

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF PUTNAM

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JUSTINE YULA POTENZO

Plaintiff,

NOTICE OF ENTRY

-against-

Index No. 501270/2023

NEW YORK CITY DEPARTMENT OF EDUCATION
and THE CITY OF NEW YORK,

Defendants.

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PLEASE TAKE NOTICE that within is a true and correct copy of the **Order**, signed by the HON. GINA C. CAPONE, J.S.C., dated on the 19th day of April, 2024, which was duly entered in the Putnam County Clerk’s Office of the Supreme Court of the State of New York on April 19, 2024.

Dated: New York, NY
19th day of April, 2024

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TO: LAW OFFICE OF HARRY I KATZ, PC
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF PUTNAM**

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JUSTINE YULA POTENZO

Plaintiff,

-against-

DECISION AND ORDER

Index No. 501270/2023

Motion Seq. No. 1

NEW YORK CITY DEPARTMENT OF EDUCATION and
THE CITY OF NEW YORK

Defendant.

-----X

CAPONE, J.S.C.

The following papers, numbered 1-8, were read and considered on the Defendants' motion to dismiss the complaint.

PAPERS

NUMBERED

Notice of Motion/ Attorney Affirmation in Support/ Exhibits A-C/
Memorandum of Law in Support

1-6

Attorney Affirmation in Opposition

7

Memorandum of Law in Reply

8

By summons and verified complaint filed August 16, 2023, the Plaintiff commenced this action against the Defendants and seeks to recover damages for defamation, interference with prospective business relations and intentional infliction of emotional distress.

The Plaintiff contends that, following her involuntary resignation from teaching with the New York City Department of Education, a "problem code" was allegedly either attached to her fingerprints or placed in her personnel file and, thereafter, she has been unable to obtain employment as a teacher in any other school district.

According to the Verified Complaint, the Plaintiff was a math cluster teacher for grades K-5 at PS X014 beginning in September 1999. She alleges that, in or about 2021, the Defendants issued a COVID vaccine mandate and, due to religious reasons, she declined the vaccine and her applications to be exempt from vaccination were denied. Accordingly, on or about December 21, 2021, “plaintiff was forced to resign from her employment with defendant” (NYSCEF Doc 2, p 3). She alleges that, on or about February 10, 2023, she learned that “her fingerprints were tagged by the defendant under “problem code” by the defendant’s Human Resources Office of Personnel Investigations” (NYSCEF Doc 2, p 3). The Plaintiff alleges that, “upon information and belief, the ‘problem code’ was placed on plaintiff’s file solely because she declined the Covid vaccine” (NYSCEF Doc 2, p 3). She alleges, again on information and belief, that “plaintiff’s fingerprints with a ‘problem code’ went to the FBI and New York Crime Justice Service” (NYSCEF Doc 2, p 4). She also alleges, upon information and belief, that “non Department of Education schools that want to learn whether a former Department of Education employee has ‘problem code’ in his or her personnel file can readily do so” (NYSCEF Doc 2, p 4). She asserts that she has applied for over 65 teaching position and has not received a single job offer. She further alleges that she has not been hired by prospective employers because of the “problem code” in her personnel file (NYSCEF Doc 2, p 4). As such, she seeks to recover damages under the theories of recovery listed above.

Prior to filing an Answer, the Defendants have now moved pursuant to CPLR 3211, to dismiss the complaint.

“On a pre-answer motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction and the plaintiff's allegations are accepted as true and accorded the benefit of every possible favorable inference” (*Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 996 [2d Dept 2010]; see *Leon v Martinez*, 84 NY2d 83, 87

[1994]). However, on a motion to dismiss pursuant to CPLR 3211(a)(7), “bare legal conclusions are not presumed to be true” (*Khan v MMCA Lease, Ltd.*, 100 AD3d 833, 833 [2d Dept 2012]; see *Gillings v New York Post*, 166 AD3d 584, 855-856 [2d Dept 2018]). A motion to dismiss pursuant to CPLR 3211(a)(1) may be appropriately granted “only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; see *Gillings v New York Post*, 166 AD3d at 856).

Defamation

To state a cause of action 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 (see *Rosner v Amazon.com*, 132 AD3d 835 [2d Dept 2015]). As a rule, “a cause of action predicated on alleged defamatory statements is subject to dismissal if the statements are insufficiently pleaded, constitute nonactionable opinion, or are subject to a qualified privilege defense” (*Gottlieb v Wyne*, 159 AD3d 799, 800 [2d Dept 2018]).

The Plaintiff’s verified complaint fails to state a cause of action for defamation. The allegations contained in the Plaintiff’s complaint do not satisfy the special pleading requirements of CPLR 3016(a), as it does not set forth the actual words complained of, and it failed to specify the particular persons to whom the Defendants allegedly published the alleged defamatory statement(s) (see *Golia v Vierira*, 162 AD3d 865, 869 [2d Dept 2018]; cf. *Wilcox v Newark Valley Cent. School Dist.*, 74 AD3d 1158 [3d Dept 2010]). The verified complaint alleges that the defendant “via the ‘problem code’ has issued misleading statements and has committed defamation, slander, and libel in derogation of the rights of plaintiff and has been continuing to do so” and that the defendants “made and continues

to make false and misleading statements, knowing the same to be false or in reckless disregard of whether they are false or not; for purpose and with the intent of harming and damaging the plaintiff” (NYSCEF Doc 2, p 5). No where in the complaint does the Plaintiff identify the actual content of the alleged defamatory statement. In fact, at one point in the verified complaint, the code is described as “generic” (NYSCEF Doc 2, p 6). Indeed, much of the discussion contained in the motion papers make clear that, other than alleging that a problem code exists in Plaintiff’s personnel file, there is nothing specifically identifying how the presence of that code itself constitutes an actionable defamatory statement. Moreover, while the complaint alleges that the Plaintiff has not been hired by prospective employers because of the “problem code” in her personnel file and asserts, upon information and belief, that other non Department of Education entities may “readily find out” if an employee has a problem code in an employee’s file, there is nothing contained in the complaint that asserts that the alleged presence of a problem code was, in fact, published to any of the prospective employers. Accordingly, having failed to state a claim upon which relief can be granted pursuant to CPLR 3211(a)(7) and CPLR 3016(a), the first cause of action of the Plaintiff’s complaint must be dismissed.

Tortious Interference with Prospective Business Relations

“To prevail on a claim for tortious interference with business relations, a party must prove: (1) that it had a business relationship with a third party; (2) that the defendant knew of that relationship and intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the relationship with the third party” (*106 N. Broadway, LLC v Lawrence*, 189 AD3d 733, 741 [2d Dept 2020]; see *Stuart’s, LLC v Edelman*, 196 AD3d 711 [2d Dept 2021]; *684 E. 222nd Realty Co., LLC v Sheehan*, 185 AD3d 879, 879–880 [2d Dept 2020]). “[C]onduct constituting tortious

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