Wiesmann v Riverhead Union Free School Dist.
2010 NY Slip Op 32640(U)
September 22, 2010
Supreme Court, Suffolk County
Docket Number: 32241/2007
Judge: Paul J. Baisley
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SHORT FORM ORDER

INDEX NO. 32241/2007

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:
Hon. Paul J. Baisley, Jr.

GERALD G. WIESMANN

Plaintiff(s),

-against-

RIVERHEAD UNION FREE SCHOOL DISTRICT, WILLIAM GROTH, PAUL DOYLE, W. BRIAN STARK and TIMOTHY S. GRIFFING, Being Employees and/or Member of the Board of Education

Defendant(s).

ORIG. RETURN DATE: December 28, 2007
FINAL RETURN DATE: February 15, 2008
MTN. SEQ. #: 001-CASEDISP

PLTF'S ATTORNEY:
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DEFT'S ATTORNEY:
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Upon the following papers numbered 1 to 37 read on this motion for summary judgment: Notice of Motion and supporting papers 1 - 12; Affirmation and Affidavit in Opposition 13 - 24; Reply Affirmation and supporting papers 25 - 37; it is

ORDERED that the motion (001) by the defendants for dismissal of the complaint pursuant to CPLR 3212 is granted and the complaint is dismissed in its entirety; and it is further

ORDERED that this action shall be marked, "Case Disposed."

This is an action brought by the plaintiff Gerald G. Wiesmann (hereinafter Wiesmann) against the defendants Riverhead Union Free School District, William Groth (Athletic Director), Paul Doyle (District Superintendent), W. Brian Stark (member of the Board of Education) and Timothy S. Griffing (member of the Board of Education; hereinafter Griffing). The defendants shall be referred to collectively, hereinafter, as the School District. This action stems from Wiesmann's basic contention that the School District wrongfully terminated him from his employ as the coach of the high school varsity basketball team after the 2005-2006 season (first cause of action) and that the defendant Griffing defamed Wiesmann when, on two separate occasions, Griffing stated to two different individuals that , "Jerry [sic; meaning the plaintiff Gerald Wiesmann] let a player push him during a game and did nothing about it" (second cause of action; ¶ 9).

On a motion for summary judgment, the moving party has the burden of making a prima facie showing of entitlement to summary judgment as a matter of law and must offer sufficient evidence to show the absence of material issues of fact (*Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York,* 49 NY2d 557, 427 NYS2d 595 [1980]). If the moving party fails in meeting this burden, the motion must be denied regardless of the sufficiency of the opposition papers (*see Smalls v AJI Industries, Inc.,* 10 NY3d 733, 853 NYS2d 526 [2008]). If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see Zuckerman v City of New York, supra*).

In support of this motion, the School District submits, inter alia, an attorney's affirmation, a transcript of Wiesmann's testimony at the hearing conducted pursuant to GML § 50-h (hereinafter, the 50-h hearing[1]) and the affidavit of the School District's Assistant Superintendent for Personnel & Community Services (hereinafter the Assistant Superintendent).

With regard to the first cause of action, the School District's major contention is the legal argument that there can be no wrongful termination from an at-will position of employment. The School District argues that since Wiesmann's prior employment as the basketball coach was pursuant to an annual appointment, with no contract, by the School District's board of education, only in effect for one season at a time, Wiesmann was an at-will employee in this regard whose employ could be "terminated" at will by either party at any time. More specifically, based upon the facts and circumstances of this case, after any given basketball season for which Wiesmann was appointed as the coach, neither Wiesmann nor the School District was obligated to continue that employment for the following season. Incidentally, Wiesmann was also employed by the School District, presumably pursuant to an actual contract, as a social studies teacher and that position was not affected by his not being rehired as the basketball coach.

At the 50-h hearing, Wiesmann admitted that for all the years he coached the basketball team (12 years) he never signed a contract and that he "just got approved by the board" (50-h, pp. 23-24). In addition, according to the affidavit submitted in reply from the School District's Assistant Superintendent, the appointment as boys varsity basketball coach was a "discretionary determination made by the Board of Education prior to each basketball season" and that Wiesmann was never awarded a contract for any season (Afft., ¶ 2).

In the absence of an agreement that provided for a fixed duration of employment as the basketball coach beyond the preceding season, Wiesmann is presumed to be an at-will employ whose employment

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[1] Although the plaintiff objects to the admissibility of the 50-h hearing as the transcript was not signed by the plaintiff, the Court notes that the plaintiff was given the opportunity to sign the transcript and failed to do so within 60 days. Accordingly, for purposes of this motion, the testimony of the plaintiff may be fully used as though signed (*see* CPLR 3116[a]).

may be freely terminated by either party at any time for any reason or even for no reason (*see Cron v Hagro Fabrics,* 91 NY2d 362, 367, 670 NYSA2d 973 [1998]). Here, not only was the School District free to decline hiring Wiesmann for the next season but if Wiesmann decided not to return for the new season, the School District could not force him to. That is the essence of an at-will employment relationship.

Under these circumstances, no cause of action lies for the wrongful termination of an at-will employee (*see Murphy v Am. Home Products Corp.,* 58 NY2d 293, 300-301, 461 NYS2d 232 [1983]).

Accordingly, based upon the facts of this case, the School District has made a prima facie showing of entitlement to summary judgment with regard to the first cause of action claiming wrongful termination. The burden now shifts to the plaintiff to come forward with evidence of material issues of fact requiring a trial as to this first cause of action (*Zuckerman v City of New York,* 49 NY2d 557, 427 NYS2d 595 [1980])2d at 401, 565 NYS2d at 427).

In opposition to this motion for summary judgment, the plaintiff submits, inter alia, what purports to be his personal affidavit[2] and affidavits from the two individuals named in the complaint as the ones to whom the defendant Griffing made his allegedly defamatory comments. These individuals are Lauri Downs (referred in the complaint and elsewhere erroneously as "Lori" Downs) and Ziggy Wilinski (hereinafter, respectively, Downs and Wilinski).

As to the "wrongful termination" claim, Wiesmann contends that the School District "ratified" his appointment as the basketball coach because the School District "authorized" him to supervise the off-season weight program and to coach a team in the summer league.

In reply to this contention, the Assistant Superintendent states in his affidavit that, "Any coaching performed by Mr. Wiesmann before or after the basketball season was purely voluntary" (Afft., ¶ 2).

With regard to the "wrongful termination" claim, there is no dispute that Wiesmann had no contract - whether with or without a fixed duration - to evidence any obligation on the part of the School District or himself to continue to coach the boys varsity basketball team beyond the appointment for any

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2

The Court refers to the plaintiff's affidavit as "purported" for two reasons: (1) Because it has a different spelling of the plaintiff's last name than is indicated in the complaint, the notice of claim and everywhere else; and, more significantly, (2) the plaintiff's signature on the affidavit is clearly different from the signatures on the verification of the complaint, the notice of claim and Reply Exhibit "B" ("Confidential Meeting Summary"). In addition, the Court notes that the purported plaintiff's signature on the affidavit resembles the signature of his attorney on the attorney's affirmation in opposition to this motion and the same person notarized the differing plaintiff's signatures on the affidavit and the verification. These submissions with the differing signatures raise serious questions of impropriety as to the conduct of the plaintiff's counsel, David V. Falkner, Esq. Accordingly, the Court is constrained, pursuant to 22 NYCRR § 100.3(D)(2), to forward copies of the pertinent submitted documents to the Grievance Committee for the Tenth Judicial District for review and for the purpose of taking any action which it deems appropriate.

given season. The fact that Wiesmann had access to the gym or other training facilities and chose to coach the summer league team all reflected a voluntary commitment on his part and there was no obligation on his part to do so or on the School District's part to appoint him as the coach for any subsequent season.

