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

PRESENT: HON. PAUL G. FEINMAN PART 52

Index Number : 113299/2005
WESLEY, GWEN
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 113299/05
MOTION DATE 5-7-08
MOTION SEQ. NO. 002
MOTION CAL. NO. 9

this motion to/for SJ

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3, 4
Replying Affidavits	5

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
THE ANNEXED DECISION AND ORDER.

FILED
AUG 20 2008

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

Dated: 8-18-08

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: CIVIL TERM: PART 52

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In the Matter of the Claim of GWEN WESLEY, NEIL BLUTH, BETTIE KOLLOCK-WALLACE, RALSTON COY, SHEILAH BOBO, BARBARA THOMAS, JOSEPH SACCENTE, STEVE BERGER, HY GELLER, SAL MAZZOLA, ANNE MCNEILL, JANE MARTIN, ELEANOR LEONARD, RAY HASKINS, CONSTANCE LORENZO-HOLDER, CAROLE KARASIK, IRAIDA FUENTES, FLOYD GREENE, DORIS ROSADO, GEORGINA WILLIAMS, JANE DANAPAS, LYNETTTE BRINSON, ROBERT HICKSON, MARGO MCKENZIE, ROBERT HABERSKI, CHERYL C. JONES, CAROL DAVIDSON, NINA POWELL, DEBBIE HARRIS, BOMA JACK, CHARLES HARRINGTON, ALTHEA GIBSON-TREADWELL, and JUDITH SCOTT,

Plaintiffs,

against

THE CITY OF NEW YORK, BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK d/b/a THE DEPARTMENT OF EDUCATION OF NEW YORK CITY, JOEL KLEIN as Chancellor of the NEW YORK CITY DEPARTMENT OF EDUCATION, and JOHN/ JANE DOE (S) # 1-3 as individuals employed by the NEW YORK CITY DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK and/or THE CITY OF NEW YORK,

Defendants.

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Index Number 113299/05
Submission Date 5-7-08
Mot. Seq. Nos. 001, 002
Cal. Nos. 9, 10

DECISION AND ORDER

For the Plaintiffs:
Council of School Supervisors & Administrators
By: David N. Grandwetter, Esq.
16 Court Street, 4th Floor
Brooklyn NY 11241

For the Defendants:
Michael A. Cardozo, Esq.
Corporation Counsel of City of New York
By: Basil C. Sitaras, Esq.
Joanna R. Helferich, Esq.
100 Church Street
New York NY 10007

Papers considered in review of these motions to dismiss and for summary judgment:

	Papers	Numbered
Mot. Seq. 001	Notice of Motion, Affirmation, and Memo of Law	1, 2, 3
	Affirmation in Opp and Memo of Law	4, 5
	Reply Affirmation and Memo of Law	6, 7
Mot. Seq. 002	Notice of Motion/Affidavits/Exhibits and Memo of Law	1, 2
	Affirmation in Opp./Exhibits and Memo of Law	3, 4
	Defendants' Reply	5

PAUL G. FEINMAN, J.:

Defendants' motion to dismiss the amended complaint (motion sequence 001), and defendants' motion for summary judgment and dismissal of the complaint (motion sequence 002), are consolidated for purposes of decision.

In motion sequence 001, defendants moved pre-answer to dismiss the amended complaint pursuant to CPLR 3211 (a) (4), (5), and (7). By interim order dated December 13, 2006, the court granted the motion as to the first and second causes of action (breach of contract and intentional infliction of emotional distress) in an oral decision that was rendered on the record on that date. By the same interim order, the court converted the motion to dismiss as concerned the third cause of action (defamation) into a motion for summary judgment pursuant to CPLR 3211(c). The parties were given an opportunity to supplement their papers, which are the papers before the court now in motion sequence 002. At oral argument on May 7, 2008, the court granted the motion on the record as to five of the plaintiffs (Harris, Jack, Harrington, Gibson-Treadwell, and Scott) because they had failed to timely serve notices of claim upon the Department of Education pursuant to Education Law § 3813 (1). The court also dimissed the action in its entirety as to the City of New York on the grounds that it was not the proper entity to be sued. The court reserved decision as to the other plaintiffs and defendants. For the reasons which follow, defendants' motion is granted as to all plaintiffs and the complaint is dismissed in

its entirety.

Background

The 33 plaintiffs are or were employed by the New York City Department of Education (DOE), the governance structure responsible for the City School District of the City of New York. Prior to the commencement of this litigation, plaintiffs were all principals of public schools. Defendant Klein is chancellor of the Department of Education.

On June 28, 2004, the day after the last day of school for the 2003-2004 school year, defendants issued a page-and-a-half-long press statement entitled "New York City Department of Education Removes 45 Principals for Poor Performance," and subtitled "Schools Chancellor Klein Says Changes Reflect New Levels of Responsibility and Accountability for Principals." (Helferich Aff. in Supp. of Def. Mot. to Dismiss Ex. 2). The press release quoted the chancellor and another DOE official concerning the importance of principals in the DOE's Children First initiative. The statement indicated that 18 principals would leave the system permanently, 25 would return to previously held or other positions within the Department, and 2 were contesting the charges against them. It also explained that of the 16 tenured principals, 14 who were in danger of being formally charged and removed had agreed to retire, resign, or revert to a former or other position, while the other 2 were being formally charged with incompetence and were entitled to a hearing. It also stated that of the 29 probationary principals, 15 were formally discontinued and would return to previously held positions, 7 who were in danger of discontinuance retired, 5 agreed to return to lower positions, and 2 resigned prior to receiving formal notification of an unsatisfactory performance rating. No principal was identified by name in the press release.

Plaintiffs allege that members of the media, seeking further information, were directed by Chancellor Klein's communication office to make a Freedom of Information (FOIL) request for the names, and thereafter the Chancellor's staff also promptly made the names available (Complaint ¶¶ 27, 28).

At issue are the following three statements included in the press release:

- Forty-five New York City public school principals are being removed from their positions for poor performance, reflecting the emphasis on accountability in the Department of Education's Children First initiative, School Chancellor Joel I. Klein announced today.

- All of the principals had received or were in danger of receiving unsatisfactory ratings in their performance evaluations.

- " . . . Without question, we are looking to our professionals to step up and promote student achievement, raise the bar on professional development in teachers, and fill the leadership role in their school communities. . . ." *[n.b., part of a longer quotation by Chancellor Klein]*.

Plaintiffs allege that these statements were false, defamatory and made with actual malice and with knowledge that they were false, or made with reckless disregard for the truth. They contend that statements in the press release were made with the conscious intent to injure their professional reputations so that they will never again be hired as principals or in any other pedagogical position for which they are qualified (Complaint ¶¶ 45, 46, 48). They assert, according to the amended complaint, that 29 of the principals were rated satisfactory for the 2003-2004 school year (Complaint ¶ 23). Certain of the plaintiffs were probationary principals who agreed to resign or retire voluntarily; some alleged that they were promised satisfactory ratings so as to allow them to revert to their former licenses or retire with a satisfactory rating (Complaint ¶¶ 12, 13). Certain others were tenured principals who retired or who received

satisfactory ratings and reverted to a prior position so as to continue their careers (Complaint ¶ 12). Many of the principals voluntarily left their positions and did so earlier in the school year, or had retired with satisfactory performance ratings (Complaint ¶¶ 14, 25). Three tenured principals pursued remedies, with one entering an agreement that settled charges against her, and two undergoing fair hearings (Complaint ¶¶ 15-16).

After the prior rulings of the court, what remains is the third cause of action sounding in defamation, and defendants seek summary judgment and dismissal of this claim as well. They argue that because the press release was issued in the course of Chancellor Klein's official duties, the statements contained in the press release are cloaked with absolute immunity. They note that the press release was part and parcel of the ongoing efforts by the DOE to make important changes in the school system and to inform the City's parents of these changes that will presumably benefit their student children. They point to a December 2002 press release issued on behalf of New York City mayor Michael Bloomberg and Chancellor Klein about five months after the chancellor was appointed, which announced "sweeping initiatives to promote principal leadership and accountability" as part of a "multi-year reform effort," with five "immediate" actions including streamlining the principal selection process, reviewing the position of principal to increase focus on instruction, and enforcing the chancellor's authority to remove principals based on failure to perform, with the goal of removing "about 50 non-performing Principals by the end of the school year" (Pl. Not. of Mot. for Summ. J., Ex. *ZZZ*). Defendants also argue that the statements in the press release are true, and truth is a complete defense to a claim of defamation.

Plaintiffs argue in opposition that the statements are patently untrue, and proffer affidavits and documentation in support of their claims that many of them retired of their own accord, received satisfactory ratings, and even received merit-based performance bonuses. They contend that the June 2004 press release was part of a "public spectacle" that attempted to show that defendants were belatedly adhering to the mandate set by the December 2002 announcement (Grandwetter Aff. in Opp. to Def. Mot. for Summ. J. ¶ 8). They argue that defendants' statements should not be afforded absolute immunity because they were not warranted nor in the service of improvement of government as a whole. They further contend that defendants' underlying intentionality and malice is evidenced by the fact that the FOIL requests by the media were complied with within a day, rather than taking the normal weeks or even months that is allegedly typical of the Department of Education (Grandwetter Aff. in Opp. ¶ 7; see also Complaint ¶¶ 26, 30; see also, Grandwetter Aff. in Opp. Ex. 21, Gibbons Aff. ¶¶ 6, 7).

Legal Analysis

Summary judgment is appropriate when there is no genuine issue as to any material fact and the disposition of the causes of action may be decided as a matter of law (*Security Pacific Bus. Credit, Inc. v Peat Marwick Main & Co.*, 79 NY2d 695, *rearg denied* 80 NY2d 918 [1992]). To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in its (*GTF Mtkg, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 967 [1985]). Where a movant has demonstrated its entitlement to summary judgment, the burden of opposing such a motion is to demonstrate by admissible evidence the existence of a material issue of fact requiring a trial (*Zuckerman v City*

of New York, 49 NY2d 557, 563 [1980]). Bare conclusory allegations are insufficient to defeat a motion for summary judgment (*see, Thanasoulis v National Assn. for the Specialty Foods Trade, Inc.*, 226 AD2d 227 [1st Dept 1996]; *Lee v Weinstein*, 116 AD2d 700 [2d Dept], *lv denied* 68 NY2d 601 [1986]). It is insufficient to offer surmises, unsubstantiated allegations, or bare accusations (*Zuckerman v City of New York, supra,* at 557).

It is well settled that "public policy mandates that certain communications, although defamatory, cannot serve as the basis for the imposition of liability in a defamation action" (*Rosenberg v Metlife, Inc.*, (8 NY3d 359, 365 [2007] [internal quotations and citation omitted]). "'When compelling public policy requires that the speaker be immune from suit, the law affords an absolute privilege'" (*Rosenberg v Metlife*, at 365, quoting *Liberman v Gelstein*, 80 NY2d 429, 437 [1992]). Officials who are the principal executives of a state or local government or are entrusted by law with administrative or executive policy making "of considerable dimensions," are entitled to complete immunity from liability for defamation (*Stukuls v State of N.Y.*, 42 NY2d 272, 278 [1977]). An absolute privilege is "generally is reserved for communications made by individuals participating in a public function, such as executive, legislative, judicial or quasi-judicial proceedings." (*Rosenberg v Metlife* at 365). The privilege encompasses only those statements made in discharge of the official's responsibilities about matters "which come within the ambit of those duties." (*Clark v McGee*, 49 NY2d 613, 617 [1980]).

The absolute privilege is intended to protect those "who bear the greatest burdens of government or those to whose official functioning it is essential that they be insulated form the harassment and financial hazards that may accompany suits for damages by the victims of even

malicious libels or slanders." (*Stukuls*, at 278). Where the privilege can properly be invoked, even a claim of malice will not revoke the privilege (*Toker v Pollak*, 44 NY2d 211, 219 [1978]). Nonetheless, a public official who is otherwise entitled to immunity can be sued if the subject of the communication is unrelated to matters within the official's competence or "if the form of the communication – e.g., a public statement – is totally unwarranted" (*Clark v McGee*, 49 NY2d at 618-619 [quotation and citation omitted]).

The courts in New York recognize an absolute privilege for members of Boards of Education (*see, Lombardo v Stoke*, 18 NY2d 394 [1966] [holding that an allegedly libelous press statement about certain unnamed faculty members, authorized and approved by the chairman of the Board of Higher Education of the City of New York and issued in response to charges of religious discrimination, was absolutely privileged]; *Smith v Helbraun*, 21 AD2d 830 [2d Dept. 1964] [absolute privilege was held to extend to the publication in the minutes of the Peekskill Board of Education of an allegedly libelous resolution, which addressed the Board's finding that the plaintiff should be relieved of his duties as Superintendent of Schools and recited the reasons for the action]). Here, contrary to plaintiffs' contention, it must be held that the chancellor of the New York City Department of Education, who is "entrusted by law with administrative or executive policy-making responsibilities of considerable dimension" (*Stukels v State*, 72 NY2d at 278), is afforded absolute immunity for his statements made in the course of his professional duties. Nor can it be argued that the June 28, 2004 press release concerned matters unrelated to the chancellor's professional competence.

Plaintiffs contend that defendants are not shielded from the consequences of their speech

because the form and mode of the communication was unwarranted. They contend that the chancellor's statements were not required by law, nor were they made in response to a direct attack on the integrity of the Department of Education, unlike the situation in *Lombardo v Stokes* where the response of the Board of Higher Education to the widespread press coverage concerning alleged religious bias at Queens College, was to issue an allegedly libelous press statement explaining that certain disgruntled academics were spreading misinformation.

Plaintiffs' arguments are not persuasive. Even if technically correct that the June 28, 2004 press release was not in response to a "direct attack" on the Department of Education, there can be little quarrel that the end of a school term is an appropriate time for the chancellor to inform the city's citizens, in particular the parents of the children attending or soon to attend public schools, of efforts that had been made to improve the education system. The press release trumpeted the DOE's actions as part of the overarching Children First initiative, a cornerstone of which is high quality accountable principals (Def. Mot. for Summ. J., Ex. ZZZZ, press release of 12/11/2002). Despite plaintiffs' arguments otherwise, the release of the June 28, 2004, press release was not "totally unwarranted" (*Clark v McGee*, 49 NY2d at 618-619). Actions by the DOE to address the myriad of issues faced by the department are likely to be important and newsworthy. Moreover, a statement about the implementation of an important policy initiative cannot be found to have no benefit to the service of government (*see, Lombardo v Stoke*, 18 NY2d at 401). Therefore, defendants' motion for summary judgment and dismissal of the complaint must be granted. It is

ORDERED that defendants' motions to dismiss and for summary judgment (sequence

numbers 001 and 002) are granted and the complaint is dismissed in its entirety with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the clerk of the court is to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: August 18, 2008
New York, New York

Paul G. Feinman
J.S.C.