

McCann v Gordon

2021 NY Slip Op 33460(U)

February 10, 2021

Supreme Court, Oneida County

Docket Number: Index No. EFCA2019-001574

Judge: Scott J. DelConte

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At a Special Term of the Supreme Court of the State of New York held in and for the County of Oneida on February 10, 2021.

PRESENT: **HON. SCOTT J. DELCONTE**
Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK
ONEIDA COUNTY

CAITLIN MCCANN,

Plaintiff,

v.

Index No. EFCA2019-001574

DAVID GORDON,

Defendant.

DECISION AND ORDER
(Motions Nos. 6, 7, 8 and 9)

APPEARANCES:

Louis T. Brindisi, Esq., and Eva Brindisi Pearlman, Esq., *of Brindisi, Murad & Brindisi Pearlman, LLP for Plaintiff*

David Gordon, *pro se, Defendant*

Plaintiff Caitlin McCann alleges that Defendant David Gordon defamed her when he falsely stated in a press release and live media events during his 2019 political campaign for Oneida County Executive that McCann: (a) had an illicit sexual relationship with Gordon's married political opponent, Anthony J. Picente, Jr., while he was the County Executive and she was employed by the County; (b) was paid off for the affair in an illegal pay raise scheme; and (c) became pregnant during the affair, and then covered up the unwanted pregnancy with a clandestine out-of-state adoption or child placement to protect Picente. Significant discovery has been completed. McCann moves for partial summary judgment on liability, arguing that Gordon's statements are defamatory *per se*. Gordon, in turn, opposes the motion and cross-moves to dismiss the Complaint. He contends that McCann has not proven that his statements to the media about her alleged illicit sexual relationship, corrupt payoff, and pregnancy were false or, alternatively, that he needs additional discovery to oppose the motion. For the reasons set forth below, and Gordon's failure to present any evidence to support his statements about McCann and Picente, McCann's motion for summary judgment on liability is **GRANTED**, in all respects, and Gordon's cross-motion to dismiss is **DENIED**.

I.

This action arises out of a series of public statements that Gordon made about McCann, a non-public figure, during his 2019 Republican Party primary campaign against Picente for the Office of Oneida County Executive. Gordon was not a political novice. He previously served one term on the Oneida County Legislature and also campaigned for higher elected office.

The genesis of Gordon's defamatory statements was the February 8, 2019 broadcast of the long-running and locally popular "*Keeler in the Morning*" radio show. That morning, the show's host, William Keeler, reported publicly for the first time that Gordon had been arrested in 2017 on a domestic violence complaint filed by Gordon's then-fiancée. Keeler's reporting was based upon Gordon's actual arrest record, which Keeler discussed, and read portions of aloud. Keeler invited Gordon to appear on the talk show to respond to the complaint and his arrest. Gordon declined.

Instead, on February 11, 2019, Gordon arranged for, and then held, a formal press conference inside Utica City Hall. Various print and broadcast media outlets attended the event. Gordon opened the conference by asserting that his then-fiancée had provoked the incident that led to his 2017 arrest – adding that she was emotional due to her pregnancy. Gordon also claimed that his fiancée had subsequently, on her own, decided not to pursue prosecution. Then, to deflect the press' attention away from his domestic violence arrest, Gordon shifted his focus before the assembled media outlets to his political opponent, and stated, publicly, that his Republican primary foe "may have had an affair with a member of his staff ultimately abusing his power as County Executive, and not only engaging in an affair with a county employee, but inevitably impregnating her and covering up the details, and discarding his responsibility sending this individual and their unborn to live in Charleston, South Carolina" (NYSCEF Doc. 1). Gordon did not name McCann at that time, but concluded his February 11 press conference by calling for Picente's resignation and a criminal investigation.

Picente did not publicly respond to Gordon's accusations of sexual misconduct and abuse of his office. Gordon, however, ramped up his efforts, hung flyers in the area and posted photographs on social media – including at least one altered with photoshop – implying that the woman that he was accusing Picente of having an affair with was McCann.

