

Levenson v Nussbaum
2011 NY Slip Op 31027(U)
April 8, 2011
Supreme Court, Nassau County
Docket Number: 17045/09
Judge: Thomas P. Phelan
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 2
NASSAU COUNTY

JACLYNNE LEVENSON,

Plaintiff(s),

ORIGINAL RETURN DATE:02/15/11
SUBMISSION DATE: 03/08/11
INDEX No.: 17045/09

-against-

CAROLE NUSSBAUM, LISA GAGLIANO,
DANA CHIMENTO and ALEXANDRA ZAZZARINO,

MOTION SEQUENCE #3,4

Defendant(s).

The following papers read on this motion:

Notice of Motion.....	1
Cross-Motion.....	2
Answering Papers.....	3
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Motion by defendants pursuant to CPLR 3025(b) for leave to serve a third amended answer to assert the defense of collateral estoppel and for summary judgment dismissing the complaint pursuant to CPLR 3212 is determined as hereinafter provided. Cross motion by plaintiff pursuant to CPLR 3212 for summary judgment against defendant Lisa Gagliano on the first cause of action of the complaint is denied.

Plaintiff, formerly a tenured fifth-grade teacher employed at P.S. 203Q, The Oakland Gardens School, Bayside, New York, commenced this action against defendants, the principal of P.S. 203 and three other teachers at the school, to recover damages arising from her arrest on October 14, 2008, for alleged violation of Penal Law 120.14, menacing in the second degree, based upon allegedly false accusations made by defendants to the police regarding plaintiff's conduct at a meeting of third-grade teachers at P.S. 203 on October 7, 2008. Plaintiff was allegedly asked to speak to the third grade teachers at a lunch time meeting to answer questions

and provide additional information regarding the school website* she had created and the type of material teachers were requested to provide. It was at that meeting that plaintiff allegedly spoke in a hostile manner to her colleagues and waved a metal knife in the air over their heads while making disparaging remarks and refusing to put the knife down. Plaintiff does not dispute that she entered the meeting room with a knife in her hand or that she made gestures as she was talking while holding the knife in her hand. She contends, however, that the knife was a plastic knife.

The incident was reported to the New York Board/ Department of Education and to the 111th Precinct of the New York City Police Department by the school's principal, defendant Carole Nussbaum. Allegedly feeling threatened after learning that plaintiff's actions at the staff meeting were directed specifically at her, defendant Lisa Gagliano, one of the third-grade teachers present at the meeting, filed a formal complaint with the police. On October 8th, the day after the incident, plaintiff was assigned to the Queens Teacher Reassignment Center. On October 14, 2008, she was arrested and given a desk appearance ticket to appear in Criminal Court on January 12, 2009. Plaintiff was advised by letter dated January 8, 2009, however, that her arrest was dismissed by the Office of the District Attorney, Queens County, prior to Criminal Court arraignment and a sealing order was to be filed with the Division of Criminal Justice Services.

Following the subject incident, the New York City Department of Education Office of Special Investigations conducted an investigation which was completed in September 2009. In his report dated September 1, 2009, the confidential investigator concluded that "the allegation that [plaintiff] entered a staff meeting with a metal knife in her hand and proceeded to menace her fellow staff members with said knife [was] substantiated." He recommended that a "Technical Assistance Conference be convened to determine the appropriate disciplinary action to be taken against plaintiff." Thereafter, a hearing was held in the matter pursuant to Education Law § 3020-a commencing June 7, 2010, and continuing on June 9, 16 and 17 and August 10 and 19, 2010, before Hearing Officer Jack Tillem, Esq. who, by written decision dated October 13, 2010, found just cause for plaintiff's termination and sustained specifications 1, 2 and 4 of the charges brought against her by the New York City Department of Education i.e., that plaintiff, *inter alia*, brandished and/or waved the knife above teacher Lisa Gagliano's head and said the following during a third grade staff meeting: "You are dysfunctional. . . . I'm not putting the knife down. . . . I can say and do whatever I want in this school." and, "[b]etween October 2008 and November 2008 [plaintiff] refused to transfer the domain name *PS203 Rising Stars* to P.S. 203." (Ex. R)

* In August 2008 defendant Carole Nussbaum asked plaintiff to help develop a new school website for P.S. 203 which would report school news and provide information about school activities and events to parents and students. Plaintiff testified that she was paid \$600 for her work in this regard. She was reimbursed for fees associated with the purchase of the website's domain name. The website was launched in late September 2008.

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The gravamen of the complaint, which contains three causes of action sounding in malicious prosecution, defamation *per se* and *prima facie* tort, is that defendants acted, or conspired to act together, to cause plaintiff's arrest without probable cause resulting in a criminal proceeding against plaintiff that was terminated in her favor.

Defendants have moved for leave to amend the complaint to add the defense of collateral estoppel and for summary judgment dismissing the complaint predicated on plaintiff's failure to file a notice of claim in accordance with General Municipal Law § 50-e, the doctrine of collateral estoppel and failure to state a cause of action for malicious prosecution, defamation and *prima facie* tort. In response, plaintiff has cross moved for summary judgment against defendant Lisa Gagliano on the first cause of action for malicious prosecution.

With regard to the notice of claim issue, plaintiff contends that because this is an action solely against four individuals, who acted tortiously and maliciously, and not an action against the City of New York or any governmental subdivision, board, commission, agency or public officer of the state, plaintiff was not required to file a notice of claim in this matter. The contention, however, is devoid of merit.

A proper and timely notice of claim is prerequisite to commencement of a lawsuit against a municipality and its employees. General Municipal Law § 50-e, 50-j and 50-k. New York City's liability for all torts is predicated upon the wrongful acts of its agents, servants or employees. The statute, which is referenced in Education Law § 3813(2), requires that a plaintiff must file a notice of claim prior to commencement of an action against a municipality and must serve the notice of claim within ninety days after the claim arises. *Bayer v City of New York*, 60 AD3d 713, 714 [2d Dept. 2009], *lv to app den.* 13 NY3d 707 [2009]; *Gondal New York City Dept. of Educ.*, 19 AD3d 141, 142 [1st Dept. 2005]. There is no basis to conclude, under the facts at bar, that defendants acted outside the scope of their employment so as to obviate the need to file a notice of claim or state a viable cause of action against any of the defendants in their individual capacities. *White v Averill Park Cent. School Dist.*, 195 Misc2d 409, 410 [Sup. Ct., Rensselaer Co., 2003].

Defendants have established entitlement to judgment as a matter of law by demonstrating that plaintiff failed to serve a notice of claim before commencing this action. The record establishes that the conduct complained of occurred while defendants were acting within the scope of their employment. Education Law § 3813(2); *W.E. Rest., Inc. v Wilson*, 38 AD3d 762, 763 [2d Dept. 2007]; *DeRise v Kreinik*, 10 AD3d 381 [2d Dept. 2004]; *Smith v Collins*, 221 AD2d 518, 519 [2d Dept. 1995]; *Agins v Darmstadter*, 153 AD2d 600, 601 [2d Dept. 1989].

In opposition, even viewing the evidence in the light most favorable to plaintiff and giving it the benefit of every favorable inference, plaintiff has failed to raise a question of fact on this issue. Even if this were not the case, the complaint is untenable for the following reasons.

The gravamen of a civil malicious prosecution claim is the wrongful commencement or continuation of a criminal proceeding by defendant against plaintiff. *Kinge v State*, 79 AD3d 1473, 1478 [3d Dept. 2010]. To succeed on such a claim, a party must establish that a criminal proceeding was commenced; that it was terminated in favor of the accused; and that it lacked probable cause and was brought out of malice. *Fortunato v City of New York*, 63 AD3d 880 [2d Dept. 2009]. A failure to establish any one of these elements results in defeat of a cause of action for malicious prosecution. *Rush v County of Nassau*, 51 AD3d 762, 763 [2d Dept. 2008].

The actual malice element of a malicious prosecution action does not require a plaintiff to prove that defendant was motivated by spite or hatred. Rather, it means defendant must have commenced a prior criminal proceeding due to a wrong or improper motive, something other than the desire to see justice done. *Nardelli v Stamberg*, 44 NY2d 500, 502-03 [1978]. Proceeding to prosecution without probable cause is merely evidence from which malice can be inferred but does not lead to a presumption of actual malice. *Martin v City of Albany*, 42 NY2d 13, 18 [1977].

When an arrest is made without a warrant, and justification for the arrest has not been demonstrated, the absence of the probable cause element is satisfied *vis-a-vis* the malicious prosecution claim and malice may be inferred by the lack of probable cause or reckless or grossly negligent conduct. Probable cause, however, requires only information sufficient to support a reasonable belief that an offense has been committed. *Reape v City of New York*, 66 AD3d 755, 756 [2d Dept. 2009].

Criminal proceedings are considered to be initiated only after an arraignment or indictment or some evaluation by a neutral body that the charges were warranted. *Weintraub v Board of Educ. of City of New York*, 432 F Supp2d 38, 59 [E.D.N.Y. 2006], *cert den.* 131 S. Ct. 444 [2010]. A charge and warrantless arrest concluding with the issuance of a desk appearance ticket do not amount to a prosecution sufficient to support a claim for malicious prosecution which typically implicates a post arraignment deprivation of liberty or, at least, an arrest pursuant to a warrant. Here, plaintiff was not arraigned or indicted nor was an arrest warrant evaluated by a magistrate. *Stile v City of New York*, 172 AD2d 743 [2d Dept. 1991]. The threshold trigger for the tort of malicious prosecution, not here present, is a judicial proceeding where the charges against the accused are reviewed and evaluated by a neutral body. *Broughton v State*, 37 NY2d 451, 459 [1975].

As a civil complainant in a criminal action, a defendant in a malicious prosecution action will not be held liable for merely seeking police assistance or furnishing information to law enforcement authorities who are then free to exercise their own judgment as to whether an arrest should be made and criminal charges filed. *Levy v Grandone*, 14 AD3d 660, 661 [2d Dept. 2005] (citation and internal quotation marks omitted).

In opposition to defendants' *prima facie* demonstration of entitlement to summary judgment as a matter of law, plaintiff has failed to raise a triable issue of fact as to whether defendants played an active role in the prosecution of plaintiff by giving advice and encouragement, or importuning the authorities, to act. *Donnelly v Nicotra*, 55 AD3d 868 [2d Dept. 2008]; *Mesiti v Wegman*, 307 AD2d 339, 340 [2d Dept. 2003]. There is no showing that defendants affirmatively induced the police officer to act to arrest plaintiff.

In the second cause of action, plaintiff alleges that defendant principal, Carole Nussbaum, made false statements to third parties that plaintiff had engaged in criminal conduct by carrying a metal knife into a meeting and threatening others with physical harm. In any event, the alleged defamatory communications were protected by the common-interest privilege since they were made by defendant Carole Nussbaum, in her capacity as principal of P.S. 203, to other persons who had an interest in her assessment of plaintiff's behavior. Furthermore, plaintiff has failed to show that the communications at issue were solely motivated by malice (*Phelan v Huntingon Tri-Village Little League, Inc.*, 57 AD3d 503, 504-505 [2d Dept. 2008]), or were so vituperative as to warrant an inference of malice. The rationale for applying the 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. *Liberman v Gelstein*, 80 NY2d 429, 437 [1992]. While the shield of qualified privilege can be pierced by a showing that a defendant was solely motivated by malice (*Golden v Stiso*, 279 AD2d 607, 608 [2d Dept. 2001]), under the circumstances extant, plaintiff's conclusory allegations of malice are insufficient to defeat the motion. *Hame v Lawson*, 70 AD3d 640, 641 [2d Dept. 2010].

The requisite elements of a cause of action for *prima facie* tort are intentional infliction of harm, resulting in special damages, without excuse or justification, by an act or series of acts that would otherwise be lawful. *DelVecchio v Nelson*, 300 AD2d 277, 278 [2d Dept. 2002]. In order to sustain a cause of action alleging *prima facie* tort, plaintiff must submit evidence that, *inter alia*, " 'disinterested malevolence to injure plaintiff constitutes the sole motivation for defendant's otherwise lawful act.' " *DeNaro v Rosalia*, 59 AD3d 584, 587 [2d Dept. 2009], quoting *Molinoff v Sassower*, 99 AD2d 528, 529 [2d Dept. 1984]. There is no recovery, therefore, in *prima facie* tort unless malevolence is the sole motivation for defendants' otherwise lawful act. *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333 [1983].

Here the *prima facie* tort claim is untenable as plaintiff has failed to raise a triable issue of fact as to whether defendants' alleged actions were motivated solely by disinterested malevolence.

Accordingly, defendants' motion for summary judgment dismissing the complaint is granted. That branch of defendants' motion which seeks leave to amend the answer to assert the defense of collateral estoppel is denied as academic. Plaintiff's cross motion for summary judgment against defendant Lisa Gagliano on the cause of action for malicious prosecution is denied in light of the disposition on the motion in chief.

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This decision constitutes the order of the court.

Dated: 4-8-11

HON THOMAS P. PHELAN
Thomas P. Phelan

J.S.C.
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