

Riordan v Garces

2022 NY Slip Op 31477(U)

May 5, 2022

Supreme Court, New York County

Docket Number: Index No. 161142/2017

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART 12

Justice

-----X

JOHN RIORDAN, KIRK BIGELOW,

Plaintiffs,

- v -

ALBERTO GARCES, ALBERTO GARCES, LOCAL
3369 SSA, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO,

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 014) 216-236, 278-283, 285-289

were read on this motion for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 015) 237-248, 268-277, 290

were read on this motion for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 016) 249-264, 291-300

were read on this motion for summary judgment.

By notice of motion, defendant Garces moves pursuant to CPLR 3212 for an order summarily dismissing the complaint against him (mot. seq. 14).

By notice of motion, plaintiff Bigelow moves for partial summary judgment on liability on his fourth cause of action for assault against Garces (mot. seq. 15). Garces opposes.

By notice of motion, defendant Local 3369 (Local) moves for an order summarily dismissing the complaint against it (mot. seq. 16). Plaintiffs oppose.

I. AMENDED COMPLAINT (NYSCEF 299)

In their amended complaint, plaintiffs, members of union Local, allege that Garces,

president of Local at the time of the incidents at issue, falsely accused them of leveling criminal death threats against them after he illegally barred them from attending a union meeting. Garces then allegedly repeated the false accusations in written and oral statements to union members. Plaintiffs contend that defendant American Federation of Government Employees, AFL CIO (AFGE) and Local were aware of Garces's conduct but failed to intervene.

Plaintiffs thus advance causes of action against Garces for defamation *per se*, libel, slander, intentional infliction of emotional distress, *prima facie* tort, and assault, alleging that on October 27, 2017, Garces threatened to attack and injure Bigelow. They also seek to hold the union defendants liable for negligent hiring and supervision and negligence.

II. GARCES'S MOTION

A. Statements of facts (NYSCEF 234, 280)

Based on the parties' statement and counterstatement of undisputed facts, the following pertinent facts are deemed undisputed:

- (1) Local 3369 held a union meeting on March 21, 2017, at the Joseph P. Addabbo Federal Building in Jamaica, Queens.
- (2) On March 27, 2017, Garces sent a letter to Riordan and others about an interaction among Garces, Riordan, Bigelow, and Osorio following the March 21 meeting (first defamatory statement).
- (3) In the letter, Garces stated that Riordan had: "threatened to kill [Garces]," "threatened to physically harm [him] on Federal property," "endanger[ed] the health and safety of the AFGE 3369 participants," and, in an earlier union meeting, engaged in "extremely violent behavior."
- (4) In the letter, Garces also stated that Riordan was not allowed to enter any future Local 3369 membership meetings.
- (5) On March 27, 2017, Garces wrote to Bigelow and others about an interaction among Garces, Riordan, Bigelow, and Osorio following the March 21 meeting (second defamatory statement).
- (6) In the letter, Garces stated that Bigelow "threatened to kill [Garces]," "threatened

to physically harm [him] on Federal property,” “endanger[ed] the health and safety of the AFGE 3369 participants,” and, in an earlier union meeting, engaged in “extremely violent behavior.”

(7) Garces also stated in the letter that Bigelow was not allowed to enter any future Local 3369 membership meetings.

(8) On March 27, 2017, Garces spoke to the Social Security Administration (SSA) Crisis Advisory Team (CAT) (third defamatory statement).

(9) Garces told CAT that, following the March 21 meeting, Riordan told him that “[I]’ll fucking kill [you]” and that Bigelow said, “I’ll kill you too.”

(10) CAT sent Garces a copy of his statement for his review.

(11) On April 21, 2017, Garces disseminated a letter about Riordan and Bigelow (fourth defamatory statement).

(12) In the letter, plaintiffs are identified as the “Charged Members,” and Garces states therein that “one of the Charged Members said: ‘I will f_____ kill you too.’”

(13) Riordan testified during his deposition that he “potentially” lost at least \$1,000,000 in lost profits as a result of the defamatory statements.

(14) Riordan testified that it was difficult to calculate future lost profits.

(15) Riordan has continued to work within Local 3369 since March 2017.

