Matovcik v Times Beacon Record Newspapers
2012 NY Slip Op 33176(U)
March 28, 2012
Supreme Court, Suffolk County
Docket Number: 04-12283
Judge: Daniel Martin
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SHORT FORM ORDER

COPY

INDEX No. 04-12283
CAL No. 11-01420OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL M. MARTIN
Justice of the Supreme Court

MOTION DATE 12-13-11 (#004)
MOTION DATE 1-3-12 (#005)
ADJ. DATE 1-3-12
Mot. Seq. # 004 - MD
005 - XMD

---X

GERARD MATOVCIK,

Plaintiff,

- against -

TIMES BEACON RECORD NEWSPAPERS, THE VILLAGE BEACON RECORD, VILLAGE TIMES, INC., and PETER C. MASTROSIMONE,

Defendants.

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Upon the following papers numbered 1 to 43 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 32 ; Notice of Cross Motion and supporting papers 33 - 37 ; Answering Affidavits and supporting papers 38 - 40 ; Replying Affidavits and supporting papers 41 - 43 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the amended complaint is denied; and, it is further

ORDERED that the portion of the cross motion by plaintiff for an order pursuant to CPLR 3212 granting summary judgment in his favor is denied; and, it is further

ORDERED that the portion of the cross motion by plaintiff for an order pursuant to CPLR 3126 striking defendants' answer and affirmative defenses is denied.

This is an action to recover damages allegedly sustained by plaintiff as a result of libelous statements written, created, produced, published, and disseminated to the general public by defendants in a newspaper article and editorial on May 13, 2004. Plaintiff was the former head of the Miller Place High School ("MPHS") English Department, and defendant Peter C. Mastrosimone was employed as an editor of the newspaper(s) issued by defendant Times Beacon Record Newspapers ("TBRN"). In its May 13, 2004 newspaper, defendant The Village Beacon Record ("the Beacon"), published an article asserting that plaintiff had "misappropriated" funds which had been paid for the purchase of vocabulary workbooks, "that came directly from the pockets of students." It indicated that the workbooks had been previously paid for by the taxpayers of the school district and that plaintiff converted the money he collected for the books into a "slush fund for the English Department." It mentioned that plaintiff purchased an air conditioner for a teachers' room and lunches for faculty meetings with the said funds. An "editorial" was published in the Beacon on that same day, which set forth the statutory definition of the crime of scheme to defraud in the second degree and posed the question "[w]hen a teacher tells his students they must give him cash to pay for workbooks and spends the cash on lunches and appliances, does that fit the description above?" Within the editorial, the Suffolk County District Attorney was called to investigate the matter. Plaintiff commenced this libel action based upon the article and editorial.

On June 2, 2006, the Hon. Ralph F. Costello, J.S.C., dismissed plaintiff's amended complaint pursuant to defendants' motion pursuant to CPLR 3211(a)(1) and (7). However, in a December 11, 2007 decision and order, Justice Costello's June 2, 2006 order was reversed, and the Appellate Division determined that:

> "the documentary evidence submitted by the defendants failed to establish, as a matter of law, the truth of certain facts set forth in the article and editorial. ... Here, the documentary evidence proffered by the defendants failed to establish, as a matter of law, that school district officials were unaware of the practice of collecting workbook fees until the fall of 2003. To the contrary, the defendants' submissions provided some evidence that the practice of collecting and spending workbook funds predated the plaintiff's tenure as head of the MPHS English Department and had been condoned, accepted, and encouraged by school district administrators. A reader would be likely to view the plaintiff's actions in a different light if he or she knew that the school district had known of and sanctioned the collection practice, and the defendants failed to submit evidence sufficient to resolve all factual issues as to whether the plaintiff had collected workbook fees from students without the school district's knowledge, as the article asserted.
>
> Additionally, by citing only the lunches and the air conditioner as examples of the plaintiff's purchases, the article left the reader with the impression that the plaintiff had used money collected from students to purchase items which benefitted only the faculty. However, the documentary evidence suggested that the plaintiff spent the money largely on books and other classroom supplies used by or for the students, and this fact would have significantly altered the conclusion drawn by the reader." (***Matovcik v Times Beacon Record Newspapers***, 46 AD3d 636, 636-639, 849 NYS2d 75 [2d Dept 2007][internal citations omitted]).

Defendants now move, pursuant to CPLR 3212, for an order granting summary judgment dismissing the amended complaint in its entirety on the ground that plaintiff cannot meet his burden of proving the falsity of the publications to the extent that such falsity is allegedly defamatory of plaintiff and of establishing the requisite "fault" on the part of either defendant reporter/editor or the newspaper. Plaintiff cross moves, pursuant to CPLR 3212 and 3126 for an order granting summary judgment in his favor on the ground that the contents of the article and editorial were actionable and defamatory as a matter of law, or in the alternative, striking defendants' answer and affirmative defenses, as a result of defendant Mastrosimone's willful destruction of relevant evidence after discovery demands were served.[1]

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see, **Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141[1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see **Alvarez v Prospect Hosp.**, supra*).

Here, the Appellate Division has previously determined that the defendants have failed to show, as a matter of law, the necessary elements required to dismiss the defamatory action interposed against them. In the present motion, the defendants have offered no "new" evidence to establish that plaintiff collected workbook fees without the school district's knowledge. They have submitted affidavits of the MPHS principal, Seth Lipshie, and the MPHS superintendent, Dr. Donald Carlisle, (which were prepared in connection with a disciplinary proceeding brought against plaintiff pursuant to Education Law §3020-a). Seth Lipshie indicated in his affidavit that, after learning of the collection of money by a teacher, Ms. Danowski, in the English Department in October, 2003, while the plaintiff was out on medical leave, he "discussed the issue with the District Office and it was decided the matter would be reviewed." It appears that he took no action with regard to the collection of monies in the high school, because in November 2004, while plaintiff continued on medical leave, Mr. Lipshie was approached again by Ms. Danowski who had collected monies for vocabulary books. He thereafter conducted a

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[1]Plaintiff fails to annex copies of the pleadings to his cross motion in violation of CPLR 3212 (b). Thus, the cross motion is not technically properly before the Court. However, inasmuch as the pleadings are annexed to the motion in chief, the Court has determined and denied both motions on the merits.

further "investigation" and discovered that the vocabulary workbooks were already purchased by the school district by a budgeted purchase order. The affidavit of Dr. Carlisle makes no references whatsoever to the prior knowledge or lack of knowledge of the school administration in connection with the collection of monies by a teacher in the high school for vocabulary books. Additionally, the defendants have not shown that the monies collected by the plaintiff did not benefit the students too.

As the Appellate Division has determined that the amended complaint set forth a legally cognizant cause of action to recover damages for libel and that the documentary evidence submitted by defendants failed to establish, as a matter of law, the truth of certain facts set forth in the article and editorial, and the defendants have failed to come forth with new evidence which would establish, as a matter of law, that the facts, as set forth in the article and editorial are true, summary judgment in their favor is unwarranted. Questions of fact remain as to whether the article and editorial were libelous. Similarly, as plaintiff's counsel indicates in his affirmation, questions of fact exist as to whether defendants complied with the proper standards for verifying the story prior to publication of the article and editorial. Accordingly, as neither party has made out a *prima facie* entitlement to summary judgment, their motions for same are denied.

Plaintiff requests an order striking defendants' answer and affirmative defenses, alleging that defendant Mastrosimone destroyed documents subsequent to plaintiff's demand for the production of same. However, as is indicated in the "continued" examination before trial testimony of defendant Mastrosimone, the documents were not destroyed and have been kept intact by the defendant newspaper. Accordingly, the portion of the motion which seeks an order striking defendants' answer and affirmative defenses is denied.

Dated: 3/28/2012

J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION