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SHORT FORM ORDER

INDEX No. 08-45272

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Supreme Court

Mot. Seq. # 001 - MG; CASEDISP

KIERA TALLEY,	:	ILANA L. DEUTSCH, ESQ.
	:	Attorney for Plaintiff
Plaintiff,	:	11 Middle Neck Road, Suite 310
	:	Great Neck, New York 11021
- against -	:	
	:	FINDER AND CUOMO, LLP
HELEN MOSS,	:	Attorney for Defendant
	:	9 East 38th Street
Defendant.	:	New York, New York 10016

Upon the following papers numbered 1-11 read on this motion to dismiss the complaint ; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 5; Notice of Cross-Motion and supporting papers ; Answering Affidavits and supporting papers 6-7; Replying Affidavits and supporting papers 8-10 ; Other 11- Deft. Mem/Law; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the defendant, Helen Moss, for an order dismissing the complaint pursuant to CPLR 3211(a)(7)for failure to state a cause is granted and the complaint is dismissed.

This action is premised on claims of defamation, more specifically, libel per se and for violation of New York Civil Rights Law §51, for statements made by the defendant, Helen Moss involving the plaintiff, Kiera Tally. It is claimed that Helen Moss was running as a candidate for election to the Brentwood School Board of Education on or about May 21, 2008 and was also a member of the Residents for Better Schools of Brentwood and North Bay Shore, New York. It is claimed that on the eve of the election a newsletter was distributed to every home in Brentwood from the Residents for Better Schools of Brentwood and North Bay Shore, New York, that the newsletter contained a photograph of the plaintiff next to a photograph of her father, George M. Talley, President of the Board, and that she did not give permission to the defendant to use her picture. The plaintiff was teaching at the Brentwood Union Free School District in November 2007 when three individual members of the Board abstained from voting on the plaintiff's teaching contract leaving the plaintiff without employment.

The words set forth in the mailing that the plaintiff claims are defamatory are "Newsday blasts Talley for his blatant abuse of power into trying the bully Board members into hiring his daughter.

"Nepotism charges split the Board-bid to create job for daughter of Brentwood schools president fall short; lawyer hired to investigate board members who opposed move." "Our efforts should be put toward improving our schools not settling Talley lawsuits. The Talley lawsuit will undoubtedly cost the taxpayers well over $100,000! What a waste!" "Tell George Talley to stop wasting our hard earned tax money on frivolous (sic) lawsuits."

The plaintiff claims that these statements are false and that on May 20, 2008, Helen Moss, along with her running mate, Joseph Fritz, sent out an additional letter to the Brentwood community that reads, "4. We lead by example and want to stop School Board Strife that started when George Talley insisted in hiring his daughter, a person who did not pass have (sic) the required test at the time of the hiring. Simply put, if I did not pass the New York State Bar Exam I could not represent clients. The same rules apply with teachers including George Talley's daughter."

The plaintiff further claims in her complaint that in or about May 2006 that she received her dual certification master's degree in elementary education and special education with a concentration in autism from Long Island University. Upon beginning a teaching position with Brentwood Union Free School District in 2006, she was given two years to successfully pass the New York State certifications examinations, a requirement for all New York State teachers, and in or about July 2007, she passed the last installment of her certification test and became fully certified as a teacher in New York State. In the supporting affidavit, it is claimed that in or about July 2007, Kiera Talley was offered a probationary contract for the 2007-2008 school year. In November 2007, three members of the Board abstained from voting on the plaintiff's teaching contract and consequently the plaintiff lost her job. Defendant Moss was not a member of the school board at the time and did not run for a board position until the following year at the May 2008 election.

Pursuant to CPLR §3211(a)(7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs ***(Leon v Martinez***, 84 NY2d 83). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action ***(Guggenheimer v Ginzburg***, 43 NY2d 268 [1977]). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (***Matter of Board of Educ., Lakeland Cent. School Dist. of Shrub Oak v State Educ. Dept.,*** 116 AD2d 939 [1986]). Only affidavits submitted by the plaintiff in support of the causes of action may be considered on a motion of this nature (***Rovello v Orofino Realty Co.,*** 40 NY2d 633 [1976]). On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (***Leon v. Martinez***, 84 NY2d 83 [1994]; ***Thomas McGee v City of Rensselaer***, 663 NYS2d 949 [1997]). Upon a motion to dismiss, a pleading will be liberally construed and such motion will not be granted unless the moving papers conclusively establish that no cause of action exists (Chan ***Ming v Chui Pak Hoi et al,*** 163 AD2d 268 [1990]).

Turning to the plaintiff's claims that the defendant violated New York Civil Rights Law §51, it is determined that the plaintiff has failed to state a cause of action. New York Civil Rights Law §51 Action for injunction and damages, provides in pertinent part that "Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written

consent first obtained as above may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait, picture or voice in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages."

Sections 50 and 51 of the Civil Rights Law prohibit merely the commercial exploitation of a person's name, portrait or picture without written consent and the applicability of the statutes is confined to such commercial situations (***Blair v Union Free School Dist.,*** 67 Misc 2d 248 [1971]). Civil Rights Law should be interpreted realistically, giving effect to the purpose as well as the language of the statute (***Namath v Sports Illustrated,*** 80 Misc 2d 531 [1975]). A statute, as with a decisional principle of law, should be applied as closely as possible to the operative facts, viewed realistically in the stream of events, giving effect to the purpose as well as the language of the statute (***Booth v Curtis Publishing Company et al,*** 15 AD2d 343 [1962]). Section 51 of the Civil Rights Law does not, of course, proscribe the use of an individual's name or picture in connection with a news article of general interest (***Hill v Hayes et al,*** 15 NY2d 986 [1965]). New York Civil Rights Law sections 50 and 51 recognize and enforce the right of a person to control the use of his name or portrait by others so far as advertising or trade purposes are concerned (***Binns v The Vitagraph Company of America,*** 210 NY 51 [1913]). The statutes were designed to prohibit commercial exploitation not extortion (***Cardy v Maxwell et al,*** 9 Misc 2d 329 [Supreme Court of New York, Special Term, New York County 1956]).

The plaintiff's picture appeared along with her father's picture as part of the Newsday publication to which the mailing by the defendant refers. In that the plaintiff's picture and name were not used in a commercial situation, but instead were used on a matter of public concern involving a candidate, Moss for the school board, and the school board's prior vote denying Kiera Talley a permanent position in a teaching slot, it is determined that the cause of action premised upon the defendant's alleged violation of New York Civil Rights Law §51 fails to state a cause of action as a matter of law. The plaintiff's name was not mentioned in either publication and the plaintiff's picture was not used for commercial purposes within the meaning of the statute and the plaintiff does not allege the same in the complaint. Based upon the foregoing, it is determined that the plaintiff has failed to state a second cause of action.

Accordingly, the second cause of action is dismissed with prejudice.

It is determined that the defendant, Helen Moss is deemed a public official for the purpose of defamation law based upon the position requiring a public vote, the broad authority over the format of education programs employed in public schools, and the significant governmental power over public educators and the students within the district; there is a high degree of public debate in the election process within the community; and there is the interaction of parents and taxpayers in the community in the selection and voting of the board candidates (*see generally,* ***Jee v New York Post Co., Inc. et al,*** 176 Misc2d 253 Supreme Court of New York, New York County 1998], citing to ***Jiminez v United Fedn. of Teachers,*** 239 AD2d 265, appeal dismissed 90 NY2d 890 [1997]).

As a public official, the elements required in a defamation action are that the defendant made a

defamatory statement; that the statement was published; that the statement was false; and that the statement was made with actual malice, i.e. knowing falsity or reckless disregard of the truth, and that the plaintiff was injured thereby (*see,* ***New York Times Co. v Sullivan,*** 376 US 254 [1964]; ***Sullivan v Suozzi v Parent,*** 202 AD2d 94 [1994]). In ***Sullivan v Suozzi & Parente,*** supra, it was held that "it of the utmost consequent that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussion is so vast, and the advantages derived are so great, that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great, and the chance of injury to private character is so small, that such discussion must be privileged.... Any one claiming to be defamed by a communication must show actual malice or go remediless. This privilege extends to a great variety of subjects, and includes matters of public concern, public men and candidates for office.... Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about the clearer perception and livelier impression of truth, produced by its collision with error."

The libel law is not a system of technicalities, but reasonable regulations whereby the public may be furnished news and information, but not false stories about any one. When the truth is so near to the facts as published that fine and shaded distinctions must be drawn and words pressed out of their ordinary usage to sustain a charge of libel, no legal harm has been done (***Cafferty v Southern Tier Publishing Company,*** 226 NY 87 [1919]).

In the instant action it is established that Helen Moss was running for a position on the school board. The plaintiff's father, George Talley, was president of the Brentwood School Board. The subject publication states, "Newsday blasts Talley for his blatant abuse of power in trying to bully Board Members into hiring his daughter. Nepotism charges split board. Bid to create job for daughter of Brentwood schools president falls short; lawyer hired to investigate board members who opposed move." In reviewing the statement, it is noted that there is no reference by name to the plaintiff. It is further noted that prior to this, in November, 2007, the plaintiff had been denied a permanent position by the board. It is further noted that any criticism set forth in the publication is directed at the conduct of the plaintiff's father and not at the plaintiff. The article does not accuse the plaintiff of any wrongdoing, but is directed to the father's actions with regard to his "Nepotism" and mentions the hiring of "Talley's daughter" to support the claim of nepotism. That part of the communication which states, "George Talley embarrassed our community by pushing to hire his daughter at all costs!" again does not refer to the plaintiff by name and is directed at the conduct of the plaintiff's father.

The second page of the publication sets forth that "Our efforts should be put toward improving our schools not settling Talley lawsuits! The Talley lawsuits will undoubtedly cost the taxpayers well over $100,000! What a waste!" Again, the statements do not refer to the plaintiff by name and it cannot be determined from the publication which Talley has a lawsuit or lawsuits.

It is determined that the statements set forth in the publication were made by a public figure, the defendant Moss, who, while running for public office on the Brentwood School Board, was addressing matters of interest and public concern to the voters for the school board candidates. The statements do not

refer to the actions of the plaintiff, but instead to the president of the board of the school, George Talley. It is therefore determined that the foregoing publication fails to state a cause of action for defamation against the plaintiff.

Accordingly, that part of the complaint that is based upon the first mailing referenced above is dismissed as a matter of law as it fails to state a cause of action.

The second publication dated May 20, 2008 at item 4 sets forth "We lead by example and want to stop School Board strife that started when George Talley insisted in hiring his daughter, a person who did not pass have the required test at the time of her hiring." It is set forth in the complaint that upon beginning a teaching position with Brentwood Union Free School District in 2006, the plaintiff was given two years to successfully pass the New York State certifications examinations, a requirement for all New York State teachers, and in or about July 2007, she passed the last installment of her certification test and became fully certified as a teacher in New York State. Therefore, the statement is true in that when George Talley's daughter was hired, she had not yet passed the required test for certification.

It is for the court to decide whether the statements complained of are "reasonably susceptible of a defamatory connotation," thus warranting submission of the issue to the trier of fact. The entire publication, as well as the circumstances of its issuance, must be considered in terms of its effect upon the ordinary reader (***Silsdorf v Levine,*** 59 NY2d 8 [1983]). Whether the statements constitute fact or opinion is a question of law for the court to decide (***Silsdorf v Levine,*** supra, citing ***Rinaldi v Holt, Rinehart & Winston***, 41 NY2d 369 [1976]).

Although the distinction between fact and opinion may be difficult to draw in some cases, the conclusory statement in defendant's letter concerning the hiring of the plaintiff when she was not certified as a teacher, is clearly set forth as an example of what started the strife in the school board and is deemed to be an opinion entitled to a certain measure of constitutional protection (*see*, ***Gertz v Robert Welch, Inc.,***418 US 323 [1974]). "This extraordinary protection of possibly defamatory statements is justified by our commitment to the principle that free and open debate on matters of public concern is not to be discouraged by the spectre of the imposition of libel damages for the expression of a harsh or unpopular opinion. Notwithstanding the importance of protecting this form of expression even to the extent of denying recompense for injury to an individual's reputation, the immunity afforded the expression of opinion obtains only when the facts supporting the opinion are set forth" (***Rinehart & Winston*** supra). The purpose of this requirement is to ensure that the reader has the opportunity to assess the basis upon which the opinion was reached in order to draw his own conclusions concerning its validity" (***Silsdorf v Levine***, supra).

In all defamation cases, the threshold issue which must be determined, as a matter of law, is whether the complained of statements constitute fact or opinion. If they fall within the ambit of "pure opinion," then even if false and libelous, and no matter how perjorative or pernicious they may be, such statements are safeguarded and may not serve as the basis for an action in defamation" (***Parks v Steinbrenner et al,*** 131 AD2d 60 [1987]). There are four factors which should generally be considered in differentiating between fact and opinion in a defamation case. They are as follows: (1) an assessment of whether the specific language in issue has a precise meaning which is readily understood or whether it is

indefinite and ambiguous; (2) a determination of whether the statement is capable of being objectively characterized as true or false; (3) an examination of the full context of the communication in which the statement appears; and (4) a consideration of the broader social context or setting surrounding the communication including the existence of any applicable customs or conventions which might 'signal to the readers or listeners that what is being read or heard is likely to be opinion, not fact...'. So long as an opinion is accompanied by a recitation of the facts upon which it is based it is deemed a 'pure opinion' and is afforded complete immunity even thought the facts do not support the opinion." (***Parks v Steinbrenner et al.*** supra).

In reviewing the statement asserted as defamatory it is determined that the criticism for the hiring of the plaintiff prior to her obtaining certification for teaching is aimed at the conduct of George Talley as president of the school board and not at the plaintiff. It is a statement of opinion wherein it is claimed that when George Talley's daughter was hired, she did not have the required test. This statement is true based upon the plaintiff's statements set forth in the complaint. The plaintiff's name is not mentioned in the communication and there has been no criticism of any actions of the plaintiff. No untrue statement has been made about her.

In applying the four factors outlined above, it is determined that the specific language has a clear and definite meaning that George Talley hired his daughter for a teaching position prior to her passing her teaching certification.

It is objectively characterized as true and is further set forth and admitted in the complaint by the plaintiff that the plaintiff had not yet passed her certification exam at the time she was hired.

In examining the full context of the communication in which it appears, it is clear that it is the conduct of George Talley which the defendant states started the strife in the school board when his daughter was hired without the proper testing completed. In this situation, running for the school board and discussing actions by the president of the school board involve public discussions and concern concerning the actions of George Talley and not the actions of the plaintiff.

In the broader social context, the communicated statement involves matters of public concern and public persons and candidates for office which makes a valuable contribution to public debate, since it brings about the clearer perception and livelier impression of truth, produced by its collision with error (*see*, ***Sullivan v New York Times***, supra) and as such is a protected statement.

Therefore, the first cause of action fails to state a cause of action as a matter of law as to the second communication complained of by the plaintiff.

Accordingly, the complaint of this action is dismissed as a matter of law as it fails to state a cause of action upon which relief may be granted.

Dated: October 22, 2009

HON. JOSEPH C. PASTORESSA

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION