

**Messina v Roosevelt Union Free School Dist.**

2011 NY Slip Op 32956(U)

October 28, 2011

Sup Ct, Nassau County

Docket Number: 5196/11

Judge: Thomas Feinman

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU**

Present:

**Hon. Thomas Feinman**  
Justice

\_\_\_\_\_  
PETER MESSINA,

Plaintiff,

- against -

ROOSEVELT UNION FREE SCHOOL DISTRICT,  
THE BOARD OF EDUCATION OF THE  
ROOSEVELT UNION FREE SCHOOL DISTRICT,  
ROBERT SUMMERVILLE, individually and in his  
Official Capacity, BISHOP J. RAYMOND MACKEY,  
individually and in his Official Capacity, FRANK  
SCOTT, individually and in his Official Capacity,  
WILHELMINA FUNDERBURKE, individually and  
in his Official Capacity, KIMBERLEY MCLEAN,  
individually and in his Official Capacity, JAMES  
MILAM, individually and in his Official Capacity,

Defendants.

TRIAL/IAS PART 13  
NASSAU COUNTY

INDEX NO. 5196/11

**X X X**

MOTION SUBMISSION  
DATE: 9/2/11

MOTION SEQUENCE  
NOS. 1, 2

The following papers read on this motion:

Notice of Motion and Affidavits.....	<u>X</u>
Memorandum of Law in Support of Motion.....	<u>X</u>
Notice of Cross-Motion and Affidavit.....	<u>X</u>
Memorandum of Law in Support of Cross-Motion....	<u>X</u>
Affirmations in Opposition.....	<u>X</u>
Reply Affirmation.....	<u>X</u>
Memorandum of Law in Support of Reply.....	<u>X</u>

The defendants move for an order pursuant to CPLR §3211 dismissing plaintiff's complaint. The defendants submit a Memorandum of Law in support of the defendants' motion. The plaintiff cross-moves for an order pursuant to General Municipal Law §50-e (5) for leave to file a late notice of claim, and opposes the plaintiff's motion. The defendants submit a reply affirmation and Memorandum of Law in support of the defendants' reply.

## BACKGROUND

The plaintiff initiated this action alleging defamation, breach of fiduciary duty, tortious interference with prospective business advantage, breach of contract, and intentional infliction of emotional distress. The plaintiff alleges, as plaintiff's first cause of action for defamation against the defendants, that the following statement made by the defendant, Robert Summerville, (hereinafter referred to as "Summerville"), a member of the Board of Education of the Roosevelt Union Free School District, (hereinafter referred to as the "Board"), was defamatory: "Messina [plaintiff] does not deserve a job because he is 'guilty' of socially promoting students". Plaintiff claims the statement is "untrue" and that "Summerville had no basis for making the statement".

The plaintiff alleges, in the complaint:

"Social promotion is the controversial practice of promoting a student to the next grade despite their low achievement in order to keep them with social peers. Negative impacts of social promotion include having students promoted to a class for which they are known to be unable to do the work forcing the next teacher to deal with the under-prepared students while trying to teach the prepared ones. The frustration endured by these under-prepared students of not being able to keep up in class often leads to classroom disruptions which can diminish the achievement of fellow students. Furthermore, social promotion provides false progress reports to parents and it also sends a negative message to all students that they can get by without having to work too hard. Lastly, social promotion is in contravention to the policy of the District.

The defendants annex various articles summarizing studies analyzing the effects of social promotion, the ban on social promotion in 2010, and discussion and debates concerning the effects of social promotion. The defendants annex an article that defines social promotion as the practice of automatically passing students to the next grade. (Posted on *allpolitics.com*>*time*>*storypage*). The article discusses the effect of social promotion on a 15-year old student who fails the state test, who is then typically sent to the city's "transition center", an educational way station for students who haven't qualified for high school, but are too old to remain in a regular eighth-grade classroom. The article provides that social promotion damages self-esteem and demoralizes students, resulting in higher rates of drop-outs.

The plaintiff testified at his 50-h hearing that social promotion pertains to graduating a student that is below grade standards, rather than to advancing a student to the next grade level. The plaintiff testified that "[f]or me to socially promote a student to graduate I have to change a teacher's grade, falsify their New York State transcript, which is a legal document. That's what Summerville accused me of doing". Plaintiff testified that Summerville must have known that his purported defamatory statement was false because it is impossible for a guidance counselor to socially promote a student without altering a student's transcript.

The plaintiff alleges in the complaint that he was employed with the defendant, Roosevelt Union Free School District, (hereinafter referred to as the "District"), from 1967 until 1998, when he voluntarily retired. Plaintiff testified, at his 50-h hearing, that he received tenure in social studies and received tenure in his position with the guidance department. Plaintiff alleges that on August 26, 2010, he was appointed for the position of Student Guidance Counselor at the Roosevelt Middle School after the recommendation of the Superintendent of the District, and after a Board meeting on August 26, 2010. Plaintiff further alleges that thereafter, on August 26, 2010, the Board reconvened in a closed executive session, whereby Summerville moved to rescind the Board's previous vote, after Summerville made the aforementioned defamatory statement, and the Board rescinded plaintiff's probationary status as Student Guidance Counselor on August 26, 2010.

#### APPLICABLE LAW

While the criteria in determining whether a complaint will withstand a motion pursuant to CPLR §3211(a)(7) is whether the pleadings state a cause of action discerned from the four corners of the pleadings, (*Guggenheimer v. Ginzberg*, 43 NY2d 268), when the moving party offers evidentiary material, the court is required to determine whether the proponent of the pleading has a cause of action, and not whether the proponent has merely stated a cause of action. (*Meyer v. Guinta*, 262 AD2d 463).

Generally, a plaintiff in a libel action must show special damages consisting of the loss of something having economic or pecuniary value. (*Liberman v. Gelstein*, 80 NY2d 429). However, the requirement of showing special damages does not apply to a statement that is libelous "per se", a statement that is defamatory "on its face". (*Pappas v. Passias*, 271 AD2d 420). Whether particular words are defamatory presents a legal question to be resolved by the Court, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction. (*Joyce v. Thompson Wigdor & Gilly, LLP*, 2008 WL 2329227, citing *Golub v. Enquirer/Star Group, Inc.*, 89 NY2d 1074). Whether a particular statement constitutes pure opinion is a question of law for the court. (*Steinhilber v. Alphonse*, 68 NY2d 283). The Court of Appeals in *Steinhilber*, has suggested four factors to be considered in making such a determination:

- (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". (*Id.* At 292, 508 NYS2d 901, 501 NE2d 550.)

The Court in *Joyce v. Thompson Wigdor, supra.*, has provided the standard in which the Second Department has applied the aforesaid considerations.

New York case law makes clear that “a subjective characterization of the plaintiff’s behavior and an evaluation of her job performance ... constitute[s] a nonactionable expression of opinion”. *Farrow v. O’Connor, Redd, Gollihue & Sklarin, LLP*, 857 NYS2d 235, 2008 WL 1990313. (NY AD2d Dep’t May 6, 2008) (citing cases) *Accord Ott v. Automatic Connector, Inc.*, 193 AD2d 657, 658, 598 NYS2d 10 (2d Dept. 1993). (An employer has the right to assess an employee’s performance on the job without judicial interference.); *Angel v. Levittown Union Free School Dist. No. 5*, 171 AD2d 770, 773, 567 NYS2d 490 (2d Dept. 1991). (Expressions of mere dissatisfaction with a plaintiff’s work performance do not constitute libel or slander per se); *see also Curto v. Med. World Commc’ns*, 388 F.Supp.2d 101, 111 E.D.N.Y. 2005) (Under New York law, statements made by employers criticizing their employees’ performance are generally protected statements of opinion).

A defendant’s statement about a secretary, that she was “one of the worse secretaries at the firm”, that her “work habits are bad”, that her “performance was bad” and that the plaintiff “is not what you are looking for” were found to be non-actionable expressions of opinion. (*Joyce v. Thompson Wigdor, LLP*, citing *Miller v. Richman*, 184 AD2d 191). The Court held that the statements which criticized plaintiff’s performance were “as a matter of law non-actionable expressions of opinion” whereby the “defendant’s unfavorable assessments of plaintiff’s work are incapable of being objectively characterized as true or false”. (*Miller v. Richman, supra.*)

In distinguishing between actual factual assertions and nonactionable opinion, the courts must consider the content of the communication as a whole, as well as its tone and apparent purpose. (*Brian v. Richardson*, 87 NY2d 46). Rather than sifting through a communication for the purpose of isolating and identifying assertions of fact, the court should look at the over-all context in which the assertions were made and determine on that bases whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff. (*Id.*, citing *Steinhilber v. Alphonse*, 68 NY2d 283). In determining whether a contested statement is reasonably susceptible of a defamatory connotation, the court must give the disputed language a fair reading in the context of the publication as a whole. (*Leone v. Rosenwach*, 245 AD2d 345). In *Leone*, the court found that the defendants’ statement that the plaintiff was an “incompetent worker” and “unfit for his job” constituted nonactionable statements as they were indefinite, ambiguous and incapable of being objectively characterized as true or false. (*Id.*) Statements in a disparaging letter written by plaintiff’s former employer to plaintiff’s clients were found to be statements of opinion. (*Silverman v. Clark*, 35 AD3d 1). The defendant physician’s alleged statement to plaintiff physician’s patient, “I don’t think [plaintiff] knows what he is talking about either” was opinion, not actionable in defamation. (*Boules v. Newman*, 302 AD2d 932). An attorney’s letter to a client noting possible irregularities in a prior real estate closing handled by plaintiff, client’s former attorney, contained statements of opinion. (*D’Agostino v. Gould*, 158 AD2d 577).

In New York, communications made by supervisors or co-workers concerning an employee’s performance falls within a qualified privilege, (*Vaughn*, Slip Copy, 2010 WL 3835191). An employer’s communication to others who share a common interest cannot be subject to a suit in defamation absent a demonstration of common-law malice. (*Id.*) An employer has the right to assess an employee’s job performance without judicial interference. (*Ott v. Automatic Connector*, 193 AD2d 657). Failure to plead that the alleged defamer acted with malice warrants dismissal of complaint. (*Cunningham v. Lewenson*, 294 AD2d 327).

It is also well established that the proper governing party must be served with a Notice of Claim within ninety (90) days of the offending incident. (New York General Municipal §50-e). Education Law §3813(1) mandates service on the proper governing party. The notice of claim requirement is applied strictly, (*Clune v. Garden City Union Free School District*, 34 AD3d 618), and service on the Board is not satisfied by service on another individual body. (*Parochial Bus Sys, Inc. v. Board of Education of the City of New York*, 60 NY2d 539).

### DISCUSSION

Here, the defendants have demonstrated that the Board has not been served with the notice of claim, *albeit*, plaintiff has purportedly served the District with a copy of the notice of claim. Additionally, the individual defendants have not been identified in the notice of claim, and have not been served with the notice of claim. Moreover, the plaintiff asserts in the notice of claim, defamation "*per se*", and alleges a cause of action for defamation in the complaint. The defendants have also demonstrated that the complaint lacks the requisite language alleging that at least thirty days have elapsed since service of notice of claim and no payment has been neglected or refused. (Gen. Mun. Law §50-i(1)(b); *Perkins v. City of New York*, 26 AD3d 483).

In any event, should this Court choose to ignore the procedural defects, the complaint herein must fail as the proponent does not have a cause of action for defamation.

As already provided, this Court must assess four factors to determine whether the purported defamatory statement, "Messina does not deserve a job because he is 'guilty' of socially promoting students" is actionable. Here, the purported defamatory statement does not contain specific language that has a precise meaning which is readily understood. "Social promotion" does not conjure precise meaning and is not capable of being objectively characterized as true or false.

Plaintiff's own admissions demonstrate that social promotion does not have a precise meaning which is readily understood. On the one hand, plaintiff describes social promotion as the controversial practice of promoting a student to the next grade, despite their low achievement, in order to keep them with social peers, as alleged in plaintiff's complaint. However, on the other hand, plaintiff previously testified at his 50-h hearing that to him, social promotion meant that he would "have to change a teacher's grade, [and] falsify their New York State transcript, a legal document [and] [t]hat's what Somerville accused me of doing".

In examining the full context of the communication in which the statement was made, it has been demonstrated that the statement was made by a Board member, to other Board members, at a closed Board meeting, to determine whether the Board should rescind plaintiff's probationary position as a guidance counselor. The statement that plaintiff engaged in "social promotion" falls squarely into the category of job performance as it relates directly to the plaintiff's performance as a guidance counselor, and is an evaluation of plaintiff's job performance, or a dissatisfaction with plaintiff's work performance, as a guidance counselor. A statement that is "somewhat deprecating" but does not rise to the level of "disgraceful conduct" is not actionable, whereby "courts will not strain to find defamation where none exists. (*Wiesmann v. Riverhead Union Free School District*, 2010 NY Slip Op 32640U). Here, the unfavorable characterization of plaintiff's job performance, or practice of social promotion, is a non-actionable expression of opinion.

[\* 6]

Moreover, the statement falls under a qualified privilege as it was made at an executive closed session, in connection with the evaluation of plaintiff's work performance, made to other Board members who share a common interest, made at a reasonable time for a legitimate purpose of hiring appropriate employees. (*Vaughn, supra*).

Additionally, plaintiff's complaint did not plead that Summerville acted in malice, ill will or spite in making the statement. Plaintiff, in opposition, has failed to make a sufficient showing of malice. Earlier disputes are not evidence of malice, (*Williams v. County of Genesee*, 306 AD2d 865). Mere conclusory allegations or surmise are insufficient to defeat the claim of qualified privilege. (*Cunningham v. Lewenson*, 209 AD2d 327).

Notwithstanding that plaintiff's notice of claim does not allege breach of fiduciary duty, tortious interference with contract, tortious interference with a prospective business advantage, or breach of contract, or that malice was not pled in the complaint, such causes of action fail under the circumstances at bar. The defendants have demonstrated that no contract existed, as the plaintiff did not obtain the position, was not employed, and therefore his employment was not effective.

In light of the foregoing, this Court need not address the defendants' remaining contentions, and therefore, the defendants' motion is granted, the plaintiff's cross-motion is denied, and plaintiff's complaint is dismissed in its entirety.

ENTER:



J.S.C.

Dated: October 28, 2011

cc: Borelli & Associates, P.L.L.C.  
Rutherford & Christie, LLP

**ENTERED**  
NOV 02 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE