

Mahoney v Dils

2014 NY Slip Op 32841(U)

April 4, 2014

Sup Ct, Erie County

Docket Number: 12012-001900

Judge: Michael L. D'Amico

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT:

COUNTY OF ERIE

§

CHARLES MAHONEY,

Plaintiff(s)

-against-

MATTHEW DILS, THE BOARD OF EDUCATION
OF THE HAMBURG CENTRAL SCHOOL DISTRICT and
THE HAMBURG CENTRAL SCHOOL DISTRICT,

Defendant(s)

JUDGEMENT FILED

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DECISION AND ORDER

This suit arises out of a claim by plaintiff Charles Mahoney that Hamburg Board of Education member Matthew Dils made statements of a defamatory nature on two separate occasions. The plaintiff alleges that in a statement made October 6, 2011 by defendant Dils during a board of education meeting wherein

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candidates for an open board seat were interviewed, he was accused of terrorizing defendant Dils' family and the family of a little girl. The plaintiff also alleges that in a second statement made January 10, 2012 by defendant Dils during an executive session of the board of education dealing with a notice of claim filed by the plaintiff concerning the first alleged defamation, he was said to have "practically raped" and then "raped" a little girl.

The court must consider several factors in order to determine whether or not summary judgment is appropriate in the instant case.

Initially, in any action for defamation, plaintiff has the burden to prove the nature of the statement allegedly made by the defendant and whether or not the statement was defamatory, *i.e.* whether it tends to expose the plaintiff to public hatred, contempt, ridicule or disgrace as opposed to being merely unpleasant, offensive or embarrassing, *Golub v. Enquirer/Star Group, Inc.*, 89 NY2d 1074. Whether a statement is an expression of fact or

opinion is a question of law for the court, *Silsdorf v. Levine*, 59 NY2d 8.

Secondly, if the statement is found to be defamatory in nature, plaintiff must prove that the defendant published the statement, *i.e.* that the statement was heard by some person or persons other than the plaintiff. If that threshold is met – that is that the statement was defamatory in nature and published – plaintiff must then at least offer some proof that he suffered special damages as a result of the alleged defamation. “Slander as a rule is not actionable unless the plaintiff suffers special damages” – *i.e.* “the loss of something having economic or pecuniary value,” *Liberman v. Gelstein*, 80 NY2d 429.

Assuming, *arguendo*, that a defamatory statement was made, published and caused the plaintiff to suffer special damages, it must then be determined whether a defense, such as truth or privilege, qualified or common interest, applies. Whether a privilege exists is a question of law to be determined by the

court, not a jury, *Kinikoff v. Prudential Insurance Co. Of America*, 1999 WL 688460 @ *13 (S.D.N.Y. 1999), Aff'd 234 F3d 92, (applying New York State law).

With respect to the statement allegedly made October 6, 2011 by defendant Dils, it must be determined whether or not it was an expression of opinion or fact. There is no proof submitted to establish that the use of the words "practically terrorized" or "terrorized" imparted anything more than a figurative statement of the emotional upset felt by defendant Dils' wife. What was imparted to defendant Dils by his wife can only be viewed as an opinion clearly expressed to him and subsequently adopted as his own. Likewise, information expressed to defendant Dils by the family of a person who felt victimized by the plaintiff was founded upon reports from that family regarding a 2003 incident involving their daughter. Additionally, it appears that the statement was founded upon prior factual information imparted to defendant Dils during his board service in 2003. To reiterate the belief that these

individuals felt (were of the opinion) that the actions of the plaintiff and his supporters made them feel harassed and terrorized does not rise to any actionable defamatory level.

With regard to alleged publication, the statement was intended to be made to fellow board members and the superintendent. Even if others nearby overheard what was said, all were individuals with a common interest (prompting consideration below of a defense to the action for defamation). The common interest was involvement in the process of interviewing and selecting candidates – one of whom was the plaintiff – for an open board seat. There is no evidence that the statement was published or intended to be imparted to the general public.

With respect to any allegation of special damages, plaintiff has failed to offer any proof. Nor can it be stated generally that the alleged slander tended to injure the plaintiff in his trade, business or profession. Any opinion expressed regarding the

plaintiff's actions aimed at defendant Dils, his family or at another family are unrelated to plaintiff's status as a teacher.

For these reasons, plaintiff's action concerning the statements allegedly made October 6, 2011 must fail.

Additionally, however, even if plaintiff's action could survive by overcoming each of the conditions precedent to sustaining such an action as discussed above, defendants have multiple defenses, namely absolute privilege or qualified privilege.

New York recognizes the applicability of absolute privilege to members of a board of education "entrusted with the authority to administer all the schools within the jurisdiction of its school system," *Stukuls v. State of New York*, 42 NY2d 272, citing Education Law § 2501 et. seq.; *Smith v. Helbraun*, 21 AD2d 830. The interviewing of candidates for an open board seat and the ultimate appointment of one of them would seem to qualify as a significant administration of the school system.

But even officials not entitled to the immunizing shield of an absolute privilege may be immunized by a qualified privilege.

A qualified privilege exists when a communication is made by a public official in good faith in the course of the performance of his duties and in furtherance of a common interest or duty.

Stukuls v. State of New York, supra p. 280, quoting Chief Judge Desmond, states succinctly: "A communication made *bona fide* upon any subject matter in which the party communicating has an *interest*, or in reference to which he has a *duty*, is privileged if made to a person having a corresponding *interest* or *duty*, although it contained criminating matter which, without this privilege, would be slanderous and actionable; and this though the duty be not a legal one, but only a moral or social duty of imperfect obligation"

(*Byam v. Collins*, 111 NY 143, 150). “The rule of law that permits such publications grew out of the desirability in the public interest of encouraging a full and fair statement by persons having a legal or moral duty to communicate their knowledge and information about a person in whom they have an interest to another who also has an interest in such person. Such privilege is known as a qualified privilege. It is qualified because it does not extend beyond such statements as the writer makes in the performance of such duty and in good faith believing them to be true” *Bingham v. Gaynor*, 203 NY 27, 31.

Also, the fact that the plaintiff was seeking appointment to a public office as a board member makes him a public figure and, therefore, communications regarding the plaintiff are subject to

a qualified privilege. This privilege is based upon the necessity of, if not the desire to, encourage open debate on matters of public importance.

When a qualified privilege – common interest or public figure – applies to the alleged statements of a defendant, it is “incumbent upon the plaintiff to prove that they were false and that the defendant was actuated by express malice or actual ill-will... Those questions are for the jury only where there is evidence in the case warranting their submission to the jury, and the burden of proof is on the plaintiff,” *Stukuls, supra*, citing *Ashcroft v. Hammond*, 197 NY 488. Plaintiff herein has failed to establish to any degree that the alleged defamatory statements were uttered with actual malice, or knowledge that the statements were false or with a reckless disregard for the truth.

Therefore, with respect to the statement of October 6, 2011, the action for defamation fails for the multiple reasons stated above.

The court must next examine the statement allegedly made January 10, 2012 and allegedly heard from outside of the room wherein an executive session of the board of education was underway.

The plaintiff advised that from his vantage point outside of the room, he had made a recording of the remarks allegedly uttered by defendant Dils during the closed-door executive session. Although production of the recording was timely demanded during discovery, and after defendants' attorneys had cautioned plaintiff to preserve the recording, plaintiff failed to either preserve or provide it, claiming he lost it, and allowing the defendants to raise spoliation of evidence issues. Nor has any second recording – the existence of which was suggested by plaintiff – ever been produced. In short, no individual other than the plaintiff himself has offered proof of any recording of the words spoken in executive session.

Even if there were such recordings, made by eavesdroppers

or surreptitiously recorded within the executive session, they would not defeat a motion for summary judgment for other compelling reasons.

As noted above, New York recognizes the applicability of absolute privilege to members of a board of education "entrusted with the authority to administer all the schools within the jurisdiction of its school system," *Stukuls v. State of New York, supra*. After a careful review of the pleadings and exhibits, as well as memoranda submitted in support and in opposition of the motion herein, the court has concluded that absolute privilege applies to any statements made during the executive session.

Even if not absolute, a qualified privilege exists based on the same analysis undertaken with respect to the October 6, 2011 allegations and plaintiff's arguments in opposition to summary judgment are without merit.

Setting aside any arguments concerning what was actually said by defendant Dils, and even accepting plaintiff's allegation as

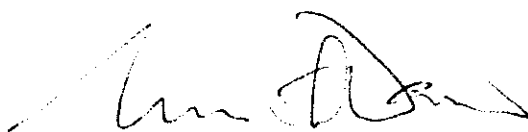
to the content of the statements, the court considered a number of factors including alleged publication and common interest. There is scant evidence that the statements could be heard outside the meeting room, and no confirmation that the statements were even heard by any person attending the executive session. Also, there is no proof of any intent by defendant Dils to publish any information to the general public and absolutely no proof of malice by defendant Dils in expressing the views he presented.

And finally, any statement made during the executive session was made to individuals having a common interest in evaluating and investigating the notice of claim filed by plaintiff and a review of the plaintiff's prior involvement with the district.

The defendants' motion for summary judgment is hereby granted and the complaint herein dismissed in full.

This decision constitutes the order of the court and no further order is required.

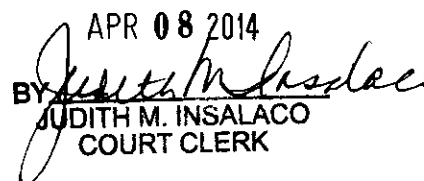
DATED: April 4, 2014
Buffalo, New York



MICHAEL L. D'AMICO
ACTING SUPREME COURT JUSTICE

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