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SHORT FORM ORDER

INDEX No. 09-40360
CAL. No. 17-00313OT

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 5-26-17
ADJ. DATE 6-16-17
Mot. Seq. #004 - MotD; CASEDISP

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FRANK J. VETRO,

Plaintiff,

- against -

THE SUFFOLK COUNTY DISTRICT ATTORNEY'S OFFICE, CHIEF PROSECUTOR THOMAS SPOTA, PROSECUTOR/SUPERVISOR CATHERAN LOEFFLER, ASSISTANT DISTRICT ATTORNEY ADINA WEIDENBAUM, ASSISTANT DISTRICT ATTORNEY KATHLEEN KEARON, ASSISTANT DISTRICT ATTORNEY MICHAEL MANNING, DISTRICT ATTORNEY SPOKESMAN ROBERT CLIFFORD, EACH RESPONDENT NAMES HEREIN IN THEIR OFFICIAL AND INDIVIDUAL CAPACITIES, " JOHN DOES" and "JANE DOES" being those persons unknown to Claimant each in their official and individual capacities,

Defendants.

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Plaintiff Pro Se
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Upon the following papers numbered 1 to 35 read on this motion for summary judgment ; Notice of Motion and supporting papers 1 - 19 ; Answering Affidavits and supporting papers 20 - 35 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants for summary judgment dismissing the complaint against them is granted as set forth herein, and is otherwise denied.

This action was commenced by pro se plaintiff Frank J. Vetro to recover damages for the alleged acts of defendants attendant to plaintiff's arrest on February 8, 2006, for multiple counts of aggravated

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harassment in the second degree. Plaintiff asserts various causes of action as against the instant defendants, including negligence, breach of duty, fraud, malicious prosecution, and defamation. The various allegations can be distilled down to three primary grievances: (1) that the Suffolk County District Attorney and the named individual assistant district attorneys prosecuted him for criminal charges without having performed a thorough investigation; (2) that defendants unjustifiably declined to prosecute one or more of plaintiff's accusers for obtaining his telephone records without permission; and (3) that employees of the Suffolk County District Attorney's Office made defamatory remarks to news media regarding his criminal case, which grossly exaggerated the magnitude of the charges against him. Specifically, plaintiff alleges defendants Cathleen Loeffler and Robert Clifford each defamed him by stating, to the media, that one of plaintiff's "victims was one of his former students," which has severely curtailed plaintiff's ability to obtain employment in the education field.

Initially, pursuant to County Law § 54, the action against Suffolk County District Attorney Thomas Spota, individually, will be deemed to be an action against Suffolk County. Further, the Suffolk County Attorney's instant motion mistakenly addresses the Suffolk County Police Department defendants named in a related action filed by plaintiff under index No. 09-40361. As the two actions were joined for the purposes of discovery and trial only, the Court will address only the claims asserted in the instant action. Accordingly, the County Attorney's application for summary judgment in favor of defendants in the related action is denied without prejudice to renewal in such action within the 120-day statutory period following the filing of the note of issue in that action.

Defendants now move for summary judgment in their favor, arguing that plaintiff's claims should be limited to those asserted in his notices of claim; that the Suffolk County District Attorney's Office has absolute immunity arising from prosecution of criminal defendants; that defendants possess a qualified privilege; that probable cause existed at the time of plaintiff's arrest; that plaintiff has failed to plead his claims for official misconduct; and that conspiracy is not a recognized cause of action. In support of their motion, defendants submit, among other things, copies of the pleadings, a transcript of plaintiff's General Municipal Law § 50-h hearing testimony, a transcript of Detective Wayne Heter's deposition testimony, copies of plaintiff's arrest paperwork, a transcript of plaintiff's plea allocution, and multiple supporting depositions of complainants in plaintiff's criminal proceeding.

It is undisputed that following plaintiff's arrest on February 8, 2006, he was held at the Suffolk County Police Department's Seventh Precinct overnight, and arraigned the next day. Each of the criminal complaints filed alleged plaintiff placed harassing phone calls to various complainants. The complainants each obtained temporary orders of protection in his or her favor. Plaintiff was arrested a second time, on June 1, 2006, and charged with criminal contempt in the second degree, for allegedly violating one of those orders of protection. On March 26, 2008, plaintiff pleaded guilty to two counts of aggravated harassment in the second degree, and was placed on interim probation for a period of one year. Upon his successful completion of interim probation on March 26, 2009, plaintiff was permitted to withdraw his previously-entered pleas of guilty and enter pleas of guilty to two counts of the violation of harassment in the second degree, in their stead. Plaintiff was fined and, as a part of the plea agreement, he waived the sealing of the record of each conviction. Pleas to violation-level offences ordinarily are sealed by the court pursuant to Criminal Procedure Law § 160.55.

