

Brown v County of Nassau

2009 NY Slip Op 32046(U)

August 24, 2009

Supreme Court, Nassau County

Docket Number: 18299/07

Judge: William R. LaMarca

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15

STEWART BROWN,

Plaintiff,

- against -

COUNTY OF NASSAU,

Defendant.

Motion Sequence #1
Submitted May 22, 2009
XXX

INDEX NO: 18299/07

The following papers were read on this motion:

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Defendant, COUNTY OF NASSAU (hereinafter referred to as the "COUNTY"), moves for an order, pursuant to CPLR §3212, granting it summary judgment dismissing the entire complaint. Plaintiff, STEWART BROWN, opposes the motion, which is determined as follows:

On October 27, 2006, plaintiff was a detective in the Nassau County Police Department. At that time, he was on vacation and was present with friends at a restaurant named Da Flava in Baldwin, New York. At approximately 2:30 AM, a shooting took place at the restaurant. At his deposition, plaintiff testified that he heard two (2) shots, and then

possibly a third shot. After the first shot, plaintiff looked around and saw two (2) persons in the vestibule, one with a gun in his left hand, and then plaintiff saw the flash of another shot. The victim started to slide down the vestibule wall, while the shooter ran to the exit. Plaintiff stated that he never saw the victim before the shooting. It appears that the victim died later that morning, and that the shooter was never apprehended.

According to plaintiff, immediately after the shooting, he ran to the exit, stepping over the victim, and went outside to see if he could locate the shooter (BROWN Transcript, p. 30). Plaintiff claimed that he ran down one block in vain pursuit of the shooter, but then, as he returned to the restaurant, he called 911 for assistance (BROWN Transcript, p.38). During the call to 911, plaintiff did not identify himself as a Nassau County police officer (Id).

Plaintiff testified that, upon his return to the restaurant, he went to aid the victim, but a retired corrections officer was already giving the victim aid (BROWN Transcript, p.39). Plaintiff stated that he stayed at the scene of the crime until the Nassau County police officers arrived, but he did not speak with them before leaving (BROWN Transcript, p.59, 61). He stated that he did not question the victim nor interview any witnesses before leaving (BROWN Transcript, p.56).

Plaintiff testified that he was outside getting some air at the time that the Nassau County police officers arrived because he wasn't feeling well (BROWN Transcript, p.69). He testified that, earlier in the evening, he had attended the "Detective of the Year" ceremony at Leonard's, where he consumed approximately six (6) vodkas with tonic, grapefruit juice, and lime (BROWN Transcript, p. 25), and that, after Leonard's, he went

to Café Moments in Elmont, New York, where he consumed approximately three (3) more of the same drink (BROWN Transcript, p. 22). He also testified that he had one more of said drink at Da Flava (BROWN Transcript, p. 23). In addition, he stated that he took Norvasc for high blood pressure (BROWN Transcript, p.70-71). Plaintiff stated that the woman he was with drove plaintiff and a friend named Leitz back to Café Moments, and that Leitz then drove plaintiff home. It appears that, later that day, plaintiff called and informed the Nassau County police department that he had been at the scene of a homicide (BROWN Transcript, p. 58).

On November 16, 2006, formal charges were brought against plaintiff and he was suspended without pay. On November 22, 2006, plaintiff plead guilty to charges of conduct unbecoming a police officer at the time of the shooting. In his Answer to Charges and Specifications, plaintiff stated that at the time of the incident he was "physically ill," "nauseous, light-headed, dizzy and weak" with a "feeling of general confusion." He attributed these feelings, which he claimed he never had before, to "the interaction of alcohol and Norvasc." He stated that after attempting "to give chase," calling 911, and waiting for the police to arrive, "I was unable to render further competent assistance."

Plaintiff was reinstated with pay, on December 16, 2006, but on restricted duty. Thereafter, on February 20 or 21, 2007, plaintiff put in his papers for retirement after twenty-one (21) years on the police force and retired on March 22, 2007. Plaintiff served the COUNTY with a notice of claim, on May 17, 2007, wherein he claimed that he was unfairly denied a "retirement package" of benefits. The action was commenced with the filing of the summons and verified complaint on October 12, 2007. The complaint contains

two (2) causes of action for libel on its face, two (2) causes of action for libel by extrinsic fact, and one (1) cause of action for breach of contract.

The libel claims are based upon newspaper articles describing the events of October, 27, 2006 and plaintiff's conduct with respect to the unsolved homicide. The first article was published in the Daily News, on November 14, 2006, authored by Richard Weir and Ernie Naspretto. It was entitled "Nassau Cop busted for making bad call from scene of slaying." The article described plaintiff as an "off-duty Long Island detective who placed an anonymous 911 call from a murder scene - but didn't spring into action." The article reported that, according to "a source", BROWN called 911 but didn't identify himself and didn't "come forward until several days later." According to the article, plaintiff was caught on video at the time of the shooting.

The second article was published in Newsday, authored by Joye Brown and was entitled: "Turning up volume of cop's silence." This article quoted Nassau Police Commissioner James Lawrence saying: "I can't talk specifically about the case," but that "someone who took an oath to serve and to protect, and who violated that oath, would turn my stomach." The article criticized plaintiff for failing to assist the victim and secure the crime scene. It also stated that plaintiff "did nothing to help identify or apprehend the suspect." According to this article, plaintiff also "did not tell supervisors until days later that he had been at the restaurant," and that "area surveillance cameras had recorded some of the action outside the bar."

On the instant motion, the COUNTY seeks summary judgment dismissing the entire complaint. Summary judgment is the procedural equivalent of a trial (*Capelin Assoc., Inc.*

v Globe Mfg. Corp., 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A. 1974]). The function of the court in deciding a motion for summary judgment is to determine if triable issues of fact exist (*Matter of Suffolk Cty Dept. of Social Services on behalf of Michael V. v James M.*, 83 NY2d 178, 608 NYS2d 940 [C.A. 1984]). The proponent must make a *prima facie* showing of entitlement to judgment as a matter of law (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 760 NYS2d 397, 790 NE2d 772 [C.A. 2003]); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923, 501 NE2d 572 [C.A. 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, 427 NYS2d 595, 404 NE2d 718 [C.A. 1980]). Summary judgment will not be defeated by mere conclusions or unsubstantiated allegations (*Zuckerman v City of New York, supra*).

Summary judgment is particularly favored in libel cases (*Immuno AG v Moor-Jankowski*, 77 NY2d 235, 566 NYS2d 906, 567 NE2d 1270 [C.A. 1991], cert den 500 US 954). A writing is libelous *per se* if it tends to expose the plaintiff to public contempt, ridicule, aversion, or disgrace, or induce an evil opinion in the minds of right-thinking persons and to deprive him of their friendly intercourse in society (*Rinaldi v Holdt, Rinehart & Winston, Inc.*, 42 NY2d 369, 397 NYS2d 943, 366 NE2d 1289 [C.A. 1977], cert den 434 US 969). A claim of libel *per se* does not require an allegation of special damages (*Id.*). A writing that is not libelous on its face may be actionable without an allegation of special damages where the writing is susceptible to a libelous meaning by reference to extrinsic facts (*Miller v Radin*, 32 AD2d 1046, 303 NYS2d 749 [2nd Dept. 1969], citing *Hinsdale v*

Orange County Publications, Inc., 17 NY2d 284, 270 NYS2d 592, 217 NE2d 650 [C.A. 1966]).

It is for the Court to decide whether the challenged writing is “reasonably susceptible of a defamatory connotation” (*Golub v Enquirer/Star Group, Inc.*, 89 NY2d 1074, 659 NYS2d 836, 681 NE2d 1282 [C.A. 1997]; *Silsdorf v Levine*, 59 NY2d 8, 462 NYS2d 822, 449 NE2d 716 [C.A. 1983], cert den 464 US 831). The entire communication and the circumstances of its issuance must be considered in terms of its effect upon the ordinary reader (*Silsdorf v Levine, supra*).

