Spencer v Tompkins County, N.Y.
2021 NY Slip Op 33188(U)
April 9, 2021
Supreme Court, Tompkins County
Docket Number: Index No. EF2016-0029
Judge: Gerald A. Keene
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

CI2021-05837 Index # : EF2016-0029

At a Term of the Supreme Court of the State of New York, held in and for the County of Tompkins at the Tompkins County Courthouse, Ithaca, New York, on the 9th day of April, 2021.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF TOMPKINS

SHANE SPENCER,
Plaintiff,

-vs-

TOMPKINS COUNTY, NEW YORK; SERGEANT KYLE KOSKINEN; SERGEANT JOE MANNING; SERGEANT JAMES VANN; JONATHAN WOOD; CAPTAIN BRETT GEORGE; UNDERSHERIFF DEREK OSBORNE, SHERIFF KENNETH LANSING; and JOHN DOE(S) and JANE DOE(S),
Defendants.

DECISION and ORDER
Index No. EF2016-0029

GERALD A. KEENE, Acting J.S.C.

On March 8, 2016, Plaintiff Shane Spencer ("Plaintiff) commenced this action by filing a Summons and Complaint. On July 22, 2016, the Defendants filed an Answer to the Complaint and affirmative defenses. On June 9, 2020, Defendant Captain Brett George filed an Amended Answer to the Complaint. On June 11, 2020, Defendant Sheriff Lansing filed an Amended Answer to the Complaint. On June 12, 2020, Defendants Tompkins County, Sergeant Kyle Koskinen, Sergeant Joe Manning, Sergeant James Vann, County Attorney Jonathan Wood, and Undersheriff Derek Osborne filed an Amended Answer to the Complaint. Counsel for all of the parties conducted extensive discovery and depositions in this case.

This action was commenced by the Plaintiff against the Defendants Tompkins County ("County"), County Attorney Jonathan Wood and six of the Plaintiff's supervising officers in the Sheriff's Department. The Plaintiff was a deputy in the Tompkins County Sheriff's Office from 1998 to 2018. The Plaintiff was a member of the Tompkins County Sheriff's Association, Inc (the

"Union") and his employment fell within the scope of the collective bargaining agreement ("CBA") between the County and the Union. The Plaintiff was the K-9 Officer for the Tompkins County Sheriff's Office.

In the summer of 2013, there was a complaint that the Plaintiff used more personal days than he was allotted and Plaintiff was investigated for an issue concerning his time card that he submitted. This was known as "recycling time" and occurs when a deputy requests personal time off and then submits time cards showing those same days off as vacation or holiday time, thereby preserving the limited personal days for future use. Capt. George was assigned by his superiors, Undersheriff Osborne and Sheriff Lansing, to conduct an investigation into the complaints of Plaintiff's alleged violation of the Sheriff's Office policies. During the investigation, it appeared that not only was the Plaintiff recycling time but he was also submitting time cards and was paid for dates that he did not work at all. As a result of the investigation, on February 25, 2014, Sheriff Lansing filed a Notice of Discipline against the Plaintiff. The Notice of Discipline sought Plaintiff's termination from employment and led to his paid suspension. In response, the Plaintiff with the assistance of the Union, filed a Notice of Arbitration pursuant to the CBA. In accordance with the terms of the CBA between the Plaintiff's Union, and the County, the matter was submitted to an impartial arbitrator.

Arbitration hearings were conducted over several days before Arbitrator Ronald Kowalski (the "First Arbitration"). Pursuant to the CBA the award rendered by Arbitrator Kowalski was final and binding on all of the parties. On June 1, 2015, the First Arbitration opinion and award was delivered to the Union, which found that the Plaintiff was "guilty of some of the charges in the Notice of Discipline to the extent he was careless and negligent, incorrectly recording time on his time cards for which he was paid but did not work." The Plaintiff served a two week unpaid suspension as punishment to compensate for the overpayment. The Plaintiff was not terminated from his employment at the Sheriff's Office, he did not lose pay and all of his fringe benefits were restored. Pursuant to CPLR § 7511 (a) the Plaintiff had ninety days to commence a proceeding to vacate or modify the First Arbitration award but the Plaintiff never brought any such proceeding. The County complied with the award.

After serving his suspension the Plaintiff was scheduled to return to work. However, on June 22, 2015, the Plaintiff filed for disability leave and sought benefits pursuant to General Municipal Law § 207 -3. The Plaintiff was placed on medical leave because he was deemed medically unfit for

duty by his psychiatrist. On February 18, 2016, the Plaintiff was informed that he had used all of this medical leave pay. Two days later, his psychiatrist signed a letter stating that Plaintiff was fit for duty. The Plaintiff never completed a required examination by the Sheriff's Office physician and so he was not permitted to return to work by the County.

On September 29, 2015, the Ithaca Voice published an article detailing the events surrounding the Plaintiff's time sheet misconduct that included photographs of the Plaintiff's personnel documents and time cards. The Plaintiff made a complaint about the disclosure of his information. The County retained Edward C. Hooks Esq., to investigate the disclosure of the Plaintiff's records.

On March 8, 2016, the Plaintiff commenced this action by filing a Summons and Complaint. The complaint alleges seven causes of action for (1) tortious interference with contractual relations; (2) *prima facie* tort; (3) defamation; (4) violation of Plaintiff's 14th Amendment substantive Due Process rights pursuant to 42 U.S.C. § 1983;(5) abuse of process in violation of 42 U.S.C. § 1983; (6) violation of Plaintiff's 14th Amendment Due Process rights pursuant to 42 U.S.C. § 1983; and (7) violation of Civil Service Law § 72. All of the defendants answered the complaint and asserted affirmative defenses by July 22, 2016.

On April 5, 2016, while this lawsuit was pending, the Plaintiff filed a grievance against the Sheriff's Office which led to a second arbitration before Arbitrator Dennis Campagna (the "Second Arbitration"). The issue in the Second Arbitration was the Plaintiff's failure to return to work and his medical leave pay. The Plaintiff complained that he did not receive medical leave pay from the County. On May 10, 2017, Arbitrator Campagna delivered an arbitration award in favor of the Plaintiff because the County violated the CBA by failing to return Plaintiff to work after he was cleared by his physician. As a remedy, Arbitrator Campagna directed the County to return the Plaintiff to the payroll effective the date his physician determined that he was fit for duty, to pay him back pay and restore all benefits and seniority rights to which he would be entitled. The Plaintiff recovered all medical leave pay and returned to work until his retirement on April 25, 2018. The County complied with the arbitration award. The Plaintiff did not bring an action to vacate or modify the award pursuant to CPLR § 7511 (a). During depositions the Plaintiff confirmed that the second

arbitration award made him whole with regard to any loss suffered as a result of the County's handling of his disability claim.

On June 23, 2016, Attorney Hooks issued a report in which he detailed the complete lack of evidence of who was involved with providing documents to the Ithaca Voice. During the pendency of this action, the County elected Defendant Derek Osborne as Sheriff and Defendant Brett George and Kenneth Lansing are no longer employed by Tompkins County.

On July 2, 2020, Defendant Captain Brett George ("Capt. George"), filed a Notice of Motion with exhibits, an affirmation of Matthew Larkin Esq., an Memorandum of Law, seeking an order for summary judgment pursuant to CPLR §§ 3212, 3211(a)(2), 3211 (a)(5), 3211 (a)(7). Capt. George is seeking a dismissal of the complaint in its entirety with prejudice on several grounds, and dismissing the punitive damages complaint against Cpt. George.

On July 2, 2020, Defendant Sheriff Kenneth Lansing ("Sheriff Lansing"), filed a Notice of Motion (with exhibits),an affirmation of Jacob Lamme Esq., and Memorandum of Law in Support of an order for summary judgment pursuant to CPLR §§ 3212, 3211(a). Sheriff Lansing is seeking a dismissal of the complaint in its entirety with prejudice on several grounds and seeking costs and disbursements.

On July 3, 2020, Defendants Tompkins County, Kyle Koskinen, Joe Manning, James Vann, Jonathan Wood and Derek Osborne, filed a Notice of Motion (with exhibits), an affirmation of Benjamin D. Heffley Esq., and Memorandum of Law in Support of an order for summary judgment pursuant to CPLR § 3212. The Defendants are seeking a dismissal of the complaint in its entirety with prejudice.

On August 7, 2020, the Plaintiff opposed the defendants motions for summary judgment. However, in his opposition to the defendant's motion for summary judgment. The Plaintiff voluntarily discontinued the Fifth Cause of Action (abuse of process), Sixth Cause of Action (due process) and Seventh Cause of Action (violation of Civil Service Law § 72).

On September 4, 2020, Defendant Captain Brett George, submitted a Reply Memorandum of Law in further support of his pending motion for summary judgment.

On September 4, 2020, Defendant Sheriff Kenneth Lansing, submitted a Reply Memorandum of Law in further support of his pending motion for summary judgment.

On September 4, 2020, Attorney Benjamin D. Heffley, Esq., attorney for Defendants Tompkins County, Kyle Koskinen, Joe Manning, James Vann, Jonathan Wood and Derek Osborne ("County Defendants"), submitted a Reply Affirmation and Reply Memorandum of Law in support of the motion for summary judgment dismissing the Plaintiff's complaint in this action. The Defendant's argue that the Plaintiff's objective is to re-litigate claims that he has already arbitrated and recover again after he has already been made whole.

The Defendants have now moved for summary judgment and the Plaintiff has submitted a memorandum of law in opposition that disputes the facts alleged by the Defendants. It is well settled that "[t]he proponent of a motion for summary judgment is required to tender sufficient, competent, admissible evidence establishing a prima facie entitlement to judgment as a matter of law so as to demonstrate the absence of any material issue of fact [citation omitted]." Holly v. Morgan, 2 A.D.3d 1170, 1171 (3rd Dept., 2003), *citing* Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003). "Only when this burden is met is the opponent required to produce competent admissible evidence establishing the existence of a material issue of fact which would preclude a grant of summary judgment [citations omitted]." Id. at 1171, *citing* Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980).

The Court in Davidowitz v. Cazes, 157 A.D.2d 1014 (3rd Dept., 1990) stated, "Summary judgment is a drastic remedy, the procedural equivalent of a trial (Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974)). Where there is doubt as to the existence of a triable issue or where the issue is arguable, summary judgment should not be granted. Sillman v. Twentieth Century Fox Corp., 3 N.Y.2d 395, 404 (1957). Issue-finding rather than issue determination is the key to the procedure."

Therefore, "[w]hen considering a motion for summary judgment, courts must view the evidence in a light most favorable to the nonmoving party and accord that party the benefit of every reasonable inference from the record proof, without making any credibility determinations [citations omitted]." Black v. Kohl's Dept. Stores, Inc., 80 A.D.3d 958, 959 (3rd Dept., 2011), citing Gadani v. Dormitory Auth. of State of N.Y., 43 A.D.3d 1218, 1219 (3rd Dept., 2007); Tenkate v. Tops Mkts., LLC, 38 A.D.3d 987, 989 (3rd Dept., 2007).

Tortious interference with contractual relations

The Plaintiff alleges there was a valid contract for employment between the Plaintiff and Defendant Tompkins County and that Defendants George, Osborne, Vann, Koskinen, Lansing, Wood and Manning knew that contract existed and knowingly and intentionally interfered with Plaintiff's employment contract.

To prevail on a claim for tortious interference with contract, a plaintiff must prove " (1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff." Canadaigua Natl. Bank & Trust Co. V. Acquest S. Park, LLC, 170 A.D.3d 1663 (4th Dept., 2019); Kronos, Inc. v AVX Corp., 81 N.Y.2d 90 (1993); *see* Lama Holding Co. v Smith Barney, 88 NY2d 413 (1996; KAM Constr. Corp. v Bergey, 151 AD3d 1706, 1707 (4th Dept., 2017).

The Plaintiff alleges that the County and the defendant employees breached the CBA by bringing disciplinary charges against the Plaintiff. The Plaintiff contends that the County tortuously interfered with its own contract with the Plaintiff's union. The Plaintiff is not a party to the contract nor is he alleging that a stranger to the contract interfered with its performance.

The defendants argue that the Plaintiff cannot satisfy the elements of this cause of action. The defendants argue and the Plaintiff is not a party to the contract between the Union and the County. The Plaintiff is a member of the Union, is not a party to the agreement "and has no standing to seek relief as a third party beneficiary to that agreement." Fiore v Town of Whitestone, 125 A.D.3d 1527 (4th Dept., 2015); Matter of Board of Educ. Commack Union Free School Dist. v Ambach, 70 N.Y.2d 501 (1987). There is no contract between the Plaintiff and the County. He is a third party beneficiary and therefore has no standing or basis to proceed on a claim that someone interfered with the contract. Further, there is nothing in the record to indicate that the contract was breached. The Union pursued the Plaintiff's rights as a third party beneficiary by submitting the matter to arbitration and the Plaintiff recovered everything that he was entitled to based on the arbitrator's decision. Accordingly, the Plaintiff's claim against each of the defendants for tortious interference with contract is dismissed.

Prima Facie Tort

The Plaintiff alleges that the defendants intentionally and maliciously inflicted harm upon the Plaintiff without any excuse or justification through actions that would otherwise be lawful.

The requisite elements of a cause of action for prima facie tort are:" (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful." (Freihofer v Hearst Corp., 65 N.Y.2d 135 (1985); Curiano v Suozzi, 63 N.Y.2d 113 (1984); Burns Jackson Miller Summit & Spitzer v Lindner, 59 N.Y.2d 314 (1983)). "There can be no recovery for prima facie tort unless a disinterested malevolence to injure the plaintiff constitutes the sole motivation for the defendant's otherwise lawful act" (Med. Care of W. New York v Allstate Ins. Co., 175 AD3d 878 (4th Dept 2019); Backus v Planned Parenthood of Finger Lakes, 161 AD2d 1116 (4th Dept 1990). Further, a "prima facie tort is neither a 'catch-all' alternative for every cause of action which cannot stand on its legs" (Burns Jackson Miller Summit & Spitzer v Lindner; *supra*; Belsky v Lowenthal, 62 A.D.2d 319, *affd* 47 N.Y.2d 820).

Here, the complaint alleged that defendants intentionally and maliciously inflicted harm upon the Plaintiff without any excuse or justification through actions that would otherwise be lawful. The complaint is vague and general. The Plaintiff clarified in his interrogatories that the defendants intentionally and maliciously provided investigative materials and confidential information about the Plaintiff's disciplinary case to other employees and the Ithaca Voice and made false statements about the Plaintiff stealing time. The Plaintiff conceded that he had no proof that anyone provided confidential material to the Ithaca Voice or anyone else.

The defendants deny the allegations and denied providing materials to the Ithaca Voice. Further, they denied any knowledge of who provided the material to the press. Further, the County conducted an independent investigation that yielded no results of who provided the material. Here, no special damages are alleged and apparently none exist. The record establishes that the Plaintiff has no idea who committed the tortious acts and he has no proof that any of the named defendants did. Further, the Plaintiff cannot argue, based on his testimony and lack of proof, that the defendants' actions were motivated by disinterested malevolence which is necessary to sustain a claim of prima facie tort (9 E. 38th St. Assoc.v Feher Assoc, 226 A.D.2d 167 (1st Dept., 1996). The

Plaintiff has not raised a triable issue of fact as to who provided information to the newspaper. Without knowing who provided the information, it is impossible for the Plaintiff to establish what the motivation of that person might be, or that the intent was to harm the Plaintiff. It is just as likely that the person's intent was to let the public know the truth behind the reasons for the dispute between the Plaintiff and the Sheriff's Office. Therefore, the Plaintiff cannot satisfy each of the elements of this cause of action and dismissal of the cause of action is warranted. That branch of the defendants' motion is granted.

Defamation

The Plaintiff alleges in paragraphs 28 and 29 of his complaint that Defendants George, Osborne, Vann, Koskinen and Lansing made false statements about the Plaintiff to third parties, including the Ithaca Voice. Further, the Plaintiff alleges that the defendants leaked confidential and investigative material to the press and made false statements to third parties regarding stealing his time. The Plaintiff failed to plead particular statements allegedly made and that the defendants knew or should have known that these statements were false. Defamation claims are subject to strict pleading requirements. "The particular words complained of shall be set forth in the complaint..." Jackie's Entere., Inc. v. Belleville, 165 A.D.3d 1567 (3rd Dept., 2018); Scalise v Herkimer, Fulton, Hamilton & Otsego County BOCES, 16 A.D.3d 1059 (3rd Dept., 2005); CPLR § 3016 (a)). Here, the Plaintiff does not allege in his complaint who made the statement or exactly what the statement was. Further, he acknowledged at his deposition that the unspecified statements were not necessarily false.

"A public official may not recover damages for defamation unless the official proves that the offending false statement was made with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not" (Watson v City of Jamestown, 56 A.D.3d 1289, (4th Dept., 2008); *citing* Freeman v Johnston, 84 N.Y.2d 52 (1994); *see* New York Times Co. v Sullivan, 376 US 254 (1964)). The Plaintiff was a deputy sheriff who is considered a public official and recovery for defamation is only available where a statement "was made with actual malice; that is knowledge that it was false or with reckless disregard of whether it was false or not." Watson v City of Jamestown, 56 A.D.3d 1289 (4th Dept., 2008); *see* New York Times v Sullivan, 376 U.S. 254 (1694). The Plaintiff has not alleged a specific false statement and offered no proof that any of the

defendants made a false statement with actual malice. Therefore, the Plaintiff's complaint does not satisfy the pleading requirements and dismissal of the cause of action is warranted. That portion of the defendants' motion is granted.

Violation of Plaintiff's 14th Amendment substantive Due Process rights

The Plaintiff alleges that the defendants violated his substantive due process rights as guaranteed by the Fourteenth Amendment. He has voluntarily dismissed his Fifth, Sixth and Seventh causes of action against all defendants. The Plaintiff contends that his reputation has been injured and harmed as a result of "false and defamatory statements" and "tampering" with scheduling records. As a result of this conduct, the Plaintiff contends that he was disciplined, he was "placed on administrative leave, received a two week unpaid suspension and lost his status as a canine officer.

A review of the record in this case indicates that the Plaintiff has not come forward with any proof that a particular individual tampered with scheduling records. Additionally, he has not sufficiently pled the statements which he asserts were defamatory. A person cannot be found to have any Section 1983 liability unless he or she was personally involved in the alleged constitutional violation Wright v Smith, 21 F.3d 496 (2nd Cir., 1994). The Plaintiff must plead and prove that the defendant violated the Plaintiff's Federal rights. Here, the Plaintiff has done neither. He does not identify the individual that he accuses of tampering with the records and admitted at his deposition that he does not know who did this. For that reason, there is no issue of fact for the jury to determine, Rather, there is an absence of proof by the Plaintiff to survive the motion for summary judgment.

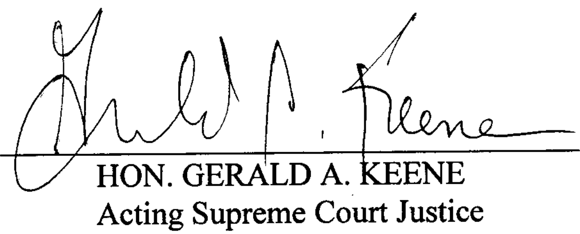
Further, "the denial of the right to substantive due process occurs only when governmental action was wholly without legal justification." St. Joseph Hosp v Novello, 43 A.D.3d 139 (4th Dept., 2007). The crux of the Plaintiff's claim is that the discipline he received as a result of the inaccurate time records that he submitted was unfair and unwarranted. However, this issue has already been arbitrated and the Plaintiff did not take any steps to challenge the decision in the Article 75 proceeding. The arbitrator that gave the Plaintiff a two week suspension necessarily found that the disciplinary action taken by the employer had legal justification.

Based upon the arguments and affidavits submitted by the parties, there are no issues of fact in dispute. The Defendants are entitled to the relief requested in their motion. For that reason, the defendants' motion for summary judgment is granted.

For all of the above reasons, it is

ORDERED, that the Defendants' motion for summary judgment is granted, and the Plaintiff's complaint is dismissed.

This constitutes the Decision and Order of the Court.



Dated: April 9, 2021
Ithaca, New York

HON. GERALD A. KEENE
Acting Supreme Court Justice

Entered 04/12/2021

Cc: Mary Hodges, Tompkins County Supreme Court
Michael H. Sussman Esq., Attorney for the Plaintiff Shane Spencer
Matthew J. Larkin Esq., Attorney for Respondent Captain Brett George
Jacob F. Lamme, Esq., Attorney for Respondent Sheriff Kenneth Lansing
Benjamin D. Heffley, Esq., Attorney for Tompkins County, NY, Sgt. Kyle Koskinen, Sgt. Joe Manning, Sgt. James Vann, Under Sheriff Derek Osborne