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (***Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP***, 26 NY3d 40, 19 NYS3d 488 [2015]; ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (***Nomura***, *supra*; *see also* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (***Daliendo v Johnson***, 147 AD2d 312, 543 NYS2d 987 [2d Dept 1989]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (***Nomura***, *supra*; *see also* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

The existence of probable cause constitutes a complete defense to causes of action alleging false arrest, false imprisonment, and malicious prosecution (*see* ***Sinclair v City of New York***, 153 AD3d 877, 878, 60 NYS3d 348 [2d Dept 2017]). Probable cause "does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a reasonable belief that an offense has been committed or is being committed by the suspected individual, and probable cause must be judged under the totality of the circumstances" (***Shaw v City of New York***, 139 AD3d 698, 699, 31 NYS3d 155 [2d Dept 2016][internal quotations and citations omitted]). Further, a plaintiff's plea of guilty in a criminal prosecution "forecloses him from asserting any cause of action based either on the common-law tort of malicious prosecution or on the corresponding constitutional tort pursuant to 42 USC § 1983" (***Bartone v County of Nassau***, 286 AD2d 354, 356, 729 NYS2d 171 [2d Dept 2001]).

Generally, a statement may be defamatory "if it tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number of the community" (***Golub v Enquirer/Star Group***, 89 NY2d 1074, 1076, 659 NYS2d 836 [1997], quoting ***Mencher v Chesley***, 297 NY 94, 100, 75 NE2d 257 [1947]). Damages will be presumed for statements "that charge a person with committing a serious crime or that would tend to cause injury to a person's profession or business" (***Geraci v Probst***, 15 NY3d 336, 344, 912 NYS2d 484 [2010]). Whether particular statements are considered defamatory per se is a question of law (*id.*). To state a cause of action to recover damages for defamation, a plaintiff "must allege that the defendant published a false statement, without privilege or authorization, to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se" (***Rodriguez v Daily News, L.P.***, 142 AD3d 1062, 1063 [2d Dept 2016]). In an action for libel or slander, "the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally" (CPLR 3016 [a]). Expressions of an opinion, false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions (***Sassower v New York Times Co.***, 48 AD3d 440, 442, 852 NYS2d 180 [2d Dept 2008][internal quotations and citations omitted]). "The issue of distinguishing between actionable fact and non-actionable opinion is a question of law for the court" (***Galanova v Safir***, 138 AD3d 686, 687, 29 NYS3d 459 [2d Dept 2016], quoting ***Gjonlekaj v Sot***, 308 AD2d 471, 474, 764 NYS2d 278 [2d Dept 2003]). Such issue is "to be decided based on what the average person hearing or reading the communication would take it to mean" (***Davis v Boeheim***, 24 NY3d 262, 269, 998 NYS2d 131 [2014][internal quotation omitted]).

Here, defendants have established a prima facie case of entitlement to summary judgment in the instant action (*see generally* ***Alvarez v Prospect Hosp.***, *supra*). Through plaintiff's admissions in his General Municipal Law § 50-h hearing transcript, defendants adduced evidence that plaintiff plead guilty to two charges stemming from the actions alleged in the criminal complaints filed against him. Therefore, plaintiff's cause of action alleging malicious prosecution cannot be sustained (*see* ***Bartone v County of Nassau***, *supra*).

Regarding plaintiff's claim that defendants breached their duties, it is well settled that New York courts do not recognize claims for negligent or malicious investigation (***Johnson v Kings County Dist. Attorney's Off.***, 308 AD2d 278, 284, 763 NYS2d 635 [2d Dept 2003]; *see* ***Antonious v Muhammad***, 250 AD2d 559, 673 NYS2d 158 [2d Dept 1998]; *see also* ***Patrella v County of Suffolk***, 154 AD3d 772, 61 NYS3d 507 [2d Dept 2017]). Further, a municipality cannot be held liable for negligence in the performance of a governmental function, including police and fire protection, unless a special relationship existed between the municipality and the injured party (***De Long v County of Erie***, 60 NY2d 296, 304, 469 NYS2d 611 [1983]; *see* ***Graham v City of New York***, 136 AD3d 747, 24 NYS3d 754 [2d Dept 2016]).

Defendants have established that plaintiff's remaining claims, save defamation, "allege activities in processing criminal charges after [plaintiff's] arrest by police based upon evidence assembled by police, [and] [t]herefore, the District Attorney defendants are entitled to absolute immunity." (***Blake v City of New York***, 148 AD3d 1101, 1104, 51 NYS3d 540 [2d Dept 2017]). There is no independent tort of civil conspiracy under state law (*see* ***Suburban League for Cerebral Palsy v Richmond Hill Hall Corp.***, 158 AD2d 453, 550 NYS2d 910 [2d Dept 1990]; ***Gould v Community Health Plan of Suffolk***, 99 AD2d 479, 470 NYS2d 415 [2d Dept 1984]). Plaintiff's civil conspiracy claims contain general allegations which are conclusory and vague and thus are insufficient (*see* ***Diederich v Nyack Hosp.***, 49 AD3d 491, 854 NYS2d 411 [2d Dept 2008]).

