

Cox v Prudential Found., Inc.
2018 NY Slip Op 31424(U)
June 29, 2018
Supreme Court, New York County
Docket Number: 151260/16
Judge: Lynn R. Kotler
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Plaintiff maintains that Keh falsely tried to take credit for the coalitions he formed and thereafter, plaintiff's relationship with Keh deteriorated. In connection with the second grant, plaintiff claims that Keh made the PTA/Plaintiff hire a public relations firm called Purpose Campaigns LLC ("Purpose"). Plaintiff maintains that Purpose produced substandard work and drained the second grant. Plaintiff further claims Keh took credit for a coalition he formed while a coalition she had formed floundered. As a result, plaintiff claims that 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.

Slander

The alleged slander occurred sometime in 2015, during a meeting between Melanie Schulz, 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 Schulz:

- 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...'"

However, Keh, Egreczky and Schulz have all denied their role in the aforementioned conversations under oath. Schulz states in a sworn affidavit that she "may have heard some variation of the three statements [above], but they were never attributed to Keh" and "were never attributed to any person at all." At her deposition, Egreczky stated that she spoke with Schulz and "told her that the PTA ladies had informed [her] that [plaintiff] had signed a contract that he didn't have the authority to sign." Egreczky denied saying that plaintiff "misspent any monies" but admitted that Keh told her that plaintiff "had a high spend rate".

Libel

Plaintiff also 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).

Plaintiff's libel claim is based on an email from Keh 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 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."

Parties' arguments

Keh testified at her deposition that her statement to Egreczky was an "overexaggeration." Based upon this admission, plaintiff moves for partial summary judgment.

Meanwhile, defendant moves for summary judgment dismissing plaintiff's complaint, arguing that there is no evidentiary support for plaintiff's slander claim. Defendant next contends that plaintiff's claims should be subject to an "actual malice" standard because they involve "matters of public concern" and plaintiff is a public figure. Defendant further argues that Keh's statements are protected by a qualified privilege.

Finally, as it did in opposition to plaintiff's prior motion to amend its complaint, defendant again argues that the remaining claims are time-barred and do not relate back to the original slander claim. The latter argument is rejected outright for the reasons stated in the court's prior decision/order dated 1/8/18 ("[P]laintiff's new claims are reasonably related to the original claims, and no surprise to defendant can possibly exist on this record.") Further, the prior decision is law of the case, and defendant has not otherwise identified its motion as one to reargue the prior motion. Therefore, defendant's statute of limitations argument is unavailing.

DISCUSSION

The court now turns to the substantive aspects of the motions. On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

At the outset, the parties agree that New Jersey law applies here because they are both domiciled in New Jersey and plaintiff's claims arose and/or occurred in New Jersey. Therefore, the court will apply New Jersey substantive law. Numerous issues of fact preclude summary judgment on the libel and slander claims. Therefore, both motions are denied as to these claims. Defendant's motion, however, is granted to the extent that plaintiff's claim for tortious interference with business expectancy is severed and dismissed.

Defamation

Under New Jersey law, the elements of a defamation claim are: (1) a defamatory statement of fact (2) concerning the plaintiff (3) which was false, and (4) which was communicated to a person or persons other than the plaintiff (*Feggans v. Billington*, 291 NJSuper. 382, 390-91 (NJ App Div 1996). A plaintiff must also prove fault (*Govito v. West Jersey Health System, Inc.*, 332 NJ Super 293, 306 [NJ App Div 2000]).

The actual malice standard does not apply

First, defendant argues that plaintiff's consulting activities regarding the public school system are an area of legitimate public concern and therefore plaintiff must demonstrate that Keh acted with actual malice. Under New Jersey law, a plaintiff asserting a defamation claim arising from statements made about a public figure or regarding matters of public concern must demonstrate "actual malice", a heightened standard designed to protect free speech (*Senna v. Florimont*, 196 NJ 469 [NJ Sup Ct 2008]). "[T]o determine whether speech involves a matter of public concern or interest that will trigger

the actual-malice standard, a court should consider the content, form, and context of the speech. (*Id.* at 497).

Here, the court finds that although the underlying dispute arose in the context of public education, the content form and context of the alleged defamation does not implicate the enhanced protections of the actual malice standard. The comments were not made in the public domain. Nor has the defendant shown that the content of the specific statements are of any public concern. The comments themselves do not concern public policy, health or safety and do not otherwise advance the public's interest. Rather, these alleged statements concern factual disputes between individuals.

Nor does the court find that defendant has established that plaintiff was a public figure. The classification of a plaintiff as a public or private figure is a question of law to be determined initially by the motion or trial judge (*Hill v. Evening News Co.*, 314 N.J. Super 545, 554 [NJ App Div 1998]). "Public figures are persons who have [1] assumed roles of especial prominence in the affairs of society or [2] thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved" (*id.* quoting *Gertz v. Robert Welch, Inc.*, 418 US 323, 345 [1974]). Defendant argues that plaintiff falls under the latter category because he had "thrust" himself to the forefront of a public controversy. The court disagrees.

Here, plaintiff was a consultant, and while he was involved in public education policy, defendant has not demonstrated that plaintiff was in a generally prominent position in the public eye. On this record, plaintiff was, at most, prominent within an insular group sharing a common interest in New Jersey public education. Accordingly, the court rejects defendant's argument that plaintiff must demonstrate actual malice.

Libel

The court will next consider the parties' substantive arguments regarding the libel claim, which is based upon Keh's May 13, 2015 email. When plaintiff is a private figure and the speech is about an exclusively private concern, under New Jersey law a plaintiff will prevail if he or she can prove that the defendant communicated a false statement while: [1] acting negligently in failing to ascertain the truth or falsity of the statement before communicating it; or [2] knowing that the statement is false and that it defames a person (*Feggans, supra* at 391).

Defendant is certainly not entitled to summary judgment dismissing this claim. But assuming *arguendo* that plaintiff has established defendant's liability on the libel claim, to wit, that Keh published a written statement that was false, defendant has raised a triable issue of fact on this point sufficient to defeat the motion. Indeed, it is for a factfinder to determine what exactly Keh meant. At her deposition, Keh maintained that she meant plaintiff allocated or committed those monies. It is not disputed on this record that the latter claim would be true. Keh's interpretation of the term "burned through" and whether this statement is false remains for a jury to determine. If a jury concludes that the statement is false, but that Keh didn't know it was false, a further fact issue is whether Keh was negligent in failing to ascertain the truth or falsity of the statement before she communicated.

Slander

Next, defendant argues that it is entitled to summary judgment dismissing the slander claim. Defendant argues that plaintiff's allegations regarding the alleged slander are based upon triple hearsay. Further, defendant points to affidavits and/or deposition testimony of Keh, Egreczky and Schulz, who in turn have all denied the key allegation that Keh was the person who made the allegedly defamatory statements about plaintiff. This argument is unavailing. The factual claims by Keh, Egreczky and Schulz await credibility determinations, in light of the record from which there is circumstantial evidence that the allegedly slanderous statements were made.

Indeed, there are discrepancies between Egreczky and Schultz' testimony regarding their conversation which cannot be resolved as a matter of law. Further, Egreczky admitted that she received an email from Keh which contained specific factual claims regarding plaintiff prior to meeting with Hesper. Although Egreczky denied reviewing that email prior to the meeting, a reasonable factfinder could discredit her testimony and find that the information contained in that email and/or otherwise obtained from Keh was communicated by Egreczky to Schulz.

The qualified privilege

The court must next consider whether Keh is protected by the qualified privilege. At common law, New Jersey recognizes a qualified privilege which protects certain defamatory statements. This privilege is "designed to advance the important public interest in unrestrained speech while retaining a measure of protection for the plaintiff who is maliciously defamed (*Fees v. Trow*, 105 NJ 330 [NJ Sup Ct, 1987]). A qualified privilege for the protection of the publisher's own interest will be recognized as a matter of law "if the circumstances induce a correct or reasonable belief that (a) there is information that affects a sufficiently important interest of the publisher, and (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest" (*Gallo v. Princeton University*, 281 NJ Super 134 [NJ App Div 1995]). In order to invoke the privilege, there must be a "circumstantial justification for the publication of the defamatory information" (*id.* quoting *Coleman v. Newark Morning Ledger Co.*, 29 NJ 357 [NJ Sup 1959]). "[T]he question of whether a defamatory statement is privileged is a determination which the judge rather than the jury must make (*Bainhauer v. Manoukian*, 215 NJ Super 9 [NJ App Div 1987]).

However, "[a] plaintiff may overcome this privilege by proving that the immunized defendant abused its privilege. A qualified privilege is abused if: "1) the publisher knows the statement is false or the publisher acts in reckless disregard of its truth or falsity; 2) the publication serves a purpose contrary to the interests of the qualified privilege; or 3) the statement is excessively published. The privilege will also be abused if the publisher does not reasonably believe the matter to be necessary to accomplish the purpose for which the privilege is given." (*Govito, supra* at 312 [internal citations and quotations omitted]). Whether a defendant has abused the privilege is a fact question for a jury to determine. (*Id.*)

Here, the court finds that defendant has established, as a matter of law, that Keh's email and alleged oral statements to Egreczky are entitled to a qualified privilege. The facts in this case are similar to *Bainhauer, supra*. In that case, defendant-surgeon told the chief of the anesthesia service that he did not want plaintiff-anesthesiologist to treat defendant's patients because he "just killed my patient." Defendant went on to publish that information in similar substance a number of times. The Superior Court of New Jersey, Appellate Division, held that the subject statements were privileged, reasoning that "the public's interest which demands that hospital staff physicians be free to express themselves openly and without fear of reprisal when matters directly affecting the quality of health care are involved." The court agrees with defendant that the challenged statements arise out of discussion between "participants in the broader public debate about New Jersey education" and the statements concern plaintiff's performance in connection with the coalition.

The court further finds, however, that there is a triable issue of fact as to whether the privilege was abused. Although defendant argues that "[p]laintiff can not adduce clear and convincing evidence to defeat the qualified privilege", the court disagrees. Plaintiff claims that Keh made the subject statements about him because of "spite" and "ill will". Indeed, plaintiff has stated sufficient facts from which a reasonable factfinder could conclude that Keh made the statements as retribution and/or to damage his professional reputation. Moreover, a factfinder could also conclude that Keh knowingly made false statements or made them with reckless disregard of their truth.

Tortious interference with business expectancy

In order to demonstrate a claim for tortious interference with business expectancy, plaintiff must state: [1] a reasonable expectation of economic advantage; [2] intentional and malicious interference

and harm inflicted, without justification or excuse; [3] the interference must have caused a loss of the prospective gain; and [4] damages (*SpaceAge Consulting Corp. v. Vizconde*, 2017 WL 4183281 [NJ App Div 2017]). Further, plaintiff must demonstrate that a prospective economic or contractual relationship was interfered with (*id.* citing *Printing Mart–Morristown v. Shartp Electronics Corp.*, 116 NJ 739 [NJ Sup Ct 1989]).

On a motion for summary judgment, plaintiff must lay bare his proof and demonstrate sufficient facts to defeat defendant's motion. Plaintiff merely speculates that he was damaged, and has failed to come forward with any facts which would raise a triable issue of fact. Specifically, plaintiff has failed to identify any particular economic or contractual relationship which was interfered with by defendant. Therefore, defendant's motion for summary judgment dismissing this claim must be granted.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that defendant's motion (motion sequence number 003) is granted only to the extent that plaintiff's claim for tortious interference with business expectancy is severed and dismissed; and it is further

ORDERED that defendant's motion is otherwise denied; and it is further

ORDERED that plaintiff's motion (motion sequence number 004) for partial summary judgment is denied in its entirety.

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:

6/21/18
New York, New York

So Ordered:



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