Armacida v Carmel Cent. Sch. Dist.
2020 NY Slip Op 34905(U)
July 6, 2020
Supreme Court, Putnam County
Docket Number: 500130/2018
Judge: Victor G. Grossman
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To commence the 30 day statutory time period for appeals as of right (CPLR 5512 [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 PUTNAM

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PHILIP ARMACIDA,

Plaintiff,

-against -

CARMEL CENTRAL SCHOOL DISTRICT,

Defendant,

----------X

DECISION & ORDER

Index No. 500130/2018
Sequence No. 1
Motion Date: 5/20/2020

GROSSMAN, J.S.C.

The following papers numbered 1 to 11 were considered in connection with Defendant Carmel Central School District's ("Defendant") Notice of Motion, dated March 5, 2020, for an Order granting summary judgment.

Papers	**Numbered**
Notice of Motion/Affirmation/Townsend Affidavit/ Livulpi Affidavit/ Exhs. A-E	1-9
Affirmation in Opposition	10
Reply Affirmation	11

Background

The cause of action for defamation presented by Philip Armacida ("Plaintiff") concerns a statement Defendant's employee made to the Putnam County Sheriff's Office.[1] Conflict between the parties began when Plaintiff filed complaints with Defendant, after confronting two

[1] There is also an inartfully pleaded claim for the infliction of emotional distress.

of Defendant's bus drivers about their driving maneuvers, one of whom was Kyle Townsend ("Townsend") a veteran school bus driver for fourteen years. On one occasion, Plaintiff confronted Townsend about his operation of the school bus. Unknown to Townsend, Plaintiff made prior complaints about another driver. After his confrontation with Plaintiff, Townsend began seeing Plaintiff's truck[2] at various bus stops on his bus route in the morning where children were present. Following his training, Townsend reported these activities to his supervisor. Later, a call was made to the Sheriff by Lorraine Keck ("Keck"), the Transportation Secretary for Defendant. Keck reported to the Sheriff's Office, *inter alia,* that Plaintiff was "talking to the kids" at the various bus stops where he was seen. It is this statement that Plaintiff asserts is false and defamatory.

Motion for Summary Judgment

Defendant now moves for dismissal, citing two defenses: (1) that the statements made in the Sheriff's report were true or substantively true as a complete defense; and (2) that Defendant's employees are protected under qualified privilege. Defendant offers the transcript of the call made to the Sheriff (NYSCEF No. 27). Defendant also offers Townsend's and Lorri Livulpi's[3] Affidavits as evidence that its employees are trained to report suspicious activities, and they did so within the scope of their privileged position.

Plaintiff opposes the motion, relying on his own theories. Plaintiff points to conflicting witness testimony regarding whether the statement that he was "talking to the kids" was a true

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[2] At the 50-h hearing, Plaintiff referred to his vehicle as a car (Exh. A at 15, 19), but at his deposition, he referred to it both as a truck (Exh. B at 15, 19, 36), and a car (Exh. B at 17, 20, 23, 25, 59). At his EBT, Townsend referred to the vehicle as both a truck (Exh. C at 15-16, 26-28, 30-31, 40), and a car (Exh. C at 28).

[3]Lorri Livulpi is Defendant's bus driver supervisor.

statement. Plaintiff also asserts that there is a triable issue concerning whether the statement was made with malice, either actual or constitutional. Further, Plaintiff's second cause of action asserts defamation *per se* by the use of the phrase "talking to the kids"[4] as an implication of pedophilic behavior (Martin Affirmation at ¶¶ 16-18).

Discussion

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of facts are raised and cannot be resolved on conflicting affidavits (*see Millerton Agway Coop. v Briarcliff Farms*, 17 NY2d 57 61 [1966]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Initially, "the proponent... must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact." However, once a movant makes a sufficient showing, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Where the moving papers are insufficient, the court need not consider the sufficiency of the opposing papers (*id.*; *see also Fabbricatore v Lindenhurst Union Free School Dist.*, 259 AD2d 659 [2d Dept 1999]).

"The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist" (*Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 201 [2d Dept 2019], quoting *Kolivas v Kirchoff*,

[4]Plaintiff's Complaint (¶23) alleges the words used were: "talking to little children". Although the pleading error (CPLR 3016(a)) was not raised, in the context of a school bus containing high school children (Townsend EBT, p.41) the difference is significant.

