain why it was not part of the broadcast.

Dykstra's reliance on *Harte-Hanks Communications, Inc. v Connaughton*, 491 US 657, 667 [1989] is misguided. The newspaper in *Harte-Hanks Communications, Inc.* had received denials of the defendant's allegations not only from the plaintiff but also from five other witnesses before the story was published and was found to have purposefully avoided the truth when it decided not to interview a key witness before the publication (*Harte-Hanks Communications, Inc.*, 491 US at 691.) Further, the newspaper knew the author of the story to have had serious credibility problems. (*Connaughton v Harte Hanks Communications, Inc.*, 842 F2d 825, 832 [6th Cir 1988].) The case at hand is not such an extreme case that a failure to investigate could be so gross as to constitute willful avoidance of knowledge. (*Kipper v NYP Holdings Co., Inc.*, 12 NY3d 348, 355 [2009].) Notably, nowhere in the amended complaint or in the opposition papers is there any allegation that, *prior to the publication of the book*, Publisher Defendants were aware of anyone denying the reference.

Furthermore, the fact that Publisher Defendants published a previous book by Darling in 2017 and there was some reference to the same "unprintable" insults consisting of "hateful, hurtful declaration[s]" and "unsuitable comments" by Dykstra toward Boyd in the same Game 3 and that there was no response by Dykstra is all the more reason for Publisher Defendants to have accepted what Darling wrote in the book. (Publisher Defendants Memo in Supp at 2, n. 2; 8.) Dykstra's vague and conclusory allegations as to Darling's desire to take revenge "rest only on surmise and conjecture, not evidentiary facts." (*Hanlin v Sternlicht*, 6 AD3d 334 [1st Dept 2004].) Moreover, Dykstra fails to allege that that Publisher Defendants had any knowledge of Darling's supposed motivation to take revenge.

Lastly, and as will be discussed further below, that Dykstra already had such a poor reputation for bigoted behavior and unsportsmanlike conduct further militates against a finding that Publisher Defendants acted with actual malice. A reasonable publisher in the position of Publisher Defendants would have determined that the reference would cause virtually no further damage to Dykstra's already soiled reputation.

To the extent that Paisner sits in a different position than Macmillan, the Court finds that it need not opine on any potential differences since it dismisses the claim as against both for failure to state a claim, as will be discussed further below.

Accordingly, Publisher Defendants' motion to dismiss the first cause of action for defamation as against them, based on Dykstra's failure to plead actual malice, is granted.

B. Libel-Proof Plaintiff Doctrine with Regard to All Defendants

Darling argues that, assuming there is actual malice on his part, Dykstra is still barred from recovery under the libel-proof plaintiff doctrine. Again, this doctrine is applied only in rare circumstances. (*Da Silva v Time Inc.*, 908 F Supp at 187; *161 Ludlow Food, LLC*, 60 Misc 3d 1221(A); *Jones*, 249 A.D.2d at 31.) This Court finds that the case at hand is one of those rare circumstances.

Based on the papers submitted on this motion, prior to the publication of the book, Dykstra was infamous for being, among other things, racist, misogynist, and anti-gay, as well as a sexual predator, a drug-abuser, a thief, and an embezzler. Further, Dykstra had a reputation—largely due to his autobiography—of being willing to do anything to benefit himself and his team, including using steroids and blackmailing umpires. The Court has been presented the aforementioned in Exhibits B, and C of Sequence 003, and in Exhibits B through P of Sequence 004, which include Dykstra's criminal convictions.

Considering this information, which was presumably known to the average reader of the book, this Court finds that, as a matter of law, the reference in the book has not exposed Dykstra to *any further* "public contempt, ridicule, aversion or disgrace," or "evil opinion of him in the minds of right-thinking persons," or "deprivation of friendly intercourse in society." (*Manfredonia v Weiss*, 37 AD3d at 286; *see also 161 Ludlow Food, LLC*, 60 Misc 3d 1221(A), at *2 [granting motion to dismiss where plaintiff restaurant had a long history of operating without permits and was libel-proof as to story charging it with operating without permit]; *Guccione*, 800

F.2d at 303-04 [plaintiff with longstanding reputation as an adulterer could not state a libel claim arising out of statements that he committed adultery]; *see also Hinsdale v Orange County Publications, Inc.*, 17 NY2d 284, 290 [1966] [presumed knowledge by average reader].)

Dykstra is a former baseball player who has admitted to pushing the boundaries of sportsmanship and crossing the line into gamesmanship to gain a physical and psychological advantage. For instance, he bragged about blackmailing umpires. He admitted to revealing umpires' private information out on the field to manipulate them—in one occasion, threatening to out an umpire about being in a gay club the night before. (DYKSTRA, NYSCEF Doc No 41, at 125.) The reference portrays him just as that—an athlete who is using psychological manipulation to his advantage. From a sportsmanship perspective, Dykstra hurling insults at an opposing pitcher to ultimately throw him off his game is hardly as disgraceful as his self-portrayal of abusing steroids or blackmailing umpires.

Further, Darling points out that Dykstra was known for making racially offensive comments long before the reference was published. In a 2009 GQ magazine article, Dykstra's former employee Kevin Coughlin ("Coughlin") wrote about his time working for Dykstra and asserted that Dykstra would use the terms "darkies" and "spearchuckers" to refer to African-American athletes featured in Dykstra's magazine the Players Club. (Ex H, NYSCEF Doc No 53, Kevin Coughlin, *You Think Your Job Sucks? Try Working for Lenny Dykstra*, GQ.com [March 1, 2009].)

These claims were also reported by other media outlets such as ESPN.com, the New York Daily News, and the Philadelphia Inquirer. (*See* Ex N [NYSCEF Doc No 59] [("now a former employee is calling [Dykstra] a racist, a sexist, a homophobe and a financial flop."]; Ex O, NYSCEF Doc No 60 ["Coughlin attributes racist and homophobic remarks to Dykstra"]; Ex P, NYSCEF Doc No 61 ["[H]e was quoted referring to several African-American athletes who have appeared on his magazine cover as 'spearchuckers.'"].)

Moreover, in a 2013 book, Dykstra's former magazine editor for the Players Club Christopher Frankie ("Frankie") detailed his account of working with Dykstra and asserted that Dykstra described Willie Mays as "his field n----r," Venus and Serena Williams as "baboons," and Celtics coach Doc Rivers as a "spear-chucker." In his book, Frankie tells the story of how Dykstra allegedly said that the staff at the Carlyle Hotel "had been offended when [Dysktra] loudly used the word 'n----r' in the lobby and had booted him out." In another instance, Frankie tells the story about how Dykstra allegedly "refused to put ugly [b-----s], usually female Asian golfers in the magazine" saying "No one wants to see that[.]" (Ex I, NYSCEF Doc No 54, CHRISTOPHER FRANKIE, NAILED!: THE IMPROBABLE RISE AND SPECTACULAR FALL OF LENNY DYKSTRA [Running Press 2013] at 135, 159, 168, 170, 258).

Dykstra undisputedly has never brought a libel suit against Coughlin, Frankie, or other media outlets for such reporting. (*See Cerasani*, 991 F. Supp. at 353 [noting that the libel-proof plaintiff never filed defamation suits against the publishers of prior reports of his crimes].)

Further, Darling, in his previous book in 2017, recounted the same game, Game 3, and detailed how Dykstra hurled at Boyd "unprintable" insults consisting of "hateful, hurtful, declaration[s]" and "unsuitable comments."

Darling, in his 2017 book, wrote the following (the "earlier reference"):

> ". . . Lenny . . . was batting in the leadoff spot. He took up position in the on-deck circle as Oil Can Boyd completed his warm-ups, and the things Lenny was screaming toward the pitcher's mound were pretty much unprintable. He dropped every hateful, hurtful declaration he thought was suitable to the moment, along with a whole bunch of unsuitable comments. You have to realize, in an old ballpark like Fenway, the distance between the on-deck circle and the pitcher's mound is nothing. Lenny was practically on top of the pitcher, which made his tirade all the more remarkable. He was relentless, fearless, tasteless, running his mouth every which way. I'd never seen anything like it—really, it was remarkable. One of the themes of his venomous chatter was that this was going to be a bad, bad day for Boyd, that Lenny was going to take him deep, that we were about to put a hurt on these Red Sox like you wouldn't believe. He was taunting him mercilessly, and what was so interesting to me here was that we were up against it. We'd given away our home field advantage, down 2-0 in the series, so by rights we should have dialed down the swagger and taken more of an underdog approach, but to a man our guys would have told you it was still our series to win. Lenny was just giving voice to what we were all thinking. Loudly. Crassly. It was hubris, of the highest order. And yet it was so, so typical of Lenny, and typical of the 1986 New York Mets. Even down 2-0 in the series, we put it out there that we had the Red Sox exactly where we wanted them, that we would dictate these next games.
>
> And do you know what? We did. Absolutely, we did, and I have to think in a lot of ways the series turned on the back of Lenny's vitriol, before the first pitch was thrown at Fenway. It had to rattle Boyd, hearing Lenny run his mouth like that. And forget Boyd—I'm sure it pissed off the entire Red Sox bench. But Lenny did more than just talk—he also delivered. He stepped to the plate and drove a 1-1 pitch down the rightfield line for a leadoff home run, so before the game was even under way, we had our edge. That's the thing about Lenny Dykstra: he always delivered. Forget the troubles that would find him away from the field when his playing days were over. In his time, in his way, he was one of the most dynamic, most unique spark plugs to ever play the game, and I used to sit back and watch him and think how lucky we were to have him on our side."

(Publisher Defendants Affirm in Supp, (Seq. 004) Ex D, NYSCEF Doc No 49.)

Other than the book referring to the rant as "racist" and comparing it to attacks that Jackie Robinson had endured, the book's reference is eerily similar to the earlier reference from 2017. Neither lists the insults, but both describe them as too offensive to be shown in print. (*Compare Stern*, 645 F Supp 2d at 271.)

In addition, Dykstra's disreputability extends beyond the field. Reportedly, he has been the subject of "at least 24 legal actions, including 18 [within a year]" for nonpayment and breach of contract. In one instance, it was reported that he asked his former driver Paul Lee to "rough up" and "hurt" his former pilot and "shut him up" about his non-payments. (Ex P, NYSCEF Doc No 61.)

Separately, Dykstra has reportedly made discriminatory comments against an employee who was gay. Frankie in his book explains an anecdote where, in a video posted on YouTube promoting Dykstra's new reality television show, Dykstra was shown interviewing a male employee. During the interview, Dykstra asked, "You like men or women?" The interviewee said he preferred men. Dykstra said, "I like women; I'm a normal dude. I know for a fact nobody chooses to wake up next to another guy's hairy a--." (NAILED! at 170.)

Relatedly, Dykstra has built his reputation as a misogynist. In his book, Frankie asserts that Dykstra wanted to list oral sex as one of the job requirements for his female employees. (*Id.* at 258.)

Further, in 2012, Dykstra pleaded no contest to charges of lewd conduct and assault with a deadly weapon relating to an incident with a female employee, as shown in Exhibit G. (*Compare Cerasani*, 991 F. Supp. at 346 [considering accusations of crimes for which plaintiff was ultimately acquitted in evaluating his reputation as a criminal and granting motion to dismiss on grounds the plaintiff was libel proof as to allegations of criminal behavior].)

In his book, Frankie asserts that in this instance Dykstra threatened a female employee with a knife to massage his upper thighs around his genital areas and was sentenced to 270 days in jail and placed on probation for three years. (NAILED! at 277; *see also* Ex G, NYSCEF Doc No 52 [Plea and Sentencing Chart].)

The nature and seriousness of Dykstra's criminal offenses, which include fraud, embezzlement, grand theft, and lewd conduct and assault with a deadly weapon, and notably the degree of publicity they received, have already established his general bad reputation for fairness and decency far worse than the alleged racially charged bench-jockeying in the reference could. (*See, e.g., Wynberg v Natl. Enquirer, Inc.*, 564 F Supp 924, 928 [CD Cal 1982]; *see also* Ex E [NYSCEF Doc No. 50] [bankruptcy fraud conviction].)

Given the aforesaid litany[3] of stories concerning Dykstra's poor and mean-spirited behavior particularly toward various groups including racial minorities, women, and the LGBTQ community—this Court finds that, as a matter of law, the reference cannot "induce an evil opinion of [Dykstra] in the minds of right-thinking persons" or "deprive him of their friendly intercourse in society," as that "evil opinion" has long existed. (*Manfredonia v Weiss*, 37 AD3d 286, 286 [1st Dept 2007].)

In reaching this conclusion, this Court balances Dykstra's reputational interest against society's interest in promoting free expression, while keeping in mind that New York provides some of the strongest protections for the latter. (*Jewell*, 23 F Supp 2d at 376, 393.)

Moreover, Dykstra has failed to state how he has been damaged other than in conclusory fashion. As Darling argues, Dykstra asks this Court to entertain a "fishing expedition" to see if there is anyone who thinks less of Dykstra because of the reference. (Darling Reply Memo at 2.) Although this Court does not dismiss Dykstra's complaint based on a failure to plead special damages—as neither Darling nor Publisher Defendants have moved for dismissal on this basis—this Court finds that Dykstra's inability to point to any monetary losses further militates in favor of having his dispute with Darling litigated in the "court of public opinion," rather than an actual, taxpayer-funded court of law. (*See Guccione*, 800 F2d at 303; *Jewell*, 23 F. Supp. 2d at 393-94; *Jackson v Longcope*, 476 NE2d 617, 619-20 [Mass 1985] ["[A] libel-proof plaintiff is not entitled to burden a defendant with a trial in which the most favorable result the plaintiff could achieve is an award of nominal damages."].)

Indeed, as the United States Supreme Court has explained:

> "The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater."

