

Impellizzeri v State of New York
2019 NY Slip Op 34278(U)
October 10, 2019
Court of Claims
Docket Number: Claim No. CM-89960
Judge: Richard E. Sise
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J. Sise

FILED

OCT 25 2019

STATE OF NEW YORK COURT OF CLAIMS
COURT OF CLAIMS
STATE OF NEW YORK

DAVID IMPELLIZZERI,

Claimant,

**DECISION AND
ORDER**

-v-

THE STATE OF NEW YORK,¹

**Claim No. 128673
Motion Nos. M-89692
CM-89960**

Defendant.

BEFORE: HON. RICHARD E. SISE
Acting Presiding Judge of the Court of Claims

APPEARANCES: For Claimant:
COTE & VAN DYKE, LLP
BY: Joseph S. Cote, III, Esq.

For Defendant:
HON. LETITIA JAMES, ATTORNEY GENERAL
BY: Edward F. McArdle, Esq.
Assistant Attorney General

The following papers were read on Defendant's motion for dismissal and Claimant's cross motion for partial summary judgment:

1. Notice of Motion dated December 22, 2016;
2. Affirmation of Edward F. McArdle dated December 22, 2016 with Exhibits A-D annexed;
3. Notice of Cross Motion dated February 4, 2017;
4. Unsworn and undated statement of Joseph Cote with referenced Exhibits A-C;
5. Affidavit of David Impellizzeri dated January 24, 2017 with Exhibit A annexed;
6. Affidavit of Crystal Townsend dated February 3, 2017;
7. Affidavit of Theresa Powers dated January 12, 2017;
8. Affidavit of Jamie Colucci dated January 23, 2017;
9. Memorandum of Law undated;

¹ The caption of this action is amended sua sponte to reflect the State of New York as the only properly named defendant.

10. Affirmation of Edward F. McArdle dated May 9, 2017;
11. Affirmation of Joseph Cote dated June 19, 2017;
12. Unsworn statement of Ida L. Castro dated August 13, 2018;
13. Expert Affidavit of Jamie Colucci dated February 6, 2018;
14. Employment file of David Impellizzeri;
15. Letter of Denise Barber dated July 22, 2015;
16. Impellizzeri disciplinary interrogation of August 12, 2015;
17. Demand for Arbitration dated September 28, 2015;
18. Arbitration Transcripts December 21, 2015 - January 5, 2016;
19. Letter of Lisa Brackett dated April 20, 2016;
20. Upstate Medical University College of Nursing Student and Preceptor Handbook;
21. The State University of New York Upstate Medical University Complaint Procedure;
22. Equal Employment Opportunity Commission Enforcement Guidance dated June 18, 1999;
23. Privilege Log;
24. Preceptor Sanford's Notes about Campagni;
25. Document Production from Upstate January 11, 2018;
26. Document Production from Upstate April 2018.

Filed papers: Claim

In June 2015 claimant was employed as a nurse at Upstate University Hospital Community Campus when a co-worker filed a sexual harassment complaint against him. The complaint resulted in a Notice of Discipline dated September 22, 2015. Following a December 21, 2015 arbitration hearing the Notice of Discipline was resolved in claimant's favor and he was reinstated to his position with back pay. On December 16, 2015, prior to resolution of the disciplinary matter, claimant served the defendant with a notice of intention to file a claim. Thereafter, on October 12, 2016, claimant served a claim in which he alleges causes of action for tortious interference with an employment relationship, defamation, and intentional infliction of emotional distress, all related to events surrounding the Notice of Discipline. On May 4, 2016 claimant resigned his position.

Defendant has now moved, prior to answering, to dismiss the claim on various grounds including lack of jurisdiction based on the untimely service of the claim, failure to comply with

the pleading requirements of Court of Claims Act § 11 (b), and failure to state a cause of action.

In response, claimant cross-moved for partial summary judgment.

As claimant concedes, public policy prohibits claims against a governmental entity for intentional infliction of emotional distress (*Crvelin v Bd. of Educ. of City Sch. Dist. of City of Niagara Falls*, 144 AD3d 1649 [4th Dept 2016]) and consequently, this cause of action must be dismissed. The cause of action for tortious interference is also subject to dismissal. The notice of intention does not raise this cause of action and the claim does not allege any events beyond claimant's resignation on May 4, 2016. Given that such a claim must be served and filed within ninety days after accrual (Court of Claims Act § 10 [3-b]), here, no later than claimant's resignation, and that service did not occur until October 12, 2016, the claim, as to this cause of action, is untimely.

"It is well established that the elements of a cause of action for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se" (*Spring v County of Monroe*, 151 AD3d 1694, 1696 [4th Dept 2017])[internal quotation marks and citations omitted]. In the notice of intention claimant alleges that on September 24, 2015 he received the Notice of Discipline in which he was falsely accused of commission of a crime, sexual harassment, and being a danger to persons or property.

Claimant further alleges in the notice of intention that the Notice of Discipline was circulated "throughout the SUNY Upstate system and elsewhere" and that the allegations contained therein constitute defamation per se. No other information relevant to the time, place, or nature of the claim is provided in the notice.

Defendant argues that the cause of action for defamation is subject to dismissal on the ground that the claim was not timely served. As an intentional tort, the claim for defamation had to be served and filed within 90 days after accrual unless a notice of intention was served within that time and then the claim could be served within one year after accrual (Court of Claims Act § 10 [3-b]). A cause of action for defamation accrues upon publication (*Gelbard v Bodary*, 270 AD2d 866 [4th Dept 2000]) and, defendant argues, based on the allegations in the notice of intention, publication occurred on September 24, 2015. Thus, defendant reasons, the claim is untimely because, though the notice of intention was served within 90 days of that date, the claim was not served within one year after accrual.

In opposing the motion claimant argues that publication of the defamatory statement occurred when the Notice of Discipline was sent to the New York State Office of Professional Discipline on December 3, 2015 and he places the date of accrual there. While claimant concedes in a memorandum of law that the notice of intention did not state the date when the defamatory statement was published, he intimates that the word "elsewhere" in the notice of intention was sufficient to put defendant on notice of this later publication. If claimant's arguments are accepted, the claim would be timely as the December 3, 2015 date is within 90 days of service of the notice of intention and within one year of service and filing of the claim.

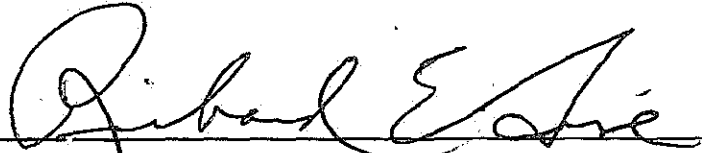
The success of claimant's argument depends on whether use of the word "elsewhere" in the notice of intention was sufficient to put defendant on notice of the December 3, 2015 publication. A notice of intention must set forth the time when and place where [the] claim arose, [and] the nature of the same (Court of Claims Act § 11 [b]). "What is required is not absolute exactness, but simply a statement made with sufficient definiteness to enable [defendant] to be

able to investigate the claim promptly and to ascertain its liability under the circumstances” (*Deep v State of New York*, 56 AD3d 1260, 1260-1261 [4th Dept 2008], quoting *Heisler v State of New York*, 78 AD2d 767, 767 [4th Dept 1980]). Furthermore, “the State is not responsible for uncovering information that the claimant is required to allege under section 11 [b]” (*Kolnacki v State of New York*, 8 NY3d 277, 280 [2007], citing *Lepkowski v State of New York*, 1 NY3d 201, 208 [2003]). The allegation that the defamatory statement was published “elsewhere” lacks any degree of definiteness as to the time and place of publication and requires defendant to inquire of claimant as to when and where such publication may have occurred. As such, the notice of intention may not serve as a predicate for the claim served in October 2016. Consequently, the claim is untimely as it was not served within 90 days of the asserted December 2015 accrual. Moreover, to the extent that the notice of intention and claim assert a cause of action for defamation based on a September 2015 publication, service of the claim is again untimely as it was made more than one year after that date of accrual.

Accordingly, it is

ORDERED, that the motion to dismiss the claim is granted and the cross motion for summary judgment is denied as moot.

Albany, New York
October 10, 2019

A handwritten signature in black ink, appearing to read "Richard E. Sise", written over a horizontal line.

RICHARD E. SISE
Acting Presiding Judge of the Court of Claims