

Verdi v Dinowitz

2017 NY Slip Op 32073(U)

September 28, 2017

Supreme Court, New York County

Docket Number: 158747/2016

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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MANUELE VERDI, individually and in his official capacity
as the Assistant Principal of Public School 24 ("P.S. 24"), a
public school under the auspices of the New York City
Department of Education,

Plaintiff,

Index No. 158747/2016
Motion Seq: 001

-against-

JEFFREY DINOWITZ, both individually and in his official
capacities as Assembly Member of the 81st Assembly District,

Defendant.

DECISION & ORDER
ARLENE P. BLUTH, JSC

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The motion to dismiss the amended complaint is granted in part and denied in part.

Background

This motion¹ arises out of an overcrowding crisis at PS 24 in the Riverdale section of Bronx County. This crisis began after the school lost the lease for an annex in a nearby co-op building on June 30, 2015, thereby forcing the school to find space for the students whose classrooms were located in that annex. Predictably, the local community expressed outrage and looked for people to blame. Led by defendant, the school administrators at PS 24, including plaintiff (the assistant principal), were singled out as responsible for losing the lease.

¹It is clear from the papers submitted that neither party bothered to read this Court's rules regarding page limits. If the parties ignore this Court's restrictions on page limits in the future, excess pages will not be read.

Plaintiff claims that defendant, a local state legislator, defamed him and interfered with plaintiff's employment contract. Plaintiff insists that defendant blamed plaintiff for losing the lease for PS 24's annex despite the fact that defendant knew that plaintiff was not responsible for obtaining or renewing leases. Plaintiff also contends that one of defendant's staff members was improperly involved in the kindergarten registration process as part of defendant's racially-motivated scheme to bar low-income minority students from the school.

Plaintiff's amended complaint includes 11 causes of action, two of which (numbers 10 and 11) plaintiff decided with withdraw.

Discussion

“On a CPLR 3211 motion to dismiss, the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Nonnon v City of New York*, 9 NY3d 825, 827, 842 NYS2d 756 [2007] [internal quotations and citation omitted]).

Libel, Defamation and Slander (Causes of Action 4-8)

“Making a false statement that tends to expose a person to public contempt, hatred, ridicule, aversion or disgrace constitutes defamation” (*Thomas H. v Paul B.*, 18 NY3d 580, 584, 942 NYS2d 437 [2012]). “Generally, only statements of fact can be defamatory because statements of pure opinion cannot be proven untrue” (*id.*).

Defendant claims that plaintiff's defamation claims (causes of action 4-8) should be dismissed because defendant was acting as a legislator and he is protected by a legislative privilege. Defendant also claims the statements were expressions of opinion rather than statements of fact.

Plaintiff insists that these statements were false and not subject to any privilege.

The Court questions defendant's claim that his position as a legislator entitles him to some kind of absolute privilege. Certainly, there is a privilege that protects legislators while working in their official capacities (*see People v Ohrenstein*, 77 NY2d 38, 54, 563 NYS2d 744 [1990] [noting that giving speeches, issuing press releases and other efforts to gain support in the community are *not* protected under legislative immunity]).

Defendant cites to *Stukuls v State of New York* (42 NY2d 272, 397 NYS2d 740 [1977]) for the proposition that legislators are entitled to immunity. But that case cites to the Speech or Debate clause found in New York's State Constitution (*see NY Const*, art 3, § 11) which, as noted in the *Ohrenstein* case cited above, only applies to legislative acts. It does not automatically apply to speeches made in the community or to quotes given to local reporters. In any event, *Stukuls* involves a distinguishable factual scenario— a professor working for a state university rather than a legislator.

Defendant also cites to a Fourth Department case in which potentially defamatory statements made by a local school board member to a school principal at a Board of Education meeting were subject to immunity (*Matter of Bd. of Educ. of City of Buffalo*, 52 AD2d 220, 229, 383 NYS2d 732 [4th Dept 1976]). Although defendant relies heavily on this case, it does not support the notion that a legislator enjoys absolute immunity for any statements; in fact, that

decision specifically stated that “Absolute privilege does not, of course, mean that a public official can always defame with impunity” (*id.* at 228).

Here, defendant insists that his statements were made in the context of acting on behalf of his constituents. Although defendant may feel responsible to serve as a mouthpiece for his constituent’s complaints, that does not mean he can say whatever he wants, wherever he wants. It is certainly understandable, politically, why a legislator would show up to a parents’ association meeting (as alleged in the Fourth Cause of Action) or offer quotes to a newspaper (as alleged in the Fifth Cause of Action) regarding an overcrowding crisis. No constituent is in favor of overcrowding and its easy to gain and solidify the public’s support by finding people to blame.

