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SHORT FORM ORDER **COPY**

INDEX No. 14-1966
CAL. No. 15-01239OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 12-1-15
ADJ. DATE 4-8-16
Mot. Seq. # 001 - MG; CASEDISP

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MICHAEL GONGAS,

Plaintiff,

- against -

COMSEWOGUE SCHOOL DISTRICT, and COMSEWOGUE BOARD OF EDUCATION, JOSEPH RELLA, JOHN SWENNING,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendants, dated October 30, 2015, and supporting papers (including Memorandum of Law dated ____); (2) Notice of Cross Motion by the , dated , supporting papers; (3) Affirmation in Opposition by the plaintiff, dated December 29, 2015, and supporting papers; (4) Reply Affirmation by the defendants, dated January 4, 2016, and supporting papers; (5) Other ___ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by defendants Comsewogue School District, Comsewogue Board of Education, Joseph Rella, and John Swenning for summary judgment in their favor is granted.

This is an action to recover for damages allegedly sustained by plaintiff Michael Gongas as a result of oral statements made by defendants Joseph Rella and John Swenning, and Board of Education member Lance Brown on February 4, 2013, at the Comsewogue School District Board of Education meeting in the Comsewogue District Office in Port Jefferson Station, New York. In attendance at the meeting were approximately fifty community members and six of the seven members of the Board of Education. Plaintiff alleges that these statements were defamatory, and resulted in injuries to his business and to his reputation.

According to the pleadings, Rella, Superintendent of the Comsewogue School District, made the following statements at the February 4, 2013 Board of Education meeting: "I received information that one of our parent volunteer coaches had gotten into a physical altercation with one of our parents. I investigated it. I spoke to the parent and the volunteer coach and this was not the first instance on this coach's part. It is the latest of a series of instances that occurred in the last 10 years and based upon that I informed the coach that I would not be recommending him to continue in that volunteer coach status."

According to the pleadings, Swenning, the president of the Board of Education, made defamatory statements in response to questions from the audience as to why plaintiff was not returning as a volunteer assistant coach for the Comsewogue varsity boys' lacrosse team. Swenning stated that "there was a physical altercation on our turf with our students standing next to [plaintiff]," and "it is the 15th incident that has occurred." Swenning also stated that "if [plaintiff] has a physical attraction for crazy people coming after him we don't feel safe having him next to our kids, that's our point" and he was "not going to comment on that but it is our opinion that it is in the best interest of the kids in our community that [plaintiff] not be on the field with them. I have witnessed many of them." Swenning further stated, in regards to allegations against plaintiff, that "when I heard these things it made me sick to tell you the truth." The pleadings also allege that Lance Brown, a member of the Board of Education, stated "it is the physical nature of the incident" and "quite honestly, no this last incident is what is known as the last straw" in response to questions from the audience.

Plaintiff testified that he is the owner of a boys travel lacrosse league, Team Long Island, Inc., and a sporting equipment and apparel business, which includes retail and team sales. Additionally, plaintiff is a board member of various lacrosse organizations and is well-known within the lacrosse community. From 2003 until 2012, plaintiff served as a volunteer assistant coach for the Comsewogue varsity boys' lacrosse team. Before each spring lacrosse season, plaintiff was required to formally apply for the position to the School District's athletic director. If approved and recommended by the athletic director, the principal would then make a recommendation to the superintendent regarding plaintiff's application. The final decision rested with the Board of Education, which would consider the superintendent's recommendation and vote on plaintiff's application.

Plaintiff further testified that in fall of 2012, he was involved in a physical altercation with a Comsewogue School District parent off the Comsewogue premises regarding Team Long Island business. Shortly after, Rella met with plaintiff to discuss the incident and informed plaintiff that he would not be recommending him for a volunteer assistant coach position with the Comsewogue varsity boys' lacrosse team for the upcoming spring 2013 season. Due to Rella's refusal to recommend him as a volunteer assistant coach, plaintiff did not formally apply for the position for the 2013 season. According to plaintiff, news of his not returning as an assistant coach for the upcoming lacrosse season spread throughout the Comsewogue community, and the Comsewogue Youth Lacrosse organization organized to show their support for plaintiff's return to the coaching staff at the subject Board of Education meeting where the allegedly defamatory statements were made.

Defendants now move for summary judgment in their favor, arguing that the alleged defamatory statements were true, opinion, or protected by a qualified privilege. Defendants submit, in support, copies of the pleadings; demand and interrogatory responses; the affidavits of Joseph Rella and John

Swenning; the transcript of plaintiff's 50-h hearing; the transcripts of the deposition testimony of plaintiff, Joseph Rella, and John Swenning; and the recording and transcript of the February 4, 2013 Comsewogue Board of Education meeting. In opposition, plaintiff argues that the statements at issue were false and not protected speech. Plaintiff submits, in opposition, his affidavit.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The court's function on a motion for summary judgment is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, so the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

The making of a false statement which tends to expose a person to public contempt, ridicule, aversion, or disgrace constitutes defamation (***Thomas H. v Paul B.***, 18 NY3d 580, 584, 942 NYS2d 437 [2012]; ***Foster v Churchill***, 87 NY2d 744, 751, 642 NYS2d 583 [1996]). A plaintiff seeking to recover damages for defamation must prove that the defendant's publication of a false statement to a third party, without privilege or authorization, either caused special harm or constituted defamation per se (*see* ***Liberman v Gelstein***, 80 NY2d 429, 590 NYS2d 857 [1992]; ***Martino v HV News, LLC***, 114 AD3d 913, 980 NYS2d 844 [2d Dept 2014]; ***Epifani v Johnson***, 65 AD3d 224, 882 NYS2d 234 [2d Dept 2009]). In addition, a plaintiff must show, as a matter of law, that the false statement is "of and concerning" him or her, where readers or listeners would be able to discern his or her identity from the publication (*see* ***Springer v Viking Press***, 60 NY2d 916, 917, 470 NYS2d 579 [1983]; ***Carlucci v Poughkeepsie Newspapers, Inc.***, 57 NY2d 883, 456 NYS2d 448 [1982]; ***Salvatore v Kumar***, 45 AD3d 560, 845 NYS2d 384 [2d Dept 2007]). "Words 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" (***Dillon v City of New York***, 291 AD2d 34, 38, 704 NYS2d 1 [1st Dept 1999]; *see* ***Aronson v Wiersma***, 65 NY2d 592, 493 NYS2d 1006 [1985]). "Loose, figurative or hyperbolic statements, even if deprecating the plaintiff, are not actionable" (***Dillon v City of New York***, *supra*, at 38; *see* ***Gross v New York Times Co.***, 82 NY2d 146, 603 NYS2d 813 [1993]).

The per se categories of defamation consist of the following statements: (1) the plaintiff committed a crime; (2) the statement tends to injure the plaintiff in his or her trade, business, or profession; and (3) the plaintiff has contracted a loathsome disease among others (*see* ***Matherson v Marchello***, 100 AD2d 233, 473 NYS2d 152 [2d Dept 1984]). When the defamatory statement falls into

one of these categories, "the law presumes damage to the slandered individual's reputation so that the cause is actionable without proof of special damages" (***Gatz v Otis Ford***, 274 AD2d 449, 450, 711 NYS2d 467 [2d Dept 2000]; ***60 Minute Man v Kossman,*** 161 AD2d 574, 575, 555 NYS2d 152 [2d Dept 1990]). In cases where the speech does not fall into one of the categories of defamation per se, the plaintiff must prove special harm, such as pecuniary or economic loss (*see* ***Liberman v Gelstein***, *supra*; ***Epifani v Johnson***, *supra*; ***Rufeh v Schwartz***, 50 AD3d 1002, 858 NYS2d 194 [2d Dept 2008]).

A qualified privilege provides immunity for speech made by a person in the performance of a public or private duty when reasonably made for a proper purpose without malice (***Toker v Pollak***, 44 NY2d 211, 405 NYS2d 1 [1978]; ***Skukuls v State***, 42 NY2d 272, 397 NYS2d 740 [1977]). A qualified privilege arises when a person makes a good faith, bona fide communication upon a subject in which he or she has an interest, or a legal, moral, or societal interest to speak, and the communication is made to a person with a corresponding interest (*see* ***Skukuls v State***, *supra*). The underlying rationale of this common interest privilege is that, so long as the privilege is not abused, the flow of information between persons sharing a common interest should not be impeded (***Grier v Johnson***, 295 AD2d 888, 686 NYS2d 535 [3d Dept 1999]). However, the shield provided by a qualified privilege is dissolved if a plaintiff demonstrates that the defendant spoke with malice (*see* ***Skukuls v State***, *supra*; ***Liberman v Gelstein***, *supra*). If the defendant made the statements in furtherance of an interest protected by the privilege, it does not matter if the defendant may have despised the plaintiff (*see* ***Liberman v Gelstein***, *supra*).

