

Mondello v Nassau County Democratic Comm.

2007 NY Slip Op 34070(U)

December 10, 2007

Supreme Court, Nassau County

Docket Number: 0851-04/

Judge: Lori Currier Woods

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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JOSEPH N. MONDELLO,

Plaintiff,

-against-

**MICHELE M. WOODARD,
J.S.C.**

**TRIAL/IAS Part 18
Index No.: 000851/04
Motion Seq. Nos.: 03 & 04
DECISION AND ORDER**

NASSAU COUNTY DEMOCRATIC COMMITTEE,
CABLEVISION, INC., RAINBOW MEDIA HOLDINGS,
INC., FUND FOR A BALANCED JUDICIARY 2003,
COMMITTEE TO ELECT JUDGE REBOLINI SUPREME
COURT JUSTICE, WILLIAM B. REBOLINI, COMMITTEE
TO ELECT JUDGE SONDR A. PARDES, SONDR A.
PARDES, COMMITTEE TO ELECT JOHN L. KASE,
JOHN L. KASE, FRIENDS OF JOEL SUNSHINE, ELECT
CIAFFA 2003, MICHAEL A. CIAFFA, COMMITTEE TO
ELECT ANGELA G. IANNACCI, FRIENDS OF JUDGE
SUSAN J. KLUEWER, SUSAN J. KLUEWER, COMMITTEE
TO ELECT NORMAN ST. GEORGE, and NORMAN
ST. GEORGE,

Defendants.

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Papers Read on this Motion:

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Defendants Nassau County Democratic Committee and Fund For a Balanced Judiciary 2003, and also defendants Committee to Elect Judge Rebolini Supreme Court Justice, Committee to Elect Judge Sondra K. Pardes, Sondra K. Pardes, Committee to Elect John L. Kase, John L. Kase, Friends of Joel Sunshine, Joel Sunshine, Elect Ciaffa 2003, Michael A. Ciaffa, Committee to Elect Angela G. Iannacci, Friends of Judge Susan J. Kluewer, Susan J. Kluewer, Committee to Elect Norman St. George, and Norman St. George (hereafter collectively referred to as "the moving defendants"), move in separate motions for reargument pursuant to CPLR §2221(d) of their prior motion and cross-motion for summary judgment dismissing the Plaintiff's first cause of action.

A motion for reargument is addressed to the sound discretion of the court which decided the prior motion [*Viola v City of New York*, 13 AD3d 439 (2d Dept 2004), lv app den 5 NY3d 706 (2005); *Perez v Linshar Realty Corp.*, 259 AD2d 532 (2d Dept 1999)]. On this record, the Court

finds that it did overlook the burden of proof of actual malice required in a defamation case such as this one, and for this reason **grants** reargument to the moving defendants.

Plaintiff Joseph Mondello is the Chairman of the Nassau County Republican Committee. In his Complaint, containing two causes of action, Mr. Mondello alleges that through October 2003 and continuing up until November 4, 2003, an advertisement defamed him. The advertisement was broadcast by defendants Cablevision and Rainbow, and was allegedly paid for, created, compiled, prepared, authorized and disseminated by the moving defendants. Although the words "actual malice" are not found in the Complaint, this pleading does contain the requisite allegations that the moving defendants knew the referenced allegations in the advertisement were false, and they knowingly disseminated the false allegations "in an effort to unfairly portray and damage Mr. Mondello's reputation." The second cause of action against defendants Cablevision and Rainbow Media Holdings was discontinued with prejudice by stipulation in 2004.

The advertisement at issue provided as follows:

What's the price of justice in Nassau County? Republican Boss Joseph Mondello says its \$50,000. Newsday calls Mondello's shakedown of judicial candidates a cruel reminder that politics determines who sits on the bench. In fact, the Bar Association found two candidates on the Republican slate unqualified. The alternative: Democratic judges. Independent, impartial all rated well qualified by the Bar Association.

On November 4th, tell the Nassau Republican machine justice isn't for sale.

The moving defendants sought summary judgment dismissing the Complaint on the grounds that the advertisement at issue was based upon an article published in Newsday on July 29, 2003. The article was written by staff writer Celeste Hadrick and it's title was: "Price of the Party; Mondello to Candidates: Turn Over This Much Money to GOP". The moving defendants quoted extensively from the article, which provided, in pertinent part:

Republicans running for office in Nassau County are being asked to pony up big bucks to party headquarters this year in an unusually blunt pitch from party chairman Joseph Mondello.

In letters to all GOP candidates in recent weeks, Mondello told them to the dollar what he expects them to turn over to headquarters for a campaign media blitz: Incumbent county legislators and town board members should transmit \$30,000 each; incumbent judges, \$50,000; and incumbent town supervisors, \$100,000 each, for instance.

'I put out a letter that says basically you're responsible for this much money and I'm going to spend it,' Mondello said. 'I've used those exact words in my meetings: 'You're going to raise it and I'm going to spend it.'

The moving defendants asserted that they had no duty to investigate the veracity of the Newsday article. They argued further that the advertisement must be understood in context, as a

political piece intended for maximum political effect based upon the Newsday article. Overall, the moving defendants sought summary judgment as a matter of law, *inter alia*, on the basis of the Newsday article and their answers denying actual malice.

In opposition, plaintiff argued that the advertisement plainly accuses plaintiff of having engaged in the unethical and criminal practice of selling judgeships. Plaintiff distinguishes the Newsday article as addressing how candidates for judicial office were asked to make contributions to the Nassau County Republican Committee after they were chosen to run for office.

Summary judgment is the procedural equivalent of a trial [*S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 (1974)]. The proponent must make a *prima facie* showing of entitlement to judgment as a matter of law [*Giuffrida v Citibank Corp.*, 100 NY2d 72, 82 (2003); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986)]. Once a *prima facie* case has been made, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact or an acceptable excuse for its failure to do so [*Zuckerman v City of New York*, 49 NY2d 557, 562 (1980)]. Summary judgment is favored by New York Courts in libel cases where actual malice is at issue [*Immuno AG v Moor-Jankowski*, 77 NY2d 235, 256, cert. den. 500 US 954 (1991); *Suoizzi v Parente*, 202 AD2d 99, 100 (1st Dept 1994), lv dsmd in part and den in part, 85 NY2d 923(1995)]. Conclusory allegations will not defeat summary judgment in a defamation action [*Suoizzi v Parente* at 100].

At the outset the Court notes for the record that while truth is a complete defense to a defamation action [*Kamalian v Reader's Digest Assn. Inc.*, 29 AD3d 527, 528 (2d Dept 2006); *Cahill v County of Nassau*, 17 AD3d 497 (2d Dept 2005; *Yan v Potter*, 2 AD3d 842 (2d Dept 2003)], a determination of truth is not possible on this record.

It is for the court to decide whether the challenged communication is “reasonably susceptible of a defamatory connotation” [*Golub v Enquirer/Star Group, Inc.*, 89 NY2d 1074, 1076 (1997); *Silsdorf v Levine*, 59 NY2d 8, 12 (1983)]. The entire communication and the circumstances of its issuance must be considered in terms of its effect upon the ordinary reader [*Silsdorf v Levine* at 13. In an acrimonious conflict, the audience may anticipate the use of epithets, fiery rhetoric or hyperbole, as statements which might otherwise be viewed as assertions of fact which may take on an entirely different character [*Brian v Richardson*, 87 NY2d 46, 52 (1995)].

Viewing the record presented herein in the light most favorable to the non-moving party, as it must [*Ptasznik v Schultz*, 223 AD2d 695 (2d Dept 1996)], the Court adheres to its original determination that triable questions of fact are presented as to whether the ordinary voter would have understood the advertisement to be defamatory, given the context of a vigorous political campaign [see *Suoizzi v Parente*].

Assuming *arguendo* solely for the purposes of the motions before the Court that the advertisement may be considered defamatory, the inquiry continues. There is no dispute that Joseph Mondello is a “public figure.” In defamation actions where the plaintiff is a “public figure,” the plaintiff must prove the statement at issue was made with “actual malice” (defined as either knowledge that the challenged statement is false or reckless disregard for the truth, *New York Times Co v Sullivan*, 376 US 254, 280 (1964)) and further, such “actual malice” must be established by clear and convincing evidence [*Mahoney v Adirondack Publishing Co.*, 71 NY2d 31, 39 (1987); *Gross v New York Times Co.*, 281 AD2d 299 (1st Dept), lv app den 96 NY2d 716

(2001); *T.S. Haulers v Kaplan*, 295 AD2d 595, 598 (2d Dept 2002)].

This standard of clear and convincing evidence applies even on a summary judgment motion [*Freeman v Johnston*, 84 NY2d 52, 56-57, cert den 513 US 1016 (1994)]. It is a “daunting” standard [*Gross v New York Times Co.* at 299, citing *McFarlane v Esquire Magazine*, 74 F3d 1296, 1308, cert den 519 US 809 (1996)], and is not met easily. The failure to investigate the source of a statement [*Suozzi v Parente* at 102], or the misinterpretation of a source [*Khan v New York Times Co., Inc.*, 269 AD2d 74 (1st Dept 2000)], is insufficient to establish actual malice. Rather than just negligence, the record must contain direct evidence that a defendant purposefully avoided the truth [see *Sweeney v Prisoners’ Legal Services of New York, Inc.*, 84 NY2d 786, 793 (1995)].

On the record before the Court on the prior motion and cross-motion, the moving defendants made out a *prima facie* case of no actual malice on the basis of the Newsday articles and their answers denying actual malice. The burden then shifted to plaintiff to present some evidence raising a triable issue of fact as to actual malice on the part of the moving defendants. No evidence was presented. Mr. Mondello’s verification of the complaint summarily alleging falsity does not suffice in opposition to the summary judgment motions.

Based on the foregoing, the former motion and cross-motion of the moving defendants for summary judgment dismissing the complaint must be **granted** in the absence of any evidence whatsoever of actual malice. Under these circumstances there is no need for the Court to consider the additional issues of qualified privilege and the failure to name proper parties.

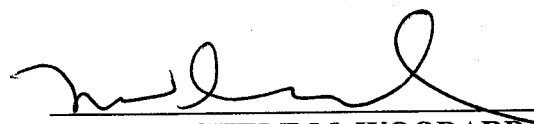
It is hereby,

ORDERED that the Complaint is **dismissed** as against all of the Defendants.

This constitutes the **DECISION** and **ORDER** of the Court.

DATED: December 10, 2007
Mineola, N.Y.

ENTER:


HON. MICHELE M. WOODARD
J.S.C.
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