

<b>Cox v Prudential Found., Inc.</b>
2018 NY Slip Op 30035(U)
January 8, 2018
Supreme Court, New York County
Docket Number: 151260/16
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

WILLIAM J. COX, JR.

INDEX NO. 151260/16

- v -

MOT. DATE

MOT. SEQ. NO. 002

PRUDENTIAL FOUNDATION, INC.

The following papers were read on this motion to/for AMEND, COMPEL
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits

In this action, plaintiff seeks to recover for alleged slander per se. Plaintiff now moves for leave to serve an amended complaint, and to compel defendant's further deposition as well as other discovery. Defendant opposes the motion. The court's decision follows.

The following facts are alleged in the original complaint. Plaintiff considers himself an expert in public education policy. Defendant is a charitable foundation which is affiliated with Prudential Financial, Inc. ("Prudential"). In 2013, defendant awarded a grant to the Council of Chief State School Officers ("CCSSO") in "for CSSO and [plaintiff] to support the Commission of Education of the New Jersey Department of Education." In or around August 2014, Sarah Keh, a Program Officer for defendant, stated at a meeting at defendant's headquarters with plaintiff and members of the New Jersey Parent and Teachers Association ("PTA") that defendant "would provide the PTA with a grant of \$750,000 if it would build a campaign to support the "Common Core" standards in New Jersey (the "PTA Grant").

In connection with the PTA Grant, plaintiff claims that Keh introduced the PTA and Plaintiff to a public relations firm called Purpose Campaigns LLC ("Purpose") and used her influence to ensure that Purpose was selected to manage the PTA campaign. Plaintiff alleges that Purpose produced substandard work, and that "Prudential Foundation's insistence, through Keh, that the PTA continue to pay Purpose large amounts of money was senseless and incompetent."

Plaintiff further claims Keh took credit for a coalition he formed while a coalition she had formed floundered. Plaintiff details further allegations between him and Keh which led to the deterioration of their relationship. As a result, plaintiff claims that "Keh has used her position at Prudential Foundation as a platform to give legitimacy to slanderous statements about Plaintiff, thereby causing significant damage to Plaintiffs reputation and business opportunities." Keh falsely advised members of plaintiff's coalition that he had been fired and refused to authorize defendant to pay CCSSO for plaintiff's services.

Dated: 1/8/18

HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER
3. Check if appropriate: [ ] SETTLE ORDER [ ] SUBMIT ORDER [ ] DO NOT POST
[ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

The alleged slander occurred in November of 2015, during a meeting between Melanie Shulz, legislative director of the New Jersey Association of School Administrators, and Dana Egreczky, the Executive Director of the New Jersey Chamber of Commerce Education Foundation. Egreczky allegedly said the following to Shulz:

- a. "According to [Keh] ... '[Plaintiff] took money from the [PTA G]rant and paid himself instead of what the [PTA G]rant was supposed to be used for...'"
- b. "[Plaintiff] spent the entire [PTA G]rant in one year instead of two...'"
- c. "[Plaintiff] mis-spent \$20,000 that almost caused us to take legal action...'"

Plaintiff's sole cause of action is for slander *per se*. In his proposed amended complaint, plaintiff makes a number of new allegations which expound on the original complaint. Plaintiff also now claims that Keh formed an "Inner Circle", including Egreczky, the PTA members and Pia Ayliffe, and instructed them "to publish devastating allegations about Cox to prominent individuals involved in New Jersey's education policy." Plaintiff points to a number of emails from Keh to members of the Inner Circle. On May 3, 2015, "Keh wrote that if Cox's termination did not go smoothly, their "outreach can be done over the phone or in person" (emphasis removed). Plaintiff also alleges that "after Pat Wright, Executive Director of the New Jersey Principals and Supervisors Association ("NJPSA"), objected to Cox's termination, Keh sent an email to Ayliffe stating that "I think it might be best to ask Dana [Egreczky] to have an off the record conversation with Pat [Wright] to explain some of [Cox's] transgressions" (emphasis removed).

In an email from Keh to Egreczky and Ayliffe on May 13, 2015, specifically, Keh sent an email to Egreczky and Ayliffe on May 13, 2015, Keh told Egreczky to speak with David Hespe, New Jersey's Commissioner of Education, and say the following about Cox: "Hespe doesn't need to know all the details on how we're unhappy with the CCSSO grant but he should know that the grant was supposed to last through 2016 and Bill [Cox] burned through \$600K in 2 years plus an additional \$900K in support of the coalition in 5 months." Plaintiff maintains that Keh's statements were completely false and made "in a conscious and intentional effort to ruin plaintiff's reputation and destroy him financially because of Keh's spite and ill will."

In addition to the original cause of action for slander *per se*, plaintiff now seeks to assert two more claims: libel *per se* and tortious interference with business expectancy. Leave to amend a pleading should be freely given in the absence of prejudice or surprise to the non-moving party (*Fahey v. Ontario County*, 44 NY2d 934 [1978]; see also *Seda v. New York City Housing Authority*, 181 AD2d 469 [1st Dept 1992]). The opponent of a motion to amend bears the burden of demonstrating prejudice, which defendant has failed to do here (*Seda, supra* at 470). Defendant's arguments about the motion being late or that discovery in this action is complete is unavailing. As plaintiff correctly points out, this case has occasioned delays beyond either party's control. Otherwise, plaintiff's new claims are reasonably related to the original claims, and no surprise to defendant can possibly exist on this record.

Defendant argues at length about the merits of plaintiff's claims, but this is not a motion to dismiss and/or for summary judgment. To the extent that defendant contends that plaintiff's claims are patently meritless, the court rejects that argument. Accordingly, the motion seeking leave to amend the complaint is granted.

The court now turns to the discovery-related aspects of the motion. Plaintiff seeks an order compelling defendant to produce Lata Reddy for deposition, compelling defendant to produce documents pursuant to his Second Request for the Production of Documents and Subpoena *Duces Tecum* served on Keh. CPLR § 3101(a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the

controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v. Crowell–Collier Publ. Co.*, 21 NY2d 403 [1968] [internal quotation marks omitted]). While unlimited discovery is not warranted, a party is entitled to obtain information that is relevant to a claim or defense (see i.e. *Yoshida v. Hsueh-Chih Chin*, 111 AD3d 704 [2d Dept 2013]).

At the outset, the court rejects defendant's procedural arguments in its discretion, given the fact that this case has languished on the court's prior calendar and in light of the court's permission for plaintiff to make the instant motion.

The court will first consider plaintiff's request for a further deposition. Defendant previously produced Keh for an EBT. Lata Reddy is Keh's direct supervisor, and plaintiff claims that "Reddy has relevant knowledge concerning Keh's motive for defaming Cox and otherwise ruining him publicly." Specifically, plaintiff wants to question Reddy "about the material differences in what Keh told her, as opposed to the defamatory statement she was publishing to third parties, with the intention they be spread further." Plaintiff further wants to ask Reddy about Keh's relationship with Prudential, and the propriety of Keh's actions generally.

The court finds that plaintiff has established that he is entitled to a further deposition of defendant, and specifically of Reddy. On this record, there is a substantial likelihood that the sought-after testimony will lead to material and necessary information in addition to the testimony Keh has already provided (*cf. Abreu ex rel. Quiroz v. Deb-bie Realty Associates, LLC*, 44 AD3d 415 [1st Dept 2007]). Contrary to defendant's arguments, this second deposition is not overly burdensome, and given the nature of the allegations, is otherwise warranted on this record.

Turning to the document demands, the court granted plaintiff permission to clarify the allegedly outstanding demands in a surreply, with defendant having an opportunity to further reply. Plaintiff claims that Request Nos. 5 and 15, which seek documents relating to Keh's testimony that the PTA Grant had sufficient funds to retain a coalition manager and assistant, are outstanding.

#### Request No. 5 sought

All documents and communications concerning the accuracy of Keh's testimony that there were sufficient monies with the Achieve and NJPTA grant monies to retain Wright, Pia, and hire a full-time manager for any coalition concerning education in New Jersey as to which Keh has had any affiliation whatsoever. (See the Transcript of Keh's May 19, 2017 deposition at 78-79).

#### Defendant's response to No. 5 was:

Defendant objects to this untimely Request to the extent it seeks documents that are not within Defendant's possession, custody, or control. Defendant has already produced documents responsive to this Request in response to Request Nos. 1, 2, 3, and 5 of Plaintiffs First Set of Requests.

The court cannot order defendant to produce that which does not exist or is not in its possession. Plaintiff is, however, entitled to an affidavit regarding the search that was conducted for same and attesting to its nonexistence.

#### Request No. 15 sought:

All documents and communications concerning (a) any contracts or agreements for Wright to perform services relating to any grant or grants provided by Prudential, whether for any coalition concerning education in New Jersey, or otherwise,

and (b) any payments or other economic benefit Wright received from any grant or grants provided by Prudential.

Plaintiff claims that Wright was the coalition manager. The court agrees with defendant that this request is overbroad, and plaintiff has otherwise failed to establish that it will lead to material and relevant information regarding his claims. Therefore, plaintiff's motion to compel a response to this item is denied.

Plaintiff claims that Request No.6 is outstanding. This demand seeks documents concerning to Defendant's email retention. Plaintiff claims that "[t]he policy is relevant to whether Keh's use of email violated it. e.g.by sending work emails to her personal email account and directly emailing grantee's vendors." The court denies the motion to compel defendant's response to this demand, since whether Keh violated an email retention policy has no bearing on plaintiff's claims.

Plaintiff seeks a response to Request No. 14, which seeks contracts and evidence of payments to Ayliffe. Plaintiff alleges that Keh offered Pia continued employment after Cox's grant funds ran out to co-opt her into assisting Defendant in undermining Plaintiff. Defendant objected to the demand as overly broad, burdensome and irrelevant. The court disagrees, insofar as the information pertains to Keh's inclusion of Ayliffe in the Inner Circle. Defendant is therefore compelled to respond to Request No. 14.

Plaintiff seeks a response to Request No. 16, which seeks communications between Keh and Reddy, Shane Harris, or anyone else at Prudential about Wright and Ayliffe. Plaintiff next seeks a response to Request Nos. 20 and 21, which seek documents concerning brochures for or concerning any coalition and written pledges with any relation to education in New Jersey regarding which Keh has had any involvement with. Finally, in Request No. 25, plaintiff seeks "[a]ll documents or communications sufficient to show other grants that Keh has claimed were financially mismanaged but as to which Cox had no involvement." The court again agrees with defendant that these requests are overbroad, and plaintiff has otherwise failed to establish that it will lead to material and relevant information regarding his claims. Accordingly, the motion to compel responses to these demands is denied.

Plaintiff seeks production of an affidavit by Schulz which defendant has in its possession. Defendant provided them in its answering papers, therefore, this request is moot.

Finally, plaintiff seeks "additional relevant documents known to be in [Keh's] possession based upon her deposition testimony." Specifically, plaintiff seeks "All documents and communications contained in [Keh's] personal email account ... or any other personal email accounts, which concern [plaintiff] or any education related collation with respect to which [Keh] has had any involvement whatsoever." Defendant responded as follows: "Keh objects to this Request as being vague, overbroad, and unduly burdensome, and as seeking documents that have no temporal or logical nexus to Plaintiff's sole claim of slander..." Keh further states, in her affidavit, that whatever responsive emails have already been produced, because whatever responsive emails in her personal account are also in her work account. Plaintiff, on surreply, contends that "at least one responsive document was received in Keh's personal email, but never produced. An actual search is plainly required."

Keh admits that relevant and responsive emails exist in her personal account, but contends that she does not need to produce them again because they have already been provided. This is true. However, Keh is hereby directed to produce any emails responsive to the subpoena which have not otherwise been produced. If the subject documents have already been provided, and/or do not exist, plaintiff is entitled to an affidavit attesting to that fact and concerning the search conducted for same.

## CONCLUSION

In accordance herewith, it is hereby

**ORDERED** that plaintiff's motion is granted to the following extent: [1] plaintiff's proposed amended complaint in the form annexed to his motion as exhibit "6" is deemed served and filed; [2] defendant is directed to provide an affidavit regarding the search that was conducted for documents responsive to Request No. 5 and attesting to their nonexistence; [3] defendant is directed to respond to Request No. 14; and [4] defendant is directed to provide an affidavit attesting to the nonexistence of documents responsive to the Subpoena Duces Tecum served upon Keh which have not otherwise been produced and concerning the search conducted for same; and it is further

**ORDERED** that the motion is otherwise denied; and it is further

**ORDERED** that defendant is directed to serve and file an answer within 20 days from the date of service of this order with notice of entry; and it is further

**ORDERED** that the parties are directed to appear for a status conference on February 6, 2018 at 9:30am in Part 8, 80 Centre Street, Room 278; and it is further

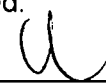
**ORDERED** that plaintiff's time to file note of issue is extended to March 6, 2018.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated:

1/8/18  
New York, New York

So Ordered:

  
Hon. Lynn R. Kotler, J.S.C.