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SHORT FORM ORDER

INDEX No. 09-6936
CAL. No. 11-00352OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 6-16-11
ADJ. DATE: 10-13-11
Mot. Seq. # 001 - MG; CASEDISP

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ROBERT WEIS,

Plaintiff,

- against -

MARY SCHUEBART, THE ISLIP PUBLIC LIBRARY and THE TOWN OF ISLIP,

Defendants.

---X

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Upon the following papers numbered 1 to 25 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 17 - 20 ; Replying Affidavits and supporting papers 21 - 22; 23 - 25 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Mary Schubart s/h/a Mary Schuebart and the Islip Public Library for summary judgment dismissing the complaint as asserted against them is granted.

In this action, the plaintiff seeks to recover damages against the defendants for, *inter alia*, defamation and violation of his federal and state civil rights. Specifically, he seeks to recover for, *inter alia*, emotional distress, loss of reputation, loss of income, compensatory damages and incidental damages, which he purportedly sustained as a result of false statements made to him in a public location within the defendant Islip Public Library by the library's director, defendant Mary Schubart, sued herein as Mary Schuebart. In his complaint, he alleges that the defendants were negligent, reckless and careless in filing, publishing and communicating to third parties the false statement that he had "groped a librarian," and that this false statement was defamatory, libelous and slanderous. In addition, the plaintiff alleges that the defendants deprived him of his federal and state civil rights, in violation of 42 USC §§ 1981, 1982 and 1983 as well as the First, Fourth, Eighth and Fourteenth Amendments of the United States Constitution, wrongfully discriminated against him and prevented him from engaging in free speech and conducting commercial activity. By stipulation of discontinuance, dated April 2010, this action was discontinued with prejudice as asserted against defendant Town of Islip.

The remaining defendants in this action, Mary Schubart, sued herein as Mary Schuebart, and the Islip Public Library, now move for summary judgment dismissing the complaint as asserted against them on the ground that the allegations of the complaint fail to support a claim for defamation, or any other cause of action cognizable at law. In this regard, they argue that they are entitled to judgment, as a matter of law, because Schubart did not defame the plaintiff, did not publish any defamatory or accusatory comments about the plaintiff to third parties, and in any event, is entitled to a qualified privilege because the statement at issue was made to the plaintiff in the course of her duties as director of the library.

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 demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986] ; ***Winegrad v New York Univ. Med. Center***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 925 [1980]). 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. Center***, *supra*). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*).

In support of the motion for summary judgment, the defendants submit, *inter alia*, the pleadings, the verified bill of particulars, the plaintiff's 50 (h) hearing and deposition testimonies and the deposition testimony of defendant Schubart. The plaintiff's deposition testimony was substantially similar to his 50 (h) hearing testimony. As may be relevant to this motion, the plaintiff testified that he owns a business, which primarily offers a type of dental insurance to the public, and has owned such business for five years. Prior to the incident, he would go to the defendant Islip Public Library on a daily basis in order to perform work related to his business. He would use the library's word processor to create policies and would sometimes go on the internet to check his email. According to the plaintiff, he also had a couple of friends that worked at the library, and with whom he would spend time. The plaintiff testified that he advertises his business by, among other things, leaving brochures at businesses all over Long Island that allow him to do so. He had left brochures at the defendant Islip Public Library from the commencement of his business. Approximately one week prior to the incident at issue, one of the librarians told him that he could not leave his brochures at the library any longer. She stated that he had been told several times not to place his brochures there. According to the plaintiff, this was untrue and he had not previously been told about the library's policy on commercial solicitations. The librarian told him that the director of the library had stated that it was against the rules of the library to allow any type of advertising. He asked to speak to the director because he felt it was his right to be able to advertise there. He did not speak to the director on that date.

The plaintiff testified that, on the date of the incident, he was sitting at his normal table, which was all the way in the rear of the library, and the director of the library, Schubart, came to his table accompanied by the library's security guard. She told him that she was there because he was accused of groping one of the librarians in a sexual manner. There were quite a few people in the area around him, and she made this accusation in a tone of voice that was loud enough for some of them to hear. The plaintiff was stunned and infuriated by the allegation and the conversation escalated into a loud argument. He demanded to know

when, where, how, and who had made such an allegation. According to the plaintiff, he had no knowledge of the purported groping incident of which the director was speaking. When he began to get loud the security guard told him he needed to lower his tone because they were doing him a favor by not pressing charges. The plaintiff continued to get louder when Schubart would not give him the details of the alleged incident and was engaging Schubart in a "full blown" argument. At the conclusion of the conversation, Schubart advised the plaintiff that he was not allowed to leave his business brochures in the library because the library does not allow any commercial advertisements. The plaintiff told her that he should be allowed to advertise since they allowed certain magazines that contained advertisements in the library. The plaintiff then told Schubart that a couple of years prior a librarian at the circulation desk told people he was gay, and that if she was doing her job looking into this alleged incident, that she should do her job looking into that alleged incident as well. At the conclusion of the conversation, the plaintiff was not asked to leave the library and was not told that he could not return to the library. This conversation was the only conversation that the plaintiff ever had with Schubart.

The plaintiff testified that, shortly after the conversation, a woman sitting at a nearby table came over and stated, "that was embarrassing" and "should not have happened." Thereafter, the plaintiff went to talk to an acquaintance of his that was approximately twenty-five feet away during the conversation at issue. The acquaintance did not hear the actual conversation, but saw that it was a loud confrontation, and asked him what happened. The plaintiff told the acquaintance that he was accused of sexually groping a librarian. The plaintiff remained in the library for three hours following the conversation at issue. Since the incident he has communicated the incident to a number of people. The plaintiff testified that, as a result of the incident, he has curtailed his business networking activities in Islip, is paranoid, has low confidence, and feels that his reputation has been tarnished. The plaintiff admitted that he did not lose any dental providers or clients as a result of the conversation at issue. However, the plaintiff testified that following the date of the incident he stopped leaving his brochures in the library, and he estimates that this has cost his business approximately five new customers a month or between $500 and $700 per month.

Mary Schubart, director of the defendant library, testified that she reported to the board of trustees. Approximately two weeks prior to the conversation at issue, a report had been made to her by a certain librarian, that while she was standing at the copier the plaintiff brushed by her and then on a second pass patted her rear and stated "how are you doing." Another library employee reported to her that she had witnessed the incident. The librarian involved had first reported the incident to her supervisor. Schubart conducted an investigation, and spoke to the librarian involved, the librarian's supervisor, and the library employee who witnessed the incident. Schubart received written statements regarding the incident. According to Schubart, she waited approximately two to three weeks to discuss the matter with the plaintiff because she wanted a security guard to be present, wanted a time and location which would afford them some privacy, and because on previous occasions the plaintiff had made a hasty departure after being approached by the security guard. Schubart testified that the conversation at issue occurred in a secluded area of the library where the plaintiff was seated at a table. She did not observe anyone in the area except the plaintiff, herself, and the guard. After approaching the plaintiff, she told him that a report had come to her attention that he had inappropriately touched a library employee. In response, the plaintiff became loud and confrontational. The security guard informed him to settle down that no accusation at that point was being made against him and that they were only bringing him the report they had received. The plaintiff's

library privileges were not suspended following the conversation. According to Schubart, the library reserves the right to limit, revoke or suspend a patron's privileges and patrons have had their privileges suspended in the past.

With respect to the library's publicity posting and solicitation policy, Schubart testified that it was a combined effort on the part of the board of directors and the director of the library to author this document. An amendment was made following the incident, but only with respect to how an appeal of a solicitation issue could be taken to the director. The library's policy was not to allow any commercial solicitations. Any solicitation materials that were left in the library would be discarded on a daily basis. In every instance, something like the brochure advertising the plaintiff's business would be discarded. This policy was in place at the time Schubart became director of the library fourteen years prior and was still in effect. According to the policy, if there was an item or activity for which a request was made to solicit within the library, an exception might be made in circumstances where the material was related to a not-for-profit enterprise. A determination of whether such solicitation would be allowed would be made on a case-by- case basis. Schubart admitted that there were no postings in the library related to the publicity and solicitation policy.

The evidence submitted by Schubart and the Islip Public Library established their *prima facie* entitlement to summary judgment dismissing the complaint as asserted against them. In his complaint, as amplified by his bill of particulars, the plaintiff seeks to recover damages based solely on the conversation which occurred between himself and the director of the defendant library, Schubart. Courts have long recognized that the public interest is served by shielding certain communications, though possibly defamatory, from litigation, rather than risk stifling them altogether (*see* ***Rosenberg v Metlife, Inc.***, 8 NY3d 359, 834 NYS2d 494 [2007]; ***Liberman v Gelstein***, 80 NY2d 429, 590 NYS2d 857 [1992]; ***Toker v Pollak***, 44 NY2d 211, 218, 405 NYS2d 1 [1978]). When compelling public policy requires that the speaker be immune from suit, the law affords an absolute privilege, while statements fostering a lesser public interest are only qualifiedly privileged (*see* ***Rosenberg v Metlife, Inc.***, *supra*; ***Liberman v Gelstein***, *supra*). To be afforded the protection of qualified immunity, the interest championed by the communicant, viewed as constituting a somewhat lesser degree of importance than those interests vindicated in communications afforded absolute privilege, must be expressed "in a reasonable manner and for a proper purpose" (*see* ***Rosenberg v Metlife, Inc.***, *supra*; ***Blackman v Stagno***, 35 AD3d 776, 828 NYS2d 152 [2d Dept 2006]). Generally, a statement is subject to a qualified privilege when "it is fairly made by a person in the discharge of some public or private duty, legal or moral, or in the conduct of his own affairs, in a matter where his interest is concerned" (***Rosenberg v Metlife, Inc.***, *supra*; ***Toker v Pollak***, *supra*; ***Hoyt v Kaplan***, 263 AD2d 918, 694 NYS2d 227 [3d Dept 1999]). Since the policy of the law is to encourage such communications, a qualified privilege serves to negate any presumption of malice or ill will flowing from a defamatory statement, and places the burden of proof on this issue upon the plaintiff (*see* ***Toker v Pollak***, *supra*; ***Garson v Hendlin***, 141 AD2d 55, 532 NYS2d 776 [2d Dept 1988]).

In the instant matter, the defendants established their *prima facie* entitlement to summary judgment dismissing the complaint by demonstrating that the statements at issue were subject to a qualified privilege. In this regard, the evidence submitted demonstrates that the statements made by Schubart were made in the discharge of her duties as director of the defendant library and were made in a reasonable manner and for a proper purpose (*see* ***Blackman v Stagno***, *supra*; *see also* ***Commonwealth Motor Parts, Ltd. v Bank of Nova Scotia***, 37 NY2d 824, 377 NYS2d 482 [1975]).

In order to overcome the qualified privilege, the plaintiff must demonstrate by tender of proof in evidentiary form that the defendants acted with malice (*see* ***Rosenberg v Metlife, Inc.***, *supra*; ***Hoyt v Kaplan***, *supra*). This, in turn, requires a showing that the statements were made with a high degree of awareness of their probable falsity (the constitutional standard of malice) or that malice was the one and only cause for the publication (the common-law standard) (***Liberman v Gelstein***, *supra*; ***Hoyt v Kaplan***, *supra*). In regard to the latter, malice may be inferred where the statements go beyond those necessary for the purpose of the privileged communication or are gratuitously extravagant or vituperative (*see* ***Hoyt v Kaplan***, *supra*).

In opposition to the motion, the plaintiff has failed to submit proof in evidentiary form sufficient to raise a question of fact as to whether the statement at issue was made with malice (*see* ***Garson v Hendlin***, *supra*). Indeed, a review of the evidence submitted, including the plaintiff's own testimony, reveals the absence of any evidentiary facts which, by themselves or in consequence of inferences fairly to be drawn from them, raise any triable issue of fact as to malice on the part of the defendants (*see also* ***Liberman v Gelstein***, *supra*; ***Hoyt v Kaplan***, *supra*). The allegations of malice contained in the plaintiff's affidavit, submitted in opposition to the motion, are based on no more than surmise, conjecture and suspicion and are, thus, insufficient to raise a triable issue of fact (*see* ***Garson v Hendlin***, *supra*). Accordingly, the defendants are entitled to summary judgment dismissing the complaint against them.

To the extent that the plaintiff's complaint purports to seek recovery for negligent infliction of emotional distress, such cause of action should be dismissed as it is duplicative of the defamation cause of action, and is also lacking in merit (*see* ***Dec v Auburn Enlarged Sch. Dist.***, 249 AD2d 907, 672 NYS2d 591 [4th Dept 1998]; ***Misek-Falkoff v McDonald***, 177 F Supp2d 224, 232 [SDNY 2001]). In a similar vein, the plaintiff's claims must be dismissed to the extent that he seeks recovery on the grounds that the defendants deprived him of his federal and state civil rights, in violation of 42 USC §§ 1981, 1982 and 1983 as well as the First, Fourth, Eighth and Fourteenth Amendments of the United States Constitution. In making such claims, it was incumbent upon the plaintiff to specify the substantive constitutional right upon which his claims are based and, further, to allege facts in support of the claimed constitutional deprivation (*see* ***Incorporated Village of Ocean Beach v Maker Water Taxi***, 201 AD2d 704, 608 NYS2d 291 [2d Dept 1994]). Given the conclusory nature of the allegations contained in the plaintiff's complaint, and verified bill of particulars, the defendant wholly failed to meet these prerequisites (*see* ***Wyllie v DA***, 2 AD3d 714, 770 NYS2d 110 [2d Dept 2003]; ***Incorporated Village of Ocean Beach v Maker Water Taxi***, *supra*).

Dated: March 14, 2012

J.S.C.

__X__ FINAL DISPOSITION____ NON-FINAL DISPOSITION