14 AD3d 493 [2d Dept 2005]). Accordingly, "'[t]he court may not weigh the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned'" (*Bank of New York Mellon v Gordon*, 171 AD3d at 201, quoting *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]). "[W]here credibility determinations are required, summary judgment must be denied'" (*Bank of New York Mellon v Gordon*, 171 AD3d at 201-202, quoting *People v Greenberg*, 95 AD3d 474, 483 [1st Dept 2012], *aff'd* 21 NY3d 439 [2013]).

Defamation is the injury to a person's reputation, either by written expression (libel) or oral expression (slander) that results from making a false statement that tends to expose the person to public contempt, ridicule, aversion, or disgrace, or induce an evil opinion of the person in the minds of right-thinking persons, and to deprive such person of their friendly intercourse in society (*see* 43A NY Jur 2d Defamation and Privacy §1). A cause of action for defamation requires a plaintiff to establish: (1) a defamatory statement of fact; (2) that is false; (3) published to a third party; (iv) "of and concerning" the plaintiff; (v) made with the applicable level of fault on the part of the speaker; (vi) either causing special harm or constituting slander *per se*; and (vii) not protected by privilege (*see* e.g. *Dillon v City of New York*, 261 AD2d 34, 37-38 [1st Dept 1999], citing *Restatement [Second] of Torts* § 558 [1976]). While the term "special damages" is so defined as to be included in the term "actual damages," actual damages are not limited to out-of-pocket or pecuniary damage. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include, and prevailing plaintiffs in libel trials are entitled to, compensation for impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Such injury is every bit as "actual" as the loss of employment

opportunities or the costs of trying to mitigate the sting of a defendant's libel (*see* 44 NY Jur 2d Defamation and Privacy § 229).

Defendant argues that Plaintiff has suffered no actual harm. In fact, Plaintiff testified that he has suffered no mental/physical, economic, or reputational harm. Instead, Plaintiff asserts that Defendant's statement, while causing no actual harm, is defamation *per* se because Defendant accused him of being a pedophile (*Harris v Hirsh*, 228 AD2d 206, 208 [1st Dep't 1996]). Defendant argues that because the term "pedophile", or words of that nature, were not a part of the report, the claim of a serious criminal charge was not made to the Sheriff and that Plaintiff was exaggerating. Plaintiff asserts that the charge of pedophilia was implied in the report, citing defamation by implication as premised not on direct statements but on false suggestions, impressions, and implications arising from otherwise truthful statements (*Armstrong v Simon & Schuster*, 85 NY2d 373, 381 [1995]).

Further, Plaintiff argues that the statement's falsity is clear because at the time the report was made to the Sheriff, there was no evidence that Plaintiff had been "talking to the kids" at the bus stops. Defendant argues two defenses against the claim for defamation. First, that the statements made to the Sheriff were true or substantially true, and second, that Defendant's employees are protected under qualified privilege.

A. Substantial Truth as a Complete Defense

Defendant argues that the statements made do not require a literal or technical truth, but that they are substantially true or accurate in order to grant a complete defense (*Law Firm of Daniel P. Foster, P.C. v Turner Broadcasting System, Inc.*, 844 F2d 955, 959 [2d Cir 1988]). Defendant offers that the following statements in the report to the Sheriff are substantially true:

(1) Plaintiff blocked the pathway of the school bus; (2) the driver of the truck (Plaintiff) could not be identified by the driver or students; (3) the truck was seen in the early mornings near bus stops while children were present; and (4) the bus driver saw the truck at several bus stop locations (NYCEF No. 20). While these statements may be true, the statement in question is that Plaintiff was "talking to the kids", which was not argued to be a true or substantially true statement. In this regard, Defendant failed to establish a *prima facie* case that all statements made in the report were true or substantially true (*but see Cusimano v United Health Servs. Hosps. Inc.*, 91 AD3d 1149, 1151-1152 [3rd Dept 2012]).

B. Qualified Privilege as a Defense

Defendant further argues that if a complete defense is inapplicable, Defendant and its employees are protected under a qualified privilege. In the defamation context, qualified privilege protects individuals from liability if the information that is reported is done so in good faith by an individual who believes the information to be true and is in a protected position (*Toker v Pollak*, 44 NY2d 211, 221 [1978]). A protected individual is a person with a legitimate interest or duty in making the statement (*id.* at 219). However, the protections of qualified privilege are lost if the plaintiff can show that the statement was made with malice by producing evidence of a deliberate intent to ignore or avoid the truth, or made with spite or ill-will (*Christenson v Gutman*, 249 AD2d 805, 807 [3d Dept 1998]; *Grier v Johnson* 232 AD2d 846, 848 [3d Dept 1996]). Privilege can also be lost if a statement is made where the individual has knowledge that the statement made is likely to be false *(New York Times Co. v Sullivan,* 376 US 254, 298 [1964]).

Additionally, "an inference of malicious intent may arise from the writer's inclusion of

expressions beyond such as are necessary for the purpose of the privileged communication" (*Mellen v Athens Hotel Co.*, 153 AD 891 [1st Dept 1912]). Such instances can also defeat qualified privilege if the plaintiff can show that the privileged occasion was abused for an improper purpose, or that the defendant's statements exceeded the privileged communication (*Schulman v Anderson Russell Kill & Olick, P.C.* 117 Misc2d 162, 169 [Sup Ct, NY County 1982]).

Defendant argues that its employees must provide safe transportation for the children, and because Townsend and Keck reported Plaintiff's behavior in good-faith, in accordance with their training and within the scope of their position, their statements are protected by qualified privilege. Defendant also argues that a person, acting in good faith, who reports information to the police, enjoys qualified privilege (*Toker v Pollak*, 44 NY2d at 221), even if a more prudent person would not have reported it, or the information turns out to be false (*Present v Avon Prods.*, 253 AD2d 183, 188 [1st Dept 1999]; *see also Sweeney v Prisoners' Legal Servs. of N.Y., Inc.*, 84 NY2d 786, 793 [1995]). However, in *Present v Avon Prods.*, the defendant carried out an investigation which produced good cause for making the police complaint.

Defendant's assertion of a qualified privilege has merit. Statements made by school personnel to law enforcement about events occurring on a school bus are protected by a qualified privilege (*Stroup v Nazzaro*, 91 AD3d 1367 [4th Dept], *lv denied* 94 AD3d 1481 [4th Dept 2012]). In the education field, information intended to protect the health, safety, and welfare of a child should be encouraged. Accordingly, the qualified privilege has been broadly applied (*Paskiewicz v National Assn. for Advancement of Colored People*, 216 AD2d 550 [2nd Dept 1995]; *Dunajewski v Bellmore-Merrick Cent. High School Dist.*, 138 AD2d 557 [2nd Dep't

1988]; *Thompson v Union Free School Dist. No. 1 of Huntington*, 45 Misc2d 916 [Sup Ct, Suffolk County 1965]).

Plaintiff can overcome the qualified privilege by establishing the speaker made the statement with malice. In this context, malice has been defined as "spite or a knowing or reckless disregard of a statement's falsity"(*Rosenberg v Metlife, Inc.*, 8 NY3d 359, 365 [2007]). Here, Plaintiff relies on the statement of Defendant's employee to a Deputy Sheriff that Plaintiff "has been driving around the Majestic Ridge area around 6:35 a.m talking at kids at the bus stop," and moments later tells the officer "...the driver is kind of a wackadoo. He calls up here and complains that the bus is turning around but I guess now he is driving around the neighborhood talking to the kids" (Notice of Motion; Exh. D). From this statement, Plaintiff infers that he has been accused of being a pedophile. Such an implication is not to be found in the challenged statement. The allegation in Plaintiff's opposition papers that his claim "is for defamation per se" (Martin Affirmation at ¶17), based on the statement "talking to the kids," is without support. The Court cannot connect the phrase "talking to the kids" with the crime of Predatory Sexual Assault Against a Child as set forth in Penal Law § 130.96 as Plaintiff suggests, and Plaintiff fails to make the connection. In the context of a bus driver reporting an incident to a supervisor, who then reports it to a Deputy Sheriff, there is nothing to suggest illegal activity. In *Sweeney v Prisoners' Legal Servs. of N.Y., Inc.* (84 NY2d at 793), the Court of Appeals made clear:

> "We have observed that there is a genuine and critical distinction between lacking knowledge of a statement's falsity and being aware that it is probably false or entertaining serious doubts about its truth (*see, Liberman v Gelstein*, 80 NY2d, at 438, *supra*). A qualified privilege may be sustained if the speaker is genuinely unaware that a statement is false because the failure to investigate its truth, standing alone, is not enough to prove actual malice even

> if a prudent person would have investigated before publishing the statement (*St. Amant v Thompson*, 390 US, at 731, 733, *supra*)."

The statement includes the phrase "I guess now he is driving around the neighborhood talking to the kids", suggesting a lack of personal knowledge about Plaintiff's specific actions.[5] "[W]ords must be construed in the context of the entire statement or publication as a whole * * * and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction * * * Loose, figurative or hyperbolic statements, even if deprecating the plaintiff are not actionable" (*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999] [internal citations omitted]). Keck also indicated, if the person is who she thinks it is, he has previously called and complained about school bus drivers. In any event, the "spite or ill-will refers to the speaker's motivation for making the allegedly defamatory comment and not to the speaker's feelings about the plaintiff"(*Grier v Johnson*, 232 AD2d 846 [3rd Dept 1996], citing *Liberman v Gelstein*, 80 NY2d 429, 439 [1992]). The apparent inaccuracy of the reference "talking to the kids," alone, is insufficient to establish malice (*Kadish v Dressner*, 86 AD2d 622 [2nd Dept 1982]; *see also Friedman v Ergin*, 110 AD2d 620 [2nd Dept], *aff'd* 66 NY2d 645 [1985]).

Plaintiff, in response to Defendant's assertion of a qualified privilege, has failed to sufficiently establish malice in order to overcome the privilege. "Once a qualified privilege is shown to exist the burden of proof shifts to the Plaintiff to offer evidentiary facts to establish that the communication was made in bad faith and was motivated solely by malice" (*Paskiewicz v National Assn. for Advancement of Colored People*, 216 AD2d at 551). In opposing a motion for summary judgment, a party must present sufficient evidentiary facts to raise a triable issue of

[5] The reference to Plaintiff as a "wackadoo" appears as a form of rhetorical hyperbole (*Immuno AG. v Moor-Jankowski*, 77 NY2d 235, 244, *cert denied*, 500 US 954 [1991]; *Lapine v Seinfeld*, 31 Misc3d 736 [Sup Ct, NY County 2011).

fact, and conclusions, surmise or speculation are insufficient. Plaintiff's complaint alleges Defendant's actions are retribution for his prior complaints about school bus drivers in his neighborhood, but Plaintiff offers no proof of such motivation (*Friedman v Ergin*, 110 AD2d at 620). Indeed, Plaintiff's opposition papers rely largely on counsel's affirmation. In contrast, the bus driver (Townsend), who reported the incident, testified at a deposition that he did not know the Plaintiff, and only had one interaction with him where Plaintiff advised him how he thought Townsend should be driving a school bus. At the time, Townsend was unaware Plaintiff did the same thing with another driver at a prior time. Plaintiff apparently telephoned Townsend's supervisor to report his complaint. The supervisor advised Townsend and instructed him what to do. When Plaintiff's vehicle was seen at other bus stops, one of the students gave Townsend the license number of Plaintiff's vehicle. Townsend gave the plate number to a dispatcher, Frank Farrel. Townsend later learned Keck, his supervisor, called the Sheriff. The communications to supervisors, and ultimately to the Sheriff, are by all persons who have an interest in the matter, and if nothing else, an obligation to protect the children in their care. In contrast, Plaintiff's suggestion of prior disputes is neither evidence of malice, nor can Plaintiff rely on such conclusory allegations (*Shapiro v Health Ins. Plan of Greater N.Y.*, 7 NY2d 56, 64 [1959]). Although the supervisor referred to "talking to the kids," which may have been literally incorrect, in the context of Plaintiff's driving around to various bus stops in his neighborhood as children are congregating and waiting for the bus, before sunrise, to the point where some children expressed concern to Townsend the bus driver, the statement constituted a "basically accurate account," and is, therefore, not actionable *(Cusimano v United Health Servs. Hosps., Inc.*, 91 AD3d at 1151-1152). Plaintiff has not offered any proof to support a claim of malice and otherwise negate the concerns that support the qualified privilege. To the extent Plaintiff

believes he has been defamed, he has not established such defamation, nor has he overcome the qualified privilege attached to the statement. And, the statement generally describing conduct attributed to him cannot be the basis for the imposition of liability (*Liberman v Gelstein*, 80 NY2d 429; *Toker v Pollak,* 44 NY2d 211*)*.

Accordingly, for the reasons stated herein, it is hereby

ORDERED that Defendant Carmel Central School District's motion for summary judgment is granted, and it is further

ORDERED that the Complaint is dismissed.

The foregoing constitutes the Decision and Order of the Court.

Dated: Carmel, New York
July 6, 2020

Hon. Victor G. Grossman, J.S.C.

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