

**D'Amico v Zingaro**

2013 NY Slip Op 30980(U)

May 6, 2013

Sup Ct, Richmond County

Docket Number: 102478/08

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 3**

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**Index No.:102478/08  
Motion No.: 007, 008**

**DINA D'AMICO,**

*Plaintiff*

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

*against*

**MARINA ZINGARO,**

**JOHN DOE 1-5, the name DOE being fictitious and intended to represent unnamed male individuals and/or entities who made defamatory statements, injurious falsehoods and/or tortuously interfered with present and future contracts between plaintiff and third-parties and**

**JANE SMITH 1-5, being fictitious and intended to represent unnamed female individuals and/or entities who made defamatory statements, injurious falsehoods and/or tortuously interfered with present and future contracts between plaintiff and third-parties,**

*Defendants*

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The following items were considered in the review of the following motion and cross-motion for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Memorandum of Law in Support	2
Notice of Cross-Motion and Affidavits Annexed	3
Memorandum of Law in Support of Cross-Motion	4
Reply Affirmation	5
Reply Memorandum of Law	6
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion and Cross-Motion is as follows:

The defendant moves for summary judgment dismissing the plaintiff's complaint, and the plaintiff moves for summary judgment dismissing the defendant's counterclaims. Both motions are granted, and consequently this action is dismissed.

## Facts

The plaintiff commenced this action by filing a summons with notice and complaint with the Richmond County Clerk on June 6, 2008. The plaintiff is employed by the New York City Police Department (“NYPD”). At the time of the alleged events the plaintiff was also a part-time fitness trainer at Dolphin Gym. The plaintiff maintains that she and the defendant were close friends in or about 2002. In or about 2006, the plaintiff and defendant had a falling out that was not elaborated on by either party that basically ended the friendship.

The complaint alleged four causes of action against the defendant. The first cause of action is one sounding in defamation per se. The plaintiff alleges that the defendant maliciously and intentionally published false and harmful statements, both orally and in writing, that the plaintiff took and distributed illegal steroids; and that the plaintiff harassed an employee at Dolphin Gym, a local gym that employed both the plaintiff and defendant as part-time trainers. The second cause of action is for “injurious falsehood.” The plaintiff alleges that the intentional, willful and malicious statements by the plaintiff cast doubt on certain property interests belonging to the plaintiff. The third cause of action is one for tortious interference with business relations. The plaintiff alleges that the defendant intentionally, willfully, and maliciously made statements for the purpose of causing her employers, the NYPD and Dolphin Gym to terminate her employment. And finally the plaintiff alleges a cause of action sounding in intentional infliction of emotional distress. The plaintiff alleges that the defendant intentionally and with the sole intention of injuring the plaintiff made statements designed to embarrass and humiliate her in order to cause the plaintiff to lose her employment and cause “humiliation and emotional despair.”

The aforementioned causes arise out of an NYPD Internal Affairs Bureau (“IAB”) investigation wherein it was alleged that the plaintiff used and sold steroids. The plaintiff had been investigated by IAB on two prior occasions before the plaintiff was accused of using and selling steroids. In 2005, the plaintiff was investigated in a “road rage” incident wherein the

plaintiff struck a woman in front of her daughter. This investigation resulted in a finding that the allegations were “substantiated.”

A second IAB investigation began later in 2005. An anonymous telephone caller that identified himself as a police officer contacted IAB and alleged that he over heard the plaintiff’s husband state that his wife was using anabolic steroids. While the second investigation was ongoing a third IAB investigation began on July 24, 2007 based on another anonymous report. IAB received another anonymous report concerning the plaintiff on August 2, 2007 that raised three allegations: 1) that the plaintiff used steroids; 2) that the plaintiff was involved with organized crime; and 3) that a trainer at Dolphin Gym named “Marina” was being threatened by a police officer who reportedly said “she wanted to put bullet in Marina’s head.”

In connection with the ongoing second and newly instituted third investigation, IAB officers conducted two unannounced interviews of the defendant. On August 7, 2007 IAB officers informed the defendant that there was an anonymous report that someone had verbalized a desire to kill her. A report prepared after this interview by the IAB investigators states that the defendant did not want to make “waves” for anyone. The report further shows that the defendant believed that any hostility between the plaintiff and her was resolved. But when asked about what acts constituted harassment the defendant stated that the plaintiff called her a “CUNT” on several occasions; displayed her middle finger in her face; intentionally bumped into her; and screamed at her in the gym. In addition, the defendant stated that a friend of her’s had a verbal dispute with the plaintiff and that the plaintiff threatened her friend’s life. Moreover, in response to the IAB officers questioning, the defendant stated that the plaintiff became “manly looking;” had “large muscles;” developed “acne and has a nasty attitude;” and that other gym members stated that the plaintiff was on steroids. In a follow up telephone call conducted on the same day, the defendant told IAB investigators that she never saw the plaintiff take steroid and apart from her certification as a personal trainer she had not received any formal training in recognizing people that take steroids.

