Nugent v Diocese of Rockville Ctr.
2010 NY Slip Op 33827(U)
August 6, 2010
Supreme Court, Nassau County
Docket Number: 009303/10
Judge: Daniel R. Palmieri
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

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TRIAL TERM PART: 45

EILEEN NUGENT,

INDEX NO.: 009303/10

Plaintiff,

MOTION DATE:7-22-10
SUBMIT DATE:7-22-10
SEQ. NUMBER - 001

-against-

DIOCESE OF ROCKVILLE CENTRE, ST. MARTIN OF TOURS SCHOOL, BISHOP WILLIAM MURPHY & KATHLEEN A. RAZZETTI,

Defendants.

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The following papers have been read on this motion:

Notice of Motion, dated 6-25-10..1
Affirmation in Opposition, dated 7-14-10..........................2
Reply Affirmation, dated 7-21-10.....................................3

This motion by the defendants pursuant to CPLR 3211(a)(7), and, in effect, CPLR 3211(a)(1) to dismiss the complaint as to each such defendant on the ground that no cause of action is stated is granted to the extent that the second, third, fourth and fifth causes of action are dismissed, and the complaint is dismissed in its entirety as to Bishop William Murphy and Kathleen A. Razzetti, individually.

This is an action for relief stemming from what plaintiff alleges was a wrongful

termination of employment in February, 2010. The plaintiff was a teacher employed by defendant St. Martin of Tours School ("School") beginning in 1997. The School is a private, Catholic elementary school, for students from nursery school through the eighth grades. It is alleged to be part of the Diocese of Rockville Center ("Diocese), whose chief officer is defendant Bishop William Murphy. Plaintiff taught remedial reading and Social Studies.

In her complaint, she alleges that the reason for her termination was her handling of certain information concerning a School student (who shall be referred to here as "alleged offender) who at the age of 14 was arrested and charged with the rape of a 13 year-old girl. Shortly after his arrest in February, 2009, defendant Kathleen A. Razzetti, the School principal, held a staff meeting, at which plaintiff was present, in which she admonished the teachers not to discuss the situation with students because the alleged offender was still enrolled at the School. By February 1, 2010, the next year, plaintiff alleges that it was widely known that he had been convicted of the rape, and was no longer a student. Plaintiff acknowledges in her complaint that on that day she told some of her students [1] that he had been convicted of the crime, to stay away from him, and to warn their sisters and female friends to stay away from him. A parent observed and overheard this conversation and informed Razzetti, who then fired plaintiff for allegedly violating the earlier "gag order" related to the alleged offender case.

On this motion defendants submit, *inter alia,* the affidavit by Razzetti and certain documents, as set forth in this paragraph. Near the end of the 2009 academic year plaintiff was presented with a "Letter of Intent" by the School which offered another year of

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[1] It is undisputed that this conversation took place away from the School.

employment for the coming year, set the salary for that year and stated that "Acceptance of this Letter of Intent binds teachers to the policies set forth in the Teachers' Handbook" ("Handbook"). Plaintiff accepted the Letter dated May 15, 2009 for the 2009-2010 school year.

The Handbook, at Section 4220.3, "Guidelines For Hiring Teachers For New Regional Schools" provides at "4." as follows:

> Upon agreement, a Letter of Intent is offered on or before April 15. Once a teacher receives and accepts a Letter of Intent, it shall be considered a firm commitment of employment for the next school year unless the conduct and/or performance of the teacher constitutes just cause for termination as set forth (i) in this Handbook or (ii) there is a material change in the circumstances of the school (including, without limitation, a significant decline in enrollment or school closure.

Under the Handbook, at § 4710.2, "just cause" for termination "includes, but is not limited to, the following: ... f. Failure to comply with the guidelines of the diocese and/or the school." According to the Razzetti, plaintiff's termination was just because she had acted unprofessionally on numerous occasions, by violating school directives, policies and procedures.

She states that plaintiff had been warned several times before her termination regarding instances of insubordination, improper teaching methods and other misconduct, which had generated numerous complaints, oral and written, by parents of students. Those complaints concerned plaintiff's classroom demeanor, as being sarcastic, hurtful and rude. Her homework assignments were inappropriate and outside the scope of traditional Catholic School teachings. Improper fraternization with students was also an issue.

Razzetti avers that in early Februrary 2010, she was advised that plaintiff had violated

her directive "to refrain from discussing issues concerning student privacy," specifically, the alleged offender. [2] This included remarks by plaintiff to some students about the arrest and conviction, and her opinion that he had a propensity for sexually deviant behavior. Razzetti states that this violated her directive and the Teacher Handbook, which states that "confidentiality of children's records must be insured."

Plaintiff sent a letter to Sister Joanne Callahan, Superintendent of Schools for the defendant Diocese of Rockville Centre, appealing/challenging her termination. However, the action by Razzetti was upheld. This law suit ensued.

Five causes of action are alleged. The first is negligent misrepresentation, based upon the theory that Razzetti's order to the staff regarding the alleged offender did not clearly bar a discussion of the case with students after he himself was no longer enrolled, and that plaintiff relied on that statement in speaking to students on February 1, 2010. Therefore, she was terminated because she relied on Razzetti's statement, to her detriment. The second cause of action is for injurious falsehood. Plaintiff alleges that defendants stated that they terminated plaintiff for "making inappropriate statements to students", which was misleading in that a reasonable person would assume that the statements plaintiff made and for which she was fired were "derogatory, perverted, or otherwise offensive and upsetting remarks to school children, when in fact she was warning vulnerable and naive young people about the risk of harm from a convicted sex offender." Complaint, ¶ 43. She claims that she will have "tremendous difficulty" finding new employment as a teacher.

The third cause of action is entitled "Infringement of Academic Freedom," in which

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[2] Razzetti never uses this name, but it is clear that he was the subject of plaintiff's remarks.

she claims that Razzetti's order stifled discussion by the staff of important issues affecting students, and was a violation of academic freedom. The fourth cause of action is premised on "tortious inteference with legally mandated duty - prima facie tort." The factual basis alleged is that by prohibiting her from warning her students of the danger posed by the alleged offender, defendants tortiously interfered with plaintiff's legal duty to adequately supervise her students. She cites Penal Law §260.10(2), which provides that a person legally charged with the care or custody of a child less than eighteen years old is guilty of endangering the welfare of child (a class A misdemeanor) if she "fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming an 'abused child'.... as those terms are defined in articles ten, three and seven of the family court act.

The fifth and final cause of action is for retaliatory discharge in violation of Labor Law § 740, the so-called "Whistleblower" statute, which prohibits an employer for retaliating when an employee discloses to a supervisor that an employer is in violation or a "law, rule or regulation." Plaintiff contends in her complaint that she was fired for violating a "gag order" that was in violation of the Penal Law, and which also was contrary to the purpose of Megan's Law, which requires registration of sex offenders.

On this motion the defendants move to dismiss for failure to state a cause of action, and although an answer is annexed to the motion papers it is stated to be a "proposed" answer only. However, there is no request to convert this motion to one for summary judgment pursuant to CPLR 3211(c). Accordingly, the standards applicable to motions made prior to answer apply. In this case, the defendants rely on what is claimed to be a just cause for plaintiff's termination. However, under applicable standards the motion cannot be granted

in full.

In evaluating a motion made pursuant to CPLR 3211(a)[7], the Court must look within the four corners of the complaint, and if any cause of action is discernable therefrom the motion should fail. *See, e.g., Guggenheimer v Ginzburg,* 43 NY2d 268, 275 (1977). In making this determination, the factual allegations asserted in the pleading are to be accepted as true, and the plaintiff is to be accorded the benefit of every favorable inference that may be drawn therefrom. *Konidaris v Aeneas Capital Mgt., LP,* 8 AD3d 244 (2d Dept. 2004); *Leon v Martinez,* 84 NY2d 83 (1994). Upon such a review, which may include affidavits submitted by the motion opponent to remedy any defects in the pleading (*Rovello v Orofino Realty Co.,* 40 NY2d 633, 635 [1976]), the motion will fail if the Court can discern sufficient allegations to support the claim (*Guggenheimer v Ginzburg,* 43 NY2d 268, *supra.*

Defendants also rely, in effect, on CPLR 3211(a)(1), documentary evidence, in that they point to alleged violations of the Handbook. In order to succeed on this basis, the defendant must provide documentary proof that "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mut. Life Ins. Co.,* 98 NY2d 314, 326 (2002); *see also, Tougher Indus. v Northern Westchester Joint Water Works,* 304 AD2d 822 (2d Dept. 2003); *Berger v Temple Beth-El of Great Neck,* 303 AD2d 346 (2d Dept. 2003); Siegel, New York Practice at 440-441 (4th ed). Importantly, affidavits may not be considered for this purpose, as they do not constitute "documentary evidence". *Fontanetta v Doe,* 73AD3d 78 (2d Dept. 2010); *Berger v Temple Beth-El of Great Neck, supra.*

Applying these well-established standards to the case at bar, the first cause of action cannot be dismissed. The elements of a claim in negligent misrepresentation are knowledge by the party making the statement that the statement is to be used for a particular purpose, reliance by the plaintiff on the statement, and some conduct by the maker linking the statement to the relying party and demonstrating the maker's understanding of that reliance. *Credit Alliance Corp. v Arthur Andersen & Co.*, 65 NY2d 536, 551 (1985) ; *see also, Meyercord v Curry,* 38 AD3d 315 (1st Dept. 2007); *Houlihan/Lawrence, Inc. v Duval,* 228 AD2d 560 (2d Dept. 1996). A close relationship between the maker of the statement and party relying on it, not simply one at arm's length, is required as well. *Aerolineas Galapagos, S.A. v Sundowner Alexandria, LLC,* 74 AD3d 652 (1st Dept. 2010).

The parties here were not operating at arm's length, as Razzetti, representative of the employer, held sway over plaintiff and she did not have the ability to ignore the directive, as her termination plainly demonstrates. Further, reading the allegations of the complaint generously and accepting plaintiff's factual assertions as true, as it must, the Court cannot say as a matter of law that she has not stated facts which, if proven, would show 1) the purposeful nature of the statement, 2) that plaintiff detrimentally relied on that portion of the directive which appeared to free plaintiff from the injunction not to discuss the alleged offender's case with students once he was no longer enrolled in the School, and 3) that Razzetti understood that as a teacher hearing that statement plaintiff would in fact rely on it. Put in factual context, if the principal meant to take disciplinary action against those who discussed the case with students, whether or not the alleged offender was a student at the

School, she arguably mislead the plaintiff, who relied on it to her detriment.

The Court notes that in fact there may be other bases for the termination that render it justified, even if there had been a negligent misrepresentation with regard to this one issue. Defendants certainly make that claim by way of Razzetti's affidavit. However, as this motion is directed to the pleading only, the Court cannot consider the affidavit to establish other grounds for the termination, and without it the documentary proof (employment letter, Teacher Handbook) is not sufficient to demonstrate that the termination had its roots in any other matter. As noted, the complaint asserts that the termination was based on the one conversation had with students on February 1, 2010, and thus the first cause of action cannot be dismissed at this time; there is no dispute that a contract existed between the plaintiff and the School and termination therefore had to be for just cause. The plaintiff effectively alleges that the negligent misrepresentation, not wrongful acts by her, was responsible for the termination, causing damages.

The second cause of action is dismissed. In an action for injurious falsehood, the plaintiff must plead that the defendant uttered a false and misleading statement harmful to the interests of the plaintiff, that it was uttered maliciously and with the intent to harm, or done recklessly and without regard to consequences, and that a reasonably prudent person would or should anticipate that damage to the plaintiff would flow therefrom. *Carrara v Kelly,* 74 AD3d 719 (2d Dept 2010); *Gilliam v Richard M. Greenspan, PC,* 17 AD3d 634 (2d Dept. 2005). Here, the alleged false statement was the reason for termination. In her complaint she alleges that this reason was making "inappropriate statements" to children, but

she admits that is was in fact statements to children deemed inappropriate by her employer that led to the termination. Further, her allegations that this was done with an intent to harm is not based on any stated facts, nor is her claim that others would assume that the reason stated for her termination involved venal conduct. Accordingly, the Court concludes that a claim for injurious falsehood is not stated.

The third cause of action must be dismissed as well. Infringement of academic freedom is not a basis for damages here, as the Court agrees with defendants that the claim concerns the internal operations of schools, a matter courts generally eschew, even in the case of public schools, absent a very direct violation of basic constitutional values. *Epperson v Arkansas,* 393 US 97, 104 (1968); *Matter of Bernstein [Norwich City School Dist. Bd. of Educ.],* 282 AD2d 70 (3d Dept. 2001). This view is therefore especially important to recognize in the case of a private school that is run according to the precepts of a recognized faith, where no state action is involved regarding the activity complained of. *See, Oefelein v Monsignor Farrell High School,* 77 Misc 2d 417 (Sup Ct Richmond County 1974).

In the instant matter no facts are alleged regarding the basis for the termination beyond plaintiff's disagreement with the "gag order", a matter of school policy and procedure in the handling of student information, with no First Amendment implications. The Court finds no factual basis for the plaintiff's claim in the complaint that the School is devoted to some "public use" that would somehow permit a court to examine and second-guess the decisions of school personnel on constitutional grounds.

The fourth cause of action also is dismissed. It is, as noted above, grounded on prima

facie tort. This in turn is premised on the School's alleged interference with plaintiff's legally mandated duty to protect her students by warning them of the danger, and exposing her to potential prosecution under the Penal Law. There are several fatal flaws in this claim. The first is that it calls on the courts to recognize an individual teacher's right to disobey an otherwise valid instruction from a superior regarding students based on that teacher's own interpretation of a statute. No authority in support of this dubious proposition is offered, and it flies in the face of the authority noted above that courts will, in general, not second-guess the decisions of school officials in matters bearing on the handling of students committed to their care. *Accord, Hoffman v Board of Educ. of City of New York,* 49 NY2d 121 (1979). The second is that there are no facts alleged that any one student or group of students was or were in actual danger of becoming "abused," such that a person in plaintiff's position, or for that matter School officials, was or were mandated to act under the Penal Law § 260.10(2). Finally, prima facie tort requires that there be an intentional infliction of harm motivated by malice, without any excuse or justification by an act that would otherwise be lawful, resulting in special damages. *See, e.g., Burns Jackson Miller Summit & Spitzer v Lindner,* 59 NY2d 314 (1983). In this case, the "act" was the "gag order," but this was directed to all staff, not just to the plaintiff, and thus no facts are alleged that this directive was motivated by an intent to harm anyone, including the plaintiff.

The Court finds no basis for sustaining the final cause of action under Labor Law § 740. Labor Law §740 applies to retaliatory action such as discharge, suspension, demotion or other adverse employment action. Labor Law § 740 (2) prohibits retaliatory action by an

employer against an employee who:

> (a) discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety, or which constitutes health care fraud;
> (b) provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any such violation of law, rule or regulation by such employer; or
> (c) objects to, or refuses to participate in any such activity, policy or practice in violation of a law, rule or regulation.

The adverse employment action here was not based on her report to a supervisor of a violation of law, or her refusal to participate in a violation of law. Rather, it is alleged to have occurred because the "gag order" prohibited the plaintiff from discussing the alleged offender with those she considered to be in peril from the offender. She contends that this was in violation of Penal Law §260.10(2), as well as being contrary to "Megan's Law" (Sex Offender Registration Act, Corrections Law § 168 *et seq.*), but the Court finds the allegations insufficient. As discussed above, no actual danger to a particular student is alleged to have existed but was ignored, and thus no violation of the Penal Law occurred by dint of Razzetti's instruction to the staff, including plaintiff, not to discuss the matter with students. Further, it is clear from even a cursory reading of legislative purpose that Megan's Law imposes no duty on private entities such as the School to alert the community, or its students, of the presence of sex offenders. That falls on the government. *Id.* Thus, being directed by her superiors not to discuss the case was not a violation of law.

In sum, none of plaintiff's allegations are sufficient to support a claim under the Whistleblower statute, because the adverse employment decision is not alleged to have been in retaliation for plaintiff's reporting, or refusing to participate in, an action that constituted

a violation of the statutes cited.

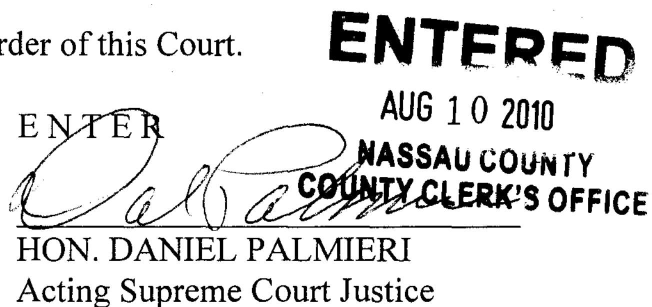
Finally, although the Court has sustained the first cause of action as a matter of pleading, the action against Bishop Murphy and Karen A. Razzetti, sued individually, is dismissed in its entirety. Their names shall be removed from the caption. No allegations are made that any of the alleged actions or failures to act were beyond their roles as supervisors or agents of the Diocese or the School. However, the Court cannot dismiss the action as against the Diocese itself. Plaintiff presents information found in the Diocese's web site demonstrating that the School, whose principal terminated plaintiff, is part of the Diocese, and that the termination was upheld by Diocese's Superintendent of Schools, Sister Joanne Callahan. Plaintiff's affidavit also refers to a number of items concerning Catholic schools and their employees which are provided and supervised by the Diocese, such as employee health plans and pension. As a teacher in the School, this information must be deemed to be stated on personal knowledge. That is sufficient to hold the Diocese in as a defendant under the doctrine of *respondeat superior.*

In sum, the motion is granted in favor of Bishop Murphy and Ms. Razzetti, and as to the remaining defendants all causes of action are dismissed except for the first.

As the plaintiff submitted a "sur reply" after the submission date for this motion, the Court declines to consider it.

This shall constitute the Decision and Order of this Court.

DATED: August 6, 2010



ENTER

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