Defendants made a prima facie case of entitlement to summary judgment in their favor by showing that the statements were protected by a qualified privilege (*see* ***Toker v Pollak***, *supra*; ***Skukuls v State***, *supra*). The statements made by Rella, Swenning, and Brown were made in their official capacities as Superintendent and Board of Education members, respectively, and the members of the Comsewogue School District community who heard the statements had corresponding interests in the subject matter of plaintiff's status at volunteer assistant coach (*see* ***Liberman v Gelstein***, *supra*; ***Toker v Pollak***, *supra*; ***Skukuls v State***, *supra*).

In opposition, plaintiff has failed to raise a triable issue of fact. Plaintiff argues that a qualified privilege did not exist, because some meeting attendees may not have had students in the school and may be been attending solely as taxpayers. However, parties in opposition to a motion for summary judgment must provide "proof and present evidentiary facts sufficient to raise a genuine triable issue of fact," as mere conclusory assertions, entirely lacking evidentiary facts, are "insufficient for this purpose, as is reliance upon surmise, conjecture, or speculation" (***Morgan v New York Tel.***, 220 AD2d 728, 729, 633 NYS2d 319 [2d Dept 1995]). Plaintiff also argues that even if a qualified privilege existed, a triable issue exists as to whether defendants made the statements maliciously. Plaintiff testified that before the meeting in question, he specifically made a request to various Comsewogue School District employees and members of the Board of Education, including Brown and Francesca Bladder, that they not discuss him at the meeting. However, plaintiff's conclusory allegations that the statements were maliciously motivated, because the Board disregarded his request and Rella began the meeting by discussing plaintiff's status as a volunteer assistant coach are insufficient to overcome defendants' qualified privilege (*see* ***Hollander v Cayton***, 145 AD2d 605, 536 NYS2d 790 [2d Dept 1988]). Additionally, contrary to plaintiff's contentions that defendants maliciously intended to hurt him, all of the statements,

when considered in their entirety and within the context of the events surrounding the meeting, reveal defendants' principal concern for the safety and well-being of the community, and fail to establish defendants' desire to injure the plaintiff (*see* ***Gross v New York Times Co.***, *supra*; ***Liberman v Gelstein***, *supra*; ***Stoup v Nazzaro***, 91 AD3d 1367, 937 NYS2d 794 [4th Dept 2012]; ***Garson v Hendlin***, 141 AD2d 55, 532 NYS2d 776 [2d Dept 1988]). Rella's and Swenning's affirmations state that at the subject meeting, the Board "praised [plaintiff's] coaching and professional ability, stating that we appreciate and are grateful for the tremendous work he has done." Furthermore, Brown's statement that the reasons for not retaining plaintiff as a volunteer coach were "purely about the safety of the children," further demonstrates the Board's intentions in their discussion of plaintiff.

Finally, plaintiff argues that he satisfies the second element of slander per se, because the statements injured him in his trade, business, and profession as the owner of a youth lacrosse league, a local sporting goods business, and as a board member of the Suffolk County Police Athletic League. However, plaintiff failed to show that the statements "impugns the basic integrity or creditworthiness of [his] business" (***Rider & Finn Inc. v Seaboard Sur. Co.***, 52 NY2d 663, 670, 439 NYS2d 858 [1981]; *see* ***John Langenbacher Co., Inc. v Tolksdorf***, 199 AD2d 64, 605 NYS2d 34 [1st Dept 1993]). The statements, at worst, reflect generally upon plaintiff's character or qualities, and do not relate to his business as the owner of a lacrosse league or a sporting goods business *(see* ***Rufeh v Schwartz***, 50 AD3d 1002, 858 NYS2d 194 [2d Dept 2008]; ***Warlock Enterprises v City Center Associates***, 204 AD2d 438, 611 NYS2d 651 [2d Dept 1994]). Additionally, statements are not slanderous per se "if reference to extrinsic facts is necessary to give them a defamatory import" (***Aronson v Wiersma***, *supra*, at 595).

Accordingly, defendants' motion for summary judgment in their favor is granted.

Dated: January 30, 2017

PETER H. MAYER, J.S.C.