

**Higgins v Goyer**

2017 NY Slip Op 33017(U)

January 26, 2017

Supreme Court, Rensselaer County

Docket Number: 253534

Judge: Patrick J. McGrath

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At an IAS Term of the Supreme Court, held in and for the County of Rensselaer, in the City of Troy, New York, on the 18<sup>th</sup> day of November 2016

PRESENT: HON. PATRICK J. McGRATH  
Justice of the Supreme Court

SUPREME COURT STATE OF NEW YORK  
COUNTY OF RENSSELAER

FRANCIS M. HIGGINS,  
Plaintiff,

-against-

DECISION AND ORDER  
INDEX NO. 253534

CATHERINE M. GOYER, MICHAEL CRANDALL,  
RICHARD UNGARO and TOWN OF GRAFTON,

Defendants.

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County Clerks Office  
Feb 01, 2017 10:28A  
Rensselaer County  
Frank J Herola

APPEARANCES: MILLER, MANNIX, SCHACHNER & HAFNER, LLC  
For the Plaintiff

MURPHY, BURNS, BARBER & MURPHY  
For the Defendants Goyer, Crandall & Ungaro

McGRATH, PATRICK J., J.S.C.

Defendants Catherine M. Goyer, Michael Crandall, and Richard Ungaro move to dismiss this action for malicious prosecution and defamation for failure to state a cause of action. CPLR 3211(a)(7). Plaintiff opposes this motion, and defendant submitted a reply.

This action results from an workplace altercation on or about February 9, 2015 between Plaintiff and Defendant Goyer where the Complaint alleges that Defendant Goyer "forced her way into [Plaintiff's office]...despite his instructions to her not to enter, then retreated and stood in the doorway, thereby preventing him from closing the door." Defendant Goyer's Workplace Violence Incident Report, filed with the Town of Grafton, indicates that Plaintiff "put his arm up to block" Goyer from entering the room and reached to grab sheet protectors out of her hand, "all the time screaming 'get out, you can't come in here.'" Defendants Crandall and Ungaro are both Town Councilman for the Town of Grafton who witnessed the incident. Plaintiff was charged with Harassment in the Second Degree in violation of New York State Penal law §240.26. Defendants Goyer, Crandall, and Ungaro testified at Plaintiffs trial. On or about December 9, 2015, defendant was found not guilty.

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Plaintiff's complaint alleges five causes of action: (i) malicious prosecution against Defendant Goyer, (ii) malicious prosecution against Defendants Crandall and Ungaro, (iii) malicious prosecution against Defendant Town of Grafton, (iv) defamation against all defendants and (v) a hostile work environment claim against the Defendant Town of Grafton. Defendants Goyer, Crandall, and Ungaro move to dismiss the complaint for failure to state a claim as to the First, Second and Fourth causes of action against them and for sanctions pursuant to CPLR §8303-a and 22 NYCRR 103-1(c).

Plaintiff has withdrawn portions of the First, Second and Fourth causes of action related to Defendants' Goyer, Crandall, and Ungaro's testimony at trial based on the "absolute immunity with respect to any claim based on the witness' testimony." Rehberg v. Paulk, 566 US 356 (2012). The remaining causes of action relate to the alleged defamatory nature of Defendant Goyer's statements to police and unnamed third parties, as well as Plaintiff's claim that Defendants Goyer, Crandall and Ungaro conspired to commit malicious prosecution against Plaintiff.

#### **Failure to State a Cause of Action**

It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference. See Nonnon v. City of New York, 9 NY3d 825 (2007); Zumpano v. Quinn, 6 NY3d 666 (2006); Amav Indus., Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner, 96 NY2d 300, 303 (2001); Leon v. Martinez, 84 NY2d 83 (1994); Kempf v. Magida, 37 AD3d 763 (2d Dept. 2007); Gallagher, Kucker & Bruh, 34AD3d 419, 419 (2d Dept. 2006). The focus in a motion to dismiss the complaint for failure to state a cause of action, is whether or not a plaintiff has a cause of action, and not the merits of the claims. Stukuls v. State of New York, 42 NY2d 272 (1977). The Court may consider affidavits submitted by plaintiff and such "affidavits may be used freely to preserve in artfully pleaded, but potentially meritorious, claims." Rovello v. Orofino Realty Co., Inc., 40 NY2d 633 (1976); see Cron v. Hargro Fabrics, Inc., 91 NY2d362 (1998). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." Gershon v. Goldberg, 30 AD3d 372 (2d Dept. 2006); see Guggenheimer v. Ginzburg, 43 NY2d 268, 275 (1977); Gaidon v. Guardian Life Ins. Co. of America, 94 NY2d 330 (1999); Operative Cake Corp. v. Nassour, 21 AD3d 1020 (2d Dept. 2005). Although "any deficiencies in the complaint may be amplified by supplemental pleadings and other evidence" (AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co., 5 NY3d 582, 591 (2005)), "bare legal conclusions as well as factual claims that are flatly contradicted by the record are not presumed to be true on a motion to dismiss for failure to state a cause of action, and are not entitled to any such consideration." Mayer v. Sanders, 264 AD2d 827, 828 (2d Dept. 1999); see Morone v. Morone, 50 NY2d 481 (1980). "Where, the plaintiff's submissions conclusively establish that there is no cause of action, the cause of action should be dismissed." Rovello v. Orofino RealtyCo., 40 NY2d 633, 636 (1976).

### Malicious Prosecution

In the First Cause of Action for Malicious Prosecution, Plaintiff alleges that Goyer initiated a criminal action against him "without cause," "motivated by her actual malice towards Plaintiff." The Complaint alleges that on or about February 20, 2015, Defendant Goyer filed "a false and fraudulent Workplace Violence Incident report" that "is false and fraudulent in that Plaintiff's conduct alleged therein did not occur." Second, that on or about February 18, 2016, Defendant Goyer "gave a false written Criminal Information to the New York State Police" that is "false and fraudulent in the Plaintiff's conduct alleged therein did not occur." Third, that on or about February 18, 2016, Defendant Goyer, "gave a false written Supporting Deposition to the New York State Police" that is "false and fraudulent in that Plaintiff's conduct alleged therein did not occur, including, but not limited to, written allegations that Plaintiff made unconsented-to physical contact with her on February 9, 2015." The complaint also makes allegations pertaining to Goyer's trial testimony, which as noted above, have been withdrawn.

In the Second Cause of Action, Plaintiff alleges malicious prosecution against Defendants Crandall and Ungaro claiming they "were co-tortfeasors with Goyer through offering false testimony to the Town of Brunswick Town Court" and that their actions "were motivated by actual malice towards the Plaintiff." As noted above, plaintiff has withdrawn the malicious prosecution allegations pertaining to Crandall and Ungaro's trial testimony.

In an action for malicious prosecution, plaintiff must plead and prove that the defendants, (i) commenced a criminal proceeding against him, (ii) that it was terminated in favor of the [plaintiff], (iii) that it lacked probable cause, and (iv) that the proceeding was brought out of actual malice. Martinex v. City of Schenectady, 97 NY2d 78, 84 (2001); see Broughton v. State of New York, 37 NY2d 451, 457 (1975).

With respect to Defendant Goyer's statements to Trooper Swartz, counsel for Plaintiff argues that Goyer took an "active role" in the prosecution by providing "false and fraudulent" information to the police. As noted above, the mere reporting of a crime to police and giving testimony are insufficient. "As is particularly relevant here, "[i]n order for a civilian complainant to be considered to have initiated a criminal proceeding, 'it must be shown that [the complainant] played an active role in the prosecution, such as giving advice and encouragement or importuning the authorities to act.'" Place v. Ciccotelli, 121 AD3d 1378, 1379 (3d Dept. 2014) citing Barrett v. Watkins, 82 AD3d 1569 (3d Dept. 2011) quoting Viza v. Town of Greece, 94 AD2d 965, 966 (4th Dept. 1983), appeal dismissed 63 NY2d 776 (1985); Krzyzak v. Schaefer, 52 AD3d 979, 980 (3d Dept. 2008) citing DuChateau v. Metro-North Commuter RR Company, 253 AD2d 128, 132 (1st Dept. 1999). Here, the complaint does not allege that Goyer gave advice, encouragement or importuned the authorities to act. The only allegation is that she sought police assistance and furnished information to law enforcement authorities, which falls far short of the "active role" alleged now in the plaintiff's opposition papers. Therefore, Defendants' motion to dismiss the First Cause of Action is granted.

Plaintiff argues that liability extends to Crandall and Ungaro for their roles "as co-tortfeasors" and "with respect to damages caused by the conspiracy to maliciously prosecute [Plaintiff] and to provide perjurious testimony." As noted above, the plaintiff has withdrawn all claims of malicious prosecution concerning all of the defendants' in court testimony. In New York, there is no independent tort of conspiracy. "The actionable wrong lies in the commission of a tortious act, or a legal one by wrongful means, but never upon the agreement to commit the prohibited act standing alone." Hickey v. Travelers Ins. Co., 158 AD2d 112, 118 (2d Dept. 1990) quoting Cuker Indus. v. Crow Constr. Co., 6 AD2d 415, 417 (1st Dept. 1958). Conspiracy requires an over act (*see* 8 NY Jur, Conspiracy § 4). The only acts alleged in the complaint are that Crandall and Ungaro testified against Plaintiff at his criminal trial, which cannot, by itself constitute malicious prosecution, nor a conspiracy to commit malicious prosecution. Therefore, the Second Cause of Action is dismissed.

### **Defamation**

In the Fourth Cause of Action, Plaintiff alleges defamation against all named Defendants claiming that each Defendant "defamed the character of Plaintiff" and that as a result "Plaintiff has suffered special harm" and "has been defamed *per se*." Plaintiff has agreed to withdraw the portions of the Fourth Cause of Action against Goyer, Crandall and Ungaro concerning their testimony at Plaintiff's criminal trial because of a trial witness' "absolute immunity with respect to any claim based on the witness' testimony." Rehberg v. Paulk, *supra*. As the only statements attributed to Crandall and Ungaro were made during their testimony, the Fourth Cause of Action is dismissed as to Crandall and Ungaro.

Plaintiff alleges that Goyer made statements to the "Town, the NYS Police and to third parties which ended up in newspapers" which constitute "false statements which tended to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking person, and which deprived him of their friendly intercourse in society." Plaintiff argues that these statements "are related to the qualifications of [Plaintiff] to perform the duties of Town Supervisor, a position necessarily requiring the public trust," and constitute defamation *per se* as they were injurious to plaintiff's trade, business or profession. Further, that these statements caused him to lose his job as Supervisor, which constitutes special damages.

Counsel for Defendants argues that CPLR 3016(A) requires that in an action for libel or slander, "the particular words complained of shall be set forth in the complaint." A review of the Complaint shows that Plaintiff failed to include specific statements allegedly made by Goyer to third parties, which ended up in newspapers. Therefore, this portion of the claim fails to state a cause of action.

Generally, defamation is not actionable without a showing of special damages, which "contemplate the loss of something having economic or pecuniary value." Matter of Barra v. County of Tompkins, 125 AD3d 1237, 1238 (3d Dept. 2015) quoting Liberman v. Gelstein, 80 NY2d at 434-435. The four classic exceptions to the requirement that plaintiff prove actual damages consist of statements (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. When statements fall within one of these categories, the law presumes that damages will result, and they need not be alleged or proven. Lieberman v. Gelstein, *supra*; Harris v. Hirsh, 228 AD2d 206, 208 (1st Dept. 1996).

The instant complaint alleges, "upon information and belief", that the defamatory statements caused petitioner special damages, specifically, the loss of his position as Supervisor of the Town of Grafton. It is well settled law that special damages must be fully and accurately identified with sufficient particularity to identify actual losses, and that "round figures" or a general allegation of a dollar amount as special damages do not suffice. Talbot v. Johnson Newspaper Corp., 124 AD2d 284, 286 (3d Dept. 1986). Neither the complaint nor the opposing papers plead any amount of special damages.

With respect to plaintiff's claims of defamation *per se*, plaintiff asserts that the statements fall under the "trade, business or profession" exception, which is "limited to defamation of a kind incompatible with the proper conduct of the business, trade, profession or office itself." Lieberman v. Gelstein, *supra*. The Court in Lieberman, *supra*, noted that "[t]he statement must be made with reference to a matter of significance and importance for that purpose, rather than a more general reflection upon the plaintiff's character or qualities." Prosser § 112, at 791. Thus, 'charges against a clergyman of drunkenness and other moral misconduct affect his fitness for the performance of the duties of his profession, although the same charges against a businessman or tradesman do not so affect him' (Restatement § 573, comment c)." In this case, the Court finds that the alleged statements made by Goyer to both the state police and in the Workplace Incident Report incorporated into the complaint, tend to reflect on Plaintiff's "general character" and do not relate specifically to his occupation as Town Supervisor. See Lieberman v. Gelstein, *supra*; Rufeh v. Schwartz, 50 AD3d 1002 (2d Dept. 2008).

To the extent that the statements may be considered slander *per se* under the theory of imputation of a serious crime, "[h]arassment is a relatively minor offense in the New York Penal Law—not even a misdemeanor—and thus the harm to the reputation of a person falsely accused of committing harassment would be correspondingly insubstantial. Hence...the cause of action must nevertheless be dismissed because it is not slanderous *per se* to claim that someone committed harassment." Lieberman v. Gelstein, *supra*.

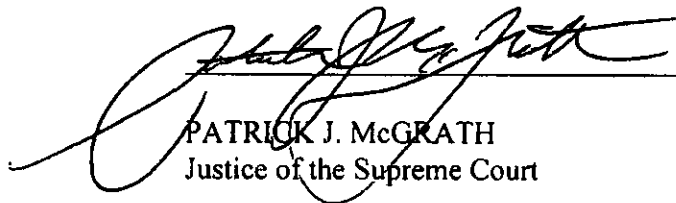
Therefore, in accordance with the foregoing it is hereby

**ORDERED** that the defendant's motion to dismiss the First, Second and Fourth Causes of Action against defendants Catherine M. Goyer, Michael Crandall and Richard Ungaro is granted, and it is further

**ORDERED AND ADJUDGED** that the complaint against defendants Catherine M. Goyer, Michael Crandall and Richard Ungaro is dismissed for failure to state a cause of action.

This shall constitute the Decision and Order of the Court, which is being returned to the attorneys for the plaintiff. All original supporting documentation is being filed with the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule relating to filing, entry, and notice of entry. Plaintiff is directed to file and serve this Order within thirty (30) days of the date of the Decision and Order.

DATED: January 26, 2017  
Troy, New York



PATRICK J. McGRATH  
Justice of the Supreme Court

Papers Considered:

1. Notice of Motion to Dismiss, dated October 14, 2016; Attorney Affidavit, Thomas K. Murphy, Esq., dated October 14, 2016, with annexed Exhibits A-D; Memorandum of Law in Support of Defendant's Goyer, Crandall and Ungaro's Motion to Dismiss, Thomas K. Murphy, Esq., dated October 14, 2016.
2. Affidavit and Memorandum of Law, Thomas W. Peterson, Esq., dated November 11, 2016
3. Attorney Reply Affidavit, Stephen M. Groudine, Esq., dated November 17, 2016.

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