

**Locario v Nieves**

2013 NY Slip Op 30772(U)

March 18, 2013

Supreme Court, New York County

Docket Number: 109699/2010

Judge: Lucy Billings

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: LUCY BILLINGS  
J.S.C.  
Justice

PART 46

Index Number : 109699/2010  
LOCARIO, PENNY  
vs.  
NIEVES, MARIA  
SEQUENCE NUMBER : 001  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for dismiss the complaint  
Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). 1  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that ~~this motion is~~:

*The court denies as moot defendants' motion to dismiss the original complaint having been superseded by defendants' motion to dismiss the amended complaint.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

## FILED

APR 17 2013

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3/18/13

Lucy Billings, J.S.C.  
LUCY BILLINGS  
J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

-----x

PENNY LOCARIO,

Index No. 109699/2010

Plaintiff

- against -

DECISION AND ORDER

MARIA NIEVES and BETH ISRAEL MEDICAL  
CENTER,

Defendants

-----x

LUCY BILLINGS, J.S.C.:

**FILED**

APR 17 2013

NEW YORK  
COUNTY CLERK'S OFFICE

I. BACKGROUND

Plaintiff, an employee of defendant Beth Israel Medical Center, sues defendants for defamation. Plaintiff alleges that her supervisor, defendant Nieves, stated to plaintiff's colleagues that plaintiff was a "snitch" and "not to be trusted." While making these comments, Nieves brandished and read from plaintiff's private journal. Plaintiff alleges that she kept the journal to document events and circumstances at her work, in contemplation of future whistleblowing.

The original complaint alleged retaliation under New York Labor Law § 741 in addition to defamation. The parties stipulated to plaintiff amending her complaint. The amended complaint no longer alleges a claim under Labor Law § 741. Defendants now move to dismiss the amended complaint based on its failure to state a claim. C.P.L.R. § 3211(a)(7). After oral argument and unsuccessful attempts at settlement, the court grants defendants' motion for the reasons explained below.

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## II. APPLICABLE STANDARDS

Upon defendants' motion to dismiss plaintiff's claims pursuant to C.P.L.R. § 3211(a)(7), the court must accept the amended complaint's allegations as true, liberally construe them, and draw all reasonable inferences in plaintiff's favor. Walton v. New York State Dept. of Correctional Services, 13 N.Y.3d 475, 484 (2009); Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 316, 326 (2002); Wadiak v. Pond Management, LLC, 101 A.D.3d 474, 475 (1st Dep't 2012). In short, the court may dismiss a claim based on C.P.L.R. § 3211(a)(7) only if the allegations completely fail to state a claim. Nonnon v. City of New York, 9 N.Y.3d at 827; Harris v. IG Greenpoint Corp., 72 A.D.3d 608, 609 (1st Dep't 2010).

## III. PLAINTIFF WAIVED HER DEFAMATION CLAIM.

Plaintiff's prior claim under Labor Law § 741 precludes her claim for defamation. N.Y. Labor Law §§ 740(7), 741(4); Reddington v. State Is. Univ. Hosp., 11 N.Y.3d 80, 89 (2008); Minoque v. Good Samaritan Hosp., 100 A.D.3d 64, 71 (2d Dep't 2012). Plaintiff may not avoid that preclusion by subsequently amending her complaint to remove the Labor Law § 741 claim. Reddington v. State Is. Univ. Hosp., 11 N.Y.3d at 87-88; Bones v. Prudential Fin., Inc., 54 A.D.3d 589 (1st Dep't 2008). Plaintiff does not allege defamatory comments against her that are distinct from the alleged incidents of retaliation in violation of Labor Law § 741. Bones v. Prudential Fin., Inc., 54 A.D.3d 589; Minoque

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v. Good Samaritan Hosp., 100 A.D.3d at 73; Garner v. China Natural Gas, Inc., 71 A.D.3d 825, 827 (2d Dep't 2010). To the contrary, plaintiff's original complaint alleged the defamatory comments and their isolating effect as part of defendants' retaliation. Aff. of Rory J. McEvoy (July 27, 2012) Ex. 1 ¶¶ 32-33.

IV. PLAINTIFF FAILS TO ALLEGE THE ELEMENTS OF DEFAMATION.

Plaintiff's own allegations admit that "she was preparing a journal to document and report conditions that could jeopardize patient health and safety and forward the report to appropriate governmental and regulatory authorities." McEvoy Aff. Ex. 2 ¶ 47. Nieves's alleged comments, that plaintiff "is a snitch who is not to be trusted because she was compiling records of improper conduct by staff," were therefore true. Id. ¶ 21. As true statements, Nieves's comments do not support a defamation claim. Omansky v. Penning, 101 A.D.3d 514, 515 (1st Dep't 2012). See Brian v. Richardson, 87 N.Y.2d 46, 51 (1995); Konrad v. Brown, 91 A.D.3d 545, 546 (1st Dep't 2012). Insofar as Nieves's comments convey a judgment about plaintiff's character in addition to a true fact about her actions, only facts may be defamatory, not opinions. Mann v. Abel, 10 N.Y.3d 271, 276 (2008).

Because Nieves was conveying an instruction or warning for her subordinate employees to heed, whatever her attitude in conveying these comments, they are protected by a qualified privilege for comments regarding a work related common interest:

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here, that the work unit members be reliable, trustworthy, and loyal to one another. Bulow v. Women in Need, Inc., 89 A.D.3d 525, 526 (1st Dep't 2011); Carone v. Venator Group, Inc., 11 A.D.3d 399, 400 (1st Dep't 2004). Plaintiff does not allege the requisite malice or reckless disregard for the truth by Nieves, to overcome the privilege. Carone v. Venator Group, Inc., 11 A.D.3d at 400.

Plaintiff also fails to allege the required special damages, a specific economic loss, rather than simply hurt feelings or symptoms of stress. Galasso v. Saltzman, 42 A.D.3d 310, 311 (1st Dep't 2007). Plaintiff does not allege that the comments caused her to be denied a promotion or even that anyone who heard the comments held authority over her promotion. Instead, plaintiff alleges that she did not receive a promotion in retaliation for keeping the journal, not because of Nieves's comments. McEvoy Aff. Ex. 2 ¶¶ 36, 38. If Nieves's comments disparaged plaintiff in her profession and therefore constitute slander per se not requiring special damages, such disparagement simply would support Nieves's entitlement, as plaintiff's supervisor, to a qualified privilege to address the comments to plaintiff's coworkers. Bulow v. Women in Need, Inc., 89 A.D.3d at 526. For these reasons, even if plaintiff has not waived her defamation claim, she fails to plead one against the individual defendant.

#### V. CONCLUSION

Because plaintiff fails to plead a claim for defamation against the individual defendant, the court need not reach the

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issue of the employer defendant's vicarious liability. For all the above reasons, on the alternative grounds of waiver and failure to allege the elements of defamation, the court grants defendants' motion to dismiss the amended complaint. C.P.L.R. § 3211(a)(7). In light of the parties' stipulation allowing plaintiff to serve and file the amended complaint and rendering plaintiff's original complaint inoperative, the court denies as moot defendants' motion to dismiss the original complaint.

DATED: March 18, 2013

*Lucy Billings*

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LUCY BILLINGS, J.S.C.

LUCY BILLINGS  
J.S.C.

**FILED**

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