Murphy v City of New York
2008 NY Slip Op 31926(U)
July 2, 2008
Supreme Court, New York County
Docket Number: 0106059/2006
Judge: Karen Smith
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[*1]

SCANNED ON 7/8/2008

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. KAREN SMITH** PART 62

Justice

Index Number : 106059/2006

MURPHY, JOHN J.

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 5/8/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the attached memorandum decision and order.

FILED
JUL 08 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/29/08

KSS

HON. KAREN SMITH J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

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JOHN J. MURPHY,

Plaintiff,

-against-

CITY OF NEW YORK, BOARD OF TRUSTEES OF THE NEW YORK CITY EMPLOYEES RETIREMENT SYSTEM, MARTHA STARK, CHAIR, AND DEPARTMENT OF INVESTIGATION, VINCENT E. GREEN, SUPERVISING INSPECTOR GENERAL,

Defendants.

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Index No.: 106059/06
Motion Seq.: 002
Motion Date: 5/8/08

DECISION AND ORDER

FILED
JUL 08 2008
COUNTY CLERK'S OFFICE
NEW YORK

PRESENT: KAREN S. SMITH, J.S.C.:

Defendants', City of New York, Board of Trustees of the New York City Employees' Retirement System, Martha Stark, Department of Investigation, and Vincent E. Green (collectively "defendants"), motion for summary judgment, dismissing plaintiff's complaint, is granted for the reasons stated more fully below.

Plaintiff brought the instant action to recover for defendants' alleged defamation, interference with profession and employment, and violation of New York City Charter §§ 803 and 805, in the circumstances leading up to his retirement as Executive Director of the New York City Employees Retirement System ("NYCERS"). Defendants, collectively, now move for summary judgment pursuant to CPLR § 3212, dismissing plaintiff's complaint in its entirety.

In support of their motion, defendants submit: 1) the EBT of Martha Stark; 2) the EBT of plaintiff; 3) an anonymous letter to the NYCERS Board of Trustees, dated June 1, 2004; 4) a NYCERS "organizational chart"; 5) a copy of Executive Order No. 16; 6) a letter from defendant

Stark to defendant Vincent Green dated June 21, 2004; 6) the EBT of defendant Green; 7) a letter from Green to Stark dated March 1, 2005; 8) a portion of the NYCERS Employee Handbook; 9) a memorandum from Karen Mazza, NYCERS' general counsel, to "All Staff" dated December 9, 2002; 10) a "Receipt for Employee Handbook" signed by plaintiff and dated October 8, 2002; 11) a letter by plaintiff to new NYCERS employees and included with the Employee Handbook, undated; 12) a string of emails between Stark and plaintiff, dated March 9, 2005; 13) a string of emails between Stark and plaintiff, dated March 16-17, 2005, including a letter from plaintiff to the NYCERS Board of Trustees, sent to Stark as an attachment to an email; and 14) the affirmation of plaintiff's counsel, which was submitted to the Court on his prior motion to amend the complaint.

Plaintiff opposes the motion and submits the following: 1) plaintiff's resume; 2) NYCERS' organizational chart; 3) the anonymous letter send to the NYCERS Board of Trustees, dated June 1, 2004; 4) a letter from Stark to Green dated June 21, 2004; 5) handwritten notes of an interview with plaintiff by the Department of Investigations; 6) a letter from Green to Stark, dated March 1, 2005; 7) a letter from Astrid B. Gloade of the City of New York Conflicts of Interest Board, to Green, dated May 31, 2005; 8) the EBT of Green; 9) a series of newspaper articles plaintiff alleges contain defamatory allegations about him; 10) a separate news article that plaintiff alleges contains defamatory allegations about him; 11) the EBT of Carol De Freitas, an investigator with the Department of Investigations; 12) employment evaluations of Niki Browne; 13) a memorandum of an interview written by De Freitas, dated July 30, 2004; 14) a memorandum of an interview written by De Freitas, dated August 2004; 15) the EBT of Milton Aron, former Acting Executive Director of NYCERS; 16) a letter from Aron to Green, dated

April 15, 2005; 17) memorandum from Patrice Barnet to Kisha Shrouder regarding "work performance", dated December 22, 2003; 18) the EBT of Stark; 19) an undated letter from plaintiff to Stark; 20) Analytic Summary "Re: NYCERS Executive Director John Murphy"; 21) an email from Michael Musuraca to Diane Bratcher dated March 4, 2005; 22) the EBT of Diane Bratcher; 23) Plaintiff's Interrogatories to Non-Party Witness Leo Vallee, Defendants' Cross-Questions to the Deposition on Written Questions of Non-Party Leo Vallee, and Vallee's sworn responses to each; 24) memoranda to plaintiff from Aron and Niki Browne, dated June 9, 2004; 25) a portion of the EBT of non-party witness Martin Murphy; 26) a portion of the EBT of non-party witness Michael Sinclair; 27) a portion of the EBT of Roger Touissant; 28) memorandum by Daniel Lau, investigator with DOI, dated September 17, 2004; 29) EBT of Karen Mazza; 30) memorandum by De Freitas dated July 23, 2004; 31) an email from De Freitas to Kin Mak, dated July 26, 2004; 32) memorandum by De Freitas dated August 13, 2004; 33) a photocopy of a newspaper advertisement for Pension Administrator; 34) the EBT of Andronoki Browne; 35) an decision an order of the Hon. Doris Ling-Cohen, dated April 10, 2006, in plaintiff's separate Article 78 action; 36) portions of the EBTS of witnesses Martinez and Sparks.

The material facts are contained in the parties' motion papers and are not in serious dispute, unless noted below. Plaintiff John J. Murphy ("Murphy") was the Executive director of NYCERS between 1990 and March 2005, when he retired. In June 2004, NYCERS received an anonymous letter from a current employee alleging, *inter alia*, that Murphy was involved in a romantic relationship with a subordinate employee named Androniki Browne ("Browne"), who he had inappropriately promoted and, in addition, had hired Browne's "best friend", Felita Baksh, as NYCERS' Director of Human Resources under allegedly dubious circumstances. The

letter claimed that Browne's success at NYCERS - including a significant salary increase - was a direct result of her relationship with plaintiff, and that other employees were being overlooked or pushed out of NYCERS to make room for Browne's promotions.

In response to the anonymous letter, defendant Martha Stark ("Stark"), Chair of the NYCERS Board of Trustees, referred the matter to defendant Vincent Green ("Green"), Assistant Commissioner and Inspector General at the New York City Department of Investigations ("DOI") by letter dated June 21, 2004. Stark, on behalf of the Board of Trustees, asked Green to investigate two things: 1) "Did Androniki (Niki) Brown [sic], current Director of Administration improperly benefit from her alleged personal relationship with Mr. Murphy?" and 2) "Was Felita Baksh improperly hired as Director of Human Resources because of her friendship with Niki Browne?" Green and the DOI conducted an investigation and, by letter dated March 1, 2005, communicated the results to Stark. In the letter, Green states that a romantic relationship did exist between Murphy and Browne, and that Browne had received "several promotions and salary increases under the direction of Murphy during the time that he and Browne were romantically involved, possibly in violation of . . . the NYCERS Employee Handbook," but did not conclusively answer whether Browne improperly benefitted from her relationship with plaintiff. The DOI also found that some of the circumstances surrounding Baksh's hiring were inappropriate, but those allegations did not implicate plaintiff. Green stated that the findings were being referred to the New York City Conflicts of Interest Board ("COIB") in addition to the NYCERS Board of Trustees to determine appropriate action.

Stark gave a copy of Green's findings to Murphy on March 9, 2005. She then asked Murphy, via email, to attend the March 10, 2005 Board meeting to address the DOI's findings.

In response, Murphy emailed Stark disputing many of the DOI's findings, but admitting to having a romantic relationship with Browne and stating that he had specifically chosen not to be involved with personnel decisions regarding Browne to avoid opening himself up to accusations of favoritism or creating an appearance of a conflict of interest. Rather, he said, the decision to promote Browne to her current position was made by her immediate supervisor, Milton Aron, independently, and that he did not reveal his relationship with Browne to Aron because he did not want to "interfere with her promotion." However, Murphy did acknowledge that the relationship was "not good management policy" and that it created "an ongoing problem."

The NYCERS Board of Trustees met on March 10, 2005, at which time Stark provided each member with a copy of Green's letter[1] and Green made a presentation to the Board members regarding the findings of the DOI investigation in an executive session. According to Stark's deposition, she then went to plaintiff's office at the Board's request to discuss the report with him. During that exchange, Stark claims that plaintiff expressed his desire to retire from NYCERS and also to have an opportunity to address the Board. Plaintiff then met with the Board of Trustees at which time he admitted having a romantic relationship with Browne but denied making any personnel decisions as a result. Plaintiff requested and was granted the right to provide the Board with a written statement. The statement had to be submitted by March 16, 2005. According to Stark's EBT, after plaintiff left the meeting, the Board determined it would accept plaintiff's retirement effective June 30, 2005. Stark testified that she called plaintiff at home that night and informed him of the Board's acceptance, and that beginning the following

[1] There is some indication that some or all of the Trustees may have received a copy of the report on the night of March 9, 2005 by fax, but each of the Trustees at the meeting received a hard copy from Stark on March 10, 2005.

day, March 11, he would no longer serve as Executive Director. Stark testified that although he would not be Executive Director, she expected him to stay on to provide transition assistance to the Acting Executive Director until June 30, 2005. Plaintiff disputes Stark's version of events, as it pertains to the circumstances of his agreeing to retire, and claims that he was forced to retire. This dispute was the subject of a separate Article 78 proceeding, and is not material to the issues raised on this motion.[2] However, plaintiff also alleges that his offer to retire was conditioned on the Board agreeing to change what he determined were inaccuracies in the DOI's findings. Stark denies that plaintiff made such a demand at the Board meeting. Plaintiff filed his retirement papers the following day, on March 11, 2005.

In news articles in a variety of New York newspapers dated March 22, March 23 and March 24, 2005, and April 3, April 8, and April 30, 2005, the findings of fact and allegations contained in the DOI report were referenced. On March 23, 2005, the television channel "New York 1" aired a story about the newspaper coverage. Thereafter, plaintiff commenced this action, alleging that 1) defendants defamed him "by the illegal and wrongful public dissemination of the DOI Report which contained . . . defamatory and false statements"; 2) defendants "maliciously and wrongfully interfered with plaintiff's employment and profession . . . by the illegal and wrongful public dissemination of the DOI Report"; and 3) defendants violated their duties under New York City Charter §§ 803 and 805, which sections, plaintiff argues, mandated that the DOI Report be kept confidential. Defendants, collectively, now move for summary judgment pursuant to CPLR § 3212, dismissing plaintiff's complaint in its entirety.

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[2] See *Matter of Murphy v City of New York, et al.*, 35 AD3d 319 (1st Dept 2006); See also *Matter of Murphy v City of New York, et al.*, Decision and Order Entered May 24, 2006 (Index No. 109352/05) (Hon. Doris Ling-Cohan).

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in an admissible form to demonstrate the absence of any material issues of fact. (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1987]). Once the movant has made such a showing, the burden then shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of any material issues of fact requiring a trial of the action. (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Absolute Immunity

Defendants first argue that plaintiff's cause of action for defamation must be dismissed because the DOI Report is protected by absolute privilege.

"The privilege of absolute immunity is bestowed upon an official who is 'a principal executive of State or local government or is entrusted by law with administrative or executive policy-making responsibilities of considerable dimension.'" (*Firth v State of New York*, 12 AD3d 907 [3d Dept 2004], *lv denied,* 4 NY3d 709 [2005]; quoting *Stukuls v State of New York*, 42 NY2d 272, 275 [1977]). This privilege "extends to those of subordinate rank who exercise delegated powers." (*Id., quoting Ward Telecom. & Computer Services v State of New York*, 42 NY2d 289, 292 [1977]).

Defendants argue that DOI is both 1) delegated executive responsibilities of investigating misconduct in City agencies, and 2) charged by law with administrative or executive policy-making responsibilities comparable to those described by the Appellate Division, Third Department, in *Firth v State of New York*. (12 AD3d 907, 908 [3d Dept 2004], *lv denied*, 4 NY3d 709 [2005]). In *Firth*, the New York Office of the State Inspector General ("OSIG") was found to be cloaked with absolute immunity, where it had conducted an investigation of the Department