On August 8, 2007 IAB conducted a second unannounced interview of the defendant wherein she told the IAB officers that “. . . a manager in the gym stated to her people in the gym were going to an anti aging center located on Seaview Avenue by Staten Island University Hospital.” Marina Zingaro stated the doctor’s name was Dr. Lassante and there was also a pharmacy close by the doctor’s office where prescriptions were filled. Marina Zingaro also stated the manager believed [plaintiff] was taking a steroid named Wnystrol.” At a deposition of the investigating IAB officer, testimony was given that this information had been discounted as “not substantial” and as “hearsay.”

Based on these statements IAB investigators required the plaintiff to submit to drug tests and restricted her duties. On August 14, 2007 the plaintiff was placed on modified duty. According to testimony, within hours of this event a “Command Finest” message was distributed throughout the NYPD making 30,000 members of the NYPD aware of the plaintiff’s modified duty. However, a copy of this message was not annexed to the plaintiff’s papers.

The second and third investigation of the plaintiff were deemed “unsubstantiated” for lack of proof. The plaintiff was restored to full duty on November 3, 2008.

The defendant moves for summary judgment dismissing the plaintiff’s complaint and award of costs and disbursements. The plaintiff cross-moves to dismiss the defendant’s counter-claims.

### **Discussion**

A motion for summary judgment must be denied if there are “facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. “Moreover, the parties competing contentions must be viewed in a light most favorable

to the party opposing the motion”.<sup>1</sup> Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.<sup>2</sup> As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.<sup>3</sup> On a motion for summary judgment, the function of the court is issue finding, and not issue determination.<sup>4</sup> In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.<sup>5</sup>

The plaintiff’s first cause of action for defamation per se must be dismissed. Statements made in the course of a police investigation are given a qualified privilege.<sup>6</sup> These communications “. . . do not provide the communicant with an immunity against the imposition of liability in a defamation action. A qualified privilege does, however, negate any presumption of implied malice flowing from a defamatory statement, and places the burden of proof of this issue upon the plaintiff.”<sup>7</sup> A defendant may demonstrate an entitlement to the qualified privilege by demonstrating that the statements were made in connection with a police inquiry.<sup>8</sup> Here, the defendant, Marina Zingaro, demonstrated an entitlement to a qualified privilege regarding her statements made during the police investigation. The burden shifts to the plaintiff to demonstrate

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<sup>1</sup> *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2d Dept 1990].

<sup>2</sup> *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1<sup>st</sup> Dept 1994].

<sup>3</sup> *Rotuba Extruders v. Ceppos.*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

<sup>4</sup> *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff’d* 65 NY2d 732 [1985].

<sup>5</sup> *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].

<sup>6</sup> *Liere v. Scully*, 79 AD3d 821 [2d Dep’t. 2010].

<sup>7</sup> *Toker v. Pollak*, 44 NY2d 11 [1978](citations omitted).

<sup>8</sup> *Levy v. Grandone*, 14 AD3d 660 [2d Dep’t. 2005].

malice on the part of the defendant. Here, the plaintiff could not come forward with any evidence demonstrating malice on the part of the defendant in her communications with the investigating IAB officers.

The same must be true with regard to the alleged defamatory and slanderous statements purportedly made to individuals at Dolphin Gym. The heightened pleading requirements concerning slander claims are contained in CPLR § 3016(a) which states: “In an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally.” Here, the plaintiff failed to set forth the particular words to be at issue. The Appellate Division, Second Department has held that strict compliance with CPLR § 3016(a) must be enforced.<sup>9</sup> The complaint is devoid of any particularized statements with respect to the specific words purportedly uttered by the defendant to individuals at Dolphin Gym. Consequently, this cause of action must be dismissed. Even assuming that the plaintiff had properly pled this cause of action, the plaintiff failed to demonstrate any actual loss or special damages linked to the purported defamatory and slanderous statements.<sup>10</sup>

The plaintiff’s second cause of action for injurious falsehood is also dismissed. The elements of a claim of injurious falsehood are defined as a statement that “(1) . . . is uttered or published maliciously and with the intent to harm another or done recklessly and without regard to its consequences, and (2) a reasonably prudent person would or should anticipate that damage to another will naturally flow therefrom.”<sup>11</sup> Here, the cause of action has not been properly pleaded, nor have any facts been developed during discovery that would show any damages as a result of any purported false statements made by the defendant. Consequently, the second cause of action is dismissed.

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<sup>9</sup> *Horbul v. Mercury Ins. Grp.*, 64 AD3d 681 [2d Dep’t 2009].

<sup>10</sup> *See, L.W.C. Agency, Inc. v. St. Paul Fire & Marine Ins. Co.*, 125 AD2d 371 [2d Dep’t 1986]; *See also, Liberman v. Gelstein*, 80 NY2d 429 [1992].

<sup>11</sup> *L.W.C. Agency, Inc. v. St. Paul Fire & Marine Ins. Co.*, 125 AD2d 371, 373 [2d Dep’t 1986].

The plaintiff's third cause of action for tortious interference with business relations is also dismissed. This court has found that the statements made by the defendant to the IAB investigative officers are not defamatory in nature, and are protected by a qualified privilege. Consequently, these statements cannot form the basis of a tortious interference with business relations cause of action, as they were made in connection with an investigation and not for the purpose of interfering with the plaintiff's employment with the NYPD. Furthermore, the plaintiff stated during her deposition that she left her employment with Dolphin Gym because of family obligations, not due to the alleged statements made by the defendant, as previously alleged.<sup>12</sup> Consequently, the third cause of action is dismissed.

The plaintiff's fourth, and final cause of action, for intentional infliction of emotional distress must also be dismissed. This tort has the following elements: “. . . extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress.”<sup>13</sup> Here, this court has already determined that the statements made by the defendant do not constitute defamation, nor were they outrageous. Furthermore, the plaintiff has not demonstrated by medical evidence that she sustained severe emotional distress.<sup>14</sup> Consequently, this cause of action is dismissed.

As a result of the foregoing the plaintiff's complaint is dismissed. The court now turns its attention to the plaintiff's motion to dismiss the defendant's counterclaims. The defendant asserts five counterclaims against the plaintiff for: intentional infliction of emotional distress; slander; assault; prima facie tort; and abuse of process.

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<sup>12</sup> D'Amico Transcript p. 155.

<sup>13</sup> *Bernat v. Williams*, 81 AD3d 679 [2d Dep't 2011].

<sup>14</sup> *See, Leone v. Leewood Serv. Sta.*, 212 AD2d 669 [2d Dep't 1995].

The defendant's claim for intentional infliction of emotional distress is dismissed based on the same reasoning dismissing the plaintiff's claim for the same tort. The defendant has not come forward with medical evidence establishing severe emotional distress. Therefore, the first counterclaim must be dismissed.

The defendant's second counterclaim for slander also must fail. While the defendant properly pled this cause of action setting forth the alleged statements made by the plaintiff against the defendant, the defendant has failed to come forward with evidence of damages. Consequently, the second counter claim must be dismissed.

The third counterclaim alleging assault is time barred by the one year statute of limitations in place for intentional torts.<sup>15</sup> Here, the plaintiff ceased being employed by the Dolphin Gym in November 2007 and interposed this counterclaim in December 2008. During her deposition the defendant could not state with specificity the dates of the alleged assaults. Therefore, the third counterclaim is dismissed.

The fourth counterclaim for prima facie tort is also dismissed pursuant to the one year statute of limitations. Similar to the counterclaim for slander, the defendant failed to substantiate what, if any, special damages she sustained as a result of the plaintiff's conduct. Consequently, the fourth counterclaim is dismissed.

The elements of the defendant's fifth and final counterclaim for abuse of process are: "(1) regularly issues process, (2) an intent to do harm without excuse or justification; and (3) use of the process in a perverted manner to obtain a collateral objective."<sup>16</sup> Here, the plaintiff has demonstrated that she is entitled to judgment as a matter of law. The defendant has failed to

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<sup>15</sup> CPLR § 215(3).

<sup>16</sup> *Curiano v. Suozzi*, 63 NY2d 113 [1984].

come forward with evidence which would demonstrate an issue of fact with respect to this counterclaim. Consequently, the fifth counterclaim is dismissed thereby leaving no counterclaims asserted against the plaintiff.

Based on the dismissal of allegations contained in the complaint and counterclaims this matter is dismissed in its entirety.

Accordingly, it is hereby:

ORDERED, that the defendant's motion to dismiss the plaintiff's complaint is granted; and it is further

ORDERED, that the plaintiff's motion to dismiss the defendant's counterclaims is granted; and it is further

ORDERED, that the Clerk shall dismiss this entire action.

ENTER,

DATED: May 6, 2013

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Joseph J. Maltese  
Justice of the Supreme Court