Of course truth is a complete defense to an action for defamation (*Rosenberg v MetLife Inc.*, 8 NY3d 359, 834 NYS2d 494, 866 NE2d 439 [C.A. 2007]; *Kamalian v Reader’s Digest Assn. Inc.*, 29 AD3d 527, 814 NYS2d 261 [2nd Dept. 2006]), and since only assertions of fact are capable of being proven false, a libel action cannot be premised upon an expression of opinion (*Brian v Richardson*, 87 NY2d 46, 637 NYS2d 397, 660 NE2d 1126 [C.A. 1995]). Even if a publication is not literally or technically true in all respects, the defense of truth applies if the publication is “substantially true” (*Carter v Visconti*, 233 AD2d 473, 650 NYS2d 32 [2nd Dept. 1996], lv app den, 89 NY2d 811 [C.A. 1997]; see *Matovcik v Times Beacon Record Newspapers*, 46 AD3d 636, 849 NYS2d 75 [2nd Dept. 2007]; *Miller v Journal-News*, 211 AD2d 626, 620 NYS2d 500 [2nd Dept. 1995]).

Statements to the press by a municipal spokesperson may be qualifiedly privileged (*Wyllie v District Attorney of County of Kings*, 2 AD3d 714, 770 NYS2d 110 [2nd Dept. 2003]; *Chase v Grilli*, 127 AD2d 728, 512 NYS2d 125 [2nd Dept. 1987]), pursuant to the “common interest privilege” (*Liberman v Gelstein*, 80 NY2d 429, 590 NYS2d 857, 605

NE2d 344 [C.A. 1992]). Once the privilege has been extended, it may only be dissolved upon a showing of malice (*Id.*), which according to the common law means spite or ill will (*Id.*), and according to constitutional law means knowledge of falsity or reckless disregard of whether it was false or not (*Lieberman v. Gelstein, supra*).

After careful review of the two (2) newspaper articles in their entirety, and giving them the fair reading of the average reader, it is the judgment of the Court that defendant has presented a *prima facie* case that the articles are protected by a combination of opinion, substantial truth, and qualified privilege. The burden then shifted to plaintiff to raise a triable issue of fact as to factual substance, falsity and malice. The Court finds that plaintiff has failed to meet that burden.

The assertion that plaintiff did not “spring into action,” and the comment by Commissioner Lawrence about what would “turn” his stomach, are plainly opinion. As to the remainder of the articles, plaintiff’s own admissions and the undisputed facts establish that the articles were substantially true. Plaintiff did not apprehend the shooter, he did not give first aid to the victim, he did not identify himself when he called 911, and he did not secure the crime scene. He did plead guilty to conduct unbecoming a police officer, and he was suspended without pay. He admitted at his deposition that at the time of the incident he was not fit for duty (BROWN Transcript, p. 132), with the explanation that he was not on duty. While the statement in the Newsday article, that plaintiff did not assist the victim, is technically incorrect in the broadest meaning of the language used because plaintiff did call 911 to request an ambulance, this technicality is remedied because plaintiff’s call to 911 was reported in the Newsday article.

Under all of the circumstances of this case, the Court finds that the remainder of the statements on which the articles were allegedly based are qualifiedly privileged pursuant to the "common interest privilege, and that plaintiff has failed to raise an issue of fact as to the existence of malice. Accordingly, the COUNTY is entitled to summary judgment dismissing plaintiff's first, second, third, and fourth causes of action for libel.

In the fifth cause of action, plaintiff alleges a claim for breach of "the terms of his contract of employment with the Nassau County Police Department" for his "retirement package benefits" (Complaint, ¶57), including monetary compensation of at least \$200,629.00, a pistol permit, and retired police identification badge. Plaintiff claims that he is entitled to these benefits, and that defendant has withheld them unfairly.

In support of its motion to dismiss, the COUNTY relies on the collective bargaining agreement ("CBA", annexed as Exhibit "O" to the moving papers) which precludes termination pay "to any employee who separates from service for cause or with charges pending" (CBA §8.12-1[B]). Defendant asserts that this provision is applicable to this plaintiff because charges were pending and the investigation by the Internal Affairs Unit of the Nassau County Police Department was continuing at the time of plaintiff's retirement due to the fact that the homicide investigation was continuing. According to defendant, plaintiff simply chose to retire during the investigations, thereby making himself ineligible to collect termination benefits.

In opposition, plaintiff argues that he was never advised of §8.12-1(B), he never read the contract (BROWN Transcript, p57) and he was never given a copy of the CBA (BROWN Transcript, pp. 57, 86). Furthermore, plaintiff testified at his deposition that he

thought that the penalty or discipline given to him after the investigation was his thirty (30)day suspension without pay (BROWN Transcript, p. 64). In other words, it is plaintiff's position that, even if he had a copy of the CBA, he would not have considered the importance of §8.12-1(B), as he was unaware that the investigation was ongoing and that charges were pending.

However, before the substance of plaintiff's contract claim can be considered, defendant has raised a procedural hurdle. The COUNTY seeks summary judgment dismissing this fifth cause of action on the ground set forth in its tenth affirmative defense, that plaintiff failed to exhaust his administrative remedies by failing to file a grievance with respect to the nonpayment of his termination benefits.

"When an employer and a union enter into a collective bargaining agreement that creates a grievance procedure, an employee subject to that agreement may not sue the employer directly for breach of that agreement but must proceed, through the union, in accordance with the contract" (*Ambrosino v Village of Bronxville*, 58 AD3d 649, 873 NYS2d 312 [2nd Dept. 2009], quoting *Matter of Board of Educ., Commack Union Free School Dist. v Ambach*, 70 NY2d 501, 522 NYS2d 831, 517 NE2d 509 [C.A. 1987], cert den 485 US 1034 [1988])). Consequently, the Court turns to the language of the CBA to determine if a grievance was required.

A grievance, is defined in the CBA as follows:

"Grievance" means any dispute between the Association or an employee and the County with respect only to the meaning or interpretation of a provision of this Agreement. It shall not include disciplinary proceedings. It shall not include disciplinary proceeding or any other matters which are reviewable under administrative procedures established by the law or the rules of the Nassau County Civil Service.

CBA, §1.5. In contrast, the term “Disciplinary Proceeding” is defined in the CBA as follows:

“Disciplinary Proceeding” means an administrative proceeding charging an infraction or violation of the law or of departmental rules commencing with the service of charges and specifications upon the employee and culminating in the final determination of the Commissioner of Police.

CBA §1.3.

Contrary to plaintiff’s assertion, the Court finds that, here, the dispute over plaintiff’s termination benefits is plainly a dispute with respect to the meaning and interpretation of CBA §8.12-1(B), and thereby the proper subject of a grievance (see, *Matter of O’Connor v Police Commission of Town of Clarkstown*, 301 AD2d 654, 753 NYS2d 885 [2nd Dept. 2003]; see also, *Sheridan v Town of Orangetown*, 21 AD3d 365, 799 NYS2d 575 [2nd Dept. 2005]). Plaintiff cannot turn his dispute over benefits into a “Disciplinary Proceeding” simply because it is related to the ongoing investigation by the Internal Affairs Unit.


Where a collective bargaining agreement is clear and unambiguous on its face, it must be enforced according to the plain meaning of its terms (*Civil Service Employees Assn, Inc. v Plainedge Union Free School District*, 12 AD3d 395, 786 NYS2d 59 [2nd Dept. 2004]). Based on the plain meaning of the CBA, plaintiff’s failure to file a grievance and exhaust his administrative remedies in connection with termination pay denied at the time he retired, bars the fifth cause of action for breach of contract (*Ambrosino v Village of Bronxville, supra*; *Sheridan v Town of Orangetown, supra*; *Matter of O’Connor v Police Commission of Town of Clarkstown, supra*). Based on the foregoing, it is hereby

ORDERED, that the COUNTY’s motion for an order granting it summary judgment dismissing the complaint in its entirety is granted.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: August 24, 2009



WILLIAM R. LaMARCA, J.S.C.

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ENTERED
AUG 31 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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