(*Gertz v Robert Welch, Inc.*, 418 US 323, 344 [1974].)

Given Dykstra's celebrity and apparent attraction to the spotlight, Dykstra's remedy lies in telling his own story to the public. In fact, according to the motion papers, Dykstra has already enlisted the likes of baseball greats Dwight "Doc" Gooden, Daryl Strawberry, and even Dennis "Oil Can" Boyd to dispute Darling's story, and this Court takes notice of the considerable attention that this dispute has garnered in sports and entertainment media. (*See Guccione*, 800 F2d at 303 [characterizing the underlying dispute between Guccione and Hustler publisher Larry Flynt as an ongoing "grudge match"].)

[3]The Court notes that this litany is only based on exhibits submitted on this motion. It does not include and this Court does not consider, in its decision, the negative publicity one comes across during a quick Google search for Dykstra. (See e.g. Chris Sheldon, "Lenny Dykstra arrested: Three decades of mugshots, drugs, sex charges, prison and steroids," NJ.com [May 14, 2019]; see also Dan Epstein, "Sex, Drugs, Nails: Talking to Lenny Dykstra About His Wild, Reckless Ride Through Life," Vice.com [June 28, 2016] [Dykstra remarking to reporter, "It's tough to say, 'I've heard a lot of good things about you,' isn't it?"].)

As such, this Court sees no legal basis for why it should use its very limited time and resources litigating whether Dykstra engaged in yet another example of bigoted behavior over thirty-years ago in a court of law. There are sports commentators, bloggers and legions of baseball fans to litigate this issue in a public space. This Court, however, has cases involving lost livelihoods, damaged and lost lives, as well as plaintiffs that have suffered very real reputational injuries. Accordingly, Darling and Publisher Defendants' motions to dismiss the first cause of action for defamation, pursuant to the libel-proof plaintiff doctrine, are granted.

That this Court dismisses the first cause of action for defamation should not be construed as a finding that Dykstra's alleged "treachery" did in fact occur or that any of the accusations by Coughlin or Frankie are true. It is only to say that Dykstra's reputation for unsportsmanlike conduct and bigotry is already so tarnished that it cannot be further injured by the reference. It is possible that Dykstra has been falsely maligned by numerous individuals over the years, including Darling, and that he has been maliciously prosecuted and wrongfully convicted of various crimes in various different courts. Whether or not that may be the case is not an issue before this Court.

The question before this Court is only whether or not Dykstra can assert a cause of action for defamation. In order to do so, Dykstra must have had a reputation capable of further injury when the reference was published. This Court finds that Dykstra lacked such a reputation at the time of publication.

As this Court finds that Dykstra is barred from recovery pursuant to the libel-proof plaintiff doctrine, this Court need not consider the substantial truth and the incremental harm defenses as independent bases for dismissal.

C. Intentional Infliction of Emotional Distress with Regard to All Defendants

Dykstra's second cause of action for intentional infliction of emotional distress against Defendants is duplicative, as the underlying allegations fall within the ambit of Dykstra's defamation cause of action. (*See Bacon v Nygard*, 140 AD3D 577, 578 [1st Dept 2016]; *see also Napoli v Bern*, 60 Misc 3d 1221(A) [Sup Ct, NY County 2018], *affd sub nom. Napoli v New York Post*, 175 AD3d 433 [1st Dept 2019] [rejecting the plaintiff's argument that an independent cause of action was appropriate because the claims are duplicative].) Moreover, Darling and Publisher Defendants' alleged conduct is not outrageous by any stretch of the imagination. (*Murphy v Am. Home Products Corp.*, 58 NY2d 293, 303 [1983].)

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion (Seq. 003) by defendant Ronald Darling, Jr. ("Darling") to dismiss the Amended Complaint as against him by plaintiff Lenny Dykstra ("Dykstra"), pursuant to CPLR 3211 (a), is granted; and it is further

ORDERED that the motion (Seq. 004) by defendants St. Martin's Press LLC ("St. Martin's"), Macmillan Publishing Group, LLC ("MacMillan"), and Daniel Paisner ("Paisner") (collectively "Publisher Defendants") to dismiss the Amended Complaint as against them by Dykstra, pursuant to CPLR 3211 (a), is granted; and it is further

ORDERED that the counsel shall serve, via NYSCEF, a copy of the instant decision and order with notice of entry within ten (10) days of the filing date of the instant decision and order; and it is further

ORDERED that the clerk shall enter judgment accordingly, with costs and disbursements to Darling and Publisher Defendants as taxed by the clerk, upon being served with a copy of the decision and order with notice of entry.

The foregoing constitutes the decision and order of this Court.

5/29/2020
DATE

ROBERT DAVID KALISH, 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