(16) Riordan was an employee-representative in two union trials in 2017 and 2018.

(17) Riordan was appointed to a scholarship committee in 2018.

(18) Riordan was an election auditor in December 2017.

(19) Bigelow, an attorney, has not been an arbitration advocate since 2009.

(20) On October 27, 2017, Riordan and Bigelow visited the Local’s offices in Flushing, NY to review its finances.

(21) Seven people attended the October 27 meeting, including plaintiffs and Garces.

(22) Garces sat at the head of the table, with attorney Cannavo to his left, Riordan to his right, and Bigelow to Riordan’s right.

(23) A few hours into the meeting, Bigelow asked Garces how much money was in the Local’s bank account.

- (24) An incident between Bigelow and Garces occurred.
- (25) The incident lasted seconds.
- (26) There was no physical contact between Garces and either Riordan or Bigelow.
- (27) The meeting ended shortly after the incident.
- (28) Garces, who admitted that he had lost his temper, later apologized.

It is also undisputed that AFGE is a national union representing federal employees, while Local represents SSA field office employees in and around New York City. Garces is a current SSA employee and was Local's president from December 2016 to December 2017; the current president is Edwin Osorio. Plaintiffs are Local members and retired SSA employees.

B. Assault claim

1. Contentions

a. Garces (NYSCEF 217)

Garces contends that Bigelow's assault claim must be dismissed absent any dispute that Garces never touched him. Instead, Garces observes that Bigelow alleges only that he made a profane statement to Bigelow, rose from his chair, ran to the seated Bigelow, stood within a few inches of his face, and uttered another profane statement. He asserts that threats, without an accompanying menacing gesture, do not constitute assault as a matter of law.

b. Plaintiffs (NYSCEF 281)

According to plaintiffs, a cause of action for assault does not require actual physical contact, but the instilling of only fear of it, and they maintain that Garces, angry when he approached Bigelow and drew very close to his face, warranted Bigelow's fear that he would physically attack him.

c. Reply (NYSCEF 285)

Garces denies that his conduct may be construed as an assault on Bigelow, as threatening a person and invading their personal space does not constitute an assault as a matter of law.

2. Analysis

An assault is the intentional placing of another person in apprehension of imminent harmful or offensive contact. A defendant is liable for assault when [he or she] intentionally causes another person to become concerned that the defendant is about to cause a harmful or offensive bodily contact. In order to commit an assault, the defendant must have the real or apparent ability to bring about that harmful or offensive bodily contact. Ordinarily, threatening words without some action are not enough to constitute an assault. There must be some menacing act or gesture that causes the plaintiff to believe that a harmful or offensive bodily contact is about to occur. It is not necessary that there be any contact.

(NY Pattern Jury Instructions [PJI] 3:2 [2022]).

As the law requires no physical touching for an assault, that Garces never touched Bigelow is irrelevant. Rather, the issue is whether Garces menaced Bigelow by gesture or act sufficient to cause Bigelow to fear that he was about to be touched offensively. The undisputed circumstances of the interaction between the two warrant the inference that Bigelow reasonably believed that Garces was about to attack him physically and thus, plaintiffs establish that a triable issue of fact exists as to whether Garces assaulted him. (*See e.g., Nicholson v Luce*, 55 AD3d 416 [1st Dept 2008] [triable issues presented as to whether defendant's physical conduct placed plaintiff in imminent apprehension of physical harm]; *Reichle v Mayeri*, 110 AD2d 694 [2d Dept 1985] [summary judgment properly denied as issues of fact remained on assault claim; "physical injury need not be present but only "a grievous affront or threat to the person"]; *see also Berg v Chelsea Hotel Owner, LLC*, 203 AD3d 484 [1st Dept 2022] [plaintiff stated claim for assault as defendant's alleged encroachment upon her while screaming epithet at her constituted type of menacing physical act required to support claim]).).

