

Agbabiaka v New York City Dept. of Educ.

2019 NY Slip Op 33626(U)

December 12, 2019

Supreme Court, New York County

Docket Number: 156018/2019

Judge: Lyle E. Frank

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART IAS MOTION 52EFM

Justice

MELITA AGBABIAKA, Plaintiff, - v - NEW YORK CITY DEPARTMENT OF EDUCATION, NYP HOLDINGS, INC. C/O NEWS CORPORATION, DAN GREENFIELD, MICHELLE GOTTHELF, SUSAN EDELMAN Defendant.
INDEX NO. 156018/2019
MOTION DATE 12/11/2019
MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 29, 30, 31, 32

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 002) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 33, 34, 35, 36, 37

were read on this motion to/for DISMISSAL

This action arises out of an investigation regarding plaintiff, commenced by defendant, New York City Department of Education ("DOE"), in October 2016. The results of the investigation were provided via a FOIL response to defendants, NYP Holdings, Inc., Dan Greenfield, Michelle Gotthelf, and Susan Edelman (collectively the "Post defendants"), which published the investigation findings in June 2018. Plaintiff contends that the information published in the Post article was false and now brings this action for intentional infliction of emotional distress ("IIED") and libel against all defendants.

Defendant, DOE, is moving to dismiss all causes of action against the DOE on the grounds that plaintiff failed to comply with the Notice of Claim requirement¹, plaintiff has failed

¹ The Court does not reach the notice of claim argument, as the Court dismisses the matter on other grounds.

to state a cause of action against DOE because claims of intentional infliction of emotional distress against government bodies are barred, and plaintiff's libel claim fails as statements made in DOE investigative and disciplinary memoranda are protected by a qualified privilege.

The Post defendants move to dismiss on the grounds that the claims set forth in the Complaint are barred by the absolute New York statutory privilege for fair and true reports of official proceedings. See N.Y. Civil Rights Law § 74. The Post defendants also move to dismiss the claim for IIED for failure to plead the elements required.

Plaintiff opposes both motions mainly arguing that the release of the investigative report and her inability to respond to same was done recklessly, willfully and maliciously. For the reasons set forth below, plaintiff's complaint is dismissed.

Applicable Law - Defamation

To be successful on a defamation claim, a plaintiff must prove that defendant made "a false statement, published 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" (*Epifani v Johnson*, 65 AD3d 224, 233 [2009] [internal quotations and citations omitted]). The complaint must set forth the particular words allegedly constituting defamation, the time, place and manner in which the false statement was made, and specify to whom it was made (CPLR 3016[a]; *id.*; *Dillon v City of New York*, 261 AD2d 34, 38 [1999]). A defamatory statement is libelous per se "if the statement tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society" (*Matovcik v Times Beacon Record Newspapers*, 46 AD3d 636, 637 [2007] [internal quotations and citations omitted]).

“In evaluating whether a cause of action for defamation is successfully pleaded, the words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction (*Dillon*, 261 AD2d at 38 [citations omitted]). Certain statements are not actionable, like expressions of opinions, loose, figurative or hyperbolic statements, even if deprecating the plaintiff, or an employer’s assessment of an employee’s job performance (*id.*; *Rinaldi v Holt, Rinehart & Winston, Inc.*, 42 NY2d 369, 380 [1977] [internal quotations and citations omitted]). Truth is a complete defense to defamation (*Rinaldi*, 42 NY2d at 380). Whether a particular statement constitutes fact or opinion is a question of law (*id.* at 381).

DOE’s Motion

Preliminarily, it must be noted that as a matter of law “claims of intentional infliction of emotional distress against government bodies are barred as a matter of public policy.” *Dillon*, 261 AD2d at 41. Furthermore, “[a]n employer has the right to assess an employee’s performance on the job without judicial interference’, often allowing for dismissal on the pleadings.” *Id* at 38 [internal citation omitted].

The DOE has established that the investigative report was prepared for the purposes of evaluating the plaintiff’s conduct and performance as an employee, thus the statements in the report are protected by qualified privilege. In opposition, plaintiff has failed to establish that the privilege does not apply nor does she cite to any purported false statements. The conduct of the DOE was not so egregious as to remove the bar of intentional infliction of emotional distress, discussed above (*Chanko v Am. Broadcasting Cos. Inc.*, 27 NY3d 46, 56 [2016]). In addition, it appears that the plaintiff takes issue with the characterization of the report. As a result, plaintiff

simply cannot maintain either of these causes of action against the DOE, and the matter must be dismissed as to this defendant.

Post's Motion

New York Civil Rights Law § 74 provides: “[a] civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published.”

The Post defendants argue that the investigative report was produced in an “official proceeding” within the meaning of the statute, and its article was a fair and true report of same.

In opposition, the plaintiff does not identify any purported false statements nor does she adequately argue that the investigation into her conduct was not an official proceeding and that New York Civil Rights Law § 74 does not apply to the Post defendants.

However, even assuming the report the Post defendants based their article on was not part of an official proceeding, pursuant to the Civil Rights Law, there is simply no evidence of reckless conduct on behalf of the Post defendants, as they relied on an official government documents received through official governmental channels, a FOIL request. The Post is entitled to the full protection of Section 74 so long as the Post Article is a substantially accurate report of the proceeding, regardless of whether the statements made by the DOE in the Investigative Report were themselves true or false. *See Rodriguez v Daily News, L.P.*, 142 AD3d 1062, 1064 [2d Dept 2016], lv. denied, 28 NY3d 913 [2017] (“[Section 74] was designed precisely to protect the publisher of a fair and true report from liability for just such an error and to relieve it of any duty to expose the error through its own investigation”) [internal citations omitted].

Conclusion

In sum, plaintiff has failed to allege what false statements were made. During oral argument, it was clear that plaintiff's concern was one of disclosure not of substance, plaintiff did not dispute, with any specificity, any statements whether in the Post article or the DOE investigative report. In addition, plaintiff fails to address the privileges asserted by both the DOE and Post defendants. Accordingly, it is hereby

ORDERED that plaintiff's complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk is directed to entire judgment accordingly.

12/12/2019
DATE

LYLE E. FRANK, J.S.C.
HON. LYLE E. FRANK
J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE