SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
Justice

TRIAL/IAS PART 14

_____X

ROBERT BROWNE,

Plaintiff,

-against-

Index No.: 008318/11
Motion Seq....01
Motion Date..12/22/11

THE BOARD OF EDUCATION, OYSTER BAY-EAST NORWICH CENTRAL SCHOOL DISTRICT, and PHYLLIS HARRINGTON,

Defendant.

_____X

Papers Submitted:
Notice of Motion.....x
Memorandum of Law.....x
Affirmation in Opposition.....x
Memorandum of Law.....x
Reply Memorandum of Law.....x

Upon the foregoing papers, the motion by the attorneys for the Defendants seeking an order pursuant to CPLR § 3211 (a) (1), (5) and (7), dismissing the Plaintiff's complaint against the Defendants, The Board of Education, Oyster Bay-East Norwich Central School District and Phyllis S. Harrington on the grounds that it is barred collaterally and estopped by prior proceedings and adjudications as to the facts presented, the defense is founded upon documentary evidence, the complaint fails to state a viable cause of action, the

Defendants are entitled to absolute immunity and the action is barred by the statute of limitations is determined as hereinafter set forth.

The Plaintiff is 48 years old and has been working as a teacher for the Defendant school district since 1992 and as a public school teacher since 1985. He has been a social studies teacher for over 22 years. The Defendants brought disciplinary charges pursuant to Education Law § 3020-a which resulted in a hearing on June 19, 2007, based on scoring errors which occurred on the 2006 New York State Global History Regents Exam. After a full hearing on the merits between January 18, 2008 and February 23, 2010, the Hearing Officer found in the Plaintiff's favor on the merits on August 13, 2010. The Hearing Officer did not find that the charges were frivolous or brought in bad faith. Neither side appealed the decision of the Hearing Officer.

On a motion to dismiss pursuant to CPLR § 3211 (a) (7), the court must accept as true, the facts "alleged in the complaint and submissions in opposition to the motion, and accord plaintiffs the benefit of every possible favorable inference," determining only "whether the facts as alleged fit within any cognizable legal theory" (*Sokoloff v. Harriman Estates Development Corp.*, 96 N.Y.2d 409, 414 [2001]; *see People ex rel. Cuomo v. Conventry First LLC*, 13 N.Y.3d 108 [2009]; *Polonetsky v. Better Homes Depot*, 97 N.Y.2d 46, 54 [2001]; *Leon v. Martinez*, 84 N.Y.2d 83, 88 [1994]; *Feldman v. Finkelstein & Partners, LLP*, 76 A.D.3d 703 [2nd Dept. 2010]). Notably, on a motion to dismiss, the plaintiff is not obligated to demonstrate evidentiary facts to support the allegations contained

in the complaint *(see, Stuart Realty Co. v. Rye Country Store, Inc.*, 296 A.D.2d 455 [2nd Dept. 2002]; *Paulsen v. Paulsen*, 148 A.D.2d 685, 686 [2nd Dept. 1989]; *Palmisano v. Modernismo Pub.*, 98 A.D.2d 953, 954 [4th Dept. 1983]), and "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19 [2005]; *International Oil Field Supply Services Corp. v. Fadeyi*, 35 A.D.3d 372 [2nd Dept. 2006]). "In assessing a motion under CPLR § 3211 (a) (7), a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint," and if the court does so, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Leon v. Martinez, supra*; *see also Uzzle v. Nunzie Court Homeowners Ass'n, Inc.*, 55 A.D.3d 723 [2nd Dept. 2008]).

Moreover, "[t]o succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Manfro v. McGivney*, 11 A.D.3d 662 [2nd Dept. 2004]; *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 [2002]; *Jorjill Holding Ltd. v. Greico Associates, Inc.*, 6 A.D.3d 500 [2nd Dept. 2004]; *see, Arnav Industries, Inc. Retirement Trust v. Brown, Raysman, Millstein, Felter and Steiner, L.L.P.*, 96 N.Y.2d 300, 303 [2001]).

In the First Cause of Action the Plaintiff alleges a violation of a New York Human Rights Law (Executive Law § 296) by discriminating against the Plaintiff because

of his gender and treating him disparately in favor of female teachers.

The State requires that individual rating sheets used by teachers who score the Regents exams be retained by the District for at least one year. The Plaintiff alleges that although Sara Anderson, Director of the Social Studies Department, was responsible for maintaining the rating sheets, and failed to do so, Ms. Anderson was not disciplined in anyway for this violation of the State's guidelines. (¶ 19). The Plaintiff alleges that he discovered that Ms. Anderson, a female, had improperly scored 16 exams on the 2007 Global History Regents, and through his union representative, sent a detailed letter in March, 2008 to the Defendants regarding his findings. The Plaintiff alleges no one from the Defendants' office spoke to the him about his findings or conducted an investigation. Ms. Anderson acknowledged that she had graded the 16 exams improperly in her testimony during the Plaintiff's administrative hearing in June 2008. Further, the Plaintiff alleges the District and the Defendant, Harrington, gave Ms. Anderson the opportunity to explain her actions and that the Defendants gave her a letter of counseling, but issued no disciplinary charges against Ms. Anderson like they did with respect to the Plaintiff. In fact, it was just the opposite, Ms. Anderson received tenure based on Dr. Harrington's recommendation 45 days after her testimony against the Plaintiff, wherein she admitted under oath to violating numerous regulations with respect to the 2006 Regent's Exam, and that she improperly scored 16 exams during the 2007 Regent's Exam. The Plaintiff asserts the foregoing was clearly disparate treatment because the allegations against him concerned only three exams, yet he

was never given an opportunity to discuss the allegations with the District or the Defendant, Harrington, but rather was immediately formally charged. (¶¶ 41-48).

On a claim based on Executive Law § 296, the plaintiff has the initial burden to prove a *prime facie* case of discrimination based on the preponderance of evidence. To support a *prima facie* case, the plaintiff must demonstrate: (1) that he is a member of a protected class; (2) that he suffered an adverse employment action; (3) that he was qualified to hold the position for which he held; and, (4) that the adverse employment action occurred under circumstances giving rise to discrimination. *See Ferrante v. Am. Lung Assoc.*, 90 N.Y.2d 623 (1997). The Plaintiff must demonstrate that he is similarly situated in all material aspects with Ms. Anderson. *Mandell v. County of Nassau*, 316 F3d 368. Proof that similarly situated employees have been treated differently has been described by courts as "[t]he most probative means of proving pretextual [discrimination]." *Francis v. Runyon*, 928 F.Supp. 195, 202-03. Accepting all the facts alleged in the complaint as true, the Plaintiff has satisfied this burden. Moreover, "[w]hether two employees are similarly situated ordinarily presents a question of fact for the jury." *Graham v. Long Island R.R.*, 230 F3d 34, 39. The Defendants argue that because Ms. Anderson's errors occurred a year later precludes a finding that the Plaintiff was "similarly situated" with Ms. Anderson. In *McDonnell Douglas Corp. v. Green*, 411 US 792, 092, the Court stated that the employer's future conduct toward similarly situated individuals is directly relevant as proof of discrimination. It is not the merits of the claim or the credibility of the allegations to be considered on a

motion to dismiss, but rather whether as in the First Cause of Action a *prima facie* claim has been pleaded. *Fischbach v. Moore Inc. v. E.W. Howell Co., Inc.*, 240 A.D.2d 157 (1st Dept. 1997). The alleged violation was not a single discrete act as asserted by defendants so as to bar the First Cause of Action based on a one year statute of limitations, but rather a continuing act of discrimination. The date of the alleged discrimination may be deemed to be any date subsequent to its inception up to and including the date of its cessation which would be the date of the determination by the Hearing Officer and which is within the applicable one year statute of limitations period. The one year statute of limitations set forth in Education Law § 3813 applies to Executive Law § 296 discrimination claims brought against a school district rather than the three year statute of limitations set forth in CPLR § 214 (2). *See State Div. of Human Rights ex rel. Mossler v. Westmoreland Cent. School Dist.*, 56 A.D.2d 205 (4th Dept. 1977).

The Second Cause of Action alleges malicious prosecution. The Third Cause of Action alleges abuse of process. To recover for malicious prosecution, a plaintiff must establish that the defendant lacked probable cause and that the proceeding was brought out of actual malice. *Martinez v. City of Schenectady*, 97 N.Y.2d 78, 84 (2001). Probable cause consists of such facts and circumstances as would lead a reasonable prudent person in like circumstances to believe that the charges against the plaintiff can be sustained. *Colon v. City of New York*, 60 N.Y.2d 78 (2001). Actual malice is defined as commencing a proceeding based on a wrong or improper motive. *Nardelli v. Stanmberg*, 44 N.Y.2d 500 (1978). The

Defendants argue that the issues of probable cause and bad faith in the disciplinary hearing are identical to the issues of probable cause and improper motive in the malicious prosecution action. To establish a claim for abuse of process, the plaintiff must prove the defendants had an ulterior purpose in bringing the disciplinary charges. *Board of Educ. of Farmingdale Union Free School Dist. v. Farmingdale Classroom Teachers Ass'n, Inc., Local 1889 AFT AFL-CIO*, 38 N.Y.2d 397 (1975). An ulterior purpose is the intent to cause harm without excuse or justification. *Curiano v. Suozzi*, 63 N.Y.2d 113 (1984). The Plaintiff had a full and fair opportunity to litigate the District's alleged bad faith in bringing the disciplinary charges. The Plaintiff had two (2) separate opportunities to dismiss the charges on the issues of frivolousness and bad faith.

On or about May 22, 2009, following the conclusion of the District's direct case, the Plaintiff moved to dismiss the charges in their entirety. The Plaintiff argued the disciplinary charges were frivolous and brought in bad faith, requesting costs and attorney's fees. On or about August 31, 2009, the Hearing Officer denied the Plaintiff's motion to dismiss. The Hearing Officer concluded the record contained sufficient testimony and evidence to withstand the motion, and noted, that testimony and evidence was offered that placed the Plaintiff in a position to score his own students' examinations and commit misconduct. In the Plaintiff's initial motion to dismiss following the District's direct case, the Plaintiff noted that pursuant to Education Law § 3020-a (4) (c), in the event the Hearing Officer determined the charges brought by the District were frivolous, the Hearing Officer

shall order the District to reimburse the State Education Department and employee for reasonable costs, including attorney's fees. The Plaintiff went on to define the definition of "frivolous" and wrote: "Pursuant to CPLR § 8303-a, referenced in Education Law § 3020-a, to be deemed frivolous, an action must be found to have been commenced or continued in bad faith, or to harass another, or to have no reasonable basis in law or fact." The Plaintiff enumerated in detail the reasoning behind the allegation that the charges were frivolous:

> Here, as detailed below, the District's bad faith is demonstrated by: 1) the lack of investigation prior to the preferral of the charges; 2) its pursuit of disciplinary charges against respondent notwithstanding its knowledge that varying ratings are anticipated on Regents essays, given the subjective nature of the process; 3) faced with the knowledge that an SED re-rate gave one of the essays in question the same rating [as] that alleged to have been given by respondent, the District continued to charge and prosecute respondent regarding the essay; 4) the District's brazen disparate treatment of respondent as compared to that of Ruthkowski, the other teacher who is alleged to have rated the same five essays in question; and 5) the District's audacious grant of tenure to Sara Jean Anderson, the probationary administrator whose ineptitude and incompetence was first exposed when the District began its "investigation", and further substantiated with additional evidence and examples of Regents scoring improprieties during the course of the prosecution of this proceeding.

The Plaintiff continued over several pages his reasoning behind the argument that the disciplinary charges were frivolous and brought in bad faith.

The Hearing Officer stated that "there is an ample record upon which to draw conclusions regarding the [plaintiff's] guilt on the charges preferred."

Following the conclusion of the disciplinary hearing, on March 22, 2010, the Plaintiff submitted his brief in support of a dismissal of the charges. Again, the Plaintiff

maintained disciplinary charges were frivolous and brought in bad faith. In his second brief, the Plaintiff argued that the charges were brought in bad faith and frivolous. The brief stated that "[t]his proceeding is frivolous on so many levels that identification of all the logical layers of bad faith would itself pose a challenging 'thematic' essay question." The Plaintiff devoted an entire point heading to his contention that the charges were brought in bad faith and "without any reasonable basis in fact." This brief afforded the Plaintiff his second opportunity to argue to the Hearing Officer that the charges were brought in bad faith. The Plaintiff specifically requested the Hearing Officer decide, according to New York Education Law § 3020-a and CPLR § 8303-a, if the District's charges were frivolous and brought in bad faith. As previously noted, the Hearing Officer concluded the District was unable to establish, by a preponderance of the evidence, the charges of misconduct and dismissed the case. The Hearing Officer concluded that the disciplinary charges were not frivolous or brought in bad faith.

In opposition to the motion, the Plaintiff argues that the Hearing Officer did not make specific findings of fact regarding the issues of frivolousness and bad faith. For example, the Hearing Officer found "[t]here are, however, quite a number of seriously troubling aspects to the District's contentions." Furthermore, the Hearing Officer stated "[i]n the context of the District's decision to level the instant charges of misconduct against [Browne], Anderson's actions are alarming. The Hearing Officer further stated, "[t]hese uncertainties highlight the lack of a complete investigation by the District . . . [and whenever]

discipline for any reason at all is contemplated, a timely and thorough investigation is critical."

"Under the doctrine of *res judicata* or collateral estoppel, a party is barred from re-litigating an action, claim or issue that is identical to that litigated and resolved in a prior action." New York Jur 2d, Judgments, § 428, at 193; *Lodal, Inc. v. Home Ins. Co.*, 309 A.D.2d 634 (1st Dept. 2003). This rule is founded upon the belief that "it is for the interest of the community that a limit should be prescribed to litigation, and that the same cause of action ought not to be brought twice to a final determination. Justice requires that every cause be fairly and impartially tried; but proper public tranquility demands that, having been once so determined, all litigation of that question, and between those parties, should be closed forever." *Fish v. Vanderlip*, 218 N.Y. 29, 36-37 (1916); *Hendrick v. Biggar*, 209 N.Y. 440 (1913). "It is a doctrine intended to reduce litigation and conserve the resources of the court and litigants and it is based upon the general notion that it is not fair to permit a party to re-litigate an issue that has already been decided against it." *Kaufman v. Eli Lilly and Co.*, 65 N.Y.2d 449, 455 (1985).

Collateral estoppel bars the re-litigation of an issue (as distinguished from the action or claim) which was actually and necessarily previously decided in a prior proceeding. *Ryan v. New York Telephone*, 62 N.Y.2d 494 (1984). To invoke the "issue preclusion" doctrine of collateral estoppel the following elements must be established: 1) an identity of an issue which was necessarily decided in the prior action; and 2) a full and fair opportunity

by the party against whom collateral estoppel is being invoked to have contested the said issue. *Allied Chemical v. Niagara Mohawk Power*, 72 N.Y.2d 271 (1988).

In further opposition, the Plaintiff argues that as a matter of public policy, he should not be precluded from pursuing his claim for malicious prosecution and abuse of process since such a determination would have broad sweeping consequences, requiring Browne and any future litigants brought up on Education Law § 3020-a charges to fully litigate the issue of bad faith in a forum which they did not choose, in front of an administrative officer rather than a jury. The Defendants acknowledge they did initiate and prosecute the disciplinary charges which were discretionary in nature. (Defendant's Memorandum of Law, pg. 24). Collateral estoppel is a flexible doctrine that should not be mechanically applied simply because some of its formal prerequisites may be present. *People v. Roselle*, 84 N.Y.2d 350 (1994). The Plaintiff's reliance on *Mavco Realty Co. v. M. Slayton Real Estate, Inc.*, 77 A.D.3d 892 (2nd Dept. 2010) for the proposition that since the Plaintiff did not initiate the administrative proceedings public policy should preclude the doctrine of collateral estoppel is misplaced. In *Mavco Realty, supra*, p. 894, the Court concluded that it was an error to give collateral estoppel effect to the administrative determination and conclude that the defendants forfeited any right they may have to the disputed brokerage commission. In the within action the record demonstrates that the Hearing Officer ruled on the same issues that are the subject of the second and third causes of action. There is nothing in *Mavco Realty, supra*, to support the Plaintiff's argument that

public policy precludes the doctrine of collateral estoppel in the within action.

The Plaintiff is collaterally estoppel from re-litigating the necessary elements to establish a cause of action for malicious prosecution or abuse of process. The Second and Third Causes of Action are **DISMISSED**.

The Plaintiff has discontinued the Fourth Cause of Action sounding in negligence.

The Fifth Cause of Action alleges that the Defendants made defamatory statements about Browne to school/education department officials leading to the false charge, and to other teachers and students which caused severe harm to the Plaintiff's reputation as a result of which he suffered special damages. The complaint alleges the following: The principal of Defendant Oyster Bay High School told other teachers that "what Browne did on the Regents was a disgrace to all teachers and he will be fired." (¶ 35). The teacher who replaced Browne while he was reassigned, said she heard Browne was reassigned because he "hit a little girl." In or around October 2010, parents of a student at the Defendant, Oyster Bay High School, told Browne they had heard from other parents that he was reassigned because of "something awful." (¶ 37). After working for a year at the office building located in Garden City, Browne was again reassigned to an elementary school, and his office was located in a glass room in the library. A second grade student told Browne that he heard Browne was in that office because his "mommy said you did something bad." (¶¶ 38, 39).

As a result of the Defendants' false charges, the Plaintiff lost his Top Secret

Clearance with the United States Army while the Defendant's charges were pending. The Plaintiff contends the temporary loss of this Top Secret Clearance caused the United States Army to deny his application to War College, and to ultimately cause him to not be promoted to Colonel in the United States Army in or around July 2010. As a result, the Plaintiff suffered a significant financial loss. (¶ 49). The Defendants' treatment of the Plaintiff also caused him to lose his positions as women's Cross-Country Coach, men's Cross-Country Coach, and as the shot clock operator and announcer for the Oyster Bay High School basketball teams. The Plaintiff also intended to reapply for the Spring Track Coach position that he had previously held. However, as a result of being reassigned by the Defendants, and despite having been found innocent of all the Defendants' charges, the Defendants replaced the Plaintiff as coach of these teams. The Defendants did not reinstate the Plaintiff as coach of any of these teams, or as shot clock timekeeper and announcer of the basketball teams after his return to Oyster Bay High School. As a result, the Plaintiff alleges he has suffered financial loss, harm to his reputation, severe emotional distress and has been prescribed medication for his stress and mental anguish. (¶¶ 49-51).

The elements for a cause of action 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, and it must either cause special harm or constitute defamation per se." *Salvatore v. Kumar*, 45 A.D.3d 560, 563 (2nd Dept. 2007), citing *Dillion v. City of New York*, 261 A.D.2d 34 (1st Dept. 1999). CPLR § 3016 (a) provides that the

complaint must be pled with the requisite specificity and alleges that the defendants published the defamatory words, as well as identify the time, manner and persons to whom the publication was made. *See Trakis v. Manhattan College*, 51 A.D.3d 778 (2nd Dept. 2008). The Defendants argue that the Fifth Cause of Action alleging defamation should be dismissed due to the Plaintiff's failure to plead with particularity pursuant to CPLR § 3016 (a). However, discovery pursuant to CPLR § 3211 (d) would allow the parties to gain a greater focus on the issue of defamation. This is especially true since any facts supporting this cause of action would be in the Defendants' possession. See for example and in accord with *Beschel v. Countrywide Home Loans, Inc.*, 2008 NY Slip Op. 52397(U), 2008 WL 5046407 (NY Sup) (Justice Austin, Sup Ct Nassau County November 26, 2008).

The Plaintiff acknowledges that to the extent that the statements were made to persons involved in the Education Law § 3020-a investigation and hearings, they are protected by an absolute immunity. The statements accusing Browne of improprieties and falsifying student grades are not subject to absolute immunity to the extent that the Defendants made those statements to persons not involved in the 3020-a hearing.

Dismissal of the Plaintiff's defamation claim on the basis of qualified privilege is not appropriate at this time. In *Wilcox v. Newark Valley Central School Dist.*, 74 A.D.3d 1558 (3rd Dept. 2010), the Court stated that:

> A claim of qualified privilege is an affirmative defense to be raised in defendants' answer and "does not lend itself to a preanswer motion to dismiss pursuant to CPLR 3211(a)." Rather, defendants must plead the privilege as an affirmative defense and thereafter move for

> summary judgment on that defense, supporting the motion with competent evidence establishing a *prima facie* showing of qualified privilege. In the event that defendants make such a showing, the burden would then shift to plaintiff to demonstrate that [the defendants'] statements were uttered with malice, either under the common law or constitutional standard. By asserting that the allegations of the complaint establish a qualified privilege as a matter of law, defendants attempted to "short-circuit that procedure" by "improperly placing the burden on plaintiff to make competent allegations of malice in anticipation of the affirmative defense." For these reasons, defendants' motion to dismiss the eighth cause of action was properly denied.

Accordingly, it is hereby

ORDERED, that the branch of the Defendants' motion seeking to dismiss the Fifth Cause of Action sounding in defamation is **DENIED**; and it is further

ORDERED, that the Sixth Cause of Action sounding in *prima facie* tort is **DISMISSED** for the reasons previously stated in regard to the Second and Third Causes of Action; and it is further

ORDERED, that this action shall proceed as to the First and Fifth Causes of Action. The Defendants shall have 20 days from today's date to interpose an Answer. The Court will not entertain any summary judgment motions until discovery is complete and a Certification Order is issued; and it is further

ORDERED, that a Preliminary Conference (see 22 NYCRR 202.12) shall be held at the Preliminary Conference part, located at the Nassau County Supreme Court on the **March 7, 2012, at 9:00 a.m.** This directive, with respect to the date of the Conference, is subject to the right of the Clerk to fix an alternate date should scheduling require.

All applications not specifically addressed herein are **DENIED**.

This constitutes the decision and order of this court.

DATED: Mineola, New York
February 6, 2012

Hon. Randy Sue Marber, J.S.C.