At the time, McCann was working as an executive assistant for the Mohawk Valley Health System. She was not a public figure and, until Gordon began publicly unloading his accusations against her, she was not the subject of any public or media attention. Gordon also sent an unsolicited text message directly to McCann on the night of March 8, 2019, stating that "I believe its time they [sic] we meet to discuss this before it goes public. Don't you?" (NYSCEF Doc. 143). When McCann did not respond to Gordon's ambiguous and threatening text, Gordon released a written statement to the media on May 15, 2019. In that statement, Gordon explicitly accused McCann, by name, as having been Picente's mistress, and also claimed that she had been illegally paid off for the illicit relationship, became pregnant, and then was forced to leave the area to hide the pregnancy. Gordon's full press statement reads:

Picente's affair with McCann started sometime in early 2008. It is believed that McCann met the county executive at a fundraiser that Picente held at McCann's previously owned family restaurant, Piggy Pat's in New Hartford. He then offered McCann a job working as a staffer in his elected office at the County Office building. As things heated up, McCann was rewarded with an unprecedented pay raise of 20 percent in late 2008. He got a rise and she got a raise. In June 2010, Picente and McCann discovered that she was in fact impregnated by Picente. In one of the biggest cover-ups in Oneida County history, Picente immediately demanded that Caitlin move to North Charleston, South Carolina to hide the evidence of the affair. (NYSCEF Doc. 1).

Not satisfied with just releasing the written statement, Gordon also called the media that afternoon to a press conference, which he held outside the Oneida County Office Building. There, Gordon publicly, and unabashedly, told the gathered reporters that:

For 15 months McCann would live in South Carolina pregnant with Picente's child away from her own family. She was ashamed and totally in love with Picente, the Oneida County Executive, her boss. And, we believe she thought she would one day end up with, sent her away. Today we search for the child of Picente. We believe that Picente either made Caitlin give it up for adoption or that the child was sent to live with relatives. One thing for sure, Picente never took

care of his responsibilities and deceived the people of Oneida County. Upon returning from Oneida County once the dust settled, it is believed that Picente leveraged his relationship with MVHS to get a job. Today her position as head of marketing for MVHS poses way more questions than it does answers. With Picente's downtown hospital agenda and McCann at the wheel to answer questions about the hospital, is the County Executive in fact controlling his former lover? Is he controlling the message of MVHS in their agenda to dismantle downtown Utica at taxpayers' expense? He goes on to say that I have presented a copy of a text message received from an unnamed third party in which an Oneida County Sheriff states that he and his partner witnessed firsthand the affair between Picente and McCann. (NYSCEF Doc. 1).

In response to Gordon's claims in his written statement to the media and the press spectacle on May 15, 2019, Picente held a pre-announced press conference of his own, later that day in the Oneida County Office Building. In that press conference, Picente directly addressed Gordon's accusation that he had had an affair with a staffer for the first time, stating that "[t]his junk that was put out by Mr. Gordon is an absolute lie from the first sentence all the way through and everything he has said about me... These are made up lies. There is not an iota of truth in any of these documents that he presents today or anything he has said" (NYSCEF Doc. 1). Gordon, nonetheless, continued to reiterate his statements on social media and to the press, and made additional claims that he had actual evidence and witnesses that substantiated his accusations of an affair between McCann and Picente (NYSCEF Doc. 1).

II.

On June 4, 2019, McCann commenced this action against Gordon for defamation. The Summons and Complaint were personally served on June 5, 2019 (NYSCEF Doc. 2). When Gordon failed to timely answer, McCann moved for a default (NYSCEF Doc. 19). In response, Gordon appeared, and requested an extension of time to answer. The Court granted Gordon's request, and scheduled a conference for August 19, 2019 (NYSCEF Doc. 24).

Gordon then served an Answer, through counsel, on August 6, 2019 (NYSCEF Doc. 26). At the August 19 court conference, a discovery schedule was set, and the parties stipulated on the record in open court that, during the pendency of this action, “no attorney or party will make any comments or statements of any nature to any media outlets” – other than to say “no comment” – and, further, that no attorney or party will “post on Facebook or any other social media outlet in connection with this case” (NYSCEF Doc. 114).

The following day, August 20, 2019, Gordon commenced a separate lawsuit against Picente; Picente’s chief-of-staff; radio talk show host, William Keeler; and the media companies that broadcast *Keeler in the Morning*; alleging slander, defamation and conspiracy to violate his constitutional rights under 42 U.S.C. § 1983. The complaint in that action was dismissed against all defendants pursuant to CPLR 3211(a)(7) for failure to state a cause of action (NYSCEF Docs. 54, 56 and 57 under Index No. EFCA2019-002270). Meanwhile, the parties in this action engaged in significant discovery, including the exchange of paper documents and medical records. On February 4, 2020, counsel for Gordon was permitted by the Court to withdraw on motion (NSYCEF Doc. 40).

Gordon proceeded to represent himself *pro se*, and engaged in additional discovery, including extensive party and non-party depositions (conducted remotely under the pandemic protocol procedures). On June 30, 2020, Gordon filed a motion for a court-ordered deposition of Rocco LaDuca, a local journalist and media personality whose counsel declined to voluntarily produce LaDuca for a deposition under Civil Rights Law § 79-h, the Shield Law (NYSCEF Docs. 76, 81; Motion No. 6). Before that motion was heard by the Court, Gordon filed a second motion for a court-ordered deposition on July 28, 2020, this time for the Chief Executive Officer of the Mohawk Valley Health System, McCann’s employer, which operates three area

hospitals (NYSCEF Doc. 98; Motion No. 7). In response to these motions, the Court exercised its discretion and control over the discovery process to prevent it from being abused (*Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]), and stayed all further depositions pending the filing of McCann's motion for summary judgment (NYSCEF Docs. 103, 104, 110).

By Notice of Motion, filed August 19, 2020, McCann now moves for partial summary judgment on her cause of action for defamation (NYSCEF Doc. 115). In support of this motion, McCann submits her Affidavit attesting to the falsity of Gordon's claims, including that she had never had an affair with Picente (NYSCEF Doc. 116), along with deposition transcripts, sworn statements from witnesses and other exhibits, including the transcript of Gordon's deposition in which he concedes to having no proof or evidence that McCann had an affair with Picente, or was ever pregnant with his child (NYSCEF Doc. 120). In response, Gordon cross-moves to dismiss the Complaint against him, arguing that McCann fails to prove that his statements were lies, and that he needs additional discovery to defend against summary judgment (NYSCEF Doc. 135). Despite Gordon's prior claims to the press about having evidence and witnesses that substantiated his outlandish accusations, Gordon's opposition and cross-motion papers contain no actual evidence that McCann had an affair with Picente, or was ever pregnant with Picente's child.

III.

"[A] false statement 'that tends to expose a person to public contempt, hatred, ridicule, aversion or disgrace constitutes defamation'" (*Davis v Boehm*, 24 NY3d 262, 268 [2014]). There are three elements in a defamation claim against a defendant, like Gordon, who is not a member of the press: (1) the statement is defamatory; (2) it was about the plaintiff; and (3) it was made to a third-party (PJI 3:23B). To ensure that defamation claims are not used to suppress

free speech, the first element is a question of law for the Court. In that regard, the law is clear: any statement that tends to expose a person to public hatred, contempt, ridicule or disgrace and is capable of being proven false is defamatory (*Davis*, 24 NY3d at 269). Here, Gordon's oral and written statements that McCann (1) had a sexual affair with Picente, the married County Executive, while she worked for the County; (2) was financially rewarded for her affair (as Gordon stated, "[h]e got a rise and she got a raise"); and (3) became pregnant with Picente's child, and then left the area to hide the pregnancy; expose her to public ridicule and disgrace, and are capable of being proven false. They are, therefore, defamatory. The first element of McCann's claim is unequivocally established as a matter of law.

As for the second and third elements of McCann's claim, Gordon admits these in his Answer; namely, that his statements were about McCann, and that they were made to third-parties, namely, local media outlets at events that Gordon staged (NYSCEF Doc. 26). Because McCann is a private citizen whose relationships are not a public concern, she does not need to prove that Gordon's statements were false (PJI 3:23B citing *Hunt v Bennett*, 19 NY 173 [1859] and *Tannerite Sports, LLC v NBCUniversal Media, LLC*, 864 F3d 236 [2d Cir 2017]). Furthermore, since the statements accuse McCann of unchastity, they are defamatory *per se* and she does not need to prove special damages (*G.L. v Markowitz*, 101 AD3d 821, 822 [2d Dept 2012]). And, finally, because Gordon is not a member of the press, McCann does not need to prove malice (PJI 3:23B; *King v Tanner*, 142 Misc2d 1004, 1009 [Sup Ct Westchester Cty 1989]).

Accordingly, McCann has established her *prima facie* entitlement to summary judgment on this motion, and the burden shifts to Gordon to raise a triable issue of fact warranting denial of summary judgment.

IV.

The arguments offered by Gordon in opposition to McCann's summary judgment motion are devoid of merit. First, this is a civil action, not a criminal one, and as such the burden of proof here is a "fair preponderance of the evidence," not "beyond a reasonable doubt" (PJI 3:23B). Moreover, Gordon has admitted the elements of the defamation claim against him, which means the burden of proof is irrelevant here (NYSCEF Docs. 1, 26). Second, Gordon's argument that his statements on May 15, 2019 were merely opinions is disingenuous. Phrases such as "Picente's affair with McCann started sometime in early 2009" and "[i]n June of 2010, Picente and McCann discovered that she was in fact impregnated by Picente" are not opinions; they are factual assertions (NYSCEF Doc. 1). Third, truth is not an element of a defamation claim, it is an affirmative defense (*Silverman v Clark*, 35 AD3d 1, 12-13 [1st Dept 2006]). In other words, McCann does not have to prove that Gordon's statements were false; instead, Gordon bears the burden of proving that his statements were true. And Gordon fails to submit any evidence, admissible or otherwise, that Ms. McCann had an affair with Picente, received improper financial gains, or became pregnant with his child.

Fourth, and finally, Gordon argues that McCann's motion for summary judgment should be denied at this time pursuant to CPLR 3211(d) because facts essential to his defense of the motion are unavailable to him without further discovery (NYSCEF Doc. 137). Gordon's papers fail, however, "to demonstrate that discovery might lead to relevant evidence," and Gordon's hope that he might "somehow uncover" evidence during discovery that could help his case is not sufficient to warrant denying the motion for summary judgment (*Dunn v Covanta Niagara I, LLC*, 181 AD3d 1340, 1341 [4th Dept 2020]). Specifically, of the two witnesses whom Gordon seeks to depose, one is a member of the media (as Gordon admits), and therefore presumptively protected by the Shield Law. Moreover, even without the Shield Law protection, Gordon seeks this

deposition merely to ask Mr. LaDuca what another individual – who was already deposed by the parties and conceded to having no actual knowledge of any affair – told him, which would be inadmissible hearsay. As to the second witness, Gordon offers absolutely no reason to believe that the Chief Executive Officer of McCann’s health care employer has any information relevant to her personal life over a decade ago, when she worked for Oneida County. It appears to the Court that this deposition request was designed solely to embarrass and harass McCann (NYSCEF Doc. 136).