Turning to the defamation claim against defendants, the Court finds that Assistant District Attorneys Cathleen Loeffler and Robert Clifford were acting as advocates for the State when they spoke to the media, inasmuch as they communicated certain information about plaintiff to the public following his arrest and after a criminal proceeding was commenced against him. Therefore, the they are entitled to a qualified privilege with respect to the statements made. The Court finds that plaintiff's complaint does not allege facts to support a claim of actual malice sufficient to overcome the District Attorney's privilege. Further, "truth is an absolute defense to a cause of action based on defamation" (***Dun-zheng Yan v Potter***, 2 AD3d 842, 843, 769 NYS2d 379 [2d Dept 2003]). Defendants, with their submission of the sworn affidavit of criminal complainant Stephanie Veraldi, established a good faith basis upon which to make the statements attributed to them regarding her status as a student at a school where plaintiff was previously employed. Defendants also possessed the "common interest privilege, 'which arises when a person makes a bona fide communication upon a subject in which he or she has an interest, or a legal, moral, or social duty to speak, and the communication is made to a person having a corresponding duty or interest'" (***Wyllie v District Attorney of County of Kings***, 2 AD3d 714, 719, 770 NYS2d 110, 115 [2d Dept 2003], quoting ***Paskiewicz v National Assn. for Advancement of Colored People***, 216 AD2d 550, 551, 628 NYS2d 405 [1995]).

The Court, cognizant of plaintiff's pro se status, construes his allegations liberally and affords him a wide berth in analyzing his evidentiary submissions. However, plaintiff fails to adduce any non-speculative evidence of the claims he asserts and, therefore, fails to raise a triable issue (*see generally* ***Vega v Restani Constr. Corp.***, *supra*). In opposition to defendants' motion, plaintiff submits, among other things, a transcript of nonparty Allison Engstrom's deposition testimony, a transcript of nonparty Christina Impastato's deposition testimony, a transcript of nonparty Rocco Veraldi's deposition testimony, copies of various newspaper articles reporting his arrests, copies of numerous documents from a related action involving his former employer, copies of e-mail messages exchanged with his criminal attorney, excerpts of transcripts of appearances during the pendency of his criminal matter, voluminous telephone records, non-party affidavits from prior actions, and numerous online social media posts.

Here, plaintiff attempts, both in his initial complaints and in his opposition to defendants' instant motion, to re-litigate the closed criminal action against him, often conflating the matters. Plaintiff's opportunity to litigate issues of witness veracity, disclosure violations, identification, official misconduct, investigative rigor, and sufficiency of the accusatory instruments has long passed. Thus, plaintiff's arguments regarding the motives of the complaining witnesses in his criminal action are irrelevant to the matter at hand. Plaintiff's numerous allegations, some presented for the first time in his opposition to defendants' motion, appear to be based solely upon his own suppositions, theories, and a desire to be free of the consequences of his admitted actions. "Mere conclusory allegations, expressions of hope, or unsubstantiated assertions may not defeat a motion for summary judgment" (***Carleton Studio, Ltd. v MONY Life Ins. Co.***, 18 AD3d 491, 492, 793 NYS2d 919 [2d Dept 2005]). Plaintiff elected to plead guilty, at first, to two counts of misdemeanor aggravated harassment. Following his successful completion of interim probation, plaintiff was permitted to withdraw his misdemeanor pleas of guilty and plead guilty to two violation-level offenses. Plaintiff's remaining charges were dismissed in satisfaction of his guilty pleas. There is nothing in the record to suggest that plaintiff appealed his convictions.

Plaintiff's pleas of guilty to the non-criminal offenses foreclose his ability to contest the validity of his arrests (*see* ***Bartone v County of Nassau***, *supra*). Plaintiff was represented by counsel for the entirety of his criminal proceedings. His reasons for accepting such plea agreements are his own, and a transcript of his plea colloquy reveals no inkling of hesitation on his part. Any negative consequences of those pleas are beyond the reach of this Court. Further, plaintiff submits no evidence that defendants' statements were "made in bad faith and . . . motivated solely by malice" (***Paskiewicz***, *supra* at 551). Plaintiff's remaining claims are without merit.

Accordingly, the application by defendants for summary judgment dismissing the complaint is granted.

Dated: 1-10-18

Hon. Denise F. Molia
A.J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION