

Lorusso v Manhasset Union Free School Dist.

2011 NY Slip Op 31976(U)

June 29, 2011

Sup Ct, Nassau County

Docket Number: 016347-08

Judge: Arthur M. Diamond

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

-----X
LORI LORUSSO,

Plaintiff,

-against-

**MANHASSET UNION FREE SCHOOL DISTRICT;
CHARLES CARDILLO, Superintendent of Schools,
individually and in his official capacity; CAROLYN
PAGNANO, Director of Health, Physical Education
and Athletics, individually and in her official capacity;
JUDITH REILLY, NCSN, individually and in her
official capacity.**

Defendants.

TRIAL PART: 14

NASSAU COUNTY

INDEX NO: 016347-08

MOTION SEQ NO.: 2

SUBMIT DATE:06/02/11

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The following papers having been read on this motion:

Notice of Motion.....	1
Affidavit in Support.....	2
Memorandum of Law.....	3
Opposition.....	4
Reply.....	5
Memorandum of Law.....	6

Motion by defendants for an order pursuant to CPLR § 3212 granting them summary judgment dismissing the two causes of action set forth in the complaint is granted.

In 2008, plaintiff commenced this action to recover money damages for defamation and constructive discharge arising out of her employment as school nurse at the Manhasset Union Free School District (the "District"). In addition to the District, Lorusso has named Charles Cardillo (the Superintendent), Carolyn Pagnano (plaintiff's supervisor) and Judith Reilly (a co-employee) as defendants.

Lorusso was initially hired as a school nurse by the District on a part-time basis in December,

1997. Lorusso became a full-time employee in March, 2004,¹ until she voluntarily resigned on August 29, 2007. The terms of Lorusso's employment were contractually governed by the Collective Bargaining Agreement ("CBA") between the District and Manhasset Education Support Association. Carolyn Pagnano, the District's Director of Health, Physical Education and Athletics, became Lorusso's supervisor in the 2005-2006 school year. Judith Reilly was Lorusso's co-employee who has been employed by the District for approximately 24 years and who worked as a nurse with Lorusso in the health office. Charles Cardillo became the District Superintendent on November 28, 2005.

During the 2006-2007 school year, there were a series of incidents related to Lorusso's performance as a nurse which allegedly called her abilities into question. These incidents ultimately led to an unsatisfactory performance evaluation (the "Evaluation"), prepared and issued by Pagnano on or about May 30, 2007. The District, based upon this evaluation, suspended Lorusso on May 31, 2007, with pay, and instructed its District counsel to hire an independent nurse practitioner to review the incidents referenced in the May 30, 2007 Evaluation. While the independent investigation concluded that the incidents did not rise to the level of being appropriate for Article 75 termination proceedings, they were appropriate to be included in the Evaluation.

Based on the results of the investigation, the District, in August, 2007, lifted her suspension, and advised her that she would be transferred to another school within the District (Munsey Park) to give her a fresh start. Lorusso's duty and pay would remain the same. Nevertheless, Lorusso resigned from her nursing position on August 29, 2007.

Prior to filing the instant action, plaintiff initially sought relief from the defendants by filing an administrative action before the New York State Division of Human Rights ("SDHR") claiming discrimination and hostile work environment based on her age and alleged disability.

The SDHR, after considering plaintiff's factual allegations, determined that there was no

¹In addition to her nursing position, Lorusso was a coach at the Manhasset boys and girls volleyball team.

probable cause to believe that the respondent has engaged or is engaging in unlawful discriminatory practices. In dismissing Lorusso's complaint, the SDHR stated in part, that, "Ms. Lorusso voluntarily resigned her position and the facts reviewed failed to show that [Ms. Lorusso] was subject to a hostile work environment that precipitated her resignation."

The plaintiff subsequently filed a petition with the Nassau County Supreme Court, appealing the above-referenced Order from SDHR.

The defendants filed a Notice of Motion to dismiss plaintiff's appeal, which was subsequently granted. Petitioner also filed a charge against the District with the U.S. Equal Employment Opportunity Commission, which was dismissed.

Defendants seek dismissal of the defamation claims on the grounds that they are either: (1) barred by the statute of limitations; (2) do not identify, with the required specificity, the time, place and manner of the alleged false statement; (3) not defamatory; (4) non-actionable expressions of opinion; or (5) fall within the qualified privilege afforded to statements made by employers reviewing or evaluating the performance of an employee.

The action was commenced on August 29, 2008 through the filing of a Summons with Notice. The statute of limitations for tort actions, such as defamation, against school districts and their employees is one year and ninety days. *Peek v Williamsville Board of Education*, 221 AD2d 919, 920, [4th Dept 1995]. Hence, any statements made by defendants prior to May 29, 2007 (one year and ninety days before the claim was commenced) are barred by the statute of limitations. As a result, Lorusso may only rely upon the May 30, 2007 evaluation as the basis of her defamation claim. All statements made prior to her evaluation are time-barred.

The elements of a cause of action to recover damages for defamation are: a false statement; published without privilege or authorization to a third party; constituting fault as judged by, at a minimum, a negligence standard; which causes special harm or constitutes defamation *per se*. *Epifani v Johnson*; 65 AD3d 224 [2nd Dept 2009] *Salvatore v Kumar*, 45 AD3d 560 [2nd Dept 2007], *lv to app den*. 10 NY3d 703 [2008]. A false i.e., defamatory statement is libelous *per se* if it charges another with a serious crime or tends to injure another in his or her trade, business or profession.

Matovcik v Times Beacon Record Newspapers, 46 AD3d 636, 367 [2nd Dept 2007]. Upon finding that a false statement has alleged a serious crime, a court may, absent any privilege, send the issue to a jury for a determination of damages. *Geraci v Probst*, 61 AD3d 717, 718 [2nd Dept 2009].

Whether particular words are reasonably susceptible of a defamatory meaning presents a question to be determined by the court in the first instance. *Kamalian v Reader's Digest Ass'n, Inc.*, 29 AD3d 527, 528 [2nd Dept 2006]. The court must look at the content of the entire communication, its tone and apparent purpose, to determine whether a reasonable person would consider it as conveying facts about the plaintiff. *Gjonlekaj v Sot*, 308 AD2d 471, 473 [2nd Dept 2003]. Merely because words are offensive or impute unlawful behavior does not render them slanderous in and of themselves i.e., slander *per se*. Words, however, which have a tendency to disparage an individual, *inter alia*, with respect to his office, trade or business are slanderous *per se* and a plaintiff need not plead/prove that he has sustained special damages. Statements which 1) charge plaintiff with a serious crime; 2) that tend to injure another in his trade, business or profession; 3) that indicate that plaintiff has a loathsome disease; or 4) impute unchastity to a woman constitute slander *per se*. As such, the law presumes that damages will result. They need not, therefore, be alleged or proven. *Epifani v Johnson, supra*. Further, "[t]he complaint must set forth the particular words allegedly constituting defamation (*see* CPLR §3016 (a), and it must also allege the time when, place where, and manner in which the false statement was made, and specifically to whom it was made. (*See Dillon v City of New York*, 261 AD2d at 38)" *Epifani v Johnson, supra*.

It is well established that many statements that might otherwise be considered defamatory may be protected by a qualified privilege. A privileged statement is one, which, but for the occasion on which it is uttered would be defamatory and actionable. *Park Knoll Associates v Schmidt*, 59 NY2d 205, 208 [1983]. Good faith communications made by a party having an interest in the subject, or a moral or societal duty to speak, are protected by a qualified privilege if made to a party having a corresponding interest. *El-Hennawy v Davita, Inc.*, 50 AD3d 625 [2nd Dept 2008].

If the statements at issue are found to be qualifiedly privileged, it becomes the plaintiff's burden in opposing a motion for summary judgment, to demonstrate a triable issue of fact by

proffering evidentiary proof that defendant was motivated by actual malice, ill-will, personal spite, negligence, etc. *Kosachkoff v City of New York*, 107 AD2d 130, 135 [1st Dept 1985], *aff'd* 68 NY2d 654 [1986]. A qualified privilege is conditioned on its proper exercise and cannot shelter statements published with malice or with knowledge of their falsity or reckless disregard as to their truth or falsity. *Loughry v Lincoln First Bank, N.A.* 67 NY2d 369, 376 [1986]. Where the relevant facts are not in dispute, it is for the court, not the jury, to decide whether a qualified privilege exists. *Harris v Hirsh*, 228 AD2d 206, 207, [1st Dept 1996] *lv to app den.* 89 NY2d 805 [1996].

With respect to statements of opinion, it is well recognized that “[o]pinions, false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions, provided that the facts supporting the opinions are set forth.” *Rinaldi v Holt, Rinehardt & Winston, Inc.*, 42 NY2d 369, 380 [1977], *cert den.* 434 U.S. 969 [1977]. The issue of distinguishing between actionable fact and non-actionable opinion is a question of law for the court. *Springer v Almontaser*, 75 AD3d 539 [2nd Dept 2010]. In making that determination the factors to be considered are: (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false, and (3) whether either the full context of the communication in which the statement appears, or the broader social context and surrounding circumstances, are such as to signal readers or listeners that what is being read or heard is likely to be opinion, not fact. *Colantonio v Mercy Medical Center*, 73 AD3d 966, 968 [2nd Dept 2010].

A pure opinion is a statement of opinion which is accompanied by a recitation of the facts upon which it is based or a statement which does not imply that it is based on some undisclosed facts. *Kamalian v Reader's Digest Ass'n, Inc.*, *supra* at p. 528.

Applying these principles to the case at bar, we find that the actual defamatory words were never pleaded with particularity. *See Murgonti v Weber*, 248 AD2d 208 [1st Dept 1998]. Moreover, to the extent that the remarks were made in the context of an employer's evaluation of an employee, the statements were protected as a matter of law by a qualified privilege. *Id*; *see Kosachkoff v City of New York*, 107 AD2d 130 [1st Dept 1985]. Hence, the burden shifts to plaintiff to raise an issue

of fact sufficient to defeat the privilege.

A review of the record establishes that plaintiff has failed to sustain her burden of proof. Accordingly, dismissal of the defamation claim is warranted.

Defendants seek summary judgment dismissing plaintiff's constructive discharge claim on any one of the following grounds:

1. There was no evidence that defendants intentionally mistreated the plaintiff (See Defendant's Memorandum of Law ("MOL") at 14-18);
2. Plaintiff's allegations do not as a matter of law support a finding that her work environment was so severely intolerable that she was forced to resign (MOL at 14-15 and 18-21);
3. The New York State Division of Human Rights ("SDHR") had already ruled that plaintiff's factual allegations were insufficient to establish a claim for a hostile work environment, much less constructive discharge thereby stopping plaintiff from pursuing this claim before this Court (MOL at 21-22);
4. Plaintiff's claim as a matter of law was for breach of contract not tort and thus the individual defendants could not be held liable as they were not in privity with the plaintiff (MOL at 22-24); and
5. Plaintiff's claim was untimely (MOL at 24-29).

Of these five grounds for dismissing the constructive discharge claim, plaintiff's "opposition" papers address only the statute of limitations and very briefly the SDHR ruling. It bears noting that the substantive arguments advanced by defendants in their initial moving papers, which plaintiff does not oppose, set forth a sufficient basis for this Court, without even addressing the statute of

7
limitations arguments, to dismiss this case.

Based upon the record submitted, we find that plaintiff's claim of constructive discharge is not supported by any evidence that defendants deliberately made her working conditions intolerable which a reasonable person in her position would be compelled to resign. *Thompson v Lamprecht Transport*, 39 AD3d 846 [2nd Dept 2007]; see *Mountleigh v City of New York*, 191 AD2d 291, 292 [1st Dept 1993]; see *Matter of Gold Coast Restaurant Corp. v Gibson*, 67 AD3d 798 [2nd Dept 2009].

Plaintiff's second cause of action for constructive discharge, is at its core, a breach of contract action. Pursuant to Education Law § 3813 (2-b), "no action or special proceeding shall be commenced against any entity specified in subdivision one of this section more than one year after the cause of action arose." Here, Lorusso's constructive discharge claim accrued more than one year before she commenced this action, and hence, it is time barred and should be dismissed. See *Williams v Environmental Defense Fund*, 246 AD2d 644, 668 [2nd Dept 1998].


In view of the foregoing, defendants' motion is granted in its entirety and the complaint is dismissed.

This constitutes the decision and judgment of the Court.

DATED: June 29, 2011

ENTER

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