STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: April 20, 2015)

MENTOR, INC.,	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. PB 01-3859**
	:	
DIANA LAM, ALIAS JANE DOE; ESTATE OF YOEL CAMAYD-FREIXAS, ALIAS JOHN DOE; GERTRUDE BLAKEY, ALIAS JANE DOE 2; GENE BURNS, ALIAS RICHARD DOE; SUSAN DERITA, ALIAS JANE DOE 3; BIENVENIDO GARCIA, ALIAS JOHN DOE 2; MARY MCCLURE, ALIAS JANE DOE 4; OLGA NOGUERA, ALIAS JANE DOE 5; SAMUEL ZURIER, ALIAS JOHN DOE 3; AND ROOSEVELT BENTON, ALIAS JOHN DOE 4, ALL IN THEIR REPRESENTATIVE CAPACITIES AS MEMBERS OF THE PROVIDENCE SCHOOL BOARD AND/OR AS SUPERINTENDENT AND/OR SPECIAL ASSISTANT TO THE SUPERINTENDENT, AND IN THEIR INDIVIDUAL CAPACITIES; STEPHEN T. NAPOLITANO, ALIAS JOHN DOE 5, IN HIS CAPACITY AS TREASURER OF THE CITY OF PROVIDENCE; AND THE CITY OF PROVIDENCE,	:	
Defendants.	:	

DECISION

SILVERSTEIN, J. Plaintiff Mentor, Inc. (Mentor or Plaintiff) brings this suit, alleging claims for breach of contract and defamation against several members of the Providence School Department (PSD) in their representative and individual capacities; Stephen T. Napolitano

(Napolitano)[1], in his official capacity as the Treasurer of the City of Providence; and the City of Providence (collectively, Defendants). In its Decision of January 29, 2008, this Court granted Defendants' Motion for Summary Judgment as to Mentor's alleged civil rights claims under 42 U.S.C. § 1983, but denied summary judgment as to the breach of contract claim and reserved judgment as to the defamation claim. See Mentor, Inc. v. Lam, No. PB 01-3859, 2008 WL 914382 (R.I. Super. Jan. 29, 2008) (Silverstein, J.). Currently before the Court for decision is Defendants'[2] Motion to Dismiss Mentor's Third Amended Verified Complaint (the Complaint) in its entirety pursuant to Super. R. Civ. P. 41(b) (Rule 41(b)), or, in the alternative, Motion for Summary Judgment pursuant to Super. R. Civ. P. 56 (Rule 56), as to the remaining breach of contract and defamation claims. Additionally, Defendants move to strike the affidavits of Thomas DiPippo (DiPippo) and Arthur Mossberg (Mossberg). Mentor opposes Defendants' Motions.

I

Facts and Travel

This matter has been pending before the Court for approximately fourteen years. The pertinent facts of this matter were succinctly summarized in the Court's January 29, 2008 Decision. Now, presented with another summary judgment motion filed by Defendants, the Court again has occasion to write on the matter. The following brief review of the facts is necessary.

[1] At the time suit was brought, Napolitano was the Treasurer of the City of Providence. There is no indication that he was subsequently replaced for another party.

[2] All named Defendants have joined in the "Motion to Dismiss and [Second] Motion for Summary Judgment" (the Motion).

Mentor is a Rhode Island non-profit corporation that provides adult education services to public and private institutions. (Compl. ¶ 1).[3] From September 1996 to August 31, 2000, Mentor provided these services to the PSD. Id. at ¶¶ 3-4. Specifically, Mentor described its services as including recruitment, placement, instruction, counseling, and administration of various examinations. Id. at ¶ 7. During its relationship with the PSD from 1996 to 2000, Mentor claims in its Complaint that no formal written agreement existed between the parties. Id. at ¶¶ 4-5. However, documents produced by Defendants in opposition to Plaintiff's Motion actually show that a written agreement existed for each school year prior to 2001 and was duly executed by Mentor and the PSD. See Defs.' Mem. in Supp. of Mot., App. G. A purchase order from the PSD's Purchasing Department was then ordered and issued. See id. In any event, prior to the signing of an agreement between the parties for that year, Mentor would prepare a so-called Adult Education Plan (AEP), which would then be reviewed by the PSD. See Compl. ¶¶ 4-6. Mentor alleges that its contractual relationship with the PSD was established on a year-to-year basis in accordance with certain terms set forth in the AEPs. See id.; Defs.' Mem. in Supp. of Mot., App. D. Relevant to the instant dispute is Mentor's allegation that at some point after August 2000, PSD and Mentor entered into a two-year agreement for Mentor's services for both fiscal years 2001 and 2002; Defendants do not contest that there was an agreement for fiscal year 2001.

Mentor's claims regarding its two-year entitlement with the PSD stem from its last AEP, wherein Mentor drafted a funding proposal for the PSD to submit to the Rhode Island Department of Education (RIDE). See id. at ¶ 9; Defs.' Mem. in Supp. of Mot., App. H.

[3] As in the Court's prior Decision, the Court again will make the Complaint part of the summary judgment record. The allegations contained in Mentor's verified complaint were sworn to by its principal, Arthur Mossberg. Accordingly, the Court will treat this verified complaint as a Mossberg Affidavit.

Generally, as described in Defendants' supporting memorandum, once RIDE received its allocated federal grant funds from the United States Department of Education, RIDE would issue "requests for proposals" (referred to as RFPs) to local education agencies, such as the PSD. To that end, on or about May 9, 2000, RIDE issued an RFP outlining its "Program Priorities" for fiscal years 2001 and 2002 for the "Adult Education Instructional Programs." See Defs.' Mem. in Supp. of Mot., App. E at 1. In pertinent part, the RFP stated that all applicants would be considered for two-year grants with funding provided for fiscal year 2001 to successful applicants. For fiscal year 2002 of the grant, the RFP stated, "[f]unding for program activities in the second year (1 July 2001-30 June 2002) of the grant will be based on adequacy of performance by each provider in year one . . . and the amount of funds available for distribution based on Federal and State appropriations." See id.

In support of Mentor's contention that it had a contract with the PSD for fiscal year 2002, Mentor principally relies upon a so-called "oral contract" allegedly formed between Mentor and DiPippo, the Federal Grant Liaison Officer at the PSD to RIDE, at some point in 2000. See Mossberg Aff. at 2, Sept. 30, 2014; DiPippo Aff. at 3, Sept. 25, 2014. According to DiPippo, funding was originally in place for Mentor's second year, although he subsequently became aware of letters from the PSD dated in early 2001 that funding for adult education programs was to be redirected. See DiPippo Aff. at 2. On February 13, 2001, in a letter sent to PSD's "agency partner," PSD advised that it was evaluating its current expenditures and, based on its ultimate priorities for the 2001-2002 school year, may not be able to provide funding to certain programs. (Pl.'s Obj. to Mot., Ex. F). Specifically, the PSD wrote "the [PSD] can make no monetary commitments to our current and traditional partners. We would advise that your agency make no monetary decisions and commitments that rely on funds previously available from the [PSD]."

Id. This letter apparently was in response to a letter from Susan F. Lusi (Lusi)[4] of RIDE to Superintendent of Providence Public Schools Diana Lam (Lam), wherein PSD would be required to direct "state Literacy Set-Aside funds" to various groups of students in kindergarten through high school. See Defs.' Mem. in Supp. of Mot., App. R. According to Defendants—and uncontested by Plaintiff—those funds included the approximate $650,000 allocated by the PSD to adult education programs for fiscal year 2001. In fiscal year 2001, Mentor received $850,503 for the provision of adult education services. See id., App. Q (collection of payment documentation).

Thereafter, as set forth in the Complaint, Mentor alleges that Lam, in an effort to reduce funding for adult education services in the upcoming budget, sought to "falsely assert that [Mentor] was incompetent, purposely deceitful in its handling of finances, and the delivery of effective services." (Compl. ¶¶ 10, 15). On March 14, 2001, Yoel Camayd-Freixas (Camayd-Freixas), then serving as Special Assistant to the Superintendent at Providence Public Schools, sent a letter to Mossberg apprising him of PSD's election to conduct mid-year reviews for its outsourced service contracts and that Mentor may be among those organizations selected for such review. See Defs.' Mem. in Supp. of Mot., App. T. On March 22, 2001, Mentor received correspondence from Camayd-Freixas indicating that Mentor had been selected for such review. Id. Mentor claims Lam hired Camayd-Freixas, under the guise of a supposed "neutral" outside evaluator, to "discredit," "defame," and "malign" Mentor in furtherance of her intended budget reduction. See Compl. ¶¶ 10, 13, 23, 26. Camayd-Freixas allegedly was, in fact, neither independent nor neutral, but rather shared a prior "professionally intimate" relationship with

[4] Interestingly, Lusi is now Superintendent of Providence Public Schools.

Lam during their corresponding tenure at various school systems in Massachusetts. See id. at ¶¶ 24-25.

In connection with the mid-year reviews performed by the PSD, Camayd-Freixas presented his "Evaluation Summary" regarding Mentor on May 7, 2001 during a special meeting of the Providence School Board (PSB). See Defs.' Mem. in Supp. of Mot., App. U; see generally Evaluation Summary. Giving rise to its defamation claims, Mentor characterizes Camayd-Freixas' Evaluation Summary as "a scathing and pejorative report against [Mentor] which was unsupported by facts, characterized by misstatements, and the intentional manipulation of data to mislead the Providence School Committee, and the public, into reaching a decision adverse to the Plaintiffs." (Compl. ¶ 27). Mentor was not engaged for fiscal year 2002. As a result, Mentor claims Defendants breached their oral agreement to retain Mentor for a second year.

Mentor filed suit against Defendants on July 23, 2001. Defendants filed their present Motion seeking either dismissal of this action or summary judgment as to Mentor's breach of contract and defamation claims on July 31, 2014. A hearing on the Motion was held on December 8, 2014.

II

Standard of Review

Defendants' Motion is two-fold: it seeks to dismiss the Complaint with prejudice pursuant to Rule 41(b),[5] and to the extent the Court denies that relief, Defendants seek summary judgment pursuant to Rule 56. Each will be discussed below, in seriatim.

[5] Defendants incorrectly cite authority supporting the standard of review applicable to a motion to dismiss filed under Super. R. Civ. P. 12(b)(6) for failure to state a claim whereas the actual standard applicable in this case is that associated with a motion to dismiss under Rule 41(b)(2).

III

Discussion

A

Defendants' Motion to Dismiss for Failure to Prosecute

Taking up the first issue, Rule 41(b)(1), following the provisions of G.L 1956 § 9-8-3, reads: "[t]he court may, in its discretion, dismiss any action for lack of prosecution where the action has been pending for more than five (5) years, or, at any time, for failure of the plaintiff to comply with these rules or to proceed when the action is reached for trial." Rule 41(b)(2) likewise states, "[o]n motion of the defendant the court may, in its discretion, dismiss any action for failure of the plaintiff to comply with these rules or any order of court, or for lack of prosecution as provided in paragraph (1) of this subdivision." On a motion to dismiss for failure to prosecute, our Supreme Court has established a balancing test requiring a trial justice to "weigh conflicting interests[:] [o]n the one hand is the court's need to manage its docket, the public interest in the expeditious resolution of litigation, and the risk of prejudice to the defendants from delay. On the other hand, there is the desire to dispose of cases on their merits." Hyszko v. Barbour, 448 A.2d 723, 726 (R.I. 1982). A trial justice in reviewing a Rule 41(b) motion to dismiss, unlike on a motion for summary judgment, need not review the evidence in the light most favorable to the plaintiff. See J. K. Soc. Club v. J. K. Realty Corp., 448 A.2d 130,

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Unlike other rules of civil procedure in Rhode Island that are said to share similar standards of review, these two rules of procedure do not. Specifically, whereas a Rule 12(b)(6) dismissal requires a trial justice to test the sufficiency of the complaint, a Rule 41 dismissal permits the trial justice to review the evidence in the record. Compare R.I. Affiliate, Am. Civil Liberties Union, Inc. v. Bernasconi, 557 A.2d 1232, 1232 (R.I. 1989) with Harvey v. Town of Tiverton, 764 A.2d 141, 143 (R.I. 2001). In any event, whether dismissal is pursuant to a plaintiff's failure to state a claim or a lack of prosecution, such dismissal operates as an adjudication on the merits. See Super. R. Civ. P. 41(b)(3); cf. Huntley v. State, 63 A.3d 526, 533 (R.I. 2013) (concluding Rule 41(b) involuntary dismissal, like a Rule 12(b)(6) dismissal, is an "adjudication on the merits" for purposes of res judicata).

133 (R.I. 1982). Moreover, an involuntary dismissal under Rule 41(b) constitutes an adjudication on the merits and "thus is with prejudice to the bringing of a new action." Manton Indus., Inc. v. Providence Washington Indem. Co., 113 R.I. 198, 199 n.2, 319 A.2d 355, 356 n.2 (1974) (citing 9 Wright & Miller, Federal Practice & Procedure: Civil § 2369, at 193 (1971)).

In moving to dismiss the present action, Defendants argue that both causes of action should fail by reason of Plaintiff's failure to timely pursue its claims. Defendants specifically allege that the death of several witnesses, combined with the fact that none of the individual-named Defendants remain in office, have unfairly prejudiced them. According to Defendants, Camayd-Freixas and PSB members Dr. Gene Burns (Burns) and Roosevelt Benton (Benton) have all died since the inception of this matter in 2001. Further, Defendants contend that dismissal is warranted because any effort to produce witnesses for trial will be severely hampered due to Defendants' allegations that the former PSB members are unable to testify.[6]

In response, Plaintiff alleges that inappropriate delay, if at all found, is not the sole fault of Plaintiff. For example, Plaintiff references its response to a prior request for production of documents submitted by Defendants wherein Plaintiff produced approximately 300 boxes of materials for review. Thereafter, Plaintiff contends Defendants delayed for "several years" before inspecting those materials. Plaintiff also cites to this case's docket in furtherance of its argument that there were no significant temporal gaps in activity. According to Plaintiff, both parties have attempted to move the litigation toward a final resolution.

[6] It is unclear to the Court exactly why Defendants allege they are unable to obtain the testimony of the former PSB members, other than those named Defendants who have since passed away. Defendants have not proffered any explanation as to why those individuals are unable to testify, other than the mere bald assertion that their ability to locate remaining witnesses to testify at trial is somehow impaired.

As Defendants correctly note, a Rule 41 dismissal requires a finding of more than "mere delay." See Harvey, 764 A.2d at 143 ("Mere delay is not enough to warrant dismissal for lack of prosecution."). In Scittarelli v. Providence Gas Co., 415 A.2d 1040, 1042 n.1 (R.I. 1980), the Court found that the mere passing of fourteen years was not enough for the Court to reverse the trial justice's denial of the defendant's Rule 41(b)(2) motion to dismiss. Despite the long duration of the case, what proved fatal for the defendant was its failure to specifically allege that the delay had, in fact, caused it to suffer prejudice. See id. (citing Manton, 113 R.I. 198, 319 A.2d 355 (affirming dismissal where trial justice found defendant was prejudiced by death of key witness)). Distinguishing the defendant in Scittarelli (who failed to allege prejudice), the Supreme Court in Tatro v. DiPanni, 712 A.2d 875, 876 (R.I. 1998) (mem.), noted that "a situation involving more than mere delay" arose where, during a five-year void in activity on the case, one of the defendant's key witnesses suffered a heart attack and moved out of the jurisdiction. The Court found this to constitute a proper showing of prejudice to the defendant necessary to affirm the trial justice's dismissal. Id.

Navigating around the pitfalls in Scittarelli, Defendants in the present case maintain that the passage of time (approximately fourteen years since Mentor's complaint was filed) has caused them to suffer prejudice—not only due to the death of several named Defendants but also due to their alleged difficulty in procuring witnesses for trial. As other cases have indicated, the death of a key defense witness during a lengthy delay in a case constitutes actual, as well as presumptive, prejudice to a defendant. See, e.g., Manton, 113 R.I. at 201, 319 A.2d at 358; Harvey, 764 A.2d at 144 ("The death or relocation of certain defendants who were key members of the alleged conspiracy demonstrated that the prejudice to the defense of this case involved more than mere delay."). In Harvey, the Court reviewed a trial justice's dismissal of an action

where the plaintiffs had not performed any action on the case for an approximate eight-year period. See Harvey, 764 A.2d at 143. While noting the "the length of inactivity exceeded the statutory five-year period," the Court ultimately determined that the trial justice did not err because, in the aggregate, the delay was found to prejudice the defendants. Id. In support of that conclusion, the Court referenced the fact that since the filing of the complaint, two defendants had died and another defendant had relocated to another jurisdiction. Id. Despite explaining that not all of those events were attributable to the delay, the Court nevertheless reasoned that "the fact that one or more of the alleged key conspirators no longer were available to testify at trial was a consideration that weighed in favor of dismissal." Id.; cf. United States v. Myers, 38 F.R.D. 194, 197 (N.D. Cal. 1964) ("If [the defendant] had shown that, because of the unreasonable delay of plaintiff in prosecuting the action, he is unable to locate witnesses or gather evidence or otherwise prepare for trial, this factor would have weighed heavily with the Court in the exercise of its discretion on the present motion.").

In reviewing § 9-8-3 and the requirements for dismissal pursuant to Rule 41(b), the Court, in exercising its discretion as to whether or not to dismiss for prosecutorial delay, is not limited to dismissing only those matters where the length of delay exceeds a period of five years. Essentially—in determining whether to dismiss Mentor's claims for breach of contract and defamation—the Court must determine whether the prejudicial delay to Defendants outweighs the interest in disposing of Mentor's claims on their merits. See Hyszko, 448 A.2d at 726. Albeit, while all of the above-cited cases have periods of inactivity greater than five years, there is no express prerequisite in either our rules or case law mandating that a trial justice find a

specific length of inactivity prior to ordering a dismissal.[7] Indeed, the exact language of Rule 41(b) provides, in pertinent part, that a trial justice may dismiss "any action for lack of prosecution where the action *has been pending* for more than five (5) years." Super. R. Civ. P. 41(b)(1); cf. Finney Outdoor Adver. Co. v. Cordeiro, 485 A.2d 910, 911 (R.I. 1984) (explaining trial justice, in computing five-year period, need not limit its consideration to time that case is pending in that particular court but may consider time spent in other courts as well). So long as the Court engages in the weighing of the equities in the case, the length of inactivity itself need not constitute a period of five years or more.[8] As this case was commenced fourteen years ago, that requirement for the case to be "pending" is inextricably satisfied.

