

Case Name:

Tewogbade v. Toronto (City) Police Services Board

**RE: John Tewogbade, Plaintiff, and
Toronto Police Services Board, Detective Constable Mike Austin
Badge #7608; and Constable Stephanie Dugan Badge #2470,
Defendants**

[2010] O.J. No. 3641

2010 ONSC 4706

Court File No. 06-CV-318673PDI

Ontario Superior Court of Justice

K.W. Whitaker J.

Heard: August 26, 2010.

Judgment: August 30, 2010.

(21 paras.)

Civil litigation -- Civil procedure -- Judgments and orders -- Summary judgments -- No triable issue -- To dismiss action -- Motion by the defendants for summary judgment allowed -- The plaintiff, a former police officer who had been convicted of drug-related offences, claimed defamation, abuse of public office, conspiracy to injure and breach of fiduciary duty -- The internal communications at issue were distributed only within 51 Division and were intended to ensure the safety and effective functioning of the Division -- Furthermore, there was no factual foundation for finding malice, recklessness, abuse of public office, conspiracy to injure or breach of fiduciary duty -- Therefore, there was no issue requiring a trial.

Tort law -- Practice and procedure -- Motion by the defendants for summary judgment allowed -- The plaintiff, a former police officer who had been convicted of drug-related offences, claimed defamation, abuse of public office, conspiracy to injure and breach of fiduciary duty -- The internal communications at issue were distributed only within 51 Division and were intended to ensure the safety and effective functioning of the Division -- Furthermore, there was no factual foundation for finding malice, recklessness, abuse of public office, conspiracy to injure or breach of fiduciary duty -- Therefore, there was no issue requiring a trial.

Counsel:

P. Pommells, for the Defendants, Moving Parties.

S.A. Pieters, for the Plaintiff, Responding Party.

ENDORSEMENT

1 **K.W. WHITAKER J.**:- This matter consists of a claim for defamation, abuse of public office, conspiracy to injure and breach of fiduciary duty.

2 The Defendants seek summary judgment.

3 The Plaintiff takes the position that all issues require a trial and asks that the motion be dismissed.

4 The Plaintiff is a former police officer who resigned following a conviction for drug related offences. The personal Defendants are police officers.

5 The dispute centres on a publication in electronic and hard copy, generated by the Defendants and circulated within 51 Division (a police station in downtown Toronto). The publication alleged that the Plaintiff resigned his position after having sold drugs from his police cruiser, that he was working at a car dealership adjacent to 51 Division, and that he had stood close to the police station during a "parade" of charged youth, "giving running commentaries to anyone who would listen".

6 The parties agree that the issues here are whether a trial is required concerning:

- the defence of qualified privilege;
- malice; and
- the torts of abuse of public office, conspiracy to injure and breach of fiduciary duty.

7 Affidavits were filed by the Plaintiff and the two personal Defendants Austin and Dugan, both of whom were responsible for the creation of the publication. No cross examinations occurred.

8 The law as it relates to defamation is described by Laskin J.A. in *R.T.C. et al v. The Queen et al.* (Ontario Court of Appeal) [2002] O.J. No. 1001, 2002 CanLII 14179 (ON C.A).

9 In paragraphs 13 to 18 of this decision, the Court notes that qualified privilege attaches to the occasion when the defamatory statement is made and not to the statement itself. The privilege arises when the interest sought to be protected by the statement is important enough to justify a limited immunity from defamation. Further, the statements must be made honestly, in good faith and without malice and in a manner and form which is reasonably appropriate. Finally, qualified privilege may be lost if the dominant motive is malice. Malice may be either intentional or reckless. Malice is reckless where there is indifference as to the truth of the statement.

10 The purpose and importance of the internal communication is outlined in paragraphs 39 to 41 of the Defendants' factum and in the references to the affidavits of Austin and Duggan contained in those paragraphs. As indicated earlier, these affidavits were not subject to cross examination and no contrary evidence or information was put before me to challenge these assertions.

11 I conclude that the internal communications, distributed only electronically within 51 Division were intended to ensure the safety and effective functioning of the Division and those officers working there. Applying the principles of *R.T.C.*, I accept the Defendants' submission that qualified privilege attaches to these communications and that there is nothing in the record which could reasonably lead to a different conclusion. There is no issue requiring a trial with respect to the existence of qualified privilege.

12 With respect to malice, the affidavits of Dugan and Austin deny any malicious intent and also provide a factual foundation for concluding that they acted certainly without any intentional malice. Similarly, there is no evidence in the record which would permit a finding that the Defendants were reckless as to the truth of the statements made in the communication. Both Defendants Austin and Dugan did not personally know the Plaintiff at the time of the communications and would have no apparent motive to act with malice.

13 I conclude that there is no issue which requires a trial with respect to the issue of malice.

14 With respect to the tort of abuse of public office, the Defendants rely on *Odhavji v. Woodhouse*, [2003] 3 S.C.R. 263 at para 32 for the proposition that this tort requires a finding that the office holders were engaged in deliberate unlawful conduct in their official duties and secondly, that they were aware that the impugned conduct was unlawful and likely to harm the Plaintiff.

15 I adopt this analysis and find there is no evidence in the record to permit such a conclusion. Accordingly, there is no issue requiring a trial with respect to the tort of abuse of public office.

16 With respect to the tort of conspiracy to injure, the Defendants rely on *New Solutions v. Gauthier* 2010 ONSC 1037 (S.C.J.) at paragraph 29 for the proposition that such a tort would require a finding that the predominant motive in making the communication was to injure the Plaintiff.

17 I adopt this analysis and find there is no evidence in the record to permit such a conclusion. Accordingly, there is no issue requiring a trial with respect to the tort of conspiracy to injure.

18 With respect to the tort of breach of fiduciary duty, the Defendants rely on *Romagnuolo v. York Police*, [2001] O.J. No 3537, at paragraph 38 for the proposition that the duties of a police officer are owed to the public at large and not to individual members of the public.

19 I adopt this analysis and find that there is no evidence in the record before the Court in this matter which would permit the conclusion that in some way the Defendants breached any fiduciary duty owed to the Plaintiff.

20 For all of these reasons, the Defendants are granted summary judgment and the Plaintiff's claim is dismissed in its entirety.

21 This is not a case which is appropriate for costs on a substantial indemnity basis. The law of defamation is fairly well settled and having regard to the principles in *Boucher v. Public Accountants*, [2004] O.J. No. 2634, the Defendants are entitled to fixed costs of \$15,000.00 inclusive of disbursements and GST, payable within thirty days.

K.W. WHITAKER J.

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