But gaining support in the community is not a legislative act subject to absolute privilege. A legislator is charged with introducing, debating and voting on legislation. Here, defendant was performing none of those acts. And this is not a close case, such as if defendant made comments at a town hall discussion he organized. Defendant showed up at the parents’ association meeting and gave quotes to publications presumably so he could remain visible.

Defendant’s status as a legislator is not a cloak that he can wear to insulate himself from any and all statements. His presence at the parents’ association meeting and the comments to the local newspapers were not required parts of his job. Defendant was not introducing or arguing in support of specific legislation– instead, he was feeding public anger about losing the lease. That anger, though likely justified, does not permit defendant to say anything with impunity. It certainly does not permit him to blame plaintiff for losing the lease especially if (as alleged) he knew that plaintiff was not responsible for renewing the lease or procuring another lease.

Frankly, plaintiff's amended complaint and defendant's motion provide no simple way for this Court to rule on this branch of defendant's motion. Plaintiff's causes of action numbered 4-8 cite multiple statements made by defendant at different times. And defendant, in his motion to dismiss, does not address these causes of action individually. Instead, defendant groups plaintiff's statements into "Overcrowding Statements" and "Lawsuit Statements" (*see* NYSCEF Doc. No. 17 at 14-21). Overcrowding Statements relate to defendant's words about the crisis while Lawsuit Statements refer to comments made about a lawsuit commenced by plaintiff against the New York City Department of Education ("DOE") on May 2, 2016. Defendant argues that all of the Overcrowding Statements, other than the claims defendant allegedly made the parents' association meeting, overlap with the Lawsuit Statements.

Here, the Court finds that the motion to dismiss is denied as to the Overcrowding Statements (*see id.* at 14-15). As stated above, defendant (even though he is a state legislator) cannot say anything with impunity especially under circumstances where plaintiff alleges that defendant was well aware that plaintiff had no direct power to renew the lease for the annex or procure other space. If it turns out that these Overcrowding Statements were false, then there is little question they subjected plaintiff to public ridicule— defendant allegedly called plaintiff "incompetent" and stated plaintiff was the main reason for the crisis. Further, these Overcrowding Statements are not opinion. Defendant claimed plaintiff was the reason for the overcrowding crisis and derelict in his duties. Defendant did not qualify these statements in any way, such as stating "In my opinion, plaintiff is responsible" or "It looks like plaintiff is the reason the lease was not renewed." Instead, defendant affirmatively stated a conclusion.

The Court grants the motion to dismiss to the extent that the Lawsuit Statements (*see id.* at 20) are stricken from the amended complaint. Although Dinowitz was not initially named as a defendant in that action (he was later added and then dismissed), he has the right to respond to allegations made against him by plaintiff (*see Campo v Paar*, 18 AD2d 364, 239 NYS2d 494 [1st Dept 1963]; *Blackman v Stagno*, 32 AD3d 776, 777-78, 828 NYS2d 152 [2d Dept 2006]; *Kane v Orange County Publications*, 232 AD2d 526, 527, 649 NYS2d 23 [2d Dept 1996]). Defendant is entitled to a qualified privilege for statements made in response to a litigation in which he was later named as a defendant.

Defendant's claim that all of the Overcrowding Statements (except those arising from Cause of Action Number 4) are also Lawsuit Statements overstates the reach of defendant's qualified privilege. While defendant has the right to respond to allegations lodged against him, he cannot use that response to assert allegedly defamatory claims against plaintiff. Put another way, the purpose of a response is to offer a retort not to attack someone else.

Special Damages

A claim for defamation must plead special damages unless an exception applies (*Liberman v Gelstein*, 80 NY2d 429, 434-35, 590 NYS2d 857 [1992]). These exceptions, called defamation *per se*, "consist of statements [I] charging plaintiff with a serious crime; [ii] that tend to injure another in his or her trade, business or profession; [iii] that plaintiff has a loathsome disease; or [iv] imputing unchastity to a woman" (*id.* at 435). Here, defendant's alleged statements clearly injure plaintiff's standing as an assistant principal. Defendant purportedly claimed that plaintiff was "incompetent" and "derelict" in performing his duties. Defendant is

also not entitled to single instance exception to the general rule that disparaging a person in his or her office is libelous per se (*Bowes v Magna Concepts, Inc.*, 166 AD2d 347, 348, 561 NYS2d 16 [1st Dept 1990]). Defendant made numerous comments about plaintiff's ability as an assistant principal over the course of 2015 and 2016.

Further, even if plaintiff were required to plead special damages, plaintiff included these allegations in the amended complaint (*see* NYSCEF Doc. No. 19 ¶¶ 106, 117, 128, 129).

Tortious Interference— Causes of Action 1-3

“Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom” (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424, 646 NYS2d 76 [1996] [citations omitted]).

“The required elements of a cause of action for tortious interference with prospective business relations are as follows: [a] business relations with a third party; [b] the defendant's interference with those business relations; [c] the defendant acting with the sole purpose of harming the plaintiff or using wrongful means; and [d] injury to the business relationship” (*Advanced Global Technology LLC v Sirius Satellite Radio, Inc.*, 15 Misc3d 776, 779, 836 NYS2d 807 [Sup Ct, NY County 2007] [citations omitted]).

Tortious interference with prospective economic advantage requires that “a plaintiff must demonstrate that the defendant's interference with its prospective business relations was accomplished by ‘wrongful means’ or that defendant acted for the sole purpose of harming the

plaintiff. ‘Wrongful means’ includes physical violence, fraud, misrepresentation, civil suits, criminal prosecutions and some degree of economic pressure, but more than simple persuasion is required” (*Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 294, 299-300, 684 NYS2d 235 [1st Dept 1999]).

Plaintiff’s first (tortious interference with contract), second (tortious interference with prospective business relations) and third (tortious interference with prospective economic advantage) causes of action arise out of plaintiff’s contract and relationship with DOE. These three claims ascribe great power to defendant over DOE employees.

These three causes of action are severed and dismissed. Initially, the Court finds that plaintiff failed to allege how his contract with DOE was breached. Plaintiff offers vague and conclusory claims that defendant interfered with his contract with DOE rather than pointing out specific portions of his contract that were breached.

Plaintiff contends that he was forced to implement defendant’s racially discriminatory policies, but offers no allegations of damages resulting from these policies. Plaintiff does not, for example, claim that he was fired for taking certain actions or that he faced retribution for his inability to perform required tasks. The insinuation that plaintiff was forced to violate his students’ civil rights also does not state a claim for tortious interference with contract or with business relations– that might be a defense to a civil rights claim against DOE and plaintiff by students at PS 24, but it is not grounds for *plaintiff* to recover damages against defendant.

Plaintiff’s memorandum of law offers no additional insight into these causes of action. Plaintiff describes a vast conspiracy to remove plaintiff from his position as assistant principal and to punish plaintiff “which would have come to fruition were it not for the complaint lodged

with the DOE Department of Investigations” (NYSCEF Doc. No. 50 at 33-34). This admission acknowledges that plaintiff did not ultimately suffer the harm defendant’s purported actions were designed to inflict— the amended complaint contends plaintiff is still the assistant principal at PS 24 (*see* NYSCEF Doc. No. 19 ¶ 2). Plaintiff failed to sufficiently articulate the harm he suffered from defendant’s purported actions; plaintiff only offers speculative consequences of defendant’s intended acts.

Obviously, these three causes of action are more commonly utilized to provide remedies for the business world rather than for teacher employed by DOE. As defendant points out, if plaintiff suffered illegal and adverse action by DOE, an Article 78 proceeding (or some other litigation against DOE) is the proper forum to address those allegations. If, for example, plaintiff’s application for the position of principal was denied by DOE for an illegal reason, then he should pursue legal action against DOE. Defendant is not an employee of DOE and does not exercise the power to hire or fire DOE employees. The allegations claiming that defendant may have improperly exerted influence over DOE does not substantiate a cognizable claim for tortious interference with contract, prospective business relations, or prospective economic advantage. It might show DOE improperly abdicated its responsibilities, but it does not save these three causes of action.

Summary

Defendant’s motion to dismiss is granted only to the extent that the causes of action numbered 1-3 (relating to tortious interference) and 10-11 (which were withdrawn) are severed

and dismissed and the Lawsuit Statements (as described above) are stricken from the complaint.

The motion is otherwise denied.

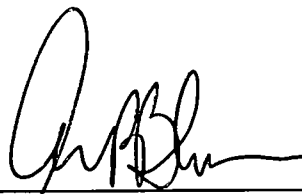
Accordingly, it is hereby

ORDERED that defendant's motion to dismiss is granted in part and denied in part in accordance with this decision and order.

The parties are directed to appear for a preliminary conference on December 5, 2017 at 2:15 p.m.

This is the Decision and Order of the Court.

Dated: September ²⁸~~25~~, 2017
New York, New York



ARLENE P. BLUTH, JSC

**ARLENE P. BLUTH
HON. ARLENE P. BLUTH
J.S.C.**