The circumstances set forth in *Okoli v Paul Hastings LLP* are distinguishable. There, the Court held that “the physical conduct alleged by plaintiff, which amounts to finger pointing and generalized yelling in the context of a heated deposition, is inappropriate behavior, not to be condoned, but, without more, is not the type of menacing conduct that may give rise to a reasonable apprehension of imminent harmful conduct needed to state an actionable claim of assault.” (117 AD3d 539 [1st Dept 2014]). Here, Garces angrily approached within inches of Bigelow’s face, screaming profanity at him.

C. Defamation claims

1. Contentions

a. Garces (NYSCEF 217)

Garces maintains that plaintiffs fail to demonstrate that they suffered special damages as a result of his allegedly defamatory statements, absent proof that they lost money or specific, non-conclusory future opportunities to earn money. Riordan’s allegation that he lost \$1 million in future earnings is neither detailed nor supported, and he cannot establish that he will be unable to earn money in the future as it is undisputed that he has served in several roles within the union since the alleged incidents between him and Garces.

As for Bigelow, he has not applied for any union legal positions since 2015, two years before the alleged incidents, and he specifies no lost opportunities resulting from the alleged defamation.

Nor can plaintiffs establish that the statements are defamatory *per se*, for which special damages are not required. According to plaintiffs, they are alleged to have been defamed by Garces’s statements that they (1) threatened to kill him, (2) threatened to harm him on federal property, (3) endangered the health and safety of the meeting participants, and (4) engaged in

extremely violent behavior.

Garces denies that his statements imply that plaintiffs committed serious crimes and/or that they tend to injure them in their business or profession. Threatening to kill or harm another person constitutes harassment which, under New York law, is not a serious crime; nor do the other statements implicate serious crimes.

Garces also contends that the statements do not tend to injure plaintiffs in their profession, as they do not reflect on their performance of their profession and are not incompatible with the proper conduct of their business.

b. Plaintiffs (NYSCEF 281)

Plaintiffs claim that, having accused them of committing indictable federal felonies and misdemeanors, Garces thereby defamed them *per se*, and observe that Garces accused them of threatening to kill him, a federal employee, on federal property, and disseminated his false statements to union members, i.e., other federal employees. They claim that their reputations as respected union officials and/or legal professionals were harmed by defendants' statements, and that accusing a lawyer of assault and harassment would tend to reflect on the lawyer's moral character and fitness. Moreover, they maintain, accusing a union official of the same conduct toward the union president at a union meeting would tend to affect his profession.

In any event, plaintiffs represent that they can demonstrate at trial that they sustained economic loss due to Garces's defamation of them, such as the loss of the value of the dues they paid to the union which resulted from being barred from union meetings from March to August 2017. Moreover, they will incur the cost of implementing a public relations campaign, at no less than \$8,000 annually, claiming that such a campaign is necessary should they run for union office in the future. They also state, without support, that they have suffered demonstrable

economic damages due to Garces's alleged defamation in the amount of \$10,006 each.

3. Reply (NYSCEF 285)

Garces denies that plaintiffs sustained special damages, absent proof that they missed any union meetings. In any event, Garces asserts that plaintiffs do not demonstrate that this loss was caused by the alleged defamation. He maintains that their claim for the costs of a public relations campaign are not only conclusory and non-specific, but they have not paid for one and thus have not sustained damages related thereto.

According to Garces, his statements do not charged plaintiffs with serious crimes, and that even if Garces had accused them of assaulting him, he did not state that they did so in the guise of his status of a federal employee. Rather, he claims that it was clear that the threats were leveled against him during a union meeting while he was engaged in union business.

Nor, Garces argues, do the statements tend to injure plaintiffs in their business or profession, observing that Bigelow has retired from the SSA, has not practiced law in over a decade, and has not applied for any legal positions since he retired. Riordan is similarly retired from the SSA and has not applied for a union position since his retirement. Nor have plaintiffs established that they were denied an opportunity to perform volunteer work for the union, and their allegations of lost opportunities are fatally speculative and conclusory.

In any event, the statements, to be defamatory *per se*, must implicate more than plaintiffs' general character or fitness, and be related to their actual profession, which plaintiffs' alleged threats do not.

2. Analysis

A defamatory statement is "a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-

thinking persons, and to deprive him of their friendly intercourse in society” (*Foster v Churchill*, 87 NY2d 744, 751 [1996] [internal quotation marks and citation omitted]).

A defamatory statement “must either cause special harm or constitute defamation per se.” (*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]). Statements “(i) charging plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman” are defamatory per se. (*Lieberman v Gelstein*, 80 NY2d 429, 435 [1992]). Therefore, to state a cause of action for defamation, the plaintiff must plead “(1) a false statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm, unless the statement is one of the types of publications actionable regardless of harm.” (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014]).

“Special damages consist of the loss of something having economic or pecuniary value, which must flow directly from the injury to reputation caused by the defamation and not from the effects of the defamation.” (*Franklin v Daily Holdings, Inc.*, 135 AD3d 87, 93 [2015] [internal citation omitted]). They “must be fully and accurately stated.” (*Drug Research Corp. v Curtis Publ. Co.*, 7 NY2d 435, 440-441 [1960]). Round figures do not suffice. (*Franklin*, 135 AD3d at 93).

Here, plaintiffs’ allegations of lost opportunities are unsupported and speculative, as is their allegation that they each lost \$10,006. (*See Vigoda v DCA Prods. Plus*, 293 AD2d 265, 266 [1st Dept 2002] [finding allegation of lost future income fatally conjectural in identity and speculative in amount]; *Matherson v Marchello*, 100 AD2d 233, 235 [2d Dept 1984] [claim for loss of business must be itemized]).

Moreover, plaintiffs do not demonstrate any costs incurred for a public relations

campaign or that their alleged loss of voting rights constitutes an economic loss and/or that it flowed directly from the alleged defamation. Garces thus demonstrates that plaintiffs do not demonstrate that they sustained special damages, and plaintiffs fail to raise a triable issue.

Accusing someone of threatening to kill another person does not implicate a serious crime, and thus does not constitute defamation *per se*. (*Lieberman v Gelstein*, 80 NY2d 429 [1992]). Plaintiffs' attempt to reframe Garces's statements as accusing them of committing federal crimes fails, as the statements' context was a union meeting, not SSA or federal business.

Moreover, even had plaintiffs demonstrated that accusing a lawyer of harassment or threats would tend to injure him in his legal profession or a union official of harassment and threats would tend to injure him in his career as a union professional (*but see Lieberman*, 80 NY2d at 436 [accusing defendant landlord of threatening to kill plaintiff did not implicate landlord's business, and thus not defamatory *per se*]), it is undisputed that at the time of the alleged defamation, Bigelow was no longer employed in the legal profession, having retired from the SSA and stopped practicing law for at least 10 years. Riordan had also retired from the SSA and had not applied for union positions since then. Plaintiffs' contentions that they may decide to run for union positions in the future are fatally speculative.

III. PLAINTIFFS' MOTION

While plaintiffs demonstrate that summary dismissal of the assault claim is not warranted, they nevertheless do not establish, *prima facie*, that Garces assaulted Bigelow. Rather, a jury question remains as to whether Garces's conduct placed Bigelow in imminent apprehension of physical contact or harm.

IV. LOCAL'S MOTION

Local filed its motion seven days after the deadline, to which it had stipulated, and thus, it

knew that the deadline fell during the week of Thanksgiving; plaintiffs and Garces timely filed their motions despite the Thanksgiving holiday. Consequently, absent good cause for the late filing, the motion is denied. (CPLR 3212[a]; *Brill v City of New York*, 2 NY3d 648 [2004]).

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Garces’s motion for summary dismissal of the complaint against him (mot. seq. 14) is granted to the extent of dismissing all of plaintiffs’ claims except plaintiff Bigelow’s cause of action against him for assault, and the claims are severed and dismissed; it is further

ORDERED, that plaintiff Bigelow’s motion for partial summary judgment on liability on his fourth cause of action for assault against Garces (mot. seq. 15) is denied; it is further

ORDERED, that defendant Local 3369’s motion for an order summarily dismissing the complaint against it (mot. seq. 16) is denied as untimely; and it is further

ORDERED, that the parties contact the court by joint email to cpaszko@nycourts.gov on or before June 1, 2022 to schedule a settlement conference with Justice Jaffe.

5/5/2022
DATE

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BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE