SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 5

NASSAU COUNTY

MARILYN SILVERMAN,

Plaintiff,

-against-

MOTION SEQ. NO.: 002, 003
MOTION DATE: 12/22/09

NEWSDAY INC.,

INDEX NO.: 9540/08

Defendant.

The following papers having been read on the motion (numbered 1-4):

Notice of Motion for Summary Judgment.....1
Affirmation in Support of Defendant's.....2
Notice of Cross Motion to Compel Discovery.....3
Affidavit in Opposition.....4

Motion by defendant Newsday, Inc. ("Newsday"), pursuant to CPLR 3212 for summary judgment dismissing the complaint, on the grounds that plaintiff is a "public official" and/or "public figure" for the purposes of this libel action, and consequently, she cannot establish that Newsday published the challenged news article with constitutional malice, is **granted.**

Cross-motion by plaintiff for an order compelling discovery is **denied** as moot.

Background

Plaintiff Marilyn Silverman was employed by the Roslyn Union Free School District from October 1977, until June 2002, when she retired. From August 1988 until her retirement, she served as Assistant Superintendent of Curriculum and Instruction. Her annual salary in 2001 was $153,700. In her final two years of employment she also received additional lumpsums in the amount of $80,000 for each

year (see Exhibit A to Silverman affidavit).

The District operates five schools: an early childhood school, two elementary schools, a middle school, and a high school. The District workforce includes more than 600 employees, and in 2001-2002 had expenditures of more than $62,000,000.

Approximately two years after plaintiff's retirement, news broke of the "Roslyn School District Embezzlement Scandal." Allegations surfaced that various officials and employees of the Roslyn School District had misappropriated large amounts of taxpayer money.

In March, 2005, after an investigation covering the period from 1996 through 2004, the New York State Comptroller issued a report (Exhibit 2 to the Smith affirmation), finding that there had been widespread misuse of funds in the amount of more than $11,000,000. The report listed twenty-nine individuals, including plaintiff, who had benefitted from the misuse of District funds. In the report, the amount of funds allegedly misused by plaintiff was listed as $106,822.

A number of former employees of the District had embezzled District moneys to pay their personal credit cards, personal mortgages, cars, travel, and other personal expenses. The allegations regarding plaintiff included alleged overpayments of salary and overuse of vacation days.

Five individuals pleaded guilty and were incarcerated in the scandal: Superintendent Frank Tassone, Assistant Superintendent Pamela Gluckin, Accounts Clerk Debra Rigano, Stephen Signorelli (Tassone's domestic partner), and Andrew Miller (the District's auditor). John McCormick, Gluckin's son, pleaded guilty, was ordered to pay restitution, and received probation. No criminal charges were brought against plaintiff.

The District pursued or threatened to pursue civil claims against several individuals, including plaintiff, and conducted its own investigation. According to the District, plaintiff owed it more than $190,000, based upon unauthorized lump sum payments for salary and benefits ($136,028), unauthorized vacation days ($13,085), unauthorized petty cash disbursements ($38,039), and unauthorized retention of a district computer ($3,579).

Plaintiff vigorously disputed these charges, but agreed to settle all claims against her in exchange for the payment of $35,000 (see release annexed as Exhibit 8 to the Smith Affirmation). In an affidavit in the record plaintiff alleges that to this day she does not know how the allegedly unauthorized compensation and vacation day payments were calculated, although she does admit that her own investigation revealed a liability to the District for almost $15,000 based on inadvertent clerical errors (Silverman affidavit, pars. 8 and 11). Plaintiff states that she agreed to the settlement in order to put the matter behind her, because the legal fees in defending a District action would have exceeded the amount the District was demanding, and because the stress was affecting her health (Silverman affidavit, par. 12).

The Challenged News Article

On March 20, 2008, Newsday published an article (Exhibit A to the cross-moving papers) on the efforts to recover money that had been misappropriated as part of the scandal. The article was written by Newsday reporter Christina Hernandez, and edited by Deputy Editor, Michael Dobie. Doug Wolfson, the Executive News Editor, added the words "theft" and "convicted" to the sub-headline at issue.

The large caption of the article was "A 'lucky' return", and underneath sub-headlines provided as follows:

Roslyn district recoups $5.5M from ex-employees convicted in

> infamous theft from schools
>
> What's been recovered
> How much money has been recouped from each of the central figures in the Roslyn school district embezzlement scandal.

The article, which did not mention plaintiff, was accompanied by a pie chart showing the "total recovered - $5,484,030" as compared to the "amount stolen - $11,200,000." In addition, the article included photographs of Tassone, Gluckin, Rigano, and McCormick, as individuals who were convicted in the scandal, and each photograph was labeled with the amount recovered from each individual. Plaintiff's photograph was also included, and the $35,000 settlement with the District was listed as the amount recovered.

By letter dated March 26, 2008 (Exhibit 27 to the Smith affirmation), plaintiff's attorney advised Newsday that the article was false and defamatory, as respects the plaintiff. On April 2, 2008, Newsday printed the following correction:

> A headline March 20 about the Roslyn school district's recovery of money from ex-employees in an embezzlement scandal was incorrect on the legal status of two figures in the case. Marilyn Silverman and Harvey Gluckin were not convicted in the theft of money.

Plaintiff states that the "correction" made matters worse, as the inference to be drawn was that although not convicted, she had been arrested and indicted for stealing from the District, just like Tassone, Gluckin, and Rigano (Silverman affidavit, par. 20). In

May, 2008, plaintiff commenced this libel action.

Summary Judgment Standard

Summary judgment is the procedural equivalent of a trial [*S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 (1974)]. The proponent must make a *prima facie* showing of entitlement to judgment as a matter of law [*Giuffrida v Citibank Corp.*, 100 NY2d 72, 82 (2003); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986)]. Once a *prima facie* case has been, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact or an acceptable excuse for its failure to do so [*Zuckerman v City of New York*, 49 NY2d 557, 562 (1980)]. Summary judgment is favored by the New York courts in libel cases, so as not to protract litigation and thereby chill the exercise of constitutional freedoms [*Armstrong v Simon & Schuster, Inc.,* 85 NY2d 373, 379 (1995); *Immuno AG v Moor-Jankowski*, 77 NY2d 235, 256, cert. den. 500 US 954 (1991)].

The "Public Official"/ "Public Figure" Issue

Defamation is defined as a false statement that exposes a person to public contempt, ridicule, aversion, or disgrace [*Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 98 NY2d 435, 444 (2002)]. A "public official" or a "public figure" may not recover damages for defamation unless the official proves that the offending statement was made with "actual malice" [*Huggins v Moore,* 94 NY2d 296, 301(1994)]. "Actual malice" is defined for constitutional purposes as either knowledge that the challenged statement is false, or reckless disregard for the truth [*Huggins* at 301, citing *New York Times v Sullivan*, 376 US 254, 279-280 (1964)].

A government employee is considered a "public official" when the position

"has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees" [*Rosenblatt v Baer*, 383 US 75, 86 (1966)]. The "public official" "designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs [*Rosenblatt* at 85]. A public high school principal is a "public official" [*Jee v New York Post Co.*, 176 Misc 2d 253 (Sup. Ct., NYCty, 1998), affd 260 AD2d 215 (1st Dept.), lv app den 93 NY2d 817 (1999); see also *Jimenez v United Federation of Teachers*, 239 AD2d 695 (1st Dept.), app dsmd 90 NY2d 890 (1997)(acting public school principal must prove actual malice)]. Courts in other states have held assistant superintendents of school districts to be "public officials" [*Beck v Lone Star Broadcasting Co.*, 970 SW2d 610, 614-15)(Tex App. 1998); *Haguewood v Gannett River States Publishing Corp.*, 2007 WL 1728700 (S.D. Miss., 2007)].

A "public figure" is one who has assumed a "role of especial prominence in the affairs of society" [*Gertz v Robert Welch Inc.*, 418 US 323, 345 (1974)]. The essential element underlying the category of "public figures" is that the publicized person has taken an affirmative step to attract public attention [*James v Gannett Co., Inc.*,40 NY2d 415, 422 (1976)]. A School District Superintendent of buildings and Grounds was a "public figure" in the context of the controversy surrounding his appointment [*Di Bernardo v Tonawanda Publishing Corp.*, 117 AD2d 1009 (4th Dept. 1986)], as was a member of the Commack Board of Education running for reelection [*Shulman v Hunderfund*, 12 NY3d 143 (2009)].

"Limited public figures" are those who have voluntarily injected themselves or

are drawn into a particular public controversy [*Guerrero v Carva*, 10 AD3d 105, 115 (1st Dept. 2004); see *Huggins* at 302]. New York also recognizes "involuntary limited purpose public figures" [*Daniel Goldreyer, Ltd v Dow Jones & Co., Inc.*, 259 AD2d 353 (1st Dept.), lv app granted 93 NY2d 811, app withdrawn 93 NY2d 1013 (1999)]. A three-part framework for making such a determination requires the following: (1) there is a public controversy; (2) plaintiff played a sufficiently central role in that controversy; and (3)the alleged defamation was germane to the plaintiff's involvement in the controversy [*Dameron v Washington Magazine, Inc.*, 779 F2d 736, 741(D.C. Cir. 1985), cert. den. 476 US 1411 (1986)].

Discussion

Plaintiff argues that she is neither a "public official," nor a "public figure" because, *inter alia*, she had no "final decision-making authority," "direct control," or "disciplinary authority" for policy making, curriculum, and tenure. She states that her role was to manage "certain day-to-day internal operations of the School District as they pertained to curriculum"(Silverman affidavit, par. 34). Plaintiff does admit however that she supervised principals and department heads, observed teachers to be recommended for tenure, supervised the drafting of the School Behavior Code, prepared curriculum proposals, occasionally resolved issues with the teacher's union, reviewed the annual proposed budget, and set the parameters of the principals' master schedules by allotting the number of teachers and classes for each subject and orchestrating the scheduling/staffing process to assure compatibility with district-wide staffing needs.

Plaintiff's job description (Exhibit 3 to the Smith affirmation), *inter alia*, provides for her to initiate, plan, maintain, review and evaluate all aspects of the curricular and instructional programs in the district, prepare all reports required by the

State Education Department, assist in the preparation, explanation and administration of the school budget, serve as a member of the Superintendent's Cabinet and lead the Department Heads' Curriculum Council, orchestrate the scheduling/staffing process for all schools in the district, supervise and work with principals, department heads, and program directors. The record also contains a letter dated June 10, 2002, from the Coordinating Council of Parent Associations for the Roslyn Public Schools (Exhibit 4 to the Smith affirmation), describing the personal impact that plaintiff had on the lives of the students of the school district and their parents. The letter states that plaintiff "helped us create a middle school, developed our Shared Decision Making Plan, and hired and mentored many outstanding teachers and administrators" and "oversaw the education of Roslyn students from 18 months to 81 years in our Adult Continuing Education Program."

Based on the foregoing, the Court concludes that plaintiff was a government employee who had, or appeared to have had, substantial responsibility for or control over education in the Roslyn school district. The public would have had an independent interest in her qualifications and performance, beyond the general public interest in the qualifications and performance of all government employee. Defendant has made a *prima facie* case that plaintiff was a "public official,"and plaintiff has failed to raise a triable issue of fact in opposition.

While it may not be said that plaintiff injected herself into the Roslyn school district embezzlement scandal, she was drawn into the controversy over misused school district funds due to the allegations of overpayments of salary and overuse of vacation days. This was plainly a public controversy, regarding the misuse of public moneys. The fact that the school district recouped $35,000 from plaintiff rendered her involvement in that controversy to be a "sufficiently central" one. The alleged

defamation, that she was convicted in the scandal, was germane to her involvement in the controversy, although incorrect. Under these circumstances, this Court finds that defendant has presented a *prima facie* case that plaintiff was also an "involuntary limited purpose public figure." Plaintiff has failed to raise a triable issue of fact in opposition.

Conclusion

The consequence of this Court's finding that plaintiff is both a "public official" and an "involuntary limited purpose public figure" is that plaintiff must prove that Newsday published the challenged news article with "actual malice," namely, knowledge of falsity or a reckless disregard for truth or falsity thereof. On this record there is only evidence of negligence and a failure to investigate. However negligence does not suffice [*Masson v New Yorker Magazine, Inc.*, 501 US 496, 510 (1991); *Kipper v NYP Holdings Co. Inc.*, 12 NY3d 348, 355 (2009)], and the failure to investigate the truth, standing alone, is not enough to prove actual malice, even if a prudent person would have investigated before publishing the statement [*Sweeney v Prisoners' Legal Services of New York, Inc.*, 84 NY2d 786, 793 (1995); *Berger v Temple Beth-El of Great Neck*, 41 AD3d 626, 627 (2nd Dept. 2007)]. In the absence of evidence that rises to the level of knowledge of falsity or reckless disregard, defendant's motion for summary judgment dismissing the complaint must be **granted.**

This Constitutes the Order of the Court.

Dated: 3/21/ 2010

ENTER:

J.S.C.

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APR 14 2010
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COUNTY CLERK'S OFFICE