

Brennan v Jonke

2012 NY Slip Op 30718(U)

January 9, 2012

Supreme Court, Putnam County

Docket Number: 550-2011

Judge: Lewis Jay Lubell

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Settlement Conference February 27, 2012

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

**SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF PUTNAM**

-----X

EILEEN BRENNAN,

Plaintiff,

-against -

PAUL JONKE, individually and the
TOWN OF CARMEL, New York,

Defendants.

-----X

LUBELL, J.

DECISION/ORDER

Index No. 550-2011

Sequence No. 1

This Decision & Order follows that issued by the Court on June 15, 2011 wherein, pursuant to CPLR 3212(c), the Court notified the parties that it intended to treat defendants' motion for an Order dismissing plaintiff's complaint for failure to state a cause of action (CPLR 3211[7]) as a motion for summary judgment (CPLR 3212). Following the issuance of said notice which expressly allowed the parties leave for further submissions on the issue and an opportunity to lay bare their proof, the Court considered the following in connection with defendant's motion for summary judgment:

PAPERS	NUMBERED
Motion/Affidavit/Affirmation/Exhibits A-L	1
Memorandum of Law In Support	2
Affirmation in Opposition/Affidavit	3
Plaintiff's Memorandum of Law In Opposition	4
Affirmation in Opposition dated October 30, 2011	5
Plaintiff's Memorandum of Law dated October 30, 2011	6
Defendant's Reply Affirmation dated November 4, 2011	7

Upon consideration of the papers originally submitted herewith to the Court (Papers Numbered 1 through 4) and those submitted in response to the Court's notification that the motion was going to be treated as one for summary judgment (Papers Numbered 5 through

7), the motion is denied.

Plaintiff Eileen Brennan, the Principal Account Clerk for the Town of Carmel, brings this action for compensatory and punitive damages individually against defendant Paul Jonke, the Town Assessor for the Town of Carmel, ("Jonke") for per se defamation and against Jonke's employer, the Town of Carmel, for the negligent hiring and retention of Jonke.

As Principal Account Clerk for the Town of Carmel, Brennan's duties included the administration of employee healthcare benefits, payroll processing and related tasks. She also served as the President of Civil Service Employees Association, Unit 8159.

On March 8, 2010, Jonke published a two and one-half page memo to Carmel Town Supervisor Kenneth Schmitt, wherein it alleged "accordance with section 900-4 of the Town of Carmel Employee Handbook", Jonke filed a "complaint of harassment" against Brennan. While the memorandum starts off with allegations of Brennan's alleged improper interference with the operation of the Town of Carmel Assessor's Office with respect to staffing and consolidation issues, it quickly interjects an underlying motive - Brennan's alleged retaliation against Jonke for Jonke's rejection of Brennan's "feeling towards [him]."

Thereafter and for the most part, the memorandum addresses Brennan's early allegations, written in her capacity as the CSEA Union President, against Jonke as appear in Brennan's February 1, 2010 letter to Supervisor Schmitt. Therein, Jonke addresses alleged false understaffing allegations that Brennan had advanced against him. Upon doing so, Jonke charges that Brennan's motivations are other than for the well being of her constituent town workers. Jonke alleges that Brennan has it out for him and, towards that end, was checking on his whereabouts at various times and even wrongfully accused him of having some sort of employment relationship with a neighboring town.

Jonke also contends that Brennan had for many years made unwanted sexual advances towards him; cancelled the health insurance coverage for his wife and two-year-old child; coerced another employee into filing a "violence in the workplace-complaint" against him; engaged in vindictive and slanderous conduct in connection with her position with the Town; and caused Jonke's family "anxiety" and "great concern". Upon closing, Jonke indicates that he is "troubled by Ms. Brennan's vindictive conduct and . . . ask[s] that [Supervisor Schmitt] give this matter [his]

immediate attention."

The allegations advanced by Jonke against Brennan were eventually investigated by Public Sector, LLP, an independent private investigation firm, which in the words of Supervisor Schmitt, were ultimately determined to be "unfounded and unsubstantiated."

The complaint alleges that these statements were made with malice, without the benefit of any privilege, in bad faith, and in calculated and/or reckless disregard for the truth. Among other things, such allegations impute unchastity to Brennan (an unmarried female), and an unfitness to engage in her professional activities as Principal Account Clerk.

Upon viewing the motion in a light most favorable to Brennan, as the Court must, the Court finds that there are material questions of fact that preclude the granting of summary judgment in favor of defendant and against plaintiff as a matter of law. Such questions of fact include, but are not limited to, whether the subject statements constitute bona fide communications upon which defendant had a legal duty to speak within the meaning of the "common interest" qualified privilege (see, Paskiewicz v. National Assn. for Advancement of Colored People, 216 AD2d 550, 551 [1995]).

The defense of qualified privilege will be defeated by demonstrating a defendant spoke with malice . . . Moreover, the conditional or qualified privilege is inapplicable where the motivation for making such statements was spite or ill will (common-law malice) or where the "'statements [were] made with [a] high degree of awareness of their probable falsity'" (constitutional malice) . . . [citations omitted].

(Foster v. Churchill, 87 N.Y.2d 744, 751-52 [1996]).

Plaintiff's 50-h hearing, in and of itself, is sufficient to defeat defendant's motion in this regard. Plaintiff's testimony therein establishes a prima facie showing and basis for Jonke's the malice alleged against Jonke, beyond mere surmise, conjecture, and suspicion (Sborgi v. Green, 281 AD2d 230 [1st Dept., 2001]). Nor is the Court persuaded from the submission currently before it that either truth or "pure opinion" is a viable defense to the statements at issue.

The motion is also denied to the extent the motion relates to

the town. In this regard, the Court is not persuaded that defendant has come forward in the first instances with sufficient proof in admissible form establishing entitlement to judgment in its favor as a matter of law on the governmental immunity defense, or otherwise.

There being no merit to any other aspect of defendants' motion, it is hereby]

ORDERED, that the motion be and is hereby denied in all respects; and, it is further

ORDERED, that the parties are directed to appear before the Court for a Settlement Conference at 9:30 a.m. on February 27, 2012.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York
January 9, 2012

S/

HON. LEWIS J. LUBELL, J.S.C.

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