

<b>Santora v Bedford Cent. Sch. Dist.</b>
2019 NY Slip Op 31275(U)
May 6, 2019
Supreme Court, Westchester County
Docket Number: 64036/2018
Judge: John P. Colangelo
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To commence the statutory time period 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

-----X  
ANDREW SANTORA,

Plaintiff,

-against-

DECISION AND ORDER  
Index No. 64036/2018  
Motion Sequence #2

BEDFORD CENTRAL SCHOOL DISTRICT,  
EDWARD ESCOBAR, individually and as agent of  
Bedford Central School District, LAURA ELWOOD,  
individually and as agent of Bedford Central School  
District, JOHN DOE(S) "1 THROUGH 5" AND JANE  
DOE(S) "1 THROUGH 5",

Defendants.

-----X  
COLANGELO, J.

The following papers were read on Defendants' Motion to Dismiss the Plaintiff's Amended Complaint pursuant to CPLR §3211(a):

Notice of Motion-Memorandum of Law- Exhibit A	1-12
Memorandum of Law in Opposition Plaintiff's Amended Complaint	13-19
Reply Memorandum of Law	20-22

Upon the foregoing papers it is ORDERED that the matter is disposed of as follows:

Relevant Background

The instant motion is brought by Defendants BEDFORD CENTRAL SCHOOL DISTRICT, EDWARD ESCOBAR, individually and as agent of Bedford Central School District,

LAURA ELWOOD, individually and as agent of Bedford Central School District, JOHN DOE(S) "1 THROUGH 5" AND JANE DOE(S) "1 THROUGH 5", (collectively, the "Defendants") for an Order dismissing the above captioned action brought against them by Plaintiff Andrew Santora ("Plaintiff"). Plaintiff's Amended Verified Complaint ("the Complaint") sets forth three causes of action: **A. Defamation** as against Defendant Bedford Central School District, Defendant Laura Elwood and Defendants John and Jane Doe(s) "1 through 5"; **B. Defamation** as against Defendant Bedford Central School District, Defendant Edward Escobar and Defendants John and Jane Doe(s) "1 through 5"; **C. Intentional Infliction of Emotional Distress** as against all Defendants. (Pl. Amended Verified Complaint).

The parties to this action are identified in the Complaint, as follows: Plaintiff is a former Special Education Instructional Assistant at Fox Lane High School of the Defendant Bedford Central School District (*Id.* ¶2); Defendant Bedford Central School District is a public school system duly authorized in New York State (*Id.* ¶4); Defendant Escobar is a private individual residing in Westchester County, New York and employed as the Director of the Pupil Personnel Services Department of the Bedford Central School District (*Id.* ¶¶6,7); Defendant Elwood is a private individual residing in Westchester County, New York and employed as a Social Worker in the Special Education Department of Fox lane High School. (*Id.* ¶¶8,9); Defendant Does are private individuals residing in Westchester County, New York. (*Id.* ¶10).

The instant motion seeks dismissal of all three causes of action set forth in the Complaint. Defendants contend that the first count of Plaintiff's Complaint alleging Defamation by Defendant Laura Elwood should be dismissed for two reasons - - because the Complaint fails to quote the exact words of Defendant Elwood's allegedly defamatory statement and Defendant

Elwood's alleged statement was substantially true. Defendants contend that the second count of Plaintiff's Complaint alleging Defamation by Defendant Escobar should be dismissed for three reasons - - because Defendant Escobar's allegedly defamatory statement was substantially true, the statement is protected by a qualified privilege, and because Defendant Escobar's statement is not defamatory and therefore cannot be challenged absent a pleading of special damages.

The basis stated for dismissal of the third count of Plaintiff's Complaint for Intentional Infliction of Emotional Distress is that the alleged conduct was not extreme and outrageous. (Notice of Motion).

Defendants have taken the position that all of Plaintiff's allegations [in the Complaint], which will be restated in relevant part below, are accepted as true for purposes of the instant motion. (Def. Mem of Law, p.1).

Plaintiff was hired by Defendant Bedford Central School District (the "District") in September 2012 as a 1:1 Aid in the "OPT PROGRAM" at Fox Lane High School. (Complaint, ¶24). After a series of promotions, Plaintiff was promoted again to the position of Instructional Assistant in the SAIL Department in September 2014, where he received satisfactory evaluations after each year as he did with the prior promotions. (*Id.* ¶¶25-28). Plaintiff worked directly with special education students to fulfill a specialized behavioral plan, which included instructional guidance, reinforcement tactics and awards for success. (*Id.* ¶32).

On or about November 28, 2017, Plaintiff was aiding a student (the "Student") using the specialized behavior plan which called for reinforcement of good behavior by using "positive language", "verbal /gestural mands" - - to provide the Student with positive responses to verbal requests. (*Id.* ¶34). During the execution of this specialized behavioral plan, the Student was

engaged, enthusiastic, and using more verbal language than Plaintiff ever noted before. (*Id.* ¶35).

In an effort to continue with the reward aspect of this plan, and after the Student satisfactorily completed her work, the Student asked Plaintiff to draw a washable cat drawing on her right arm during art class. After several efforts to confirm the request, Plaintiff, in the presence of five other teachers, drew a picture of a cat on the Student's arm. (*Id.* ¶36). Teachers and Instructional Assistants had different methods of rewarding students which included face painting or similar art designs. Plaintiff has previously drawn animal drawings during the students' art classes. These practices were often encouraged, and the drawings have been done prior to November 28, 2017 with the approval of and in the presence of the teachers of the program. (*Id.* ¶¶37,38).

Plaintiff showed a picture of the completed drawing to Defendant Elwood, who smiled and stated "That's great." (*Id.* ¶41). Plaintiff emailed the Student's parents notifying them of the Student's excellent classroom work and his drawing with washable marker on the Student's arm as both a reward and an incentive to motivate her class participation. (*Id.* ¶42).

One day after the drawing on the Student's arm, Plaintiff was removed from classroom by the Principal and Assistant Principal concerning the "incident" they claimed occurred the day before. Plaintiff was placed on administrative leave. (*Id.* ¶¶43,44).

On December 15, 2017, Defendant Escobar distributed an email to all principals and front staff in the District stating the following: **"Please be advised that Andrew Santora is not permitted on any school grounds at any time. He has been advised of this. If he is seen on school ground, please call the police."** **"Please inform all of your front staff of this."** (Emphasis added) (*Id.* ¶48).

On or about February 15, 2018, Plaintiff and the District entered into a Separation

Agreement (the “Agreement”)(Def. Exh. A) whereby, *inter alia*, Plaintiff resigned from his employment with the District. The Agreement set forth no reason for Plaintiff’s resignation. The Agreement provided that the District would not file disciplinary charges against Plaintiff. The Agreement provided that through December 31, 2020, **Plaintiff shall not enter onto any premises owned or leased by the District during school hours, or attend any District event, without specific written prior permission.** (Emphasis added). Plaintiff was permitted to go to his assigned polling place to vote in any election. (*Id.* ¶¶49,50; Agreement ¶¶1,2 5).

On or about February 26, 2018, Defendant Escobar forwarded to all principals of the District, the exact email that he sent on December 15, 2017 and added “[o]nce again I need to remind you, since my original email in December to please dust off and post as appropriate the picture of this former employee. Please remind everyone of what is stated below . . .”. (Emphasis added) (*Id.* ¶52). The December 15, 2017 email was incorporated into the February 26, 2018 email, **along with a large head shot photograph of Plaintiff.** (Emphasis added) (*Id.* ¶53).

The Complaint avers that upon information and belief, on February 28, 2018 at approximately 7:20 am, Defendants openly facilitated and reinforced false and defamatory statements made in a meeting, with employees and non-employees present, by allowing Defendant Elwood to falsely defame Mr. Santora and state that he was terminated from his employment due to inappropriately touching a student.” (*Id.* ¶58). The Complaint further alleges that “[i]n sum and substance, at the meeting on February 28, 2018 at approximately 7:20 am, Defendant Elwood stated, in the presence of administrators Assistant Principal, Emerly Martinez, Director of Human Resources, Stacy Haynsworth, Principal Brett Miller, and several other staff

members and third parties, “ **I am so disappointed that Andrew, a staff I had trusted so much, would touch one of our students inappropriately.**”(Emphasis added). Plaintiff alleges that, [u]pon information and belief, additional statements and conversations took place in that setting that furthered the defamatory dialogue. (*Id.* ¶59).

In the first cause of action, Plaintiff alleges that Defendant Elwood, individually and as agent of the District, stated “ **I am so disappointed that Andrew, a staff I had trusted so much, would touch one of our students inappropriately.**” (Emphasis added). Further, that the statement was communicated to, including but not limited to, Assistant Principal, Emerly Martinez, Director of Human Resources, Stacy Haynsworth, Principal Brett Miller, and other staff members and third parties present. Defendant Elwood further stated that **Mr. Santora was terminated as a result of this incident.** (Emphasis added) (*Id.* ¶74).

