

**Cole v Siegel**

2013 NY Slip Op 33753(U)

July 25, 2013

Sup Ct, Westchester County

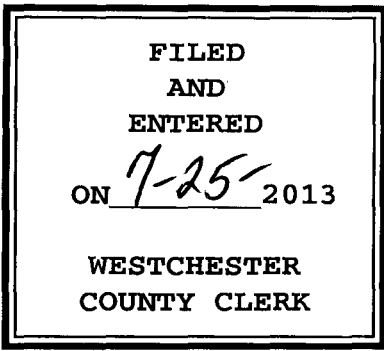
Docket Number: 51007/2011

Judge: William J. Giacomo

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time 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 WESTCHESTER  
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

-----X  
PATRICIA COLE,

Plaintiff,

Index No. 51006/2011  
**Action #1  
AMENDED<sup>1</sup>  
Decision & Order**

-against-

SUSAN SIEGEL, Individually, and TOWN OF YORK  
TOWN, NEW YORK,  
Defendants.

-----X  
ERIC DI BARTOLO,

Plaintiff,

Index No. 51007/2011  
**Action #2**

-against-

SUSAN SIEGEL, Individually, and TOWN OF YORK  
TOWN, NEW YORK ,  
Defendants.

-----X  
The following documents numbered 1 to 29 were read on defendants' summary judgment motion seeking to dismiss the complaint in both Action #1 and Action #2.

	<b>PAPERS NUMBERED</b>
The School District's Notice of Motion/Affirmation/Exhibits A-R	1-20
Affirmation in Opposition/Exhibit 1-6	21-27
Memorandum of Law in Opposition	28
Reply Affirmation	29

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<sup>1</sup>See page 11.

## Factual and Procedural Background

This case involves statements made by defendant Town Supervisor Susan Siegel, on May 27, 2010, in two separate telephone calls. Plaintiffs allege that they were defamed by these statements. The facts in this case are not in dispute.

Plaintiff, Eric DiBartolo, is the Town of Yorktown Superintendent of Highways. Plaintiff, Patricia Cole is employed as a motor equipment operator/stock clerk in the Town Highway Department. DiBartolo is Cole's immediate supervisor. Patricia Cole's brother Tom Cole is the Yorktown School District's Assistant Superintendent for Business. Patricia Cole had previously worked in the Town Assessor's Office and in 2008 transferred to the Highway Department taking a \$20,000 pay cut from \$60,000 to \$40,000 plus over time. Patricia Cole acknowledges that there were complaints made in the Highway Department regarding favoritism DiBartolo had shown her regarding overtime approvals.

Defendant Susan Siegel is the Town Supervisor of the Town of Yorktown. The parties characterize the relationship between Siegel and DiBartolo as "strained." Supervisor Siegel is in favor of making DiBartolo's position appointed rather than elected and upon her election she voted in favor of abolishing the Director of Labor Operations, a position he held. At his deposition, DiBartolo acknowledges that he keeps a "box of stuff" full of documents and correspondence he has had with Siegel. Upon election to Office Supervisor Siegel requested that the NYS Office of Comptroller conduct a Risk Assessment Audit of Town Departments, including the Highway Department. The audit was critical of DiBartolo as Superintendent of Highways raising concerns about his ethics concluding, *inter alia*, that DiBartolo obligated the Town to purchase equipment from a

company of which he was the sole proprietor without disclosing this conflict to the Town.

In anticipation of the Town's 2010 Memorial Day Parade, Town Supervisor Siegel sought to use the Yorktown School District's ("the School District") bucket truck to prepare for the parade. Previously, in January of 2010, the Town was permitted to borrow the bucket truck to take down Christmas decorations. The Town needed to use the bucket truck because the Town's own bucket truck, which was under the control of the Highway Department, was in disrepair.

Since January, the School District adopted a new procedure for lending its truck to municipalities, to wit, prior to lending the truck the School District required a hold harmless agreement and payment of a fee.

In the days before May 27, 2010, Jen Fava, the Town Parks and Recreation Superintendent, called Dennis Verboys the School District's Director of Facilities to inquire about using the truck. Ms. Fava was informed that the School District would not lend the truck to the Town.

Also in the days preceding May 27, 2010, Tom Cole, the School District's Assistant Superintendent for Business, received a call from DiBartolo advising Cole that the Town would be requesting the use of the bucket truck. Cole inferred from his conversation with DiBartolo that DiBartolo did not want the School District to lend the truck to the Town and had political motives for not wanting the Town to have use of the truck.

On May 27, 2010, Supervisor Siegel called Dennis Verboys and the School District's Superintendent Ralph Napolitano seeking to resolve the issues arising from the Town's request to borrow the bucket truck. Plaintiffs allege that during this conversation,

Supervisor Siegel stated that the only reason Tom Cole was withholding the vehicle was the fact that his sister was having a "relationship" with DiBartolo. Thereafter, the conversation continued regarding how the District could permit the Town to use the truck.

At his deposition, Dennis Verboys testified that he didn't give Supervisor Siegel's statement regarding the relationship between Patricia Cole and DiBartolo much thought. At his deposition, Ralph Napolitano testified that he wasn't even sure what Supervisor Siegel was talking about. He stated "I don't know who she meant had a relationship, Tom and Eric, Eric and Patti. I don't know Ms. Cole so I really don't have much recollection of that. That is not of interest to me."

Since Supervisor Siegel was not able to secure the use of the truck during her conversation with Verboys and Napolitano, she called Jackie Carbone, the President of the School Board. According to plaintiffs Supervisor Siegel repeated this "relationship" comment to Carbone. However, at her deposition, Carbone testified that she had no recollection of Supervisor Siegel mentioning a relationship between the plaintiffs.

After Supervisor Siegel's call to Verboys and Napolitano, Verboys mentioned the Supervisor's comment to Tom Cole. Tom Cole was "steamed" about the comment because he understood the comment to imply that "somehow [he] was making a decision that wasn't necessarily in the best interest of the school district because of the other end my sister worked for the town, something of that nature, and that's what set me."

Tom Cole and Napolitano called Supervisor Siegel to address this comment. During that conversation, Supervisor Siegel apologized to Tom Cole for making the comment that Cole felt created an impression to his supervisors "other than the truth, that is, that I'm

[\*5]  
somehow corrupt in this dealing.” Supervisor Siegel then agreed to call each of Tom Cole’s supervisors to apologize for the comment, which she did.

Sometime thereafter, Tom Cole told his sister about the comment.

On May 17, 2011 Patricia Cole and DiBartolo each commenced an action seeking damages on the grounds of defamation per se based upon the comments made by Supervisor Siegel in the May 27, 2010 telephone conversations. Plaintiffs also seek punitive damages from both defendants. On March 19, 2012, the actions were consolidated for discovery and trial.

Defendants now move for summary judgment dismissing both complaints on the ground that plaintiffs failed to meet the specific pleading requirements of CPLR 3016(a) because they cannot state exactly what was said by Supervisor Siegel. Rather, they allege that Supervisor Siegel used the words “sexual relationship” and/or “sexual affair.” Defendants claim plaintiffs cannot paraphrase the alleged defamation. Defendants also argue that there is no proof that Supervisor Siegel ever stated that plaintiff’s were having a “sexual affair” or “sexual relationship.” Defendants note that at his deposition, when asked if Supervisor Siegel ever said that plaintiffs were in a “sexual relationship” Dennis Verboys testified “Not to my recollection.” Rather, according to Verboys she merely stated that they were in a “relationship.” Further, Napolitano never stated that Supervisor Siegel said there was a “sexual relationship” between the plaintiffs. Likewise, Tom Cole testified that he was told Supervisor Siegel had mentioned a “relationship” between plaintiffs, not a sexual relationship.

Defendants also argue that any statements made by Supervisor Siegel are absolutely privileged and immune from liability, since they were made in the course of her duties as the Town Supervisor. Defendants note that the alleged defamatory statements were made in the context of Supervisor Siegel attempting to obtain use of the School District's bucket truck. Notably, she made these alleged defamatory comments to a member of the School District Administration and Board of Directors in an attempt to resolve the bucket truck issue.

Defendants also argue that they cannot be liable to plaintiffs for defamatory remarks made by third parties. Defendants also note that municipalities cannot be liable for punitive damages and that Supervisor Siegel's conduct does not support a claim for punitive damages against her individually.

In opposition, plaintiffs argue that they have properly alleged a cause of action for defamation per se since it could be inferred from Supervisor Siegel's comments that she meant a "sexual relationship" or a "sexual affair." Plaintiffs also argue that these statements are not subject to immunity because they are unrelated to Supervisor Siegel's public duties. Plaintiffs also argue that defendants are liable for the republication of the defamatory statements to others. Plaintiffs argue that they do not need to establish any damages since their claim is defamation per se. Finally, while plaintiffs agree that a municipality cannot be liable for punitive damages, they argue that the statements made by Supervisor Siegel in her individual capacity warrant punitive damages.

## Discussion

A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law. (See *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hospital*, 68 N.Y.2d 320 [1986]). "Once this showing has been made ... 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 *Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Defendants have established prima facie entitlement to summary judgment as a matter of law by showing that Supervisor Siegel's comments, whether defamatory or not, were absolutely privileged and entitled to immunity. Plaintiffs fail to raise an issue of fact precluding summary judgment.

There is no dispute that Susan Siegel is the Town Supervisor of the Town of Yorktown; a high official of the executive branch and, thus, is entitled to a privilege for statements made in the course of the performance of her duties. (See *Clark v. McGee*, 427 N.Y.S.2d 740, 744 [1980][ "we conclude that a town supervisor is absolutely immune from liability for allegedly defamatory remarks related to his responsibilities and made during the course of the performance of his duties" ]).

Supervisor Siegel is entitled to such privilege, and will be absolutely immune from liability for the alleged defamatory remarks, so long as such remarks are (1) made during the course of performing her administrative duties, and (2) the remarks are related to and about matters which come within the ambit of those duties. (*Clark*, 427 N.Y.S.2d at 744;

*Bisaccia v. Funicello*, 540 N.Y.S.2d 302 [2<sup>ND</sup> Dept 1989]). Thus, once the privilege is applicable, as here, the speaker's statements will be immune from suit unless "the subject of the communication is unrelated to any matters within his competence \* \* \* or if the form of the communication - e. g., a public statement - is totally unwarranted" (*Clark, supra, quoting Lombardo v. Stoke*, 18 N.Y.2d 394, 401, 276 N.Y.S.2d 97, 102, 222 N.E.2d 721, 724 [1966]).

The Court finds that the statements made by Supervisor Siegel were made "during the course of the performance of [the town supervisor's] duties." As Town Supervisor, Supervisor Siegel is responsible for the oversight and administration of public affairs. The phone calls during which she made the alleged defamatory statements were initiated in her attempt to obtain the use of the School District's bucket truck in order to prepare for the Town's Memorial Day parade. Supervisor Siegel made the alleged defamatory comments when inquiring into the reason why the School District denied her permission to use the truck which it had previously been allowed to use. Supervisor Siegel was stating her concern that plaintiffs' relationship may be the reason why the School District was not allowing the Town to use the bucket truck.

Other such comments by County or Town Officials regarding suspicious "relationships" have been held to be privileged and thereby immune from liability. For example, in *Doran v. Cohalan*, 125 A.D.2d 289, 509 N.Y.S.2d 51 [2<sup>nd</sup> Dept 1989]) a County Executive made comments about withholding funds to a contractor because of his suspicions that the contract was obtained with the aid of a local judge. The County Executive's comment regarding the contractor's relationship with the Judge was that "they

had the right rabbi in the right place," in order to get the contract. The Appellate Division Second Department held that this comment was "related to their public duties ... [because they] were concerned with the expenditure of public funds and the possibility that fraud had been committed on the county." (*See also See Clark v. McGee*, 427 N.Y.S.2d 740, 744 [1980])["As town supervisor, defendant is concerned with the expenditure of public funds and the possibility that a fraud had been committed upon the town by a public official"].

Here, Supervisor Siegel was seeking permission to use the bucket truck to prepare for the Town's Memorial day parade and commented on whether a relationship existed between plaintiffs which interfered with the Town's ability to use the truck. Accordingly, the comments made by Supervisor Siegel are privileged because they were made during the course of her duties as Town Supervisor. (*See Energy Brands, Inc. v. Cnty. of Nassau*, 266 A.D.2d 501, 698 N.Y.S.2d 907 [2<sup>nd</sup> Dept 1999][comments to the press made by County were privileged because they concerned the health and welfare of consumers]); *Jaeger v. Bd. of Educ. of Hyde Park Cent. Sch. Dist.*, 258 A.D.2d 507, 685 N.Y.S.2d 278 [2<sup>nd</sup> Dept 1999][holding that statements which related to plaintiff's qualifications and performance in the public office were absolutely privileged]); *Bisaccia v. Funicello*, 149 A.D.2d 645, 540 N.Y.S.2d 302 [2<sup>nd</sup> Dept 1989][ "When presented with evidence that the plaintiff could be involved in ticket fixing and towing kickback schemes, he [executive officer - defendant] acted properly in presenting these matters to a closed session of the village board of police commissioners ... [and] was entitled to judgment as a matter of law").

Nevertheless, a finding that the remarks were made in the course of and related to an official's public duties "is not necessarily sufficient justification for the assertion of

absolute immunity, for the particular forum in which the remarks are made also plays a part in determining the availability of the privilege" (See *Clark v. McGee*, 427 N.Y.S.2d 740, 744 [1980]). For example in *Clark v. McGee, supra*, the Court of Appeals found that comments made by a Town Supervisor, during a meeting, suggesting that plaintiff had been involved in an illegal scheme were in fact related to her public duties. However, when that Town Supervisor reiterated those same allegations while at a radio station the comments were no longer absolutely privileged "for the simple reason that they were not made during his performance of an essential part of his public duties." (See also *Doran v. Cohalan*, 125 A.D.2d 289, 509 N.Y.S.2d 51 [2<sup>nd</sup> Dept 1989] [comments related to officials duties were not entitled to privilege when made public to the newspaper]).

In *Cheatum v. Wehle*, 5 N.Y.2d 585, 186 N.Y.S.2d 606, 159 N.E.2d 166 [1959], defamatory comments were made by a State Conservation official about the ability and integrity of one of his staff members during a speech he made while a guest at a dinner attended by over 150 people. The Court stated that generally such a comment would be protected by the absolute privilege doctrine if made in the context of his public duties, however, here they were made during an after-dinner speech. The Court found that this "speech simply lacked the requisite connection with performance of his public duties." Therefore, since the absolute privilege doctrine is aimed at the protection of speech which is necessary to the efficient operation of government, any failure to demonstrate a relationship between the speech to some underlying purpose, by and through the use of an appropriate forum, renders the speech unwarranted and, thus, removes the comments from the privileges protection. (See *Cheatum v. Wehle*, 5 N.Y.2d 585, 186 N.Y.S.2d 606,

159 N.E.2d 166 [1959]; *Clark v. McGee*, 427 N.Y.S.2d 740, 744 [1980][“the privilege is not to be extended liberally, and instead must be carefully confined to that type of situation in which the protection provided by the privilege will serve a necessary societal function”]).

Here, Supervisor Siegel's phone calls were made in furtherance of her official duties to obtain the use of the bucket truck in preparation for the Town's Memorial Day parade. The comments in question were made out of concern that an alleged relationship was interfering with her and/or the School District's ability to carry out their official duties. Thus, the comments are privileged and enjoy absolute **immunity**<sup>2</sup>. Notably, unlike statements made by public officials in *Clark*, *Cheatum*, and *Doran*, the comments made by Supervisor Siegel were made to the very people from whom she sought permission to use the truck in question.

Based upon the foregoing, defendants' motion for summary judgment dismissing the complaints is GRANTED.

Dated: White Plains, New York  
July 25, 2013



WILLIAM J. GIACOMO, J.S.C.

H:\Motions Summary Judgment\Cole v. Siegel DiBartolo v. Siegel (def 2 sj motion - granted).wpd

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<sup>2</sup>Correction: In the original July 8, 2013 decision from this Court, the term “absolute liability” was inadvertently used instead of the proper term “absolute immunity.”