

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

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CAROL DENARO and SCOTT DENARO

Index
Number: 19512/05

Plaintiffs,

- against -

Motion
Date: OCT. 30, 2007

STEPHANIE ROSALIA, SALVATORE LIPARI,
and RALPH PERFETTO, Individually and
THE CITY OF NEW YORK,

Motion
Cal. Number: 5
Motion Seq. No. 4

Defendants.

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The following papers numbered 1 to 20 read on this motion by defendants Stephanie Rosalia and Salvatore Lipari for partial summary judgment, motion by defendants Ralph Perfetto and the City of New York for summary judgment or, in the alternative, to dismiss, cross-motion by plaintiffs to strike Rosalia's and Lipari's answer or, in the alternative, to preclude them from offering evidence for failure to comply with discovery, or, in the alternative, to compel said defendants to comply with plaintiffs' discovery demands, and cross-motion by plaintiffs to strike the answer of Perfetto and the City or, in the alternative, to preclude them from offering evidence, for failure to comply with discovery, or, in the alternative, to compel said defendants to comply with plaintiffs' discovery demands.

Papers
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Upon the foregoing papers it is ordered that the motions and cross-motions are decided as follows:

Motion by Rosalia and Lipari for partial summary judgment dismissing plaintiffs' first through fourth causes of action and

cross-claim asserted against them by Perfetto and the City relating to plaintiffs' first four causes of action is granted solely to the extent that so much of the first cause of action for defamation relating to the statements in the letters pertaining to the filling of plaintiffs' pool from a hose connected to a fire hydrant, so much of the first cause of action which may allege, as a distinct tort, conspiracy to defame, the second cause of action for intentional infliction of emotional distress and the third cause of action for injurious falsehood are dismissed. In all other respects, the motion is denied.

Plaintiffs are the owners of the premises located at 178 Beach 142nd Street in Queens County. Rosalia and Lipari are the owners of the adjoining property located at 172 Beach 142nd Street. The underlying action stems from a bitter feud between these neighbors purportedly precipitated by plaintiffs' erection of a fence between the parties' abutting driveways making it difficult for said defendants to park their automobile. Plaintiffs allege that Rosalia and Lipari retaliated against them by causing false complaints to be filed against them by the Office for the Public Advocate on these defendants' behalf to City agencies requesting inspections for various alleged local law violations relating to plaintiffs' premises.

Five letters were sent by Perfetto as Ombudsman for the Public Advocate to the various City agencies relating the complaints of Rosalia and Lipari. Plaintiffs allege that Perfetto is a friend of Rosalia and Lipari and alleges that his son is a close, intimate friend of Rosalia. Plaintiffs allege that Perfetto conspired with Rosalia and Lipari to defame plaintiffs and cause them emotional distress.

Rosalia and Lipari also installed high-powered florescent outdoor flood lights directly illuminating plaintiffs' premises on a nightly basis, resulting in an order issued by Justice Thomas V. Polizzi on March 21, 2006 granting plaintiffs a preliminary injunction enjoining Rosalia and Lipari from continuing to illuminate their premises with the flood lights. Plaintiffs disregarded the order of Justice Polizzi, resulting in Rosalia and Lipari moving for contempt and an order by Justice Davild Elliot, issued on June 12, 2007, setting the matter down for a hearing on the contempt. The record on these motions and cross-motions do not disclose the result of said hearing.

Plaintiffs also allege that Rosalia's and Lipari's son has a rock band playing at an excessive decibel level in a room they erected above their garage thereby creating a nuisance.

Plaintiffs commenced the underlying action seeking damages for defamation, intentional infliction of emotional distress, nuisance and property damage.

The first cause of action is for defamation relating to the five letters. Plaintiffs quote the language of the subject letters in their complaint and copies of such letters are annexed to the moving and cross-moving papers.

Prior to sending to the various City agencies the five letters which are the subject of plaintiffs' complaint, Perfetto, in his capacity as Ombudsman to the Office of the Public Advocate, sent plaintiffs a letter dated October 26, 2004 and a letter dated November 12, 2004.

The October 26, 2004 letter states, in part:

Public Advocate Betsy Gotbaum received an appeal from some of your neighbors regarding violations of local law, and the quality of life of your neighbors. While the complaints are voluminous in numbers, it has been our experience that problems of this nature can be resolved amicably.

The November 12, 2004, letter states, in part:

On October 26, 2004 I sent a letter to you and Mr. Denaro in the hope of settling a resolvable dispute that was brought to our attention by concerned neighbors from your block. As often happens in many communities, where neighbors are in dispute, throughout New York City, we seek to get the confronting parties to agree to go to the Alternative Dispute Resolution Program, Community Mediation Services to settle their difference. The professional mediators at the centers have been able to reach amicable solutions for all involved and have turned a hostile environment into a tolerable, if not cordial one. We are respectfully suggesting to you and your neighbors that you avail yourselves of this service by contacting a Community Dispute Resolution Center.

Perfetto thereafter sent the subject five letters, all dated December 22, 2004, in his capacity as Ombudsman to the Public Advocate's Office, to various City agencies regarding Rosalia.

The first letter, to the Borough Commissioner of the NYC Department of Transportation states:

Public Advocate Betsy Gotbaum received an appeal from the aforementioned constituent regarding her allegation that her neighbor, Ms. Carol DeNaro, of 178 Beach 142nd Street, Rockaway Park, NY, has had a carport installed on the far side of her property without applying for a curb cut and is using planks in the street to enter and exit the site. She contends that it is both a hazard to motorists and pedestrians since a center island runs down the middle of Beach 142nd Street thereby creating a single lane on each side. Motorists are prohibited from parking cars in those single lanes, and the planks can cause an accident. We are respectfully requesting an inspection of said property, and a reply to our office with your findings.

The second letter, to the Deputy Commissioner of the New York City Department of Investigations, states:

Public Advocate Betsy Gotbaum received an appeal from the aforementioned constituent regarding her allegation that her neighbor, Ms. Carol DeNaro, of 178 Beach 142nd Street, has used her influence that her brother is a fireman, and that she owns an optical firm which services civil service employees to circumvent legal procedure. Reportedly, Ms. DeNaro had a hose connected to the fire hydrant diagonally across the street from her house to fill her pool with water. When she was approached by a neighbor and questioned why she didn't fill her pool as had all of her neighbors from her own metered water supply, she reportedly replied, 'You can call the Fire Department, my brother is a fireman.' I am enclosing copies of photos of the hose connected from her house to the fire hydrant. It was also alleged that an FDNY fire truck was used as an attraction at a family party at the DeNaro's house. We are respectfully requesting an investigation of Ms. Rosalia's complaint, and a reply to our office with your findings.

The third letter, to the Deputy Commissioner of the New York City Fire Department, contains the identical language as the letter to the Deputy Commissioner of DOI.

The fourth letter, to the Director of Customer Service of the NYC Department of Environmental Protection, states:

Public Advocate Betsy Gotbaum received an appeal from the aforementioned constituent regarding her

allegation that her neighbor, Ms. Carol DeNaro, of 178 Beach 142nd Street, Rockaway Park, NY, used the New York City water supply to fill her pool this past summer, as opposed to all of her neighbors who filled their pools from their own water supplies which is registered on their water meters. Reportedly, when she was approached by a neighbor questioning her use of the fire hydrant to fill her pool she replied, 'You can call the fire department, my brother is a fireman.' I am enclosing copies of photos of the hose connected from her house to the fire hydrant. We are respectfully requesting a review of her water bills for 2004 to determine if there was a difference in the spring and summer months in her water usage.

The fifth letter, to the Deputy Commissioner of the New York City Department of Buildings, states:

Public Advocate Betsy Gotbaum received an appeal from the aforementioned constituent regarding her allegation that her neighbor, Ms. Carol DeNaro, of 178 Beach 142nd Street, Rockaway Park, NY, has added a porch and large light fixtures to the front of their house. Reportedly, your agency responded to an earlier complaint about a rear yard fence that was built to the height of eight feet. The inspector issued a violation and the fence was lowered to the legal six feet. It was also stated that they created a carport on the other side of their property without applying for a curb cut, and are using planks in the street to enter and exit the carport. We are respectfully requesting an inspection of their premises, and a reply to our office with your findings.

The elements of a cause of action for defamation are 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" (Salvatore v. Kumar, __AD 2d__, 2007 NY Slip Op 08435 [2nd Dept, November 7, 2007]).

Plaintiffs allege in the complaint that the statements in these five letters are entirely false and that "because of the defamatory statements by the defendants published in their letters" plaintiffs sustained actual damages.

Counsel for Rosalia and Lipari argues that no cause of action in defamation is stated against Rosalia and Lipari in the first instance since even if the allegations in the letters were false,

they did not have a defamatory connotation and they were not published by them but by Perfetto.

This Court cannot say, as a matter of law, that the statements contained in the letters cannot be viewed as having defamatory connotations. Therefore, it is for the jury to decide whether or not the statements were defamatory (see Matherson v. Marchello, 100 AD 2d 233 [2nd Dept 1984]).

Although the first cause of action relies upon the allegedly defamatory content of the five letters which were written and published by Perfetto, it is undisputed that the letters accurately recite the allegations made by Rosalia and Lipari to Perfetto.

While the original publishers of a defamatory statement are not automatically liable for subsequent republications of the statement by third parties, liability against the original publishers may be found where they "approved or participated in some other manner in the activities of the third-party republisher" (Karaduman v. Newsday, Inc., 51 NY 2d 531, 540 [1980]). Moreover, "an individual may not escape liability when a defamatory statement he makes is foreseeably republished" (Rand v. New York Times Co., 75 AD 2d 417 [1st Dept 1980]).

One making a complaint to the Office of the Public Advocate concerning violations of local law may reasonably expect that the matter would be forwarded by the Public Advocate to the appropriate agencies for investigation.

Rosalia stated in her affidavit in support of the motion that she contacted Perfetto at the suggestion of his son, with whom she was close friends, after her own efforts to contact City agencies yielded no results. She also stated that she did not tell Perfetto how to investigate her complaints.

It appears somewhat disingenuous of Rosalia to argue that she wrote to and personally met with the Ombudsman for the Public Advocate concerning the subject complaints but neither expected nor desired that he take any action whatsoever on her behalf. In the very least, there is a question of fact as to whether Rosalia and Lipari approved of or participated in the activities of Perfetto in writing the letters to the City agencies or whether it was foreseeable that the communication of the subject allegations to Perfetto would be republished by him to others at the appropriate City agencies.

Rosalia and Lipari also allege that the statements contained in the letters are substantially true. In this regard, they fail to

submit evidence, in admissible form, demonstrating that any violations were, in fact, found with respect to the items complained of in the letters and, therefore, that their complaints were true. Since a defamatory statement, by definition must be false, truth is an absolute defense to an action for defamation (see Licitra v. Faraldo, 130 AD 2d 555 [2nd Dept 1987]).

However, the record herein establishes as substantially true defendants' allegation that plaintiffs filled their pool with water from a fire hydrant. Plaintiffs admit in their verified answer to Rosalia's and Lipari's interrogatories that a hose was connected to a City fire hydrant by employees of Clearwater Pool Co. to pump water into their backyard pool. Therefore, Rosalia and Lipari have established their entitlement to summary judgment as a matter of law dismissing that portion of plaintiffs' first cause of action for defamation relating to plaintiffs' allegations that they pumped water into their pool from a City fire hydrant.

Counsel for Rosalia and Lipari also contends that even if plaintiffs' complaints were not true, plaintiffs were protected by a qualified privilege.

A bona fide communication made by a party on a matter in which he has an interest or duty to a person having a corresponding interest or duty is protected by a qualified privilege (see Licitra v. Faraldo, 130 AD 2d 555 [2nd Dept 1987]). Requests to government agencies to investigate alleged violations are such communications protected by qualified privilege (see Fantaco Enterprises, Inc. V. Iavarone, 161 AD 2d 875 [3rd Dept 1990]). Therefore, even if the complaints made by Rosalia and Lipari to Perfetto were not true and they either approved or participated in Perfetto's republishing of their complaints or that it was foreseeable that Perfetto would republish their complaints, such communications were covered by qualified privilege.

However, a qualified privilege may be defeated by a showing that the defamatory statements were made with actual malice, or with personal spite or ill will, (see Misek-Falkoff v. Keller, 153 AD 2d 841 [2nd Dept 1989]; Licitra v. Faraldo, supra; see also Zaidi v. United Bank Ltd., 194 Misc 2d 1 [Supreme Court, NY County 2002]).

Since the issue of malice requires a determination of Rosalia's and Lipari's state of mind, it is not amenable to resolution by way of summary judgment but is a question of fact to be resolved at trial (see Hollander v. Long Island Plastic Surgical Group, P.C., 104 AD 2d 357 [2nd Dept 1984]; Misek-Falkoff v. Keller, supra). It is obvious from the record herein that this

matter involves a bitter, "Hatfields and McCoys"-style dispute between neighbors, who clearly harbor ill will toward each other. Not only plaintiffs' cross-moving papers but Rosalia's and Lipari's moving papers themselves raise a question of fact as to whether the motivation behind Rosalia's and Lipari's reporting of plaintiffs for multiple alleged violations, pointing high-intensity flood lights at plaintiffs' home and violating the order of the Court preliminarily enjoining them from maintaining said lights was to retaliate for the erection by plaintiffs of the fence between the parties' abutting driveways. Therefore, the record herein raises a sufficient question of fact as to whether Rosalia and Lipari reported plaintiffs out of spite or ill will. Accordingly, the issue of qualified privilege may only be resolved at trial.

Moreover, the complaint sufficiently pleads special damages, and counsel for Rosalia and Lipari does not argue otherwise. Of course, while plaintiffs' claims of actual damages need not be established by proof in admissible form on a motion for summary judgment, such must be established at trial (see Matherson v. Marchello, supra; Hogan v. Herald Co., 84 AD 2d 470 [4th Dept 1982]).

This Court agrees with counsel for Rosalia and Lipari that New York jurisprudence does not recognize civil conspiracy to commit a tort as an independent cause of action (see Salvatore v. Kumar, supra). While plaintiffs in their first cause of action allege that Rosalia and Lipari acted in concert with Perfetto to defame plaintiffs and use the word "conspiracy", this Court does not perceive said expression as alleging a distinct cause of action for conspiracy, but rather only a cause of action for defamation. However, to the extent that plaintiffs intended to articulate a separate cause of action for conspiracy to commit defamation, in addition to a cause of action for defamation proper, such branch of the first cause of action alleging conspiracy must be dismissed.

The second cause of action alleges intentional infliction of emotional distress by virtue of defendants' alleged acts of defamation. Counsel for Rosalia and Lipari contends that the complaint fails to allege conduct extreme enough to support a cause of action for intentional infliction of emotional distress, as a matter of law. In this regard, liability may be found "'only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community'" (Murphy v. American Home Prods. Corp., 58 NY 2d 293, 303 [1983], quoting Restatement [Second] of Torts §46, comment d).

This Court, however, need not reach the issue of whether the

conduct alleged rises to the requisite level of outrageousness.

Plaintiffs failed to annex to their opposition papers any medical evidence, in admissible form, supporting their claims of extreme emotional disturbance so as to raise a triable issue of fact (see Glendora v. Walsh, 227 AD 2d 377 [2nd Dept 1996]; Walentas v. Johnes, 257 AD 2d 352 [1st Dept 1999]; Christenson v. Gutman, 249 AD 2d 805 [3rd Dept 1998]).

In addition, plaintiffs already seek redress for defamation in their first cause of action and seek special damages which include medical expenses for emotional injuries with physical manifestations. Where a cause of action for defamation is plead and is not dismissed, a cause of action for intentional infliction of emotional distress based upon the alleged defamation is duplicative and must be dismissed (see 164 Mulberry Street Corp. V. Columbia University, 4 AD 3d 49 [1st Dept 2004]).

Accordingly, the second cause of action contained in the complaint alleging intentional infliction of emotional distress must be dismissed.

The third cause of action alleges that defendants committed "the tort of injurious falsehood" by virtue of the alleged defamation. The essence of this tort is intentional infliction of emotional distress (see France v. St. Claire's Hosp. and Health Center, 82 AD 2d 1 [1st Dept 1981]). Since plaintiffs have failed to establish emotional harm by medical proof in admissible form, they may not seek the same relief under another name.

The fourth cause of action alleges that plaintiffs committed prima facie tort by defaming plaintiffs and creating a nuisance on their property through their complaints of violations. Unlike the torts of intentional infliction of emotional distress and injurious falsehood, prima facie tort may be plead in the alternative along with another traditional tort (see Board of Edu. v. Farmingdale Classroom Teachers Assn., 38 NY 2d 397 [1975]). Of course, since double recovery will not be allowed, once a traditional tort has been established, the cause of action for prima facie tort will be rendered academic (id.). Therefore, plaintiffs properly state a cause of action for prima facie tort.

Motion by Perfetto and the City for summary judgment dismissing the complaint as against them is granted solely to the extent that the complaint is dismissed as against the City only.

The record on this motion indicates that plaintiffs served a notice of claim upon defendant on May 31, 2005 and filed the

summons and complaint upon the City on September 13, 2005 and upon Perfetto on September 27, 2005.

A condition precedent to commencement of a tort action against a municipality or public corporation is the service of a notice of claim upon the municipality within 90 days after the claim arises (see General Municipal Law §50-e[1][a]; Williams v. Nassau County Med. Ctr., 6 NY 3d 531 [2006]). Plaintiffs' claim accrued on the date of publication of the allegedly defamatory letters (see Nussenzweig v. DiCorcia, NY2d __, 2007 NY Slip Op 08783 [November 15, 2007]). There is no dispute that the date of publication was December 22, 2005. Indeed, plaintiffs state in their notice of claim that the alleged defamation was committed on December 22, 2005. The notice of claim herein was filed 70 days past the 90-day deadline.

A late notice of claim may not be filed more that one year and 90 days after the cause of action accrued, which is the period of limitation for commencing tort actions against a municipality (see General Municipal Law § 50-e[5]; Pierson v. City of New York, 56 NY 2d 950 [1982]). Therefore, the period of limitation within which plaintiff had to commence a timely action expired on March 22, 2006.

The untimely service of the notice of claim on May 31, 2005 without leave of court was a nullity (see Chicara v. City of New York, 10 AD 2d 862 [2nd Dept 1960, appeal denied 8 NY 2d 1014 [1960]; Wollins v. NYC Board of Education, 8 AD 3d 30 [1st Dept 2004]). Therefore, the instant action, though served and filed within the one year and 90 day limitation period, was never properly commenced (see Davis v. City of New York, 250 AD 2d 368 [1st Dept 1998]).

Counsel for plaintiffs argues that the City waived the untimeliness of the notice of claim by proceeding with the litigation process without asserting such defense. Although a defect or irregularity in a notice of claim may be waived by the conduct of the municipality, "the requirements as to the manner or time of service may not be waived" (Badgett v. NYC Health and Hospitals Corp., 227 AD 2d 127, 128 [1st Dept 1996]). Moreover, the untimely filing of the notice of claim is not an affirmative defense that must be asserted in the answer, since compliance with the notice of claim requirements under General Municipal Law § 50-e is a condition precedent to suit and not a statute of limitations that must be specifically raised as an affirmative defense (see Rodriguez v. City of New York, 169 AD 2d 532 [1st Dept 1991]).

Plaintiffs' failure to file a timely notice of claim rendered

the complaint legally insufficient and, thus, warrants dismissal for failure to state a cause of action (see Reaves v. City of New York, 177 AD 2d 437 [1st Dept 1991]).

Accordingly, the complaint must be dismissed as against the City in its entirety.

The action was brought against Perfetto in his individual capacity and, therefore, dismissal of the action against the City upon the ground that plaintiffs failed to comply with the requirements of General Municipal Law §50-e does not also mandate dismissal against Perfetto upon said ground (see Kalpin v. Cunningham, 60 AD 2d 997 [4th Dept 1978]).

Since there are factual questions regarding the defamatory nature of the subject letters (with the exception of the complaint concerning the attachment of the hose to the fire hydrant), Perfetto is not entitled to summary judgment on plaintiffs' first cause of action for defamation.

The citation by counsel for Perfetto and the City to Ward Telecommunications and Computer Services v. State of New York (42 NY 2d 289 [1977]) in support of the proposition that Perfetto, in the performance of his duties as Ombudsman to the Public Advocate, is protected by an absolute immunity from liability, even where he acted out of malice, is misplaced. In that case, the Court of Appeals held that official audit reports containing allegedly defamatory statements issued on behalf of the State Comptroller by the Division of Audit and Accounts was subject to absolute privilege. However, the Court was careful to qualify its holding, stating, "In making the disposition which we do in this case, we note the significant distinction between actions of employees of executive departments of State government undertaken on their own behalf in the discharge of their own official duties (as in Stukuls) and actions (as here) performed by delegation on behalf of the department head. In the former instances there is no absolute privilege; in the latter, there is."

In Stukuls v. State of New York (42 NY 2d 272 [1977]), the Court of Appeals, in holding that the acting president of a State University was not protected by an absolute privilege but only by a qualified privilege, stated that "unless an official is a principal executive of State or local government or is entrusted by law with administrative or executive policy-making responsibilities of considerable dimension, policy considerations do not require that he be given an absolute license to defame" (42 NY 2d at 278). Perfetto is not such an official.

As heretofore stated, the communications made in the subject letters carry a presumptive qualified privilege which may be defeated by a showing of malice. Although the burden is upon plaintiffs to demonstrate malice, the instant motion interdicted plaintiffs in their attempt to conduct discovery on this issue. The patent hostility between plaintiffs and Rosalia and Lipari toward each other, coupled with the apparent personal relationship between Perfetto's son and Rosalia, provides a sufficient basis to allow plaintiffs to investigate whether Perfetto acted with ill will.

Accordingly, that branch of the motion seeking dismissal of plaintiffs' first cause of action of defamation as against Perfetto is denied.

That branch of the motion seeking dismissal of plaintiffs' second and third causes of action for intentional infliction of emotional distress and injurious falsehood as against Perfetto is granted, for the reasons heretofore stated.

That branch of the motion seeking dismissal of plaintiffs' fourth cause of action for prima facie tort as against Perfetto is denied, for the reasons heretofore stated.

Cross-motions by plaintiffs to strike defendants' answers or, in the alternative, to preclude them from offering evidence for failure to comply with discovery, or, in the alternative, to compel defendants to comply with plaintiffs' discovery demands, is granted to the extent that Rosalia, Lipari and Perfetto are directed to furnish the items requested in plaintiffs' notices for discovery and inspection dated May 12, 2006 and heretofore ordered pursuant to the compliance conference order issued by Justice Martin E. Ritholtz on October 16, 2006 within 30 days after service of a copy of this order with notice of entry, there appearing no opposition by Rosalia and Lipari. Contrary to the argument of counsel for Perfetto and the City, the e-mail communications requested are not to ascertain defamatory statements contained in them, but to explore the issue of whether a personal relationship between Perfetto and Rosalia may have motivated Perfetto to act out of ill will, thereby defeating his presumed qualified privilege.

The selected fragments of deposition transcripts and unsworn and/or uncertified transcripts annexed to the moving and cross-moving papers are inadmissible and have not been considered.

Dated: December 17, 2007

KEVIN J. KERRIGAN, J.S.C.
