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SHORT FORM ORDER

INDEX No. 06-7599
CAL. No. 09-02464OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 3-4-10
ADJ. DATE 5-3-10
Mot. Seq. # 011 - MG; CASEDISP

BRAD BALDWIN, II, Plaintiff, - against - JILL HUSCILOWITC, Defendants.	ANDREW C. LAUFER, PLLC Attorney for Plaintiff 255 W. 36th Street, Suite 1104 New York, New York 10018 AHMUTY, DEMERS & McMANUS Attorney for Defendant 200 I.U. Willets Road Albertson, New York 11507

Upon the following papers numbered 1 to 26 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17; ~~Notice of Cross Motion and supporting papers~~ ___; Answering Affidavits and supporting papers 18 - 24; Replying Affidavits and supporting papers 25 - 26; ~~Other~~ __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the defendant for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted.

This action was commenced as the result of an incident which occurred between the plaintiff and the defendant culminating in the plaintiff being arrested and accused of sodomy and rape. Six months later the charges were dropped. The complaint alleges six causes of action against the defendant including libel per se, slander per se, slander, intentional infliction of emotional distress, malicious prosecution/abuse of process and prima facie tort.[1]

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[1] By order dated October 5, 2006, the Court dismissed all claims against a former defendant, Joanne Huscilowitc, mother of the defendant herein, including the fourth and eighth causes of action in the complaint, and amended the caption to reflect the deletion of said defendant.

Defendant moves to dismiss the complaint, alleging that there are no issues of fact regarding her liability in this action. In support of her motion, the defendant submits, *inter alia*, the pleadings, written statements given to the Suffolk County Police Department by the parties and a nonparty witness, and the depositions of the parties and a nonparty witness.

"Defamation has long been recognized to arise from the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society. The elements are a false statement, published without a privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se" (***Dillon v City of New York***, 261 AD2d 34, 704 NYS2d 1 [1st Dept 1999]). "In cases involving defamation per se, the law presumes that damages will result, and special damages need not be alleged or proven" (***Gatz v Otis Ford,*** 274 AD2d 449, 711 NYS2d 467 [2d Dept 2000]). The per se categories consist of the following statements: (1) the plaintiff committed a crime; (2) the statement tends to injure the plaintiff in his or her trade, business or profession; and (3) the plaintiff has contacted a loathsome disease among others (*see* ***Matherson v Marchello,*** 100 AD2d 233, 473 NYS2d 152 [2d Dept 1984]). When the defamatory statement falls into one of these categories, "the law presumes damage to the slandered individual's reputation so that the cause is actionable without proof of special damages" (***60 Minute Man, Ltd. v Kossman,*** 161 AD2d 574, 555 NYS2d 152 [2d Dept 1990]).

Defamation traditionally consists of two related causes of action, libel and slander. The demarcation between libel and slander rests upon whether the allegedly defamatory words are written or spoken (***Matherson v Marchelleo***, *supra*). Slander is the uttering of defamatory words which tend to injure another in his reputation, office, trade, etc. (***Shapiro v Glens Falls Ins. Co.***, 39 NY2d 204, 383 NYS2d 263 [1976]; ***Liffman v Brooke***, 59 AD2d 687 [1st Dept 1977]. Libel is always considered as written (***Liffman v Brooke***, *id.*; ***Matherson v Marchelleo***, supra; ***Locke v Gibbons***, 164 Misc 877, 299 NYS2d 188 [Sup Ct, New York County 1937]). The plaintiff alleges that the defendant intentionally and maliciously made 1) a written complaint to the police that she was raped by the plaintiff, and 2) oral statements to her friend, Victoria Egan, that "[Brad Baldwin, II] had sex with [Jill Huscilowitc], and [Jill Huscilowitc] kept telling [Brad Baldwin, II] no, but [Brad Baldwin, II] did not listen," thus meeting the requirements of CPLR 3016[a] (*cf.* ***Shapiro v Central Gen. Hosp. Inc.,*** 251 AD2d 317, 673 NYS2d 724 [2d Dept 1998]).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2004]; ***Rebecchi v Whitmore,*** *supra*).

First Cause of Action for Libel Per Se

Here, the defendant contends that she is entitled to summary judgment because her statements about the alleged rape were protected by a qualified privilege. A qualified privilege arises when a person makes a good faith, bona fide communication upon a subject in which he or she has an interest, or a legal, moral or societal interest to speak, and the communication is made to a person with a corresponding interest. The underlying rationale of this common interest privilege is that, so long as the privilege is not abused, the flow of information between persons sharing a common interest should not be impeded (***Williams v County of Genesee***, 306 AD2d 865, 762 NYS2d 724 [4th Dept 2003]; ***Sanderson v Bellevue Maternity Hosp.***, 259 AD2d 888, 686 NYS2d 535 [3d Dept 1999]). The interest must be expressed in a reasonable manner and for a proper purpose (***Cucinotta v Deloitte & Touche, LLP***, 20 Misc3d 1144A, 872 NYS2d 689 [Sup Ct, New York 2008]; *see also* ***Toker v Pollack***, 44 NY2d 211, 405 NYS2d 1 [1978]). Generally, statements to police officers and district attorneys are protected by "qualified immunity," as long as they are given in "good faith" (***Present v Avon Products, Inc.***, 253 AD2d 183, 687 NYS2d 330 [1st Dept 1999]). However, the privilege will be lost where the statement was not made for its stated purpose or if it was made with malice, that is to say with ill will, spite, or culpable recklessness (***Lieberman v Gelstein,*** 80 NY2d 429, 590 NYS2d 857 [1992]; ***Cucinotta v Deloitte & Touche, LLP,*** supra).

The defendant has established her prima facie entitlement to summary judgment regarding writings and statements made by her to law enforcement officials, based on a qualified privilege. It is therefore incumbent upon the plaintiff to show that the writings and statements are nonetheless actionable because they were false and motivated by malice (***Park Knoll v Schmidt***, 59 NY2d 205, 464 NYS2d 424 [1983]; ***Toker v Pollack***, supra). However, conclusory allegations of malice, or statements based upon surmise, conjecture, and suspicion are insufficient to defeat a claim of qualified privilege (***Shover v Instant Whip Processors***, 240 AD2d 560, 658 NYS2d 661 NYS2d 661 [2d Dept 1997]; ***Grier v Johnson***, 295 AD2d 888, 686 NYS2d 535 [3rd Dept 1999]; see also ***Christenson v Gutman***, 249 AD2d 804, 671 NYS2d 835 [3d Dept 1998]). The plaintiff has not submitted any evidence that the defendant's written or oral statements to the police and district attorney were made with malice, ill will, or culpable recklessness.

Accordingly, that portion of the defendant's motion for summary judgment which seeks to dismiss the first cause of action is granted.

Second Causes of Action for Slander Per Se

Whether particular words are defamatory presents a legal question to be resolved by the court in the first instance (***Golub v Enquirer/Star Group***, 89 NY2d 1074, 659 NYS2d 836 [1997]; ***Sprewell v NYP Holdings, Inc.***, 1 Misc3d 847, 772 NYS2d 188 [Sup Ct, New York County 2003]. In deciding whether the defendant's oral statement to Ms. Egan is defamatory it is necessary to determine if it constitutes a statement of fact or opinion, that is, whether the reasonable person would have believed that the statements were conveying facts about the plaintiff. Initially, the court notes that the evidence reveals that the sworn statement of Victoria Egan states that the defendant said to her "I think I just got raped," and that "Brad had sex with her and she kept telling him no, but he didn't listen."

It has been held that the essence of defamation is the publication of a statement about an individual that is both false and defamatory. Because only assertions of fact are capable of being proven false, a defamation action cannot be maintained unless it is premised on published assertions of fact (***Brian v Richardson***, 87 NY2d 46, 637 NYS2d 347 [1995]). Non-actionable "pure opinion" is a statement of opinion accompanied by recitation of facts upon which it is based, or, if not accompanied by such factual recitation, the statement must not imply that it is based upon undisclosed facts (***Steinhilber v Alphonse,*** 68 NY2d 283, 508 NYS2d 901 [1986]). It is a settled rule that expressions of an opinion, "false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions" (***Steinhilber v Alphonse,*** *id.*).

In ***Steinhilber,*** the Court sets forth a four factor analysis which rejected any "mechanistic rule" based on the semantic nature of the assertion in favor of a determination on "totality of the circumstances." In distinguishing between fact and opinion, the four factors are: (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 readers or listeners that what is being read or heard is likely to be opinion, not fact," (***Steinhilber v Alphonse,*** *id.*, citing from ***Ollaman v Evans***, 750 F2d 970 [DC Cir.], *cert denied* 471 US 1127). An analysis of the four factors 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. It is clear that the specific language used by the defendant was indefinite and ambiguous. The defendant's specific language, in its entirety, is expressed as an inquiry into what the defendant believes happened, or might have happened, to her in this incident.

(2) A determination of whether the statement is capable of being objectively characterized as true or false. It is determined that the statement is not capable of being objectively characterized as true or false in that the defendant clearly set forth an opinion based upon her belief that the plaintiff had sex with her despite her saying no. No evidence has been submitted to establish that the statement was false when it was made and no expert testimony has been submitted to dispute the statement.

(3) An examination of the full context of the communication in which the statement appears. It is determined that the examination of the full context of the communication in which the statement appears is that of an opinion made by a young woman who had just experienced a confusing sexual encounter under conditions which were ripe for mis-communication, misunderstanding and mis-perception by the participants.

(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 readers or listeners that what is being read or heard is likely to be opinion, not fact. The totality of the circumstances strongly suggests that the important policy of deterring actual sex crimes/abuse, and the heightened sensitivity of

society to the rights of individuals to control expressions of their sexuality, supports the determination that such exploratory language should be protected.

Based upon the foregoing application of the four factors set forth above, and considering the totality of the circumstances, it is determined that the words uttered by the defendant constitute non-actionable opinion. In addition, the plaintiff has failed to submit admissible evidence of other or further statements by the defendant that would require a trial of his action for slander per se. Accordingly, that portion of the defendant's motion for summary judgment which seeks to dismiss the second cause of action is granted.

Third Cause of Action for Slander

A plaintiff alleging slander, as opposed to slander pre se, must plead and prove that he or she has sustained special damages (***Lieberman v Gelstein***, 80 NY2d 429, 590 NYS2d 857 [1992]; ***Epifani v Johnson***, 65 AD3d 224, 882 NYS2d 234 [2d Dept 2009]; ***Rufeh v Schwartz***, 50 AD3d 1002, 858 NYS2d 194 [2d Dept 2008]). Injury to reputation does not constitute special damage and the plaintiff in a slander action cannot recover therefor (***Galassso v Saltzman***, 42 AD3d 310, 839 NYS2d 731 [1st Dept 2007]; ***Campion Funeral Home v State***, 166 AD2d 32, 569 NYS2d 518 [3d Dept 1991]; ***Casale v Calderone***, 49 Misc 555, 97 NYS 1102 [Sup Ct New York, Appellate Term 1906]). Here, the plaintiff has not alleged special damages, and thus his slander claim is not sustainable. Accordingly, the defendant's motion for summary judgment seeking to dismiss the plaintiff's third cause of action is granted.

Fifth Cause of Action Sounding In Intentional Infliction of Emotional Distress

A cause of action for intentional infliction of emotional distress "predicates liability on the basis of extreme and outrageous conduct, which so transcends the bounds of decency as to be regarded as atrocious and intolerable in a civilized society" (***Freihofer v Hearst Corp.***, 65 NY2d 135, 490 NYS2d 735 [1985]). The conduct alleged by plaintiff is defendant's filing a complaint about her alleged rape with the police department. This conduct does not rise to the level of atrocity or outrageousness necessary to sustain a claim of this nature (*see*, ***Howell v New York Post Co.***, 81 NY2d 115, 596 NYS2d 350 [1993]). In this regard the defendant has established her prima facie entitlement to summary judgment on the issue. The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2004]; ***Rebecchi v Whitmore,*** *supra*). The plaintiff has failed to submit any evidence that the defendant's actions were purposeful, extreme or outrageous.

Accordingly, the defendant's motion for summary judgment seeking to dismiss the plaintiff's fifth cause of action is granted.

Sixth Cause of Action Sounding In Prima Facie Tort

The elements of a cause of action for prima facie tort are: (1) the intentional infliction of harm; (2) causing of special damages; (3) without lawful excuse or justification; and (4) by an act or series of acts that would be otherwise unlawful (*see* ***Freihofer v Hearst Corp.,*** *supra*; ***Curiano v Suozzi,*** 63 NY2d 113, 480 NYS2d 466 [1984]). There can be no recovery under this tort unless malevolence is the sole motive for the defendant's otherwise lawful act (*see* ***Lynch v McQueen,*** 309 AD2d 790, 765 NYS2d 645 [2nd Dept 2003]; ***Landor-St. Gelais v Albany Intl. Corp.,*** 307 AD2d 671, 763 NYS2d 369 [3d Dept 2003]). Also, where there are other motives, such as self interest or business advantage, there is no recovery under this tort (*see* ***Squire Records v Vanguard Rec. Socy.***, 25 AD2d 190, 268 NYS2d 251 [1st Dept 1996], *affd* 19 NY2d 797, 279 NYS2d 737 [1967]).

Since the complaint does not allege that defendants' sole motivation was disinterested malevolence, the prima facie tort cause of action must fail (*see* ***Burns Jackson Miller Summint & Spitzer v Lindner,*** 59 NY2d 314, 464 NYS2d 712 [1983]; ***Avgush v Town of Yorktown,*** 303 AD2d 340, 755 NYS2d 647 [2d Dept 2003]; ***Hakim v Paine Webber***, 261 AD2d 578, 739 NYS2d 371 [2d Dept 1999]). Furthermore, special damages are an essential element of a prima facie tort and must be pleaded with sufficient particularity (*see* ***DiSanto v Forsyth***, 258 AD2d 497, 684 NYS2d 628 [2d Dept 1999]).

In the matter before the Court, the complaint only sets forth an amount of damages to be proven at trial without any particularity as to a specific and measurable loss so as to identify and causally relate the actual losses to the allegedly tortuous act as required for a prima facie tort cause of action (*see* ***Vigoda v DCA Prods. Plus Inc.***, 293 AD2d 265, 741 NYS2d 20 [1st Dept 2002]; ***Broadway & 67th St. Corp. v City of New York***, 100 AD2d 478, 475 NYS2d 1 [1st Dept 1984]; *see also* ***Del Vehicco v Nelson***, 300 AD2d 277, 751 NYS2d 290 [2d Dept 2002]; ***Dembitzer v Chera***, 305 AD2d 531, 761 NYS2d 60 [2d Dept 2003]). "All that plaintiff has alleged is lost future income, conjectural in identity and speculative in amount. As such, this is an insufficient allegation of damages to support a cause of action for prima facie tort. As the complaint fails to show that the defendant acted with disinterested malevolence and also fails to set forth special damages with particularity" ***(Vigoda v DCA Prods. Plus Inc.***, *supra)*, the cause of action sounding in prima facie tort is dismissed.

Seventh Cause of Action Sounding in Malicious Prosecution and Abuse of Process

In order to state a claim for malicious prosecution, the plaintiff must establish the following four elements: (1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff; (2) the termination of proceedings in favor of the accused; (3) the absence of probable cause for the criminal proceeding; and (4) actual malice (*see* ***Smith-Hunter v Harvey,*** 95 NY2d 19, 712 NYS2d 438 [2000]). It is well settled that in regard to the first element, the mere reporting of a crime to the police is insufficient to sustain the claim. Here, the defendant reported her alleged rape to the police department. A civilian complainant, who furnishes information, concerning what she at the time considers to be a crime, to law enforcement authorities, who are free to exercise their own judgment as to whether as arrest should be made and criminal charges filed, will not be held liable for false arrest and malicious prosecution (*see* ***Quigley v City of Audburn,*** 267 AD2d 978, 701 NYS2d 580 [4th Dept

1999]; ***DeChateau v Metro-North Commuter R. Co,*** 253 AD2d 128, 688 NYS2d 12 [1st Dept 1999]). It must be shown that the defendant played an active role in the prosecution, such as giving advice and encouragement or importuning to the authorities to act. The mere act of reporting a crime to the police is insufficient to support an assertion that an individual caused a proceeding to be commenced (*see* ***Present v Avon Prod.,*** 253 AD2d 183, 687 NYS2d 330 [1st Dept 1999]; *lv app dism* 93 NY2d 1032, 697 NYS2d 555 [1999]; ***Viza v Town of Greece,*** 94 AD2d 965, 463 NYS2d 970 [4th Dept 1983]).

Here, the defendant provided the police authorities with information and cooperated in their investigation. In this regard the defendant has established her prima facie entitlement to summary judgment on the issue. The plaintiff has failed to provide any evidence of the defendant's alleged malice in reporting this incident to the police department beyond mere conclusions and unsubstantiated allegations which are insufficient to raise any triable issues of fact (***Zuckerman v City of New York***, *supra*). Thus, the Court need not proceed any further to consider the other elements of malicious prosecution. A failure to establish any of the required elements defeats the entire claim (*see* ***Brown v Sears Roebuck and Co.***, 297 AD2d 205, 746 NYS2d 141 [1st Dept 2002]).

In ***Board of Educ. Of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assoc., Inc., Local 1889, AFT-CIO***, 38 NY2d 397, 380 NYS2d 635 (1975), the Court of Appeals stated the necessary elements of an abuse of process claim. The elements are: (1) there must be a regularly issued process, civil or criminal, compelling the performance or forbearance of some prescribed act; (2) the person activating the process must be moved by a purpose to do harm without that which has been traditionally described as an economic or social excuse or justification, and (3) the defendant must be seeking some collateral advantage or corresponding detriment to the plaintiff which is outside the legitimate ends of the process (*see* ***Parr Meadows Racing Assn. V White***, 76 AD2d 858, 428 NYS2d 509 [2d Dept 1980]). The defendant utilized the legal system in a manner consonant with the purpose for which that particular legal system was designed (*see e.g.* ***Raved v Raved***, 105 AD2d 735, 481 NYS2d 170 [2d Dept 1984] *citation omitted).* The plaintiff has failed to allege any evidentiary facts sufficient to demonstrate that the defendant knowingly and willingly contrived and abused the criminal justice system to the detriment of the plaintiff (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; *see also* ***W.I.L.D. W.A.T.E.R. Ltd. v Martinez***, 152 AD2d 799, 543 NYS2d 579 [3d Dept 1989]; ***Williams v Pinks, Feldman & Brooks***, 141 AD2d 723, 530 NYS2d 162 [2d Dept 1988]; ***Hornstein v Wolf***, 109 AD2d 129, 491 NYS2d 183 [1985], *affd* 67 NYS2d 721, 499 NYS2d 938 [1986]; ***Iovinella v General Elec. Credit Corp.***, 79 AD2d 748, 434 NYS2d 806 [3d Dept 1980] *app dism* 53 NY2d 937, 440 NYS2d 1029 [1981] *app den* 53 NY2d 607, 440 NYS2d 1027 [1981]).

Accordingly, the defendant's motion for summary judgment seeking to dismiss the plaintiff's seventh cause of action is granted.

The complaint is dismissed in its entirety.

Dated: 7/16/10

THOMAS F. WHELAN, J.S.C.