

Mackey v Lawrence Union Free Sch. Dist.
2020 NY Slip Op 35795(U)
May 5, 2020
Supreme Court, Nassau County
Docket Number: Index No. 607044/2018
Judge: Randy Sue Marber
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAUPresent: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 6

X
AMIR MACKEY,

Plaintiff,

Index No.: 607044/18

Motion Sequence...04

-against-

Motion Date...11/01/19

LAWRENCE UNION FREE SCHOOL DISTRICT,

Defendant.

X

Papers Submitted:

Notice of Motion.....X

Affirmation in Opposition.....X

Reply Affirmation.....X

Upon the foregoing papers, the motion by the Defendant, LAWRENCE UNION FREE SCHOOL DISTRICT (the “District”), seeking an Order, pursuant to CPLR § 3211 (a)(7), dismissing the Plaintiff’s Complaint, is decided as hereinafter provided.

The following facts are derived from the Plaintiff’s Complaint, which, for purposes of a 3211 motion, are deemed true.

The Plaintiff alleges that in Spring of 2015, a District employee, Mr. Stabile, “engaged [Plaintiff] in an argument over the use of the school’s performance drum set despite knowledge that [he] had previously received permission to use said drum set by his direct superior (the “Drum Set Incident”).” (See Complaint at ¶ 6, annexed to Defendant’s

Motion as Exhibit “A”). While the Plaintiff was not disciplined for the Drum Set Incident, it is alleged that Mr. Batts, the Chairman of the Music Department, demanded that Plaintiff apologize to Stabile “or risk [his] standing within the Music Department.” (Id. at ¶¶ 7-8). The Plaintiff alleges that because he “did not heed Batts’ threat, Batts used his position as Chairman of the Music Department to retaliate against [him] for the Drum Set Incident by requiring other teachers to pull [him] from multiple performances.” (Id. at ¶ 9).

The following two paragraphs allege facts that give rise to the Plaintiff’s defamation claims:

10. Batts falsely told other students, teachers, and administrators that he pulled me from the various performances because I was a poor student who was failing my courses and that I had failed to meet the requirements of the Music Honor Society. Batts knew or had reason to know these statements to be false.

11. In retaliation for the Drum Set Incident, Batts and other teachers (hereafter, the “Faculty Employees”), colluded together to intentionally cause me harm by pulling me from multiple performances for which I worked incredibly hard my entire career to earn, and by making and/or repeating such false statements suggesting that I had a poor professional character despite knowing or having reason to know that such statements were false. In essence, the Faculty Employees engaged in wrongful acts to harass and bully me in retaliation on behalf of their friend and colleague, Stabile.

(Id.)

The Plaintiff also alleges that the District’s administration, including the Assistant Principals and Superintendent (the “Administrative Employees”), engaged in wrongful acts by “making, adopting, and/or repeating the defamatory statements about

[his] professional character made by the Faculty Employees despite knowing or having reason to know that such statements were false” (Id. at ¶¶ 12, 14, and 15 [b]). The Plaintiff further alleges that the Administrative Employees threatened to call law enforcement to have him and his sister arrested for a false claim of trespass simply because he refused to withdrawn his complaints... (Id. at ¶ 15[e]).

In his Complaint, the Plaintiff asserts eleven causes of action: the first and second for defamation; the third and forth for intentional infliction of emotional distress (“IIED”); the fifth, sixth and seventh for negligence; and the eighth through eleventh for negligent supervision/training.

Legal Analysis

“On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory” *Velez v. Captain Luna’s Marina*, 74 A.D.3d 1191, 1192 [2d Dept. 2010], citing *Breytman v. Olinville Realty, LLC*, 54 A.D.3d 703, 703–704 [2d Dept. 2008]; *Moore v. Liberty Power Corp., LLC*, 72 A.D.3d 660 [2d Dept. 2010], lv. Denied, 14 N.Y.3d 713 [2010]). “[B]are legal conclusions, as well as factual claims flatly contradicted by the record, are not entitled to any such consideration” *Velez*, 74 A.D.3d at 1192, citing *Garner v. China Natural Gas, Inc.*, 71 A.D.3d 825, 826 [2d Dept. 2010]; *Riback v. Margulis*, 43

A.D.3d 1023 [2d Dept. 2007]).

Here, at the outset, the Court finds that, even affording the Plaintiff the benefit of every possible inference, the claims for IIED, negligence and negligent supervision and training must be dismissed. Accordingly, the Plaintiff's third through eleventh causes of action are dismissed for failing to state a claim.

As to the Plaintiff's defamation claims, the Defendant argues that they are not pled with the requisite particularity; that the statements were privileged and Plaintiff failed to plead facts sufficient to overcome that presumption; and that Plaintiff failed to plead facts sufficient to satisfy several of the prima facie elements of the claim. In reviewing the case law proffered in support of the Defendant's motion, the Court notes that most, if not all, the defamation cases relied upon by the Defendant are in the context of summary judgment, not a pre-answer motion to dismiss. While the Defendant's motion was filed prior to any discovery having been conducted, discovery was thereafter conducted and the matter was certified on January 30, 2020 (See Certification Order, dated 01/30/20, and entered on 02/07/20, NYSECF Doc. No. 58).

CPLR § 3211(c), provides, in relevant part, that, "[w]hether or not issue has been joined, the court, after adequate notice to the parties, may treat the [subdivision (a)] motion as a motion for summary judgment." The purpose of the notice requirement is to provide the parties with an opportunity to make an appropriate record before the Court decides the motion (*Mihlovan v. Grozavu*, 72 N.Y.2d 506 [1988]; *JP Morgan Chase Bank*

v. Johnson, 129 A.D.3d 914 [2d Dept. 2015]; Schultz v. Estate of Sloan, 20 A.D.3d 520 [2d Dept. 2005]). Here, as noted above, after the Defendant's motion was filed, but prior to its submission, the parties appeared for a Preliminary Conference and began conducting discovery. Following full submission of the motion, the matter was certified as ready for trial. Given the equivocal posture of the case, the Court finds it appropriate to convert the branch of the Defendant's CPLR § 3211 (a)(7) motion to dismiss the Plaintiff's First and Second Cause of Action sounding in defamation, into one for summary judgment.

By this Order, adequate notice is being provided, as well as an opportunity for the parties to lay bare their proof as required by CPLR § 3211 (c). As such, the parties are directed to file and serve their proofs, and such additional papers as may be relevant, pursuant to the briefing schedule set forth hereinbelow. That is, by this Order, the Court invites the parties submit any evidence that could possibly be considered in support of, and in opposition to, the Defendant's motion, which is now been treated as one for summary judgment, but only with regard to the Plaintiff's defamation claims.

Lastly, when a CPLR 3211(c) conversion takes place, the Court must be mindful of any deadlines applicable to the filing of summary judgment motions¹. Here, the Court has extended the Plaintiff's time to file a Note of Issue up to and including June

¹ A summary judgment motion (unlike a CPLR 3211[a][7] motion) must be made within a certain period of time. CPLR 3212[a] provides, in relevant part, that "the court may set a date after which no [summary judgment] motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." Further, the Certification Order issued on January 30, 2020, provides that summary judgment motions must be filed within sixty (60) days of the filing of the note of issue.

26, 2020. As the Plaintiff has not filed a Note of Issue yet, the time period within which a summary judgment motion must be filed has not been triggered.

Accordingly, it is hereby

ORDERED, that the branch of the Defendant's motion, seeking an Order, pursuant to CPLR § 3211(a)(7), dismissing the Plaintiff's Third through Eleventh Causes of Action, is **GRANTED**, and such claims are **DISMISSED**; and it is further

ORDERED, that the Defendant's motion to dismiss the Plaintiff's First and Second Cause of Action, asserting defamation claims, is hereby converted into one for summary judgment and the parties shall be afforded the opportunity to submit evidentiary proof in accordance with the schedule set forth herein; and it is further

ORDERED, that the Defendant's motion is adjourned sua sponte to July 10, 2020, at which time defense counsel may submit any additional items of proof they have omitted that would be relevant to the summary judgment issue; the Plaintiff's opposition and any reply shall thereafter be served and filed in accordance with the CPLR.

This constitutes the decision and Order of this Court.

DATED: Mineola, New York
May 5, 2020

/S/
Hon. Randy Sue Marber, J.S.C.

ENTERED

May 08 2020

NASSAU COUNTY
COUNTY CLERK'S OFFICE