of Environmental Conservation's Law Enforcement Division and its subsequent report, allegedly containing defamatory statements about the Division's former director, was later published on the Internet. (*Id.* at 907). The court explained that "[a]n executive order created OSIG to fulfill the Governor's statutory duty to investigate agencies of defendant to assure their proper management . . . rendering OSIG a delegatee of the Governor." (*Id.* at 908, *citing* Executive Order [Pataki] No. 39, 9 NYCRR 5.39; Executive Law § 6). The Court also noted that, even if OSIG had not been a delegatee of the governor, its power to, *inter alia*, subpoena witnesses; administer oaths; require production of documents; compel agency employees and officers to submit to questions; remove individuals for refusal to cooperate in its investigations; recommend remedial action; and recommend amendment of policies and procedures, makes OSIG more than a mere investigatory agency, like a police force. Rather, OSIG's "policy-making responsibilities of considerable dimension" are sufficient to warrant absolute privilege. (*Firth v State of New York*, 12 AD3d 907, 908 [3d Dept 2004], *quoting Stukuls v State of New York*, 42 NY2d 272 [1977]).

Plaintiff argues that defendants seek to extend the law of absolute immunity far beyond what is warranted, and beyond that supported by precedent. According to plaintiff, absolute immunity is afforded only to judges and the highest government officials, or to government officials who have been delegated judicial or quasi-judicial functions. However, the cases relied on by plaintiff for this proposition are distinguishable and do not support a finding that the DOI's reports are not protected by immunity.

Plaintiff equates DOI investigations with police-like investigations, which have not been afforded absolute immunity. In support of his position, plaintiff cites the decision in *Mahoney v*

Temporary Comm. of Investigation of the State of New York (165 AD2d 233 [3d Dept 1991]), which, according to plaintiff, stands for the proposition that because DOI does not, itself, adjudicate the results of its investigations and does not have the power to mandate or oversee its policy recommendations, it is merely an investigatory body that should not be afforded absolute privilege. In *Mahoney*, however, the court specifically emphasized that the defendant there was a *temporary* commission, whose role was limited to investigating and reporting organized crime and racketeering, a role "essentially similar to those of a police force." (165 AD2d at 238). The Commissioner of DOI, on the other hand, is delegated the role of investigating, either on his or her own initiative or by request of the mayor's office or city council, *inter alia*, "the affairs, functions, accounts, methods, personnel or efficiency of any [City] agency," (NYC Charter § 803[a]). And no other officer or employee of the City may conduct such investigations without prior approval of the DOI (EO No. 16). Furthermore, the DOI is required to prepare a written report or statement of its findings, and provide such report or statement to the requesting party. (NYC Charter § 803[c]).

In addition to having all of the investigatory powers held by the OSIG in *Firth (supra)*, the DOI is also charged with assisting agency heads in establishing and maintaining standards of conduct and an efficient disciplinary system (EO No. 78 [1984] [amending EO No. 16]), advising each agency on establishment of formal and informal disciplinary proceedings, and has the power to force an agency to suspend such proceedings if it might interfere with its own investigations [EO No. 105 [1986] [amending EO Nos. 16 and 78]). This power goes far beyond merely investigatory functions consistent with that afforded a police force, and evidences the intent of the mayor to delegate "administrative or executive policy-making duties". (*Stukuls v State of New*

York, 42 NY2d 272 [1977]).

Plaintiff's reliance on *Anemone v Metropolitan Transit Authority*, (410 FSupp2d 255 [SDNY 2006]), is also misplaced. Plaintiff argues that the court in *Anemone* rejected absolute immunity for the MTA Inspector General because he "'does not functionally resemble a judge or prosecutor,'" (410 FSupp2d at 272). This finding, however, was made in the context of a federal civil rights claim under 42 USC §1983. The plaintiff in *Anemone* had no claim for libel or defamation, as in the instant case. In fact, in a footnote, the court expressly rejected the defendant's reliance on cases extending absolute immunity for state law defamation claims, explaining that the doctrine of federal absolute immunity at issue in that case is derived from Congress's original intent when it enacted §1983. (410 FSupp2d at 272, n. 7 [internal citation omitted]). The issue of absolute immunity under *state* law was not presented nor addressed in *Anemone*.

Finally, plaintiff argues that defendants have erroneously relied upon and mischaracterized the Appellate Division, First Department's decision in *Aquilone v City of New York, et al.*, (262 AD2d 13 [1st Dept 1999], *lv denied*, 93 NY2d 819 [1999]). The plaintiff in *Aquilone* was the Executive Director of Personnel of the Board of Education. After his retirement in 1999, the Deputy Commission of Investigation issued a report which concluded Aquilone had participated in a sham hearing and coverup of the felony sex crime conviction of a former co-employee. Plaintiff characterizes the court's holding in *Aquilone* as "premised on the fact that the Chancellor's statement's [sic] about the report were made in the discharge of responsibilities within the ambit of his duties as the highest official of the Board of Education. It is a quasi-judicial delegation by the highest official so that the publication was supported by prior

precedents. . . No similar authorization and delegation is involved in the case at bar." (Plaintiff's memorandum in opposition, p. 9).

The First Department's decision in *Aquilone*, however, makes absolutely no mention of "quasi-judicial delegation," and there is no discussion of any statements made by the Chancellor. Rather, the court's holding focuses solely on the report issued by the Deputy Commissioner of Investigation, and states without equivocation that "absolute privilege applies . . . . to the results of an official investigation into coverup of a sex crime committed by a public employee." (262 AD2d at 14). In addition, as defendants point out, the Deputy Commissioner of Investigation in *Aquilone*, whose report was determined to be absolutely privileged, is an appointee of the Commissioner of the DOI and derives his authority from the same delegated executive authority as is at issue in the instant matter. (See EO No. 11 [1990]; EO No. 34 [1992] [amending EO 11]; EO No. 15 [2002] [amending EO Nos. 11 and 34]). This Court's finding, then, that reports issued by the DOI in furtherance of its executive and statutory mandate are cloaked in absolute immunity from suit sounding in defamation, is wholly consistent with the First Department's holding in *Aquilone*.[3] As such, the DOI defendants have met their burden of establishing entitlement to judgment as a matter of law on this issue. As plaintiff has failed to raise an issue of fact, the DOI defendants are entitled to judgment in their favor on this cause of action.

Defamation Claims Against Non-DOI Defendants

While the case law makes it clear that neither the DOI nor defendant Green, an

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[3] Plaintiff, in his memorandum of law, argues that "Green published the report to defendant Stark, who published it to the defendants Board of Trustees." As NYC Charter § 803(c) *requires* that DOI provide a copy of its report and/or findings to the party requesting the investigation, and Stark requested the investigation as Chair of the Board of Trustees, plaintiff's contention that, by providing the Trustees a copy of the report, Stark engaged in a separate defamatory publication, is unsupported by the law.

investigator for DOI, can be liable to plaintiff for allegedly defamatory statements contained in the official report produced as a result of its investigation, the parties have cited to no case that directly addresses whether a third-party can be held liable for *re-publication* of a report for which the DOI has absolute immunity. The Court need not address this issue, as plaintiff is unable to establish all of the elements of defamation.

To succeed in a claim for defamation not involving a public figure, whether libel or slander, plaintiff must be able to prove the following: 1) a false statement; 2) published to a third party; 3) negligently; and 4) which either causes special damages to plaintiff or constitutes defamation *per se*. (*Dillon v City of New York*, 261 AD2d 34 [1st Dept 1999]). In the case of an action brought by a public figure, the plaintiff must also show that the allegedly defamatory statements were published with actual malice, not just negligence. (*Blum v State*, 255 AD2d 878 [4th Dept 1998], *lv denied*, 93 NY2d 802 [1999]). Plaintiff must plead "the particular words complained of . . . in the complaint," (CPLR § 3016[a]), and allege "the time, manner and persons to whom the publication was made." (*Dillon v City of New York, supra*; *Geddes v Princess Properties International, Ltd.*, 88 AD2d 835 [1st Dept 1982]).

In this case, plaintiff has alleged in his complaint five specific statements, taken verbatim from the DOI report, which he claims are libelous. However, he fails to identify the "time, manner and persons to whom the publication was made." Rather, he alleges that "[o]n or about March 10, 2005 the DOI Report and the anonymous letter were leaked to the press by defendants." While plaintiff alleges here that the anonymous letter, which was initially sent to DOI, was "leaked" to the press at the same time as the DOI Report, plaintiff has not included any allegedly defamatory statements made in the anonymous letter and does not state a claim for

defamation based on the contents of the anonymous letter in his complaint. Plaintiff also fails to allege which of the defendants actually published the DOI Report and to whom it was published. Even if this Court were to overlook plaintiff's lack of specificity in his complaint, in his opposition to this motion, plaintiff has failed to adduce any evidence that any of the defendants published the report and has submitted no evidence indicating to whom the defendants allegedly published it. Because the DOI defendants are cloaked in immunity, as discussed above, this element is particularly important. It is not sufficient for purposes of a defamation claim to make a blanket statement that one of the defendants published the report, because the defendants are different individuals and entities, some being protected by absolute immunity and others not.

Despite this lack of evidence of publication, plaintiff argues that the issue of publication has been decided in prior proceedings and cannot, therefore, be relitigated here. Plaintiff brought a separate Article 78 proceeding, before Hon. Doris Ling-Cohan, seeking, *inter alia*, a judgment declaring the defendants' actions a deprivation of a liberty interest under the Due Process Clause, entitling plaintiff to a name-clearing hearing. In her decision, declaring plaintiff entitled to a name-clearing hearing, Justice Ling-Cohan stated that the respondents did not challenge the fact that the DOI report had been "widely disseminated, which satisfies the publication requirement." (*Matter of Murphy v City of New York, et al.*, Index No. 109352/05 [Sup Ct, April 10, 2006], *aff'd* 35 AD3d 319 [1st Dept 2006]). On appeal, the Appellate Division, First Department found that respondents "concede[d] that the element of dissemination" was satisfied. Plaintiff nonetheless argues that the findings of Justice Ling-Cohan and the Appellate Division that the element of dissemination, in an action seeking a name-clearing hearing, means defendants cannot now challenge plaintiff's proof of publication in an action for defamation, under a theory of

collateral estoppel. This Court disagrees.

As plaintiff points out in his memorandum of law in opposition to the motion, collateral estoppel precludes a party from re-litigating in a subsequent action or proceeding, an issue clearly raised and decided in a prior action or proceeding, where there is an identity of issue and the issue was material in the first action or proceeding. (*Ryan v NY Telephone Co.*, 62 NY2d 494 [1984]). That is clearly not the case here. While "dissemination" is an element of a cause of action seeking a name-clearing hearing, the issue of dissemination is not identical to the issue of publication in a defamation action. The element of dissemination may be satisfied merely by showing that the false, stigmatizing information is in wide circulation or that "even the *likelihood* of dissemination" exists. (*Matter of Murphy v City of New York, et al.*, Index No. 100352/05, at p 13; *citing to Matter of Swinton v Safir*, 93 NY2d 758, 765 [1999]). While plaintiff proved, in the prior proceeding, that the DOI Report was in wide circulation, plaintiff was not required to prove "the time, manner and persons to whom the publication was made." (*Dillon v City of New York, supra*; *Geddes v Princess Properties International, Ltd.*, 88 AD2d 835 [1st Dept 1982]). In fact, to succeed on a claim of entitlement to a name-clearing hearing, plaintiff was not required to make a showing as to which of the defendants made the alleged publication, which is an important issue in the instant litigation. On the other hand, to succeed in his defamation claim against Stark or Green, individually, he must establish that he or she provided the report to a specific member of the media. To hold NYCERS or the City of New York liable under a theory of *respondeat superior*, plaintiff must also prove that the publication was made by an employee acting within the scope of his employment. (*Davis v City of New York*, 226 AD2d 271 [1st Dept 1996]). Plaintiff's argument that a jury should be allowed to determine who published the report,

based solely on the fact that defendants and plaintiff were the only individuals who possessed the report, is unpersuasive. In opposition to a motion for summary judgment, the plaintiff is required to "lay bare his proof," and an issue of fact will not be determined to exist based solely on surmise, conjecture or suspicions not supported by the admissible evidence. (*Shapiro v Health Ins. Plan of Greater New York,* 7 NY2d 56 [1959]).

As collateral estoppel does not apply in this instance, and as plaintiff has failed to properly plead his cause of action for defamation and has adduced no evidence to raise an issue of fact as to the "the time, manner and persons to whom the publication was made," (*Dillon v City of New York, supra*; *Geddes v Princess Properties International, Ltd., supra*), the defendants are entitled to summary judgment dismissing this cause of action.

Violation of New York City Charter §§ 803 and 805

Defendants seek summary judgment dismissing plaintiff's claim that they violated the New York City Charter §§ 803 and 805 by "leaking" the DOI's report to the public and to media sources. Section 803 enumerates the powers and duties of the commissioner of the DOI. Section 803(c) provides, *inter alia*, "For any investigation made pursuant to this section, the commissioner shall prepare a written report or statement of findings and shall forward a copy of such report or statement to the requesting party, if any."[4] Section 805 governs the conduct of

[4] NYC Charter § 803, "Powers and duties", provides:
a. The commissioner shall make any investigation directed by the mayor or the council.
b. The commissioner is authorized and empowered to make any study or investigation which in his opinion may be in the best interests of the city, including but not limited to investigations of the affairs, functions, accounts, methods, personnel or efficiency of any agency.
c. For any investigation made pursuant to this section, the commissioner shall prepare a written report or statement of findings and shall forward a copy of such report or statement to the requesting party, if any. In the event that the matter investigated involves or may involve allegations of criminal conduct, the commissioner, upon completion of the investigation, shall also forward a copy of his written report or statement of findings to the appropriate prosecuting attorney, or, in the event the matter investigated involves or may involve a conflict of interest or

investigations, and authorizes the DOI to compel attendance of witnesses, administer oaths, and examine witnesses, in association with an investigation or a hearing.[5] Plaintiff alleges in his complaint that, by publicly disseminating the DOI report, defendants violated a duty imposed by NYC Charter §§ 803 and 805 to keep the report confidential. Defendants move for summary judgment on the basis that neither section of the NYC Charter imposes a duty on it to keep its reports confidential, nor does either section provide for a private right of action to enforce their provisions.

Nothing on the face of either § 803 or § 805 imposes a duty upon the DOI to ensure the confidentiality of its final investigation reports.[6] Plaintiff argues, however, that case law supports his claim that there is a duty to protect the contents of such report from being made public. Although there is some case law finding that the DOI's investigatory materials and reports are "not open for public inspection," (*Blaikie v Borden Co.*, 47 Misc2d 180 [Sup Ct, New York 1965]), such cases were issued prior to the enactment of New York's modern Freedom of

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unethical conduct, to the board of ethics.
d. The jurisdiction of the commissioner shall extend to any agency, officer, or employee of the city, or any person or entity doing business with the city, or any person or entity who is paid or receives money from or through the city or any agency of the city.
e. The commissioner shall forward to the council and to the mayor a copy of all reports and standards prepared by the corruption prevention and management review bureau, upon issuance by the commissioner.

5 NYC Charter § 805, "Conduct of investigations", states:
a. For the purpose of ascertaining facts in connection with any study or investigation authorized by this chapter, the commissioner and each deputy shall have full power to compel the attendance of witnesses, to administer oaths and to examine such persons as he may deem necessary.
b. The commissioner or any agent or employee of the department duly designated in writing by him for such purposes may administer oaths or affirmations, examine witnesses in public or private hearing, receive evidence and preside at or conduct any such study or investigation.

6 Although plaintiff refers to the defendants collectively in his papers, as mentioned above, the defendants are not all under the same legal obligations nor are they protected by the same privileges or immunities. As plaintiff, in his opposition, does not make the argument that the non-DOI defendants had a duty to keep the report confidential pursuant to the NYC Charter, the Court addresses only the DOI's obligations under those provisions.

Information Law (Public Officers Law § 84 et seq., eff. January 1, 1978) ("FOIL"). The modern FOIL dramatically altered the responsibilities of government for making documents available for public inspection when it was enacted in 1977. As the court in *Sheehan v City of Binghamton*, (59 AD2d 808 [3rd Dept 1977]), made clear, while the earlier FOIL law enumerated only nine categories of documents required to be made available for public inspection, thereby limiting public access, the 1977 enactment provides that "[e]ach agency shall make available for public inspection and copying *all records*, except" those records falling under a limited number of exemptions. (Emphasis added.).

That the DOI is an agency subject to the provisions of New York's FOIL law is undisputable. The New York Department of State Committee for Open Government regularly issues advisory opinions regarding agencies' obligations under FOIL and has concluded, *inter alia*, that unless exempted under FOIL, the DOI must reveal the names of DOI employees who conducted an investigation once it has concluded (FOIL-AO-9399), communications between the DOI and the Department of State are subject to disclosure (FOIL-AO-4766), "closing memoranda" prepared by the DOI as a result of an investigation are presumptively accessible to the public (FOIL-AO-9399), and the DOI must disclose all written documents, including reports and memoranda if sought pursuant to a FOIL request (FOIL-AO-3656). As such, not only is plaintiff mistaken in his claim that the DOI has a duty to him to ensure the confidentiality of its investigative reports, but, as a matter of law, the DOI is obligated to make available for public inspection all documents not specifically exempted under FOIL. Accordingly, as defendants have sufficiently demonstrated that, as a matter of law, the DOI owes plaintiff no duty of confidentiality, and plaintiff has failed to raise an issue of fact requiring trial, defendants are

entitled to summary judgment on this cause of action.

Tortious Interference with Employment/Prospective Business Relations

Plaintiff's final cause of action alleges that defendants maliciously and wrongfully interfered with plaintiff's employment and profession through the illegal and wrongful public dissemination of the DOI report, which plaintiff contends was false and known to be false by defendants. Specifically, plaintiff alleges that he was in discussions with the MTA for a position as Pension Manager, a position he claims he could not obtain after the public dissemination of the DOI report. In November 2004, prior to the DOI report being issued, plaintiff met with two individuals from the MTA about the position, but states in his affidavit that he decided not to pursue the job because "it was clear that they were not contemplating a salary akin to that which I was receiving at NYCERS." On March 11, 2005, after meeting with the Board of Trustees on March 10, plaintiff contacted the MTA and discovered that the position was still open. When plaintiff expressed his continued interest in the job, he was told to send his resume, which he did. There was no communication between plaintiff and the MTA between the time he sent his resume and the time stories about him began appearing in the media. Plaintiff submits the EBT testimony of his brother, Martin Murphy, in support of his contention that he lost the MTA opportunity as a result of the DOI report becoming public. Martin Murphy testified to statements made to him by an employee of the MTA, which plaintiff claims can be "inferred" to mean the MTA decided not to pursue his application because of his recent "notoriety". However, such statements are hearsay evidence and not admissible. After the media reports came out, however, plaintiff claims his calls weren't returned and a follow-up letter was not responded to. Plaintiff further states that, despite sending out hundreds of resumes, even for entry-level positions, he has

been unable to secure employment.

To establish a claim of tortious interference with prospective economic advantage, "plaintiff must demonstrate that the defendant's interference with [his] prospective business relations was accomplished by 'wrongful means' or that defendant acted for the sole purpose of harming the plaintiff." (*Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 294 [1st Dept 1999], quoting *Glen Cove Assocs. V North Short Univ. Hosp.*, 240 AD2d 701, 702 [2d Dept 1997], *lv denied* 91 NY2d 801 [1997]). "'Wrongful means' includes physical violence, fraud, misrepresentation, civil suits, criminal prosecutions and some degree of economic pressure. . . ." (*Id.* at 300).

Plaintiff argues that defendants' interference was accomplished through allegedly defamatory publication of the DOI report, and offers no evidence of any other tortious means by which defendants interfered with his prospective business relations. However, as defendants have established as a matter of law, through submission of admissible evidence, that plaintiff cannot establish a cause of action for defamation and plaintiff failed to raise a triable issue of fact, plaintiff can point to no "wrongful means" by which defendants interfered. (See *Snyder v Sony Music Entertainment, Inc.*, 252 AD2d at 300). Likewise, while plaintiff alleges that he was unable to secure a position with the MTA after the DOI investigation became public, he has failed to submit admissible evidence that "but for" the defendants' actions, he would have secured the position. (*Snyder v Sony Music Entertainment, Inc.*, *id.*). The fact that plaintiff had submitted his resume to the MTA and that they had expressed some level of interest in the past, is not sufficient to satisfy plaintiff's burden of raising a triable issue of fact to defeat defendants' motion for summary judgment.

This Court has considered the parties' remaining arguments and found them unavailing.

Accordingly, it is;

ORDERED that this motion by defendants the City of New York, the Board of Trustees of the New York City Employees Retirement System, Martha Stark, Department of Investigation, and Vincent E. Green, is granted; it is further

ORDERED that, upon service of this decision and order, with notice of entry, the Clerk of the Court is directed enter judgment in favor of defendants; it is further

ORDERED that movant serve a copy of this decision and order, together with notice of entry, upon all parties, and upon the Clerk of the Court (60 Centre Street), the Clerk of the Trial Support Office (60 Centre Street), and the Clerk of the DCM Part (80 Centre Street)

The foregoing constitutes the decision and order of this court.

Dated: July 2, 2008

ENTER:

Hon. Karen S. Smith, J.S.C.