#### Legal Analysis

In *Neuman v. Echevarria*, 2019 WL 1461788 (2d Dept. 2019), the Supreme Court, Appellate Division Second Department reiterated the standard to be applied in determining a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211(a)(7). “When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action” (*Sokol v. Leader*, 74 A.D.3d 1180, 1180-1181 [2d Dept. 2010]). “In considering such a motion, the court must 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” (*Sokol v. Leader*, 74 A.D.3d at 1181 [internal quotation marks omitted]); see *Nonnon v. City of New York*, 9 N.Y.3d 825 [2007]; *Leon v. Martinez*, 84 N.Y.2d 83, 87–88

[1994]; *Gutierrez v. McGrath Management Services, Inc.*, 152 A.D.3d 498 [2d Dept. 2017], quoting *T. Mina Supply, Inc. v. Clemente Bros. Contr. Corp.*, 139 A.D.3d 1040, 1041-1042 [2d Dept. 2016]; see also *Silsdorf v. Levine*, 59 N.Y.2d 8, 12 [1983]; *Armstrong v. Simon & Schuster*, 85 N.Y.2d 373, 379 [1995]). ‘Whether a plaintiff can ultimately establish its allegations is not part of the calculus’ ” (*Sokol v. Leader*, 74 A.D.3d at 1181, 904 N.Y.S.2d 153, quoting *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11 [2005]).

Unlike on a motion for summary judgment where the court assesses the sufficiency of the evidence, on a motion to dismiss the court “merely examines the adequacy of the pleadings” (*Davis v. Boenheim*, 24 N.Y.3d 262 [2014], quoting *State of New York v. Barclays Bank of N.Y.*, 151 A.D.2d 19 [3d Dept. 1989], *aff’d*, 76 N.Y.2d 533 [1990]). In determining the sufficiency of a defamation pleading, the court is to consider “whether the contested statements are reasonably susceptible of a defamatory connotation” (*Davis v. Boenheim*, 24 N.Y.3d 262 [2014]; *Armstrong*, 85 N.Y.2d at 380, citing *Weiner v. Doubleday & Co.*, 74 N.Y.2d 586, 592 [1989]). “If, upon any reasonable view of the stated facts, plaintiff would be entitled to recovery for defamation, the complaint must be deemed to sufficiently state a cause of action” (*Silsdorf*, 59 N.Y.2d at 12, citing *219 Broadway Corp. v. Alexander’s, Inc.*, 46 N.Y.2d 506, 509 [1979]). See *Davis v. Boenheim*, 24 N.Y.3d 262 (2014).

In order for the challenged statements to be susceptible of a defamatory connotation, they must come within the well established categories of actionable communications. Thus, a false statement “that tends to expose a person to public contempt, hatred, ridicule, aversion or disgrace constitutes defamation” (*Davis v. Boenheim*, 24 N.Y.3d 262 [2014], quoting *Thomas H. v. Paul B.*, 18 N.Y.3d 580, 584 [2012] ).

*Statements by Defendant Elwood*

This Court rejects Defendant Elwood 's contention that Plaintiff failed to plead the particular words spoken by her because of the allegations in ¶59 of the Complaint stating “[i]n sum and substance, at the meeting on February 28, 2018 at approximately 7:20 am, Defendant Elwood stated, in the presence of . . . . . ‘I am so disappointed that Andrew, a staff I had trusted so much, would touch one of our students inappropriately.’” In the first instance, the words “in sum and substance” do not precede the specific words stated by Defendant Elwood, and secondly, in paragraph 74 of the first cause of action in the Complaint, Plaintiff alleges “[s]pecifically, Defendant Elwood, individually and as agent of the District stated the following: “I am so disappointed that Andrew, a staff I had trusted so much, would touch one of our students inappropriately.” It is clear from the cited paragraphs that the Complaint set forth “the particular words complained of” and thereby complied with CPLR §3016(a). (*Sokol v. Leader*, 74 A.D.3d at 1183).

The same determination is made with respect to Defendant Elwood's position that Plaintiff's defamation claim against her must fail because the allegedly defamatory statements were substantially true.

As set forth in the Complaint, Plaintiff's act of drawing a washable cat figure on the Student's arm took place in the presence of five other teachers who saw no issue with the drawing. In fact, Defendant Elwood, when shown the picture, approved of it. It is therefore reasonable to conclude that at the time Defendant Elwood stated that Plaintiff inappropriately touched a student, she knew it was untrue. The statement that Plaintiff was terminated as a result of the incident was also knowingly false since the Agreement does not state that Plaintiff was

terminated, but rather that he resigned. Defendant's statement was reasonably susceptible of a defamatory connotation including that the inappropriate touching of a student which resulted in termination was sexual in nature.

*Statements of Defendant Escobar*

With regard to Defendant Escobar's emails of December 15, 2017 and February 26, 2018, Plaintiff takes the position that the falsity of both statements rests in both the plain language of the statements as well as the defamatory connotation of which they are susceptible.

The email of December 15, 2017 which was distributed to all principals and front office staff in the District was quoted by Plaintiff as stating : **"Please be advised that Andrew Santora is not permitted on any school grounds at any time. He has been advised of this. If he is seen on school grounds, please call the police."** **"Please inform all of your front staff of this."** (Emphasis added) (*Id.* ¶48). The statement is set forth and plead by Plaintiff with sufficient particularity to state a cause of action for defamation. Contrary to the Defendants' contention, the statement is neither true or substantially true, since the Agreement made between Plaintiff and the District two months after this email prohibited Plaintiff from entering onto District premises during *school hours* or from attending any District event. Further, by asking the principals and front office staff to call the police if Mr. Santora was seen on school grounds is a statement that tended to expose Mr. Santora to public contempt, hatred, ridicule, aversion or disgrace, and therefore constitutes defamation. *Davis v. Boenheim*, 24 N.Y.3d 262 [2014], quoting *Thomas H. v. Paul B.*, 18 N.Y.3d 580, 584 [2012]).

This Court rejects Defendant Escobar's claim that Plaintiff offered no evidence that Escobar intended or endorsed a defamatory inference and "simply told his staff what they needed

to know in order to enforce the terms of Mr. Santora's separation agreement. " (Defs. Memo of Law, p. 7). The Agreement was not in force at the time of the December 15<sup>th</sup> email, and urging police presence should Mr. Santora be seen on school grounds implied that Mr. Santora is dangerous and/or had been engaged in criminal activity for which police presence was necessary to escort him from the premises.

In this Court's view, the sending of the same email two months later, stating the following: "[o]nce again I need to remind you, since my original email in December to please dust off and post as appropriate the picture of this former employee. Please remind everyone of what is stated below . . ." and incorporating the December 15<sup>th</sup> email and a large head shot of Plaintiff, reaffirmed that Plaintiff remained dangerous and/or had been engaged in criminal activity for which police presence was necessary to remove him. As such, Escobar's February 26<sup>th</sup> email was reasonably susceptible of a defamatory connotation. In addition, it is reasonable to conclude that since Defendant Escobar was familiar with the terms of the Agreement, he knew that the content of the February 26<sup>th</sup> email was false- - in that he knew that Mr. Santora was not prohibited from being on school grounds when school was not in session. Despite the language of the Agreement, the February 26<sup>th</sup> email encouraged individuals to call the police if Plaintiff was ever seen on District owned or leased property.

Defendant Escobar maintains that the allegedly defamatory statements are protected by qualified privilege since the communication was sent in his capacity as Director of Pupil Personnel Services to relevant staff within the District who had a "corresponding interest or duty" in the statement, since they were the ones responsible for enforcing the no-trespassing policy against Plaintiff. (*Id.*, p. 8). However, the protection of this privilege "may be dissolved if

plaintiff can demonstrate that defendant spoke with malice.” *Kamchi v. Weissman*, 125 A.D.3d 142 (2d Dept. 2014), quoting *Lieberman v. Gelstein*, 80 N.Y.2d 429, 437 [1992]; see *Diorio v. Ossining Union Free School Dist*, 96 A.D.3d 710, 712 [2d Dept. 2012]). To establish malice necessary to defeat the privilege, a plaintiff may show common-law malice, i.e., spite or ill will, or may show actual malice, i.e., knowledge of the falsehoods of the statement or reckless disregard for the truth. *Diorio v. Ossining Union Free School Dist*, 96 A.D.3d at 712; see *Lieberman v. Gelstein*, 80 N.Y.2d at 437-438; see also *New York Times Co. v. Sullivan*, 376 U.S. 254, 280, 84 S. Ct 710, 11 L.Ed.2d 686 [1964]). Since the burden does not shift to the nonmoving party on a motion to dismiss pursuant to CPLR§3211(a)(7), Plaintiff was not required to show evidentiary facts to support his claim of malice on a motion to dismiss pursuant to CPLR §3211(a)(7). (*Shaw v. Club Mgrs. Ass’n of America, Inc.*, 84 A.D.3d 928, 931 [2d Dept. 2011]; see *Sokol v. Leader*, 74 A.D.3d at 1182, quoting *Kotowski v. Hadley*, 38 A.D.3d 499, 500-501 [2d Dept. 2007]). The allegations of the Complaint establish that Defendant acted with actual malice. Plaintiff was not prohibited from being on District property at all times, as the Agreement so stated, and encouraging police presence and thereafter publishing Plaintiff’s picture throughout the District gave the false impression that Plaintiff was dangerous and/or engaged in criminal behavior. Thus, Defendant Escobar’s motion to dismiss the cause of action against him on the grounds that his statements are protected by a qualified privilege is denied.

This Court rejects Defendant Escobar’s contention that his statements are not defamatory *per se* and therefore cannot be challenged absent a pleading of special damages. To constitute defamation *per se*, the alleged statements must (1) charge a plaintiff with a serious crime; (2) tend to injure another in his or her trade, business or profession; (3) state that plaintiff has a

loathsome disease; or (4) impute unchastity to a woman. (*See Aguilar v. Reback*, 63 Misc.3d 1214(A) [Sup Ct. Kings Cty 2019], citing *Lieberman v. Gelstein*, 80 N.Y.2d 429 [1992]).

Defendants' statements were reasonably susceptible of a defamatory meaning as they tended to disparage Plaintiff in his business or profession, and Plaintiff was not required to plead or prove special damages. (*See Porcari v. Gannet Satellite Info. Network, Inc.*, 50 A.D.3d 993 [2d Dept. 2008]). In his Complaint, Plaintiff has alleged that his personal and professional passions lie in the field of Behavioral Studies of Persons with Disabilities and in the fields of Special Education and Childhood Education, and he obtained both a Bachelor's and Master's Degree in these fields. Thereafter Plaintiff created his own business, SFELLC, which seeks to create educational and recreational programs for individuals with disabilities. (Complaint ¶¶22-23). As a result of Defendant Escobar's emails, which Plaintiff contends were likely distributed to teachers, parents of students in addition to principals and front office staff, all those who received the email were caused to believe and did believe that Plaintiff was terminated from his position and permanently prohibited from approaching the school premises as a result of having engaged in criminal behavior towards a student for which police presence was required should he be spotted on school grounds at any time. The Complaint alleges that the actions taken by Defendants were never taken for employees who were terminated, let alone employees who resigned. (*Id.* ¶64). Plaintiff further alleged that he has received very many reports of the false and defamatory statements that, along with additional statements, continue to be spread throughout the community of the Town of Bedford, where Plaintiff was born and educated and where he and his family are involved and maintain wholesome reputations. (*Id.* ¶¶68, 21).

The Complaint alleges that shortly after the communications by Defendants Escobar and

Elwood, several students who were enrolled in Plaintiff's SFE Company withdrew from the program, and prospective students who were intending to enroll in the Company never enrolled. Plaintiff complains that he has been subject to public isolation and humiliation at public community events where members of the community avoid him, whisper about him and deny him participation. Not only has his business suffered and continues to suffer, his emotional stability has and continues to diminish from the downfall of his business, the excommunication from the community and the perpetual stain on his name: (*Id.* ¶¶69-71).

Based upon the foregoing, this Court finds the allegations in the Complaint sufficient to establish that the statements of the Defendants did tend to injure Plaintiff in his trade, business or profession, and are defamatory *per se*. Plaintiff was therefore not required to plead special damages.

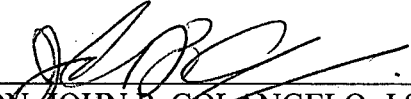
Based upon the foregoing, this Court finds that Plaintiff has adequately plead that Defendants's conduct was extreme and outrageous, and the motion to dismiss the third cause of action for Intentional Infliction of Emotional Distress is denied. To reiterate, Plaintiff alleges that the actions taken against him by the District employees were never taken for employees that were terminated or resigned, and no picture of any employee who was terminated or resigned was ever displayed throughout the District offices as was Plaintiff's picture.

Accordingly and based upon the foregoing, Defendants' motion is in all respects denied.

All parties and counsel are directed to appear in the Settlement Conference Part, Courtroom 1600 on May 23, 2019 at 9:15 am.

The foregoing constitutes the Decision and Order of this Court.

Dated: May 6, 2019  
White Plains, New York

  
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HON. JOHN P. COLANGELO, J.S.C.