In short, Gordon has failed to submit any evidence, or advance any arguments, that would justify the denial of McCann’s motion for partial summary judgment. The uncontradicted evidence before this Court plainly establishes as a matter of law that Picente and McCann did not have an affair, that McCann was not unlawfully paid or rewarded with public money for sex, and that McCann did not become pregnant with Picente’s child and run away to hide that pregnancy. Indeed, the uncontradicted evidence in this case, including the medical records that were disclosed to Gordon, establishes that McCann has never been pregnant (NYSCEF Doc. 173 [under seal]). While Gordon and Picente were battling for the Republican nomination, McCann was not. She was not seeking – and did not deserve – public scrutiny and media attention, particularly based on salacious and false accusations involving extramarital sex and public corruption. Despite Gordon’s self-serving claims to the press over a year ago that he had actual evidence of the corruption and affair, he offers none to this Court. Innuendo is not evidence, and an individual who publicly spreads rumors that are not based in fact will be held liable for the damage that he causes.

In short, Gordon fails to raise any triable issues of fact as to liability. Indeed, it is apparent to the Court that Gordon has never had any evidence whatsoever to support his personal attacks on McCann during his failed 2019 political campaign. Accordingly, summary judgment is granted, and a trial on damages will be set upon the filing of the note of issue.

V.

Upon due deliberation, it is hereby

ORDERED that Defendant David Gordon's motion for a judicial subpoena for the testimony of Rocco LaDuca (Motion No. 6) is **DENIED**, as moot; and it is further

ORDERED that Defendant David Gordon's motion for a judicial subpoena for the testimony of Darlene Stromstad (Motion No. 7) is **DENIED**, as moot; and it is further

ORDERED that Plaintiff Caitlin McCann's motion for summary judgment under CPLR 3212 on the issue of liability for her cause of action for defamation is hereby **GRANTED**, and Plaintiff is directed to file a trial note of issue within 60 days; and it is further

ORDERED that Defendant David Gordon's cross-motion to dismissal this action under CPLR 3211 is **DENIED**.

Dated: February 10, 2021



HON. SCOTT J. DELCONTE, J.S.C.

ENTER.

PAPERS CONSIDERED:

1. Order to Show Cause on Defendant David Gordon's Motion for Judicial Subpoena for Rocco LaDuca, entered July 6, 2020 (NYSCEF Doc. 78; Motion No. 6);
2. Affidavit in Support of Motion of David Gordon, sworn to July 1, 2020 (NYSCEF Doc.76; Motion No. 6);
3. Affirmation of Michael J. Grygiel, Esq., Attorney for Non-Party Rocco LaDuca, affirmed July 16, 2020, with Exhibits A through D, attached (NYSCEF Docs. 82-86; Motion No. 6);
4. Reply Affidavit of Defendant David Gordon, sworn to July 21, 2020 (NYSCEF Doc.87; Motion No. 6);
5. Reply Affidavit [captioned Affirmation] of Defendant David Gordon, sworn to July 21, 2020, with Exhibits A through D, attached (NYSCEF Docs. 88, 89, 91, 93 and 94; Motion No. 6);

6. Notice of Motion on Defendant David Gordon's Motion for Judicial Subpoena for Darlene Stromstad, dated July 28, 2020 (NYSCEF Doc. 97; Motion No. 7);
7. Affidavit in Support of Motion of David Gordon, sworn to July 18, 2020, with Exhibits A through D, attached (NYSCEF Docs. 98-103; Motion No. 7);
8. Notice of Motion on Plaintiff Caitlin McCann's Motion for Summary Judgment, dated August 19, 2020 (NYSCEF Doc. 115, Motion No. 8);
9. Affidavit of Caitlin McCann, sworn to August 18, 2020, with Exhibits A through L, attached (NYSCEF Docs. 116-129, Motion No. 8);
10. Notice of Cross-Motion on Defendant David Gordon's Motion to Dismiss, dated September 15, 2020 (NYSCEF Doc. 135, Motions Nos. 8 and 9);
11. Affidavit of Defendant David Gordon in Opposition to Summary Judgment and in Support of his Motion to Dismiss, sworn to September 15, 2020, with Exhibits A through CC (including U-2), attached (NYSCEF Docs. 136, 138-167; Motions Nos. 8 and 9); and
12. Reply Affirmation of affirmed September 22, 2020, with Exhibits A through D, attached (NYSCEF Docs. 171-175, Motions Nos. 8 and 9).