Huffine v South Shore Press
2012 NY Slip Op 30169(U)
January 11, 2012
Supreme Court, Suffolk County
Docket Number: 11-17764
Judge: Peter H. Mayer
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SHORT FORM ORDER

INDEX No. 11-17764

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 8-9-11 (#001)
MOTION DATE 9-27-11 (#002)
ADJ. DATE 9-27-11
Mot. Seq. # 001 - MD; CASEDISP
002 - MG

ANTOINETTE HUFFINE, Plaintiff, - against - THE SOUTH SHORE PRESS, FRED TOWLE, JR. and GREGORY C. MIGLINO, JR., Defendants.	REGINA SELTZER, ESQ. Attorney for Plaintiff 30 Brewster Lane Bellport, New York 11713 HAMMILL, O'BRIEN, CROUTIER, DEMPSEY, PENDER & KOEHLER, P.C. Attorney for Defendants The South Shore Press & Fred Towle, Jr. 6851 Jericho Turnpike, Suite 250, P.O. Box 1306 Syosset, New York 11791 J. LEE SNEAD, ESQ. Attorney for Defendant Gregory C. Miglino, Jr. 144 South Country Road Bellport, New York 11713

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the plaintiff, dated July 5, 2011, and supporting papers 1 - 14 (including Memorandum of Law dated July 5, 2011); (2) Notice of Cross Motion by the defendants The South Shore Press and Fred Towle, Jr., dated September 19, 2011, and supporting papers 15 - 23 (including Memorandum of Law dated September 19, 2011); (3) Affirmation in Opposition by the plaintiff, dated September 22, 2011, and supporting papers 24 - 25; (4) Affirmation in Opposition by the defendant Gregory C. Miglino, Jr., dated September 23, 2011, and supporting papers 26 - 30; (5) Affirmation in Opposition by the plaintiff, dated September 24, 2011, and supporting papers 31 -32; (6) Reply Affirmation by the defendant Gregory C. Miglino, Jr., dated September 29, 2011, and supporting papers 33 - 34; (5) Other Sur-Reply by the plaintiff, dated October 1, 2011, and supporting papers 35 - 36; Rejoinder by the defendant Gregory C. Miglino, Jr., dated October 4, 2011, and supporting papers 37 - 38 ~~(and after hearing counsels' oral arguments in support of and opposed to the motion)~~; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that this motion by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment in her favor as to the defendants' liability is denied and, in searching the record, summary judgment is granted to the defendant Gregory C. Miglino, Jr. as a matter of law and the plaintiff's complaint against him is dismissed.; and it is further

ORDERED that the motion by the defendants The South Shore Press and Fred Towle, Jr. for an order pursuant to CPLR 3211 (a) (7) dismissing the complaint is granted.

This action for libel per se arises out of the publication of two newspaper articles in The South Shore Press, a weekly local newspaper serving the Town of Brookhaven, New York, on May 4, 2011 and May 11, 2011, and the distribution of a political flyer dated May 17, 2011. The plaintiff alleges that the defendant The South Shore Press and its publisher, the defendant Fred Towle, Jr. (collectively The Press), maliciously published false statements about her in the two newspaper articles, and that the defendant Gregory C. Miglino, Jr., (Miglino) maliciously published false statements about her in the political flyer.

The plaintiff now moves for summary judgment in her favor as to the defendants' liability. Initially, the Court notes that the plaintiff's motion was made prior to the service of an answer by The Press. Pursuant to CPLR 3212 (a), a motion for summary judgment may not be made before issue is joined, and the requirement is strictly enforced (***City of Rochester v Chiarella***, 65 NY2d 92, 490 NYS2d 174 [1985]; *see also* ***Union Turnpike Assocs., LLC v Getty Realty Corp.***, 27 AD3d 725, 812 NYS2d 628 [2d Dept 2006]; ***Miller v Nationwide Mut. Fire Ins. Co.***, 92 AD2d 723, 461 NYS2d 128 [4th Dept 1983]). Accordingly, that portion of the plaintiff's motion which seeks an order granting summary judgment against The Press is denied.

In support of her motion against Miglino, the plaintiff submits, *inter alia*, her affidavit, the relevant pleadings, a copy of the two newspaper articles, and a copy of the subject flyer. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

The plaintiff's complaint sets forth three causes of action based on the May 4, 2011 article, the May 11, 2011 article and the political flyer, respectively.[1] The Court notes that the second cause of action involving the May 11, 2011 article includes allegations that only pertain to The Press, and that the

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[1] To the extent that the plaintiff's first cause of action includes allegations of mental anguish, or the intentional infliction of emotional distress, said claims are dismissed because they "fall within the ambit of other traditional tort liability which, in this case, is reflected in plaintiff's causes of action sounding in defamation" (***Herlihy v Metropolitan Museum of Art***, 214 AD2d 250, 263, 633 NYS2d 106 [1st Dept 1995]; *see also* ***Hirschfeld v Daily News***, 269 AD2d 248, 703 NYS2d 123 [1st Dept 2000]; ***Butler v Delaware Otsego Corp.***, 203 AD2d 783, 610 NYS2d 664 [3d Dept 1994]; ***Liker v Weider***, 2003 WL 25712421 [Sup Ct, New York County 2003]).

third cause of action involving the political flyer includes allegations that only pertain to Miglino. The first cause of action involving the May 4, 2011 article potentially involves both The Press and Miglino. However, in light of the Court's decision to deny the plaintiff's motion for summary judgment against The Press, only those issues involving Miglino will be discussed herein.

In her affidavit in support of her motion for summary judgment, the plaintiff swears that Miglino bears her ill will due to previous disagreements during their mutual tenure as members of their local Board of Education (Board). She states that the defendant Fred Towle, Jr. and Miglino are political allies, and that the two conspired to spread false statements about her when she chose to seek a new term as a member of the Board. She indicates that the May 4, 2011 article reads as follows: "Miglino states that Steven Long is associated with Toni Huffine who was removed from the Board of Education in 2008." It is undisputed that the plaintiff was removed from the Board in 2008, after litigation and the determination of an independent hearing officer. In addition, the plaintiff has failed to submit any evidence regarding her association, relationship or dealings with Steven Long. The issue is of some importance because the May 4, 2011 article actually concerns Mr. Long and his arrest for allegedly cheating the local school district regarding one of its construction projects.

In addition, Miglino can only be found responsible for the republication of his allegedly defamatory statement in The Press if it can be shown that he knew his statements would be published (***Schoepflin v Coffey***, 162 NY 12 [1900]), or that he had some control over whether The Press published the article, or approved, or participated in the activities of the republisher. "It is too well settled to be now questioned that one who utters a slander, or prints and publishes a libel, is not responsible for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control and who thereby make themselves liable to the person injured, and that such repetition cannot be considered in law a necessary, natural and probable consequence of the original slander or libel" (***Geraci v Probst***, 15 NY3d 336, 912 NYS2d 484 [2010] quoting ***Schoepflin v. Coffey***, *id.* at 17) . If the article contains an accurate statement of what Miglino said, and he authorized or intended its publication, he would be responsible for any damage caused by the publication regardless of its being labeled as slander or libel (***Campo v Paar***, 18 AD2d 364, 239 NYS2d 494 [2d Dept 1963]).

The plaintiff has failed to establish her entitlement to summary judgment on her first cause of action herein. There are issues of fact regarding the truth of Miglino's statements, whether he was quoted correctly, and his potential responsibility for the republication of his allegedly defamatory statements. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see*, ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*).

In addition, the plaintiff has failed to establish her entitlement to summary judgment regarding her third cause of action. In her affidavit, the plaintiff asserts that the following statements included in the political flyer, dated May 17, 2011, are defamatory: "4.6 Million deficit in 2005 when Huffine served on the Board," and "Thousands spent over three decades defending against her frivolous law suits as a former School Administrator and Board Member." A review of the flyer reveals that it was distributed in support of two candidates running against the plaintiff in the election for membership on the Board, not on behalf of Miglino. The flyer is unsigned, it does not indicate who created or distributed it, and it

does not mention Miglino, or his alleged disputes with the plaintiff. In addition to issues of fact involving the truth of the enumerated statements contained in the political flyer, the plaintiff has failed to establish that Miglino published said flyer, or was otherwise involved in its creation and distribution. Accordingly, the plaintiff's motion is denied.

The Press cross-moves for an order dismissing the complaint for failure to state a cause of action. Pursuant to CPLR §3211 (a) (7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs (***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (***Guggenheimer v Ginzburg***, 43 NY2d 268, 401 NYS2d 182 [1977]). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (***Pacific Carlton Development Corp. v 752 Pacific, LLC***, 62 AD3d 677, 878 NYS2d 421 [2d Dept 2009]; ***Gjonlekaj v Sot***, 308 AD2d 471, 764 NYS2d 278 [2d Dept 2003]). On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (***Leon v. Martinez***, *supra*; ***International Oil Field Supply Services Corp. v Fadeyi***, 35 AD3d 372, 825 NYS2d 730 [2d Dept 2006]; ***Thomas McGee v City of Rensselaer***, 174 Misc2d 491, 663 NYS2d 949 [Sup Ct, Rensselaer County 1997]). Upon a motion to dismiss, a pleading will be liberally construed and such motion will not be granted unless the moving papers conclusively establish that no cause of action exists (***Chan Ming v Chui Pak Hoi et al,*** 163 AD2d 268, 558 NYS2d 546 [1st Dept 1990]).

First and Second Causes of Action for Libel Per Se

"Defamation has long been recognized to arise from the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society. The elements are a false statement, published without a privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se" (***Dillon v City of New York***, 261 AD2d 34, 704 NYS2d 1 [1st Dept 1999]). "In cases involving defamation per se, the law presumes that damages will result, and special damages need not be alleged or proven" (***Gatz v Otis Ford,*** 274 AD2d 449, 711 NYS2d 467 [2d Dept 2000]). The per se categories consist of the following statements: (1) the plaintiff committed a crime; (2) the statement tends to injure the plaintiff in his or her trade, business or profession; and (3) the plaintiff has contacted a loathsome disease among others (*see* ***Matherson v Marchello,*** 100 AD2d 233, 473 NYS2d 152 [2d Dept 1984]). When the defamatory statement falls into one of these categories, "the law presumes damage to the slandered individual's reputation so that the cause is actionable without proof of special damages" (***60 Minute Man, Ltd. v Kossman,*** 161 AD2d 574, 555 NYS2d 152 [2d Dept 1990]).

Defamation traditionally consists of two related causes of action, libel and slander. The demarcation between libel and slander rests upon whether the allegedly defamatory words are written or spoken (***Matherson v Marchelleo***, *supra*). Slander is the uttering of defamatory words which tend to injure another in his reputation, office, trade, etc. (***Shapiro v Glens Falls Ins. Co.***, 39 NY2d 204, 383

NYS2d 263 [1976]; ***Liffman v Brooke***, 59 AD2d 687 [1st Dept 1977]. Libel is always considered as written (***Liffman v Brooke***, *id.*; ***Matherson v Marchelleo***, *supra*; ***Locke v Gibbons***, 164 Misc 877, 299 NYS2d 188 [Sup Ct, New York County 1937])

Whether particular words are defamatory presents a legal question to be resolved by the court in the first instance (***Golub v Enquirer/Star Group***, 89 NY2d 1074, 659 NYS2d 836 [1997]; ***Sprewell v NYP Holdings, Inc.***, 1 Misc 3d 847, 772 NYS2d 188 [Sup Ct, New York County 2003]. In deciding whether the articles are defamatory it is necessary to determine if they constitute statements of fact or opinion, that is, whether the reasonable person would have believed that the statements were conveying facts about the plaintiff.

It has been held that the essence of defamation is the publication of a statement about an individual that is both false and defamatory. Because only assertions of fact are capable of being proven false, a defamation action cannot be maintained unless it is premised on published assertions of fact (***Brian v Richardson***, 87 NY2d 46, 637 NYS2d 347 [1995]). Non-actionable "pure opinion" is a statement of opinion accompanied by recitation of facts upon which it is based, or, if not accompanied by such factual recitation, the statement must not imply that it is based upon undisclosed facts (***Steinhilber v Alphonse,*** 68 NY2d 283, 508 NYS2d 901 [1986]). It is a settled rule that expressions of an opinion, "false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions" (***Steinhilber v Alphonse,*** *id.*).

Here, the plaintiff contends that the "false malicious publications" are as follows:

> South Shore Press - May 4, 2011 - Front Page Photos. Steven Long with a mug shot and a caption stating "Suffolk County Police mug shot of Steven Long following his arrest" and Toni Huffine with a caption stating "Miglino states that Steven Long is associated with Toni Huffine who was removed from the Board of Education in 2008. Ms. Huffine is shown here stealing campaign lawn signs."
>
> South Shore Press - May 11, 2011 - "RESIDENTS OUTRAGED OVER HUFFINE'S CANDIDACY - "On election day ... Mrs. Huffine was observed and photographed ... stealing campaign signs. (See photo below)" "Research done by the press (*sic*) also uncovered that Ms. Huffine has a history of suing the school district going back to the 1980s. In each of the instances the cases were dismissed by the courts."

Taking the allegedly defamatory statements seriatim, the Court finds that the statement that Steven Long associated with the plaintiff is not actionable as libel per se. A cause of action for libel per se requires, among other things, a statement charging the plaintiff with the commission of an indictable offense (***Privitera v Town of Phelps***, 79 AD2d 1, 435 NYS2d 402 [4th Dept 1981]; ***Klein v McGauley***, 29 AD2d 418, 288 NYS2d 751 [2d Dept 1968]. In fact, because association with or membership in an organization having a criminal purpose is not an indictable offense, it is not defamatory per se to charge a person with being a member of the Mafia (***Privitera v Town of Phelps***, *supra*), or to have criminal

associations (***Galasso v Saltzman***, 42 AD3d 310, 839 NYS2d 731 [1st Dept 2007]; ***Unroch v Monderer***, 13 Misc 3d 1234[A], 831 NYS2d 357 [Sup Ct, New York County 2006]).

The statement that the photo of the plaintiff shows her "stealing campaign lawn signs" is likewise not actionable. The plaintiff admits, in her complaint and her affidavit herein, that she was arrested and charged with misdemeanor petit larceny regarding her removal of such signs, and that she later plead guilty in exchange for an adjournment in contemplation of dismissal. Although, the plaintiff asserts that the use of the word "stealing" is objectionable and erroneous in the context of her arrest, it is clear that the use of word is not actionable herein. In fact, the misdemeanor information included within the plaintiff's submission defines the charges against her with the preface that "A person steals property and commits larceny when ..." In any event, in order to establish defamation per se it is necessary that the defendant charge the plaintiff with a serious crime, not a relatively minor offense (***Liberman v Gelstein***, 80 NY2d 429, 590 NYS2d 857 [1992]). It does not appear to the Court that the "stealing" of an opponent's campaign signs would arouse public sentiment against the plaintiff to the extent necessary to support a claim for libel per se. Accordingly, the motion by The Press to dismiss the plaintiff's first cause of action is granted.

Turning to the second cause of action involving the May 11, 2011 article, the Court finds that the headline ""RESIDENTS OUTRAGED OVER HUFFINE'S CANDIDACY" is not actionable as it consists of "pure opinion (***Steinhilber v Alphonse***, *supra*). The next statement in the article, which accuses the plaintiff of stealing campaign signs, is likewise not actionable for the reasons set forth above. The third and final statements that the plaintiff has a history of unsuccessfully suing the school district, again, are not actionable as libel per se. It has been held that words of general abuse, though vexatious or discourteous, are not actionable in the absence of an allegation and showing of special damages (***Landy v Norwegian America Line Agency, Inc.***, 26 AD2d 923, 274 NYS2d 687 [1st Dept 1966]; ***Torres v Huner***, 150 AD 798, 135 NYS 332 [2d Dept 1912]; ***Todd Layne Cleaners, LLC v. Maloney***, 17 Misc 3d 1114(A), 851 NYS2d 67 [Civ Ct, New York County 2007]; ***Rizzo v Zucker***, 18 Misc 2d 593, 182 NYS2d 246 [Sup Ct, Queens County 1958]). Here, the subject statements made about the plaintiff were loose, figurative or hyperbolic statements, which even if deprecating her, were not actionable defamation (***Kaye v Trump***, 58 AD3d 579, 873 NYS2d 5 [1st Dept 2009]; ***Dillon v City of New York***, *supra*; ***Stephan v Cawley***, 24 Misc 3d 1204[A], 890 NYS2d 371 [Sup Ct, New York County 2009]; ***Penn Warranty Corp. v DiGiovanni***, 10 Misc 3d 998, 810 NYS2d 807 [Sup Ct, New York County 2005]). Although it is clear that the language was offensive to the plaintiff, it is not actionable as libel as it does not falsely relate factually ascertainable facts or characteristics concerning her (***600 West 115th Street Corp. v Von Gutfeld***, 80 NY2d 130, 589 NYS2d 825 [1992]). In addition, the statements do not assert or imply that the plaintiff committed a crime; nor do they tend to injure the plaintiff in her profession as an adjunct professor (*see* ***Matherson v Marchello***, *supra*).

The plaintiff's third cause of action does not include any allegations against The Press. Accordingly, the cross motion is granted and the complaint against the defendant The South Shore Press and the defendant Fred Towle, Jr. is dismissed.

The Court acknowledges Miglino's request that, absent a cross motion made by him, the Court search the record and grant summary judgment dismissing the complaint against him (CPLR 3212 [b]).

A review of the record reveals that Miglino has established his entitlement to summary judgement herein. In his affidavit submitted in opposition to the plaintiff's motion for summary judgment, Miglino swears that he "was not the person responsible - in any way - for the publication of the May 17, 2011 flyer, that he had no knowledge that the flyer was being produced, and that he did not learn of the flyer's existence until someone showed it to him after it had been place in public distribution.

In opposition to Miglino's request that the Court search the record and grant him summary judgment, the plaintiff fails to address the issue whether Miglino published, or is responsible for the publication, of the statements in the flyer. Neither does the plaintiff submit any relevant argument or evidence that would require the Court to deny Miglino the relief requested. The plaintiff has failed to produce evidence in admissible form sufficient to require a trial of the material issues of fact in her third cause of action (***Roth v Barreto***, *supra*; ***Rebecchi v Whitmore***, *supra*; ***O'Neill v Fishkill***, *supra*). In addition, for the reasons set forth above, the Court has found that the plaintiff does not have a cognizable first cause of action for any alleged statement that Steven Long associated with her. A court may search the record and grant summary judgment in favor of a nonmoving party with respect to a cause of action or issue that is the subject of the motions before the court (CPLR 3212 [b]; ***Dunham v Hilco Construction Co., Inc.***, 89 NY2d 425, 654 NYS2d 335 [1996]; ***Yusin v Saddle Lake Home Owners Association, Inc.***, 73 AD3d 1168, 902 NYS2d 139 [2010]). Upon reviewing the entirety of the records submitted, the Court determines as a matter of law that the defendant Gregory C. Miglino is entitled to summary judgment dismissing the plaintiff's complaint against him.[2]

Accordingly, the complaint is dismissed in its entirety.

Dated: January 11, 2012

PETER H. MAYER, J.S.C.

[2] The Court notes that, under the circumstances, it has considered plaintiff's sur-reply and Miglino's "rejoinder to [plaintiff's] sur-reply" (CPLR 2214 [c]).