

<b>Dollmann v Crawford</b>
2017 NY Slip Op 30865(U)
April 27, 2017
Supreme Court, Suffolk County
Docket Number: 14-2232
Judge: Joseph A. Santorelli
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SHORT FORM ORDER

**PUBLISH**

INDEX No. 14-2232  
CAL. No. 16-00421OT

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 10 - SUFFOLK COUNTY

**PRESENT:**

Hon. JOSEPH A. SANTORELLI  
Justice of the Supreme Court

MOTION DATE 5-5-16 (003)  
MOTION DATE 9-8-16 (004)  
ADJ. DATE 12-01-16  
Mot. Seq. # 003 - MG; CASDISP  
# 004 - XMD

-----X  
DANIEL D. DOLLMANN,  
  
Plaintiff,  
  
- against -  
  
WILLIAM CRAWFORD a/k/a WILLIAM E.  
CRAWFORDE, CARL SICILIANO, PHILIP  
JACOBS, and JAMES MAYBECK,  
  
Defendants.  
-----X

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**COPY**

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Upon the following papers numbered 1 to 41 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; Notice of Cross Motion and supporting papers 16 - 33; Answering Affidavits and supporting papers 34 - 36; Replying Affidavits and supporting papers 37 - 39; 40 - 41; Other    ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that defendants' motion for summary judgment dismissing the complaint against them is granted; and it is further

**ORDERED** that the cross motion by plaintiff for partial summary judgment in his favor on the issue of liability with respect to his defamation claims against defendant William Crawford is denied, as moot.

Plaintiff Daniel Dollmann commenced this action to recover damages allegedly sustained as a result of the publication of a certain defamatory statements made about him concerning his conduct as an adult leader of Troop 43 of the Boy Scouts of America ("BSA"). Troop 43 of the BSA is chartered by the St. Peter's by the Sea Episcopal Church, located in Bay Shore, New York. The chartered organization representative for Troop 43 is defendant William Crawford. Crawford also is the head of a special administrative committee, known as the "chartered organization committee," which is responsible for, among other things, the appointment of people to fulfill various leadership and adult membership positions with the troop. Defendant Carl Siciliano is the chairman of the committee. Defendant Philip Jacobs, also a member of the committee, is the scout master for Troop 43, and defendant James Maybeck, a former scout master, is one of several adult troop leaders.

The alleged defamatory statements made about plaintiff concern an incident which occurred during a week long camping trip under taken by Troop 43 in July 2013. Plaintiff, his son, who was a member of the troop, and defendants Maybeck and Jacobs attended the camp along with other scouts. While there, plaintiff allegedly sought to discipline two scouts for what he deemed was inappropriate behavior. Following the incident, the two scouts in question, their parents, as well as Maybeck and Jacobs, who allegedly witnessed the incident, reported to Crawford that plaintiff became verbally abusive and condescending to the scouts. Following communications between Maybeck, Jacobs, and Crawford, a meeting was held to discuss the incident. Siciliano, Maybeck, Jacobs, Crawford, and the parents of the scouts all attended the meeting, where it was determined that plaintiff's conduct was inconsistent with the scout's oath and the values of the chartered organization. As a result, Crawford wrote a letter notifying plaintiff that his adult leader registration with Troop 43 was being revoked. The letter states, in pertinent part, as follows:

Due to behavior reported to us that is inconsistent with the Scout Oath and Law and our own church's values we are informing you that your adult registration with the Boy Scouts of America is being revoked by St. Peter's by the Sea Episcopal Church and Boy Scout Troop 43. Kindly refrain from any participation in troop activities going forward. Thank you for your service to our church and its Scout troop.

By way of his complaint plaintiff alleges, inter alia, that Crawford conspired with the other defendants to publish a letter containing defamatory statements which caused harm to his reputation as scout leader, father, member of the church and community, and the Suffolk County Council of the BSA. The complaint further alleges that Crawford, responding to service by plaintiff's wife of a complaint that plaintiff filed in the Suffolk County Fourth District Court, told her that she should cease service of the complaint because her "husband did very bad things." In addition to the defamation claims, the complaint alleges that the conduct of the defendants violated plaintiff's civil rights.

On January 27, 2014, the District Court (Barbera-Dalli, J.) granted a motion by defendants seeking dismissal of the action against them, finding that plaintiff failed to state cognizable causes of action for libel or slander, and that the court lacked subject matter jurisdiction with respect to the other forms of equitable relief requested in the complaint. Shortly thereafter, by order dated June 30, 2014, this court (Tarantino, J.) granted a motion by defendants seeking dismissal of the complaint pursuant to

CPLR 3211 (a) (7) to the extent that plaintiff's claims under 42 USC § 1983 were dismissed. However, the court denied the branch of defendants' motion seeking dismissal of the defamation claims, finding, inter alia, that plaintiff stated a defamation claim with respect to the actionable "mixed opinion" statements contained in the letter. The court further found that defendants failed to address the alleged defamatory statement made to plaintiff's wife.

Defendants now move, pursuant to CPLR 3212 and 3016, for dismissal of the remaining claims contained in plaintiff's complaint. Defendants argue, inter alia, that plaintiff's remaining defamation claims must be dismissed, as he is unable to show that he suffered any pecuniary or economic losses, and he failed to plead, with the specificity required by CPLR 3016, any defamatory statements made by Maybeck, Siciliano, or Jacobs. Defendants further assert that the statements made by Crawford are inactionable opinion, and protected by qualified privilege. Plaintiff opposes the motion and cross-moves for summary judgment as against Crawford, arguing, essentially, that Crawford failed to interview him prior to accepting the version of events offered by defendant Siciliano and others regarding the underlying incident. Plaintiff further argues that the motion should be denied, as the court's order issued June 30, 2014 determined that he stated actionable defamation claims constitutes law of the case. Defendants oppose the cross motion on the grounds it is untimely.

Initially, the Court notes that an untimely cross motion for summary judgment may be considered where, as in this case, a timely summary judgment motion was made raising nearly identical issues (*see McCallister v 200 Park, L.P.*, 92 AD3d 927, 939 NYS2d 538 [2d Dept 2012]; *Whitehead v City of New York*, 79 AD3d 858, 913 NYS2d 697 [2d Dept 2010]).

On a motion for summary judgment, the movant bears the initial burden of establishing his cause of action or defense sufficiently to warrant the court to direct judgment in his favor as a matter of law. Once the movant meets this burden, the burden shifts to the opposing party to show by tender of sufficient facts in admissible form that triable issues of fact remain which preclude summary judgment in the movant's favor (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). However, in opposing a summary judgment motion, mere conclusions, unsubstantiated allegations or assertions are insufficient to raise triable issues of fact (*see Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595[1980]). In determining a motion for summary judgment, the court's function is not to resolve issues of fact or to determine matters of credibility but rather to determine whether issues of fact exist precluding summary judgment (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

The making of a false statement which tends to expose a person to public contempt, ridicule, aversion, or disgrace constitutes defamation (*Thomas H. v Paul B.*, 18 NY3d 580, 584, 942 NYS2d 437 [2012]; *Foster v Churchill*, 87 NY2d 744, 751, 642 NYS2d 583 [1996]). Generally, only statements of fact can be defamatory because statements of pure opinion cannot be proven untrue (*see Thomas H. v Paul B.*, 18 NY3d 580, 584, 942 NYS2d 437). Non-actionable "pure opinion" is a statement of opinion accompanied by recitation of facts upon which it is based, or, if not accompanied by such factual recitation, the statement must not imply that it is based upon undisclosed facts (*Steinhilber v Alphonse*, 68 NY2d 283, 508 NYS2d 901 [1986]). The difficult task of distinguishing an actionable statement of fact from a protected statement of opinion is a question of law for the court (*see Mann v Abel*, 10 NY3d 271, 276, 856 NYS2d 31 [2008]). This task involves an examination of three factors: (1) whether the

allegedly defamatory words have a “precise meaning” that is “readily understood”; (2) whether the statement can be proven true or false; and (3) whether in the context of the communication or the either broader social context signal to that what is being read or heard is likely to be opinion, not fact (*see Mann v Abel, supra* at 276; *Steinhilber v Alphonse, supra* at 292). Indeed, context is often the key consideration in categorizing a statement as fact or opinion (*see generally Immuno AG. v Moor-Jankowski, 77 NY2d 235, 254, 566 NYS2d 906 [1991]*).

Even where an alleged defamatory statement has been made, “a qualified privilege [exists] where the communication [has been] made to persons who have some common interest in the subject matter” (*Foster v Churchill, 87 NY2d 744, 751, 642 NYS2d 583 [1996]*; *see Liberman v Gelstein, supra*; *Santavicca v City of Yonkers, 132 AD2d 656, 657, 518 NYS2d 29 [1987]* [a qualified privilege arises when a person makes a bona fide communication upon a subject in which he or she has an interest, or a legal, moral, or social duty to speak, and the communication is made to a person having a corresponding interest or duty]). If the statements at issue are found to be privileged, it becomes the plaintiff’s burden in opposing a motion for summary judgment, to demonstrate a triable issue of fact by proffering evidentiary proof that the defendant was motivated by malice, spite or ill-will, or that the statements were published with reckless regard to their truth or falsity (*Kasachkoff v City of New York, 107 AD2d 130, 135, 485 NYS2d 992 [1985]*, *affd 68 NY2d 654, 505 NYS2d 67 [1986]*). Furthermore, it is well established that statements made at all stages of a judicial proceeding in communications among the parties, witnesses, counsel, and the court are accorded an absolute privilege, so long as the statements may be considered in some way pertinent to the issue in the proceeding (*see Weinstock v Sanders, 144 AD3d 1019, 42 NYS3d 205 [2d Dept 2016]*; *Black v Green Harbour Homeowners’ Association, 19 AD3d 962, 798 NYS2d 753 [3d Dept 2005]*). This privilege applies to statements made in or out of court, on or off the record, and regardless of the motive with which they were made (*see Weinstock v Sanders, supra*; *El Jamal v Weil, 116 AD3d 732, 986 NYS2d 146 [2d Dept 2014]*).

Here, defendants established their prima facie entitlement to summary judgment dismissing plaintiff’s defamation claims by demonstrating that the letter drafted by Crawford and published to other members of the BSA concerning the revocation of plaintiff’s adult leadership role in Troop 43 was subject to the qualified privilege (*see Colantonio v Mercy Med. Ctr., 135 AD3d 686, 24 NYS3d 653 [2d Dept 2016]*; *Phelan v Huntington Tri-Vil. Little League, Inc., 57 AD3d 503, 868 NYS2d 737 [2d Dept 2008]*; *Clark v Schuylerville Cent. School Dist., 74 AD3d 1528, 902 NYS2d 707 [2d Dept 2010]*; *Berger v Temple Beth-El of Great Neck, 41 AD3d 626, 839 NYS2d 504 [2d Dept 2007]*). Significantly, plaintiff and defendants were all adult members of Troop 43, and shared a common interest in ensuring that the type of adult supervision delivered to the scouts complied with the values set forth in the BSA oath. Further, it is undisputed that the alleged defamatory letter, drafted after the conduct of an emergency meeting held to determine plaintiff’s alleged abusive behavior towards two of the troop’s scouts, was published only to other members of the BSA and the chartered organization who had corresponding interests in the subject matter. Defendants further established, as a matter of law, that Crawford’s subsequent statement to plaintiff’s wife that her husband “did very bad things” at the time she was serving him papers in connection with the legal proceedings brought against him was also privileged (*see Galanova v Safir, 138 AD3d 686, 29 NYS3d 459 [2d Dept 2016]*; *Weinstock v Sanders, supra*; *El Jamal v Weil, supra*) and was based, in any event, on inactionable opinion (*see Immuno AG. v Moor-Jankowski, supra*; *Steinhilber v Alphonse, 68 NY2d 283, 508 NYS2d 901 [1986]*; *Hull v Town*

of *Prattsville*, 145 AD3d 1385, 44 NYS3d 253 [3d Dept 2016]; *Sabharwal & Finkel, LLC v Sorrell*, 117 AD3d 437, 985 NYS2d 70 [1st Dept 2014]; *Frechtman v Gutterman*, 115 AD3d 102, 979 NYS2d 58 [1st Dept 2014]; *Melius v Glacken*, 94 AD3d 959, 943 NYS2d 134 [2d Dept 2012]).

In opposition, plaintiff failed to raise any triable issues as to whether defendants published the letter in a manner that exceeded the scope of the privilege (see *Berger v Temple Beth-El of Great Neck, supra*; *Anas v Brown*, 269 AD2d 761, 702 NYS2d 732 [4th Dept 2000]), or as to whether they acted based solely on spite or ill will or with reckless disregard for the truth (see *Liberman v Gelstein, supra* at 437-438). It is noted that plaintiff's conclusory assertions that Crawford failed to conduct a more thorough investigation before the committee made its determination is insufficient to raise a triable issue of fact as to whether defendants acted out of malice or with reckless disregard for the truth (see *Sweeney v Prisoners' Legal Servs.*, 84 NY2d 786, 622 NYS2d 896 [1995] [the failure to investigate, standing alone, is not enough to prove actual malice]; see also *Hollander v Cayton*, 145 AD2d 605, 536 NYS2d 790 [2d Dept 1988]; *Hoyt v Kaplan*, 263 AD2d 918, 920, 694 NYS2d 227 [3d Dept 1999]). Moreover, plaintiff's assertion the court's previous determination that his complaint stated actionable claims for defamation constitutes "law of the case" is rejected, as it is well established that the law of the case doctrine is inapplicable where, as in this case, a summary judgment motion follows a motion to dismiss pursuant to CPLR 3211(a) (7) (see *347 Cent. Park Assoc., LLC v Pine Top Assoc., LLC*, 144 AD3d 785, 41 NYS3d 99 [2d Dept 2016]; *Borawski v Abulafia*, 140 AD3d 817, 33 NYS3d 412 [2d Dept 2016]; *Bernard v Grecni*, 48 AD3d 722, 853 NYS2d 168 [2d Dept 2008]). Accordingly, defendants' motion for summary judgment dismissing the complaint against them is granted.

In light of the foregoing, plaintiff's cross motion for summary judgment in his favor on the issue of liability with respect to his defamation claims against Crawford is denied, as moot.

Dated: 1 APR 27 2017

  
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HON. JOSEPH A. SANTORELLI,  
J.S.C.

X  FINAL DISPOSITION        NON-FINAL DISPOSITION