[7] Unlike Rhode Island, other jurisdictions apparently have adopted set time frames and definitions for what constitutes a failure to prosecute. For example, even though Delaware's Rule 41(b) does not specify what period of time warrants dismissal, courts there look to subsection (e) for guidance which allows dismissal after one year of inactivity on the case. See Del. Ch. Ct. R. 41(b), (e); Ayers v. D. F. Quillen & Sons, Inc., 188 A.2d 510, 511 (Del. 1963) (reasoning ten years of inaction on case warranted dismissal under Rule 41(b) where period of inactivity greatly exceeded one-year requirement under Rule 41(e)). Additionally, in California, "an action shall be dismissed unless brought to trial within five years after the action was filed." Wills v. Williams, 121 Cal. Rptr. 420, 421 (Ct. App. 1975) (citing Cal. Civ. Proc. Code § 583.310). Despite these state specific examples, the federal counterpart to Rule 41(b)(1) does not define a "failure of the plaintiff to prosecute" unlike Rhode Island's prerequisite that the action be pending for five years. See 1 Robert B. Kent et al., Rhode Island Civil Procedure with Commentaries, at § 41:8 (2006).

[8] The Harvey Court seemingly suggests that the period of inactivity in evaluating the prejudicial delay must constitute five years. See Harvey, 764 A.2d at 143 ("The fact that plaintiffs finally requested a deposition after eight years did not prevent the trial justice from dismissing the case for failure to prosecute because the length of inactivity exceeded the statutory five-year period."). Despite any inference to the contrary, the Court nonetheless considers Rule 41 to require nothing more than a finding that dismissal is warranted where the case has been *pending* before the Court for more than five years. See Super. R. Civ. P. 41(a); cf. Black's Law Dictionary, at 1314 (10th ed. 2014) (defining "pending" to mean "[r]emaining undecided; awaiting decision <a pending case>"). Whether the long passage of time in this case has thus resulted in prejudice to Defendants is determinative.

1

Defamation

Turning now to weighing the equities, and taking up whether Mentor's claims for defamation and breach of contract ought to be dismissed, the Court finds that, with respect to defamation, the exorbitant duration and passage of time in this case has indeed prejudiced the Defendants. The Court is cognizant of the well-established principle that "dismissal with prejudice is a drastic action." Manton, 113 R.I. at 201, 319 A.2d at 357. However, the Court is also aware of the general rule that "'[t]he primary responsibility for moving a case on for trial rests with the plaintiff and his or her attorneys, not the defendant or the trial court.'" Bergeron v. Roszkowski, 866 A.2d 1230, 1237 (R.I. 2005) (quoting Hyszko, 448 A.2d at 726).

In this case, Camayd-Freixas' Evaluation Summary is the main subject of Mentor's defamation claims. Accordingly, his availability as a witness in this case is crucial to the defense; however, and unfortunately, he passed away on April 28, 2011 (roughly ten years after the filing of the Complaint). In establishing a cause of action for defamation, Mentor must prove: "(1) the utterance of a false and defamatory statement concerning another; (2) an unprivileged communication to a third party; (3) fault amounting to at least negligence; and (4) damages, unless the statement is actionable irrespective of special harm." Nassa v. Hook-SupeRx, Inc., 790 A.2d 368, 373 n.10 (R.I. 2002) (citing Restatement (Second) Torts § 558, at 155 (1977)). In support of its defamation claims, Mentor cites to Marcil v. Kells, wherein the Court states: "With respect to the first element of defamation, a plaintiff must show that the statement is 'false and malicious, imputing conduct which injuriously affects a man[']s reputation, or which tends to degrade him in society or bring him into public hatred and contempt . . . .'" 936 A.2d 208, 212-13 (R.I. 2007) (quoting Reid v. Providence Journal Co., 20

R.I. 120, 124-25, 37 A. 637, 638 (1897)). The Evaluation Summary was alleged by Mentor to "assert[] manipulation of financial data, alleging misrepresentations of material fact made by Mentor as to the handling of funds, the illegal co-mingling of performance data and . . . material misrepresentations of facts which are contradicted by [Plaintiff's evidence]." (Pl.'s Obj. to Mot. 21). While the defamation claims asserted by Mentor may traverse several different legal paths (depending on what type of defamation exists), the testimony of the PSB members and Camayd-Freixas would nevertheless be necessary.

First, the parties dispute whether this action is one for defamation per se—to wit, libel per se—which would obviate Mentor's need to plead special damages resulting from the Evaluation Summary's publication. See Swerdlick v. Koch, 721 A.2d 849, 861 (R.I. 1998). If this case is not defamation per se, the intent of Camayd-Freixas behind publishing the report, while not operating as a defense to the action itself, is still considered for purposes of assessing damages. See Laudati v. Stea, 44 R.I. 303, 117 A. 422, 424 (1922). If this case is indeed one for defamation per se, Mentor has the burden of proving that there indeed was a "false statement of fact." Alves v. Hometown Newspapers, Inc., 857 A.2d 743, 751 (R.I. 2004). Importantly, as to this form of defamation, Defendants would be prejudiced by not having the opportunity to present Camayd-Freixas' testimony regarding the specific underlying factors or analysis he undertook or considered in drafting the Evaluation Summary. Moreover, this Court finds the existence of prejudice to Defendants regarding their inability to produce the former PSB members (either due to their death or Defendants' inability to locate them). Even if some PSB members were available, the Court would not be hard-pressed to find prejudice, despite whether

depositions were taken earlier.[9] See Hanson v. Disotell, 106 So. 3d 351, 357 (Miss. Ct. App. 2011), aff'd, 106 So. 3d 345 (Miss. 2013) ("Such lengthy, protracted litigation creates issues with the evidence and witnesses' memories, even with the availability of depositions."). This testimony would be required for Defendants to present what they reasonably understood the Evaluation Summary's intended meaning to be, not to mention the difficulty in Defendants procuring any testimony from any other audience members that may have been present in 2001. Marcil, 936 A.2d at 213 (quoting Restatement (Second) Torts § 563 cmt. e., at 164 (1977)) ("[T]he decisive question is what the person or persons to whom the communication was published reasonably understood as the meaning intended to be expressed."). But for the long passage of time in this case, such testimony would have likely been produced.

Lastly, if this is a case of defamation of a "limited purpose public figure" or a case where there exists a qualified privilege—as Defendants contend—Mentor would be required to prove "actual malice" or "common law malice." See Mills v. C.H.I.L.D., Inc., 837 A.2d 714, 720 (R.I. 2003) ("To overcome . . . a qualified privilege, the plaintiff must prove that the person making the defamatory statements acted with ill will or malice."); Cullen v. Auclair, 809 A.2d 1107, 1110 (R.I. 2002) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964)) ("When a public official brings an action for defamation relating to his official conduct he must prove 'that the statement was made with 'actual malice.'"). Accordingly, whether "actual malice" exists—that is, "with knowledge that it was false or with reckless disregard of whether it was false or not"—inherently goes to Camayd-Freixas' state of mind in drafting and presenting the Evaluation Summary. See Cullen, 809 A.2d at 1110; DeCarvalho v. daSilva, 414 A.2d 806,

[9] Mentor has alleged to have taken the deposition of Lam, Camayd-Freixas, and other "material witnesses" with knowledge of this matter. Despite these depositions, their unavailability at trial somewhere down the road does not materially alter the Court's prejudice analysis.

814 (R.I. 1980) (upholding jury instruction that stated "the test for actual malice is a subjective one which requires you to determine the defendant's state of mind at the time [of publication]"). Because Defendants no longer have the ability to present him as a key witness to testify about his own state of mind, they have been actually and presumptively prejudiced. See Manton, 113 R.I. at 201, 319 A.2d at 358.

Assuming arguendo that the Court were to deny Defendants' Rule 41 motion with respect to defamation, it is quite clear to the Court that based on the evidence now before it, a qualified privilege may exist for the Evaluation Summary, operating to defeat Mentor's claim. See Mills, 837 A.2d at 720 (quoting Ponticelli v. Mine Safety Appliance Co., 104 R.I. 549, 551, 247 A.2d 303, 305-06 (1968)) ("A qualified privilege exists if the publisher makes the statements in good faith and 'reasonably believes that he has a legal, moral or social duty to speak out, or that to speak out is necessary to protect either his own interests, or those of third person[s], or certain interests of the public.'"). As to this issue, Defendants argue that all of the Defendants in this case shared the "common interest" of evaluating Mentor's services to the PSD. Defendants also contend they shared the common interest of ensuring that the state and federal funds were being properly allocated to the PSD's outsourced contracts (including its contract with Mentor). See id. ("A qualified privilege also may exist when the parties communicating share a common interest."). Whether this privilege exists is exclusively an issue for the Court to decide. Id.

Relying on Mills, Defendants argue that Camayd-Freixas was hired only as a "neutral evaluator" and accordingly, in that capacity, presented his findings to the PSB. Regrettably, Mentor fails to reply to this argument in its opposing memorandum; instead Mentor focuses all of its attention to the issue of special damages. Nevertheless, it is well settled in Rhode Island that:

> "to overcome a motion for summary judgment based on a qualified privilege, a plaintiff must point to *some* specific facts in the record that raise a genuine issue relative to the existence of such ill will. Indeed, it is axiomatic that a party opposing a motion for summary judgment 'will not be allowed to rely upon mere allegations or denials in [the] pleadings.'" Kevorkian v. Glass, 913 A.2d 1043, 1049 (R.I. 2007).

The Kevorkian Court explained in a footnote that "once a qualified privilege is established, it is then necessary 'to determine whether the plaintiff [has] raised, in opposition to the motion for summary judgment, a genuine issue of material fact in respect to common-law malice.'" Id. at 1049 n.5 (quoting Belliveau v. Rerick, 504 A.2d 1360, 1363 (R.I. 1986)). This analysis would not change even if this was a case of defamation per se so long as Plaintiff shows that the alleged defamatory statements were the product of ill will, spite, or malevolence.[10] See Powers v. Carvalho, 117 R.I. 519, 531, 368 A.2d 1242, 1249 (1977). Here, it cannot be said that Mentor has sustained its burden of putting forth facts indicating that the underlying causative factor of the Evaluation Summary was ill will or spite rather than "common interest." See Swanson v. Speidel Corp., 110 R.I. 335, 341, 293 A.2d 307, 311 (1972).

Plainly, Mentor offers nothing more than alleged conspiracy theories as to why Lam and the PSB retained Camayd-Freixas and, ultimately, as to why the PSD refused to continue with Mentor's services. The long-running story behind Mentor's allegations that Lam and Camayd-Freixas shared a "close" relationship and that they somehow conspired to accomplish Lam's intended budget reductions for adult education is simply unsubstantiated. As the Kevorkian Court made clear, in order to avoid summary judgment, there must be some specific facts in the record demonstrating Camayd-Freixas' spite or ill will. By only offering speculation, suspicion,

[10] Indeed, this may be a case of defamation per se as Plaintiff avers in its Complaint that the Evaluation Summary accuses Plaintiff of committing crimes, including felonies. See Compl. ¶ 28.

and mere conjecture, Mentor fails to meet its burden as the nonmoving party on summary judgment to show that the publication of the Evaluation Summary was motivated by common-law malice to Mentor.[11] See Providence Journal Co. v. Convention Ctr. Auth., 774 A.2d 40, 46 (R.I. 2001); Belliveau, 504 A.2d at 1363. Consequently, after a review of all the evidence in this case, the Court finds this claim would be ripe for summary judgment in favor of Defendants.

Turning back to the Rule 41 analysis, Mentor's arguments explaining the delay in bringing this case to trial do not adequately substantiate why this case has been pending before the Court for fourteen years. As the docket reflects, there are several periods during which this case laid dormant: January 2004 to June 2006; April 2008 to November 2010; and November 2011 to June 2013 (except for one entry of appearance by Defendants' current counsel). Mentor claims there were various discovery requests filed and not reflected in the case's docket. However, the Court is not persuaded that such an excuse justifies a fourteen-year duration. The Manton case is instructive:

> "During [the years of inactivity], plaintiff may not have actively tried to delay or prevent a trial, but it certainly did nothing to obtain a trial even though it knew that there would be no trial until something was done. . . . [F]or the inactivity during those periods plaintiff has not come forward with any satisfactory explanation." Manton, 113 R.I. at 201, 319 A.2d at 357-58.

Using Mentor's example of the alleged delay of Defendants—that Mentor produced 300 boxes of records that Defendants failed to review for "several years"—there is no explanation of why Mentor allowed the boxes to sit idly without review or without calling Defendants' failure to inspect to the Court's attention, as it, and not Defendants, had the "primary responsibility" to

[11] Keeping in mind Plaintiff's burden to move this case to trial, Mentor had approximately ten years prior to Camayd-Freixas' death to generate evidence of his ill will or spite. The fact that he has since died would not similarly prejudice Plaintiff in the same way that it has Defendants, especially considering Mentor had previously taken his deposition somewhat early in this case's long history.

move a case on for trial.[12] See Bergeron, 866 A.2d at 1237. Nor does Plaintiff adequately provide the Court with an explanation for the other periods of inactivity on this case; lengthy discovery alone simply cannot justify Plaintiff's delay. In weighing the prejudice suffered by Defendants and the interest in "expeditious resolution of litigation" against Plaintiff's offered excuses, it is abundantly clear to the Court that Plaintiff's defamation claims should be dismissed pursuant to Rule 41(b)(2). See Hyszko, 448 A.2d at 726. Accordingly, Defendants' Rule 41 Motion is granted as to this count.

2

Breach of Contract

Turning next to the breach of contract claims, because Defendants do not allege which PSB members are unable to testify, other than Burns and Benton, or if there are at least some former PSB members available to provide testimony on the contract procedure of the PSD, Defendants have failed to persuade the Court they have suffered prejudice due to the passage of time. See Scittarelli, 415 A.2d at 1042 n.1. Unlike their defense to the claims for defamation, as

[12] As Defendants argue, they were not affirmatively required to conduct discovery or move the case forward in a timely manner. In Hyszko, our Supreme Court cited to the Ninth Circuit's decision in Ely Valley Mines, Inc. v. Hartford Accident & Indem. Co., 644 F.2d 1310 (9th Cir. 1981) in analyzing whether the trial justice properly dismissed for a "total lack of prosecution in [the] matters." Hyszko, 448 A.2d at 725-26. The Ninth Circuit found that "[a]lthough delay caused by a defendant may be considered by the court, the primary responsibility for furthering a case is upon the plaintiff and his attorney." See Ely Valley, 644 F.2d at 1317. Importantly, the Ely Valley Court noted that even if the defendants-appellees caused some of the delay, the plaintiffs-appellants did not explain how the defendants' delay somehow overcame their ultimate responsibility in furthering the suit. See id. The Court therefore concluded that "[the defendants] have shown actual prejudice in that all of their witnesses, except [defendant] Campini, are now deceased. Under these circumstances, it is dubious whether a trial on the merits could be fair to [defendants]." Id. Here, while Mentor attempts to shift some of the responsibility for the delay to Defendants, Mentor is unable to show how Defendants' alleged inaction, even if found, could have nonetheless relieved it of its burden to further the suit. While any delay caused by Defendants should be considered by the Court, there is no evidence to suggest their delay ought to outweigh the delay caused by Plaintiff in this case.

set forth above, the deaths of the two former PSB members—or the alleged inability to present other members of the PSB, in the discretion of this Court—do not outweigh the interest of Mentor in seeking a resolution of this claim on its merits. See Hyszko, 448 A.2d at 726. Excluding the testimony at trial of the former PSB members, there would be other evidence that a potential jury could consider on whether Defendants breached any agreement with Mentor. Because their defense to the breach of contract claim does not hinge on one key witness (as the defamation claim does with Camayd-Freixas), Defendants cannot be said to have been actually prejudiced by the passage of time as our Supreme Court cases have contemplated. See Manton, 113 R.I. at 201, 319 A.2d at 357. Accordingly, the Court denies Defendants' Rule 41(b)(2) Motion with respect to this count.

B

Summary Judgment as to Breach of Contract Claim

As to Rule 56, "[s]ummary judgment . . . is a drastic remedy to be granted sparingly only when a review of all pleadings, affidavits, and discovery materials properly before the court demonstrates that no issue of fact material to the determination of the lawsuit is in genuine dispute." Superior Boiler Works, Inc. v. R.J. Sanders, Inc., 711 A.2d 628, 631 (R.I. 1998). In ruling on a motion for summary judgment, a trial justice must refrain from determining factual issues and must not pass upon the weight or credibility of the evidence; rather, the trial justice must only determine whether there are issues involving material facts. Steinberg v. State, 427 A.2d 338, 340 (R.I. 1981). Once a trial justice determines no issues of material fact exist and the moving party is entitled to judgment as a matter of law, the trial justice is then permitted to grant summary judgment. Id.

In reviewing Defendants' summary judgment motion, the Court must determine whether there was a binding "oral contract" in existence between the parties for fiscal year 2002. As was stated in this Court's 2008 Decision, the parties do not dispute that the PSD hired Mentor for fiscal year 2001. In that Decision, Mentor's claims pertaining to the existence of an "oral contract" for the 2001 to 2002 school year were not specifically excluded by the mere existence of a written agreement for the 2000 to 2001 school year. See Mentor, 2008 WL 914382, at *6 n.3 ("It is not necessarily inconsistent with the written agreement, which sets forth a contract for the 2000-2001 school year, that an additional agreement also existed for the 2001-2002 school year."). The Court therefore found that the existence of a written agreement for the 2000-2001 school year did not entitle Defendants to summary judgment on the breach of contract issue where a separate oral agreement could have existed to extend the agreement for another year. See id. at *6. Moreover, the Court concluded that the Statute of Frauds did not bar Plaintiff's contract claim from proceeding, where Mentor alleged that an oral promise to employ Mentor for the 2001-2002 school year was made at some point during the summer of 2000. See id. at 6-8. In reaching that conclusion, the Court looked to the AEP, see Defs.' Mem. in Supp. of Mot., App. H, supra, as the sufficient "note or memorandum" to "fulfill the evidentiary functions of the statute." See Mentor, 2008 WL 914382, at *7-8. Consequently, Mentor was then afforded the opportunity to at least present evidence that such an agreement was in place between the PSD (via DiPippo) and Mentor for the disputed second year.

However, not before the Court when it previously ruled in 2008, was Defendants' instant argument that regardless of whether there was any oral agreement or promise for that second fiscal year, no such agreement was binding until it was expressly authorized by the City of Providence's Board of Contract and Supply (BCS). Section 708 of Article VII of the Home Rule

Charter of the City of Providence (hereinafter, the Charter) reads as follows: "All purchases or contracts for supplies, materials, equipment, and services required by the school department, other than salaries for teaching and administration, shall be made by the [BCS] or the purchasing agent of the city."[13] It is undisputed in this case that no written contract existed for fiscal year 2002. Instead, Mentor explicitly relies on the promises made by DiPippo to bind the PSD to an agreement with Mentor for that year.

As Defendants contend, without BCS approval, there was simply no contract to breach. In support of its argument, Defendants cite to Mossberg's deposition, wherein he describes the promise made to Mentor as indicative of the existence of an oral agreement with the PSD. Mossberg's testimony on this point reads, as follows:

> "Q. There's reference in your complaint and other pleadings to an oral agreement. Are you familiar with that?
>
> "A. Yes.
>
> "Q. Do you know what that is?
>
> "A. Yes. The oral agreement is the idea that when the two-year funding cycle arose for the first time and that a proposal was submitted for two years of funding for the first time, that the School Department was signing on when it passed that for those two years. We were instructed that the School Department never gave contracts for more than one year, so they would give us the contract to pay for the first year, and then the next year they would issue a contract to pay for the second year. That was orally informed to me.
>
> "Q. Who told you that?

[13] Section 1007 of the Charter establishes the BCS and sets forth the responsibilities of the BCS as including "[t]o make all contracts for purchase of materials, supplies, services, equipment and property on behalf of the city, the price or consideration of which shall exceed five thousand dollars ($5,000.00) . . . ." Sec. 1007(c)(1). Furthermore, Article II, § 21-36 of the Code of Ordinances of the City of Providence provides: "All contracts and purchases made by the [BCS] shall be made or evidenced in writing, and in such form as shall be approved by the city solicitor."

> "A. Thomas DePippo [sic]. He was the Federal Grants Officer of the Providence Public Schools." (Mossberg Dep. 10:5-24, Nov. 21, 2013).

With that said, Mentor's arguments must fail. At the outset, Mentor is unable to establish that any oral promise or agreement by DiPippo—whether on behalf of the PSD or not—is actually binding on the PSD without subsequent approval.[14] In opposition to Defendants' Motion, Mentor argues that a question of fact exists as to whether Mentor's contract was indeed for "salaries for teaching and administration," as those terms are used in § 708 of the Charter. See Pl.'s Obj. to Mot. 10-12; see also Mossberg Aff. at 2 ("[T]he funds to be received from the City of Providence were for teaching and administration in the main."). If the contract was for teaching and administration salaries, then, as Mentor explains, it necessarily follows that any such contract does not have to be in writing. Because § 21-36 of the Providence Code of Ordinances—which establishes a writing requirement for contracts—only applies to contracts entered into by the BCS, any contract that falls outside that section would not need to be in writing. Following that line of reasoning, Mentor claims that DiPippo, as an alleged agent of the PSD "cloaked" with the apparent authority to bind the PSD to an agreement, properly entered into the oral agreement with Mentor for fiscal year 2002. Plainly, Mentor's arguments that questions of fact exist are of no moment.

Without question, for any oral agreement in this instance to be binding on the PSD, it had to be approved by the BCS. See Charter § 708. After a review of all the evidence presented to

[14] While § 708 of the Charter contemplates that purchases or contracts can be made by either the BCS or the "purchasing agent of the city," Defendants rely only on the lack of BCS approval to support its argument. See § 708. While not expressly stating so, the Court believes Defendants are only considering whether BCS approval was obtained, rather than the city's purchasing agent, because Mentor's contract exceeded $5000. See Charter § 1007(c)(1). In any event, there is no evidence that either the BCS or the City of Providence's purchasing agent gave express approval for a contract for fiscal year 2002.

the Court, there is no indication whatsoever that the BCS approved any retention of Mentor's services for fiscal year 2002.[15] On summary judgment, Mentor, as the nonmoving party, carries the burden to prove the existence of genuine issues of material fact. See Sullo v. Greenberg, 68 A.3d 404, 407 (R.I. 2013) (internal quotation marks omitted) ("[T]o avoid summary judgment the burden is on the nonmoving party to produce competent evidence that prove[s] the existence of a disputed issue of material fact[.]"). Moreover, Mentor's arguments ignore the nearly four-year prior contractual relationship with the PSD. For each and every year prior to fiscal year 2001, the BCS had approved the PSD's contract in writing with Mentor for adult education services. See Defs.' Mem. in Supp. of Mot., App. G (collection of written agreements and purchasing orders from City of Providence between the PSD and Mentor). According to Defendants, the PSD would forward its written agreements and purchase orders to the BCS for final approval. See id. Mentor cannot now allege that its agreement for the fifth year of its services contemplated such a different degree of services so as to render its new contract so materially different that it was to fall outside the requirement of BCS' approval. While Mentor provides its budget reports for fiscal year 2001 and earlier, indicating it indeed used some of the grants for salaries, see Mossberg Aff. Exs., approval by the BCS was nonetheless required.

[15] Specifically, pursuant to the November 2000 written agreement, referenced in this Court's 2008 Decision, see infra, the date of "Board" approval was expressly indicated on the contract. While the BCS is not specifically referenced by name, the contract does provide for the "Date of Board Approval," indicating its approval "(For contracts of $5,000 or more)." Given that § 1007 of the Charter mandates the BCS to have exclusive power to make all contracts for services with a value exceeding $5000, it is clear to the Court that the "Board" referred to here is the BCS. Indeed, as provided in § 104 of the Charter, "[a]ll powers of the city shall be exercised in the manner prescribed by this Charter or, if not so prescribed, then in such manner as shall be provided by ordinance or resolution of the city council." Without any other entity having such authorization pursuant to the Charter, the Court is not improperly determining that approval from the BCS was achieved. Accordingly, Defendants have established that, at the very least, the BCS authorized a contract for the 2000-2001 school year. No such similar contract is in the record for the 2001-2002 school year.

The Court need look no further than PSB Resolution No. 344, adopted September 27, 1999, authorizing the Superintendent of Schools to seek bids through the BCS for, inter alia, adult education services provided by Mentor. See Defs.' Rebuttal Mem., Ex. 2. As Mentor's own documents indicate, Mentor used its fiscal year 2000 funds for salaries, despite the fact that those contracts had required BCS approval. There is no evidence in the record to suggest that years 2001 or 2002 should have been any different. As a result, Mentor cannot now rely on its interpretation of the language in Charter § 708 to justify its contention that a separate oral contract would have been permitted for that second year, when all past years included salaries for its employee-teachers and were nonetheless subject to BCS approval. In other words, as any separate agreement for fiscal year 2002 would have required ultimate BCS approval, no oral contract—regardless of whether DiPippo had apparent or real authority to bind the PSD—would have operated to establish a contract with the PSD and the City of Providence.

Further, Mentor's failure to establish the existence of a contract proves fatal to any claim for a breach of contract. See Empire Merch. Corp. v. Bancorp R.I., Inc., No. PB 08-3372, 2011 WL 4368923 (Silverstein, J.) (citing Petrarca v. Fidelity & Cas. Ins. Co., 884 A.2d 406, 410 (R.I. 2005) ("In order for [the plaintiff] to have a legally cognizable breach of contract claim he was required to establish the existence of a valid contract, a breach of the contract, and damages resulting from the breach."). The mere fact that DiPippo may or may not have promised Mentor that their engagement with the PSD would continue on for a second year does not overcome Plaintiff's insufficient showing of a properly authorized and duly-executed contract between Mentor and the PSD for fiscal year 2002. The requisite procedure simply was not followed: while there undoubtedly was a two-year grant (as evidenced by the AEP, see Defs.' Mem. in Supp. of Mot., App. H, for fiscal year 2002) there was no signed purchase order or an executed

written agreement for services. Absent any evidence to the contrary indicating there was some authorization for an agreement for a second year, there can be no valid contract.

The only remaining question for the Court to consider in granting Defendants' request for an entry of summary judgment in their favor is whether or not the municipality (here, City of Providence and the PSD) would be estopped from now denying the existence of a contract for that year. While Mentor does not directly address this issue, Mentor repeatedly argues—albeit without any supporting authority—that DiPippo nonetheless had the authority to bind the PSD and the City of Providence to a second-year contract. Assuming then for the purposes of argument that DiPippo definitively promised a full contract for that year, Defendants contend that DiPippo's statements would be ultra vires (or in conflict with applicable law), and thus, the doctrine of equitable estoppel should not apply.

In Romano v. Ret. Bd. of Emps.' Ret. Sys. of R.I., our Supreme Court made clear—by distinguishing several other cases on the doctrine—that "'[e]stoppel against a [public entity] . . . must be predicated upon the acts or conduct of its officers, agents or official bodies acting within the scope of their authority.'" 767 A.2d 35, 42 (R.I. 2001) (quoting Ferrelli v. Dep't of Emp't Sec., 106 R.I. 588, 592-93, 261 A.2d 906, 909 (1970)). There, the Court affirmed the trial justice's judgment "squarely on the grounds that the doctrine of equitable estoppel should not be applied against a governmental entity . . . when, as here, the alleged representations or conduct relied upon were *ultra vires* or in conflict with applicable law." Id. at 38. The Court ultimately reasoned:

> "to rule otherwise would undermine the integrity and structure of our state government because it would allow every government official to act as his own mini-legislature, cashiering those laws he or she dislikes, is ignorant of, or misinterprets, and instead molding the law to be whatever the government official claims it to be." Id. at 43.

The Romano Court's opinion on the matter is conclusively instructive and the Court here need not engage in a lengthy analysis to determine that DiPippo's promises, regardless of their form or Mentor's impressions to the contrary, could not bind the PSD to a contract. Because § 708 of the Charter is clear that only the BCS or the purchasing agent for the City of Providence has the authority to contract or purchase service contracts, DiPippo's statements to Mentor were therefore not within his authority as they were in conflict with the Charter. See id. at 40 (quoting Providence Teachers Union v. Providence Sch. Bd., 689 A.2d 388, 391 (R.I. 1997) ("'[T]his Court has squarely rejected the proposition that a municipality may be bound by the actions of an agent without actual authority.'"); accord Waterman v. Caprio, 983 A.2d 841, 846-47 (R.I. 2009). Any argument that estoppel precludes the municipality from currently denying the existence of a contract must inherently fail. Prior to 2001, the PSD's contract with Mentor was approved by the BCS. Absent any evidence in the record that BCS approval was not required for this disputed fiscal year or that the BCS somehow condoned or sanctioned DiPippo's oral promise, Mentor cannot have a binding contract with the municipality based on the doctrine of equitable estoppel. Accordingly, because Mentor is unable to demonstrate the existence of a contract with the PSD, and any breach thereof, summary judgment as to its breach of contract shall enter in favor of Defendants.

C

Defendants' Motion to Strike

Lastly, Defendants challenge the admissibility of the affidavits of DiPippo and Mossberg submitted by Mentor. In moving that they be stricken from the summary judgment record, Defendants argue that both affidavits assert a host of impermissible statements, including impermissible conclusions of law. See Mossberg Aff. at 3-5. While a party is permitted to file

affidavits in either support or defense of a motion for summary judgment, it is generally held that "'naked conclusory assertions in an affidavit . . . are inadequate to establish the existence of a genuine issue of material fact . . . .'" Carrozza v. Carrozza, 944 A.2d 161, 164 (R.I. 2008) (quoting Roitman & Son, Inc. v. Crausman, 121 R.I. 958, 959, 401 A.2d 58, 59 (1979) (mem.)); see also Mruk v. Mortg. Elec. Registration Sys., Inc., 82 A.3d 527, 533 (R.I. 2013) (internal quotation marks omitted) ("[Our Supreme Court] has made it clear that conclusory assertions in an affidavit filed in opposition to a motion for summary judgment are inadequate to establish the existence of a genuine issue of material fact . . . ."). The Court notes the unconventional form of the Mossberg Affidavit, to wit, the certain statements regarding his identification and listing of several "material issues of fact" in the case. Similarly, the DiPippo Affidavit is riddled with mere conclusions, apparently unsupported by facts, despite his assertions that he has "personal knowledge" to the same.

In reviewing both affidavits in full, the Court finds that they largely consist of nothing more than improper legal conclusions. See Narragansett Imp. Co. v. Wheeler, 21 A.3d 430, 438 (R.I. 2011) (internal quotation marks omitted) ("[T]he nonmoving party . . . cannot rest upon mere allegations or denials in the pleadings, mere conclusions or mere legal opinions."). Consequently, the Court holds that to the extent the affidavits provide improper conclusory assertions or mere legal opinions, those provisions will be stricken from the record. In presenting an order to the Court, the parties are directed to meet and confer in an attempt to agree as to which provisions are in violation of the above.

IV

Conclusion

After due consideration of all the evidence, together with the arguments advanced by counsel at the hearing and in their memoranda, the Court finds that, for the reasons stated herein, Defendants' motion for failure to prosecute under Rule 41(b)(2) is granted with respect to only Plaintiff's claim for defamation. On Mentor's claim for breach of contract, the Court finds that summary judgment shall enter for Defendants due to Mentor's failure in establishing the existence of a valid contract. Finally, as stated, to the extent the DiPippo and Mossberg Affidavits are found to set forth mere conclusory assertions, Defendants' Motion to Strike shall be granted.

Prevailing counsel may present an order consistent herewith which shall be settled after due notice to counsel of record.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Mentor, Inc. v. Lam, et al.**
CASE NO:	**PB 01-3859**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**April 20, 2015**
JUSTICE/MAGISTRATE:	**Silverstein, J.**
ATTORNEYS:	
For Plaintiff:	**Mitchell S. Riffkin, Esq.**
For Defendant:	**John T. D'Amico, Jr., Esq.** **Pamela B. Quigley, Esq.** **Lisa Dinerman, Esq.** **Megan K. DiSanto, Esq.**