Short Form Order

Index Number: 28548-2004

Supreme Court - State of New York
I.A.S. Term, Part 23, Suffolk County

Present:

HON. EMILY PINES
Justice Supreme Court

Original Motion Date: 04-19-2007
Motion Submit Date: 09-27-2007
Motion Sequence No.: 004 MD

---X

DARLENE LANCASTER,

Plaintiff,

-against-

THE TOWN OF EAST HAMPTON, FRED OVERTON, TIFFANY KECKEISEN, JOHN DO 1-20, AND JANE DOE 1-20, the last 40 names being fictitious persons now unknown to Plaintiff,

Defendant.

---X

Plaintiff's Attorney
Warshaw Burstein Cohen Schlesinger & Kuh LLP
555 Fifth Avenue
New York, New York 10017

Defendant Keckeisen's Attorney
David Sutton, Esq.
1205 Franklin Avenue, Suite 320
Garden City, New York 11530

Defendant East Hampton & Overton's Attorney
Miranda Sokoloff Sambursky Slone Verveniotas, LLP
240 Mineola Blvd.
Mineola, New York 11501

ORDERED, that the motion (motion sequence no. 004) by Defendant, TIFFANY KECKEISEN ("KECKEISEN") to dismiss the fourth and fifth causes of action in the amended complaint is denied.

Plaintiff commenced this action against Defendants, THE TOWN OF EAST HAMPTON, FRED OVERTON, JOHN DOE, 1-20 AND JANE DOE 1-20 seeking damages arising from alleged age discrimination, discrimination on account of disability, defamation and *prima facie* tort in connection with the asserted unlawful termination of Plaintiff's termination from employment by the Defendant Town as a Deputy Clerk. By Order of this Court dated December 20, 2006, Plaintiff was permitted to serve an Amended Complaint, naming KECKEISEN as an additional party Defendant on the claims for defamation and *prima facie* tort. Plaintiff's request to amend the complaint to assert a claim against KECKEISEN for tortious interference was denied.

In the December 20, 2006 Order, the Court found that the claim for defamation against KECKEISEN was not barred by the statute of limitations under the "relation back" doctrine. Additionally, the Court held that the original complaint against Defendants set forth a cause of action for defamation. Finally, the Court determined that the complaint set for the essential elements of a claim against Defendants for *prima facie*. Thus, the Court permitted the service of an Amended Complaint adding KECKEISEN as a party Defendant. By Order (PINES, J.) dated May 22, 2007, Defendants' motion pursuant to **CPLR §2221** for leave to reargue the December 20, 2006 Order was denied in its entirety.

Defendant KECKEISEN now moves to dismiss the fourth and fifth cause of action of the complaint on the following grounds: that the causes of action for defamation and *prima facie* tort are barred by the statute of limitations and the relation back doctrine does not apply; that the cause of action for defamation was not specifically pled pursuant to **CPLR Rule 3016**; that the cause of action for *prima facie* tort cannot be asserted because plaintiff has also asserted a claim for defamation which is a traditional tort.

In opposition, Plaintiff argues that pursuant to the doctrine of "law of the case" and/or *res judicata*, the Court, in its December 20, 2006 Order, already determined that the claim of defamation was not barred by the statute of limitations under the relation back doctrine. Plaintiff further argues that the claim for *prima facie* tort is not barred by the statute of limitations because (1) the relation back doctrine also applies ; and (2) that the statute of limitations for *prima facie* tort is three years and not one year. Plaintiff additionally asserts that it is proper to assert a cause of action for *prima facie* tort and defamation in the complaint, and it is only once a traditional tort has been established (i.e., proven at trial), that the claim for *prima facie* tort must be dismissed. Finally, Plaintiff argues that the allegations of the complaint regarding defamation provide adequate specificity to comply with **CPLR §3016** and further, that the Amended Complaint cannot provide any greater degree of specificity because the information

is solely within the purview of the Defendants.

Statute of Limitations and Law of the Case

Defendant KECKEISEN moves to dismiss the causes of action for defamation and *prima facie* tort on the ground that they are barred by the one year statute of limitations applicable to those claims. Plaintiff argues that the doctrine of law of the case and/or *res judicata* prohibit KECKEISEN from relitigating this issue as it was determined in the December 20, 2006 Order.

As the Courts have oft recognized, the doctrine of law of the case "seeks to prevent relitigation of issues of law that have already been determined in an earlier stage of the proceeding." ***Hampton Valley Farms, Inc., v. Flower & Medalie***, 40 A.D.3d 699, 835 N.Y.S.2d 678 (2d Dept. 2007) (internal citations omitted). Once an issue is of law is judicially determined in a litigation, it is the "end of the matter as far as Judges and courts of coordinate jurisdiction are concerned." ***Dittmer v. State of New York,*** 140 A.D.2d 663, 528 N.Y.S.2d 876 (2d Dept. 1988), ***quoting, Martin v. City of Cohoes***, 37 N.Y.162, 165, 371 N.Y.S.2d 687, 332 N.E.2d 867. ***See also, Abbas v. Cole,*** 44 A.D.3d 31, 840 N.Y.S.2d 388 (2d Dept. 2007).

In the case *sub judice*, the law of the case doctrine bars the relitigation by Defendant KECKEISEN of the issue of the statute of limitations challenge to the causes of action for defamation and *prima facie* tort. In the December 20, 2006 Order granting Plaintiff's motion to amend the complaint to add KECKEISEN as a Defendant on the defamation cause of action, this Court thoroughly analyzed and finally determined that the claims were not barred by the statute of limitations under the relation back doctrine. In fact, the Court emphasized that it "cannot imagine a situation better suited for application of the doctrine than that presented in the case at Bar." Similarly, the Court permitted plaintiff to add KECKEISEN as a Defendant on the *prima facie* tort claim. This determination, unchanged after a motion for leave to reargue was denied, is the law of the case. Thus, the motion to dismiss the fourth and fifth causes of action on the ground of the statute of limitations is denied. Based on this determination, the Court need not reach the issue

of the applicable statute of limitations on a *prima facie* tort cause of action.

Pleading Defamation and *Prima Facie* Tort

Defendant KECKEISEN argues that the Plaintiff's cause of action for *prima facie* tort should be dismissed because she has also asserted a cause of action for defamation, a traditional tort. Plaintiff rebuts that, according to the Court of Appeals, a *prima facie* tort may be pled together with a traditional tort, and that it is not until the traditional tort is established, that the cause of action for *prima facie* tort must be dismissed. Interestingly, both sides cite, ***Curiano v. Suozzi***, 63 N.Y.2d 113, 480 N.Y.S.2d 466 (1984), in support of their respective arguments, so it merits discussion herein. In that case, the issue was whether plaintiff could recover on a cause of action for *prima facie* tort when they had instituted a prior action against the same defendants for defamation. In that case, after discussing the elements necessary on a cause of action for *prima facie* tort[1], the Court stated that while "*prima facie* tort may be *pleaded* in the alternative with a traditional tort, once a traditional tort has been *established* the cause of action for *prima facie* tort disappears" (emphasis added). The ***Curiano*** Court cited ***Board of Education v. Farmingdale Classroom Teachers Assn.***, 38 N.Y.2d 397, 380 N.Y.S.2d 635 (1975). A reading of this case clarifies the issue of the distinction between pleading a cause of action and establishing the cause of action. There, the Court of Appeals stated that:

> It is our view that a modern system of procedure, one which permits alternative pleading, should not blindly prohibit that pleading in the area of prima facie tort. Of course, double recoveries will not be allowed, and once a traditional tort has been established the allegation with respect to prima facie tort will be rendered academic. Nevertheless there may be instances where the traditional tort cause of action will fail and plaintiff should be permitted to assert this alternative claim.

Board of Education, 38 N.Y.2d at 406, 380 N.Y.S.2d at 645. Based on

---

[1] The four elements are: (1) intentional infliction of harm; (2) causing special damages; (3) without excuse or justification; (4) by an act or series of acts that would otherwise be lawful. ***Curiano, supra.***

these Court of Appeals decisions, clearly, Defendant KECKEISEN's motion to dismiss the cause of action for *prima facie* tort because a cause of action for defamation was alleged, must be denied. The Amended Complaint permissibly *pleads* both theories; however, in the event the cause of action for defamation is *established*, i.e., at trial, the cause of action for *prima facie* tort will be dismissed. Therefore, the motion to dismiss on this ground is denied.

Specificity of Pleading

CPLR Rule 3016(a) provides that "In 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." Defendant argues that the allegations of defamation of the Amended Complaint do not satisfy the pleading requirements of **Rule 3016.**

In the fourth cause of action of the Amended Complaint, Plaintiff alleges that Defendants disseminated false and defamatory statements regarding sexual misconduct, publicly accused plaintiff being a thief and violating the public trust, and stated that plaintiff had traded permits issued by her office for free lunches. The Amended Complaint alleges that these statements were made to Montauk Citizens Advisory Committee and the East Hampton Star newspaper. These allegations, especially regarding the issuance of permits in exchange for gratuities, would constitute a crime and thus might be considered defamatory per se. ***See, Caffee v. Arnold***, 104 A.D.2d 352, 478 N.Y.S.2d 683 (2d Dept. 1984).[2]

Based upon the foregoing, the Court finds that the Amended Complaint sets forth a cause of action with sufficient specificity to satisfy the pleading requirements of **CPLR Rule 3016(a)** and the motion to dismiss is therefore denied.

---

[2] ***See also, International Shoppes, Inc., v. Spencer,*** 34 A.D.3d 429, 825 N.Y.S.2d 483 (2d Dept. 2006)(In defamation action, on a motion to dismiss, whether the alleged defamatory statements were substantially true regarding plaintiffs fraudulent and illegal activity cannot be determined as a matter of law, Rather the issue is whether plaintiff has a cause of action.

Defendant KECKEISEN is directed to serve a Verified Answer to the Amended Complaint within thirty (30) days from the date herein. A preliminary conference is scheduled for January 31, 2008 at 9:30 a.m. before the undersigned at 210 Center Drive, Courtroom 18, Riverhead, New York.

The foregoing constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: November 28, 2007
Riverhead, New York

Emily Pines

EMILY PINES
J. S. C.