Accordingly, Wiesmann, insofar as his employment as the boys varsity basketball coach, was a season-to-season at-will employee and, thus, cannot have a cause of action for wrongful termination (*see Murphy v American Home Products Corp.,* 58 NY2d 293, 300-301, 461 NYS2d 232 [1983]). In any event, from the end of the previous season until the time he is reappointed for the next season, if at all, he was not in any contractual or appointive position as the basketball coach. Wiesmann, therefore, as a matter of law, has not sustained his burden to show that there is a material issue of fact in this regard requiring a trial (*see Zuckerman v City of New York,* 49 NY2d 557, 427 NYS2d 595 [1980]).

Turning now to the defamation claim (second cause of action), the School District argues that the actual words uttered are not defamatory and, in any event, were subject to a qualified privilege, were uttered with regard to a single instance and since they were not slanderous per se, the complaint is required to allege special damages, the absence of which requires dismissal.

In reviewing the complaint's defamation claim (second cause of action), the plaintiff Wiesmann alleges, inter alia, as follows:

> "9. On or about November 2006 Defendant Griffing, on two occasions maliciously, spoke the following false and defamatory words concerning plaintiff 'Jerry [sic] let a player push him during a game and did nothing about it', in the presence of others including Lori [sic] Downs, and Ziggy Wilenski [sic].
> "10. As intended by defendant Griffing these words were understood by those who heard them as to charge the plaintiff with professional incompetence."

At the 50-h hearing, Wiesmann provided hearsay testimony to the effect that Ziggy Wilinski, a volunteer assistant with the basketball program at the time in question, told Wiesmann that during the course of an unrelated conversation, Wilinski asked Griffing (a member of the School District's board of education at the pertinent time), why Wiesmann was being given a "hard time" and Griffing responded that he had witnessed a player of Wiesmann's push Wiesmann during a game and that Wiesmann did nothing about it and let the player "get away with it" (50-h, p. 33).

Wiesmann gave further hearsay testimony at the 50-h hearing to the effect that Downs (president of the Parent Teacher Organization at the pertinent time) told Wiesmann that she heard from Griffing that "some kid pushed [Wiesmann] and that [Wiesmann] didn't have the respect of the kids" (50-h, p. 34).

Wiesmann also testified that there were no other claims of defamation aside from these two incidents (50-h, p. 38).

In order for a statement to be defamatory per se, it must naturally imply disgraceful professional conduct on the part of the subject person in the mind of an intelligent person (43 NY Jur § 70). Where a statement is slanderous per se, special damages need not be alleged in the complaint (*see Liberman v Gelstein,* 80 NY2d 429, 435, 590 NYS2d 857 [1992]; *Tourge v City of Albany,* 285 AD2d 785, 727 NYS2d 753 [3d Dept 2001]); if not slanderous per se, then special damages must be alleged (43 NY Jur 2d, Defamation & Privacy § 8; *Larson v Albany Med. Ctr.,* 252 AD2d 936, 676 NYS2d 293 [1st Dept 1998]).

Here, there is merely a recitation of facts by Griffing that he saw a player push the coach during a game for which the coach took no apparent action. On its face, there is no charge of disgraceful conduct contained in these words. At worse, the statement may be somewhat deprecating but it certainly does not rise to the level of charging "disgraceful" conduct (*see e.g. Dillon v City of New York,* 261 AD2d 34, 704 NYS2d 1 [1st Dept 1999]). Also, courts will not strain to find defamation where none exists (*see Cohn v Natl. Broadcasting Co.,* 50 NY2d 885, 430 NYS2d 265 [1980], *cert denied* 449 US 1022 [1980]).

Nor is there an opinion stated by Griffing based upon the facts he stated he observed. In any event, any stated opinion flowing from such a factual recitation would be pure opinion and not actionable (*see e.g. Versaci v Richie,* 30 AD3d 648, 815 NYS2d 350 [3d Dept 2006]). In this case, the plaintiff contends that the statement itself gives rise to the implication that Griffing thought that Wiesmann was not fit to be the coach. As such, according to the plaintiff, Griffing was impugning Wiesmann's performance and such a statement would be actionable per se.

Even assuming arguendo that Wiesmann's arguments have merit, a statement impugning one's professional competence is not actionable where it refers to a single instance unless special damages are pleaded (*see Larson v Albany Med. Ctr.,* 252 AD2d 936, 676 NYS2d 293 [1st Dept 1998]; *Casamassima v Oechsle,* 125 AD2d 855, 509 NYS2d 960 [3d Dept 1986]).

In this case, the purported defamatory remarks attributed to Griffing both refer to the same single instance observed by Griffing during a game. Accordingly, Griffing's remarks are protected by the single instance doctrine unless the complaint contains allegations of special damages (*id.*).

Here, the complaint is utterly devoid of any allegations as to special damages. Moreover, the plaintiff's opposition papers fail to mention any special damages and, indeed, the plaintiff takes the position that the statements made by Griffing are per se slanderous and, thus, need no allegations of special damages. The Court disagrees.

The statements at issue are not slanderous on their face and evidence no express statement or opinion as to Wiesmann's professional competence. Moreover, the statements refer to a single instance and are not actionable without allegations of special damages (*id.*).

In addition, the defendant Griffing is entitled to a qualified privilege for the statements he made because they were made with regard to matters within his professional concern as a member of the board of education, made to others with a corresponding interest in the subject matter (a colleague of the

plaintiff's in the basketball program and the president of the Parent Teacher Organization), were expressed in a reasonable manner and for a proper purpose (in response to questions regarding Wiesmann) (*see*; *Foster v Churchill,* 87 NY2d 744, 751, 642 NYS2d 583 [1996]; *Garcia v Puccio,* 62 AD3d 598, 879 NYS2d 435 [1st Dept 2009][statement by a school principal to a student's parent]; *East Point Collision Works, Inc. v Liberty Mut. Ins. Co.,* 271 AD2d 471, 472, 706 NYS2d 700 [2d Dept 2000]; *Dillon v City of New York,* 261 AD2d 34, 704 NYS2d 1 [1st Dept 1999]; *Present v Avon Prods., Inc.,* 253 AD2d 183, 687 NYS2d 330 [1st Dept], *lv dismissed* 93 NY2d 1032, 697 NYS2d 555 [1999]; 43 NY Jur 2d, Defamation & Privacy § 120).

Unless the plaintiff can show malice and falsity, a qualified privilege covers the statements alleged herein (*see* 43 NY Jur 2d, Defamation & Privacy § 161). Here, the plaintiff has made no showing of malice. As to falsity, his self-serving statement in his purported affidavit in opposition that he was never pushed by a player lacks credibility and the lack of any corroborating affidavits from anyone else present at the game weighs heavily against the plaintiff.

The plaintiff also argues that he should be allowed further discovery before the Court considers this motion for summary judgment. The plaintiff, however, fails to show that further discovery would produce relevant evidence to support his allegations (*see Fawcett v Suffolk Transp. Serv., Inc.,* 55 AD3d 535, 537, 865 NYS2d 292 [2d Dept 2008]; *Riddy v HSBC USA Inc.,* 21 AD3d 465, 466, 799 NYS2d 744 [2d Dept 2005]).

In conclusion, whether the statements made by the defendant Griffing were true or not, they would not be actionable in view of the single instance rule and the qualified privilege, both of which are applicable here. The Court, therefore, finds that the defendants have made a prima facie showing of entitlement to summary judgment dismissing the defamation cause of action and the plaintiff has not met his burden to show the existence of a material issue of fact requiring a trial (*see Zuckerman v City of New York,* 49 NY2d 557, 427 NYS2d 595 [1980]).

Accordingly, dismissal of the complaint in its entirety as to all defendants pursuant to CPLR 3212 is granted as provided herein.

This constitutes the decision and order of the court.

Dated: Sept. 22, 2010

HON. PAUL J. BAISLEY, JR.

HON. PAUL J. BAISLEY, JR., J.S.C.