UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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DR. LEONARD MORSE,

Plaintiff,

-against-

ELIOT SPITZER et al.,

Defendants.
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NOT FOR PUBLICATION
MEMORANDUM & ORDER
07-CV-4793 (CBA) (RML)

AMON, Chief United States District Judge:

BACKGROUND

This is a 42 U.S.C. § 1983 action arising from the criminal prosecution of the plaintiff, Dr. Leonard Morse, for Medicaid fraud. Morse was indicted in 2006 by a grand jury for Grand Larceny in the First Degree and Offering a False Instrument in the First Degree. He was ultimately acquitted of all charges after a bench trial. Morse subsequently commenced this action against former New York Attorney General Eliot Spitzer, Special Assistant Attorney General John Fusto, who worked in the Medicaid Fraud Control Unit ("MFCU") and was the prosecutor responsible for overseeing the investigation, grand jury proceedings, and prosecution of Morse, Robert Flynn, the lead MFCU investigator on Morse's case, and Jose Castillo, an MFCU audit-investigator also assigned to Morse's case. Morse alleges that the defendants violated his civil rights by initiating and pursuing his arrest, indictment, and prosecution for Medicaid fraud. His second amended complaint asserts claims for false arrest, malicious prosecution, denial of the right to a fair trial due to fabrication of evidence, and various claims stemming from the issuance of a press release publicizing Morse's indictment. (DE 63.)

This Court granted summary judgment to Defendants on Morse's false arrest and malicious prosecution claims and denied summary judgment on Morse's fair trial claim, Morse

v. Spitzer, No. 07-CV-4793 CBA RML, 2011 WL 4625996 (E.D.N.Y. Sept. 30, 2011), and adhered to its decision on reconsideration, Morse v. Spitzer, No. 07-CV-4793 CBA RML, 2012 WL 3202963 (E.D.N.Y. Aug. 3, 2012). The Court found that Morse had presented evidence sufficient to raise a genuine issue of fact regarding whether Fusto and Castillo intentionally fabricated and/or altered billing summaries for use before the grand jury and whether such fabricated evidence was material in securing the indictment. Morse, 2011 WL 4625996, at *4. On reconsideration, Defendants raised for the first time an absolute immunity defense. The Court considered the argument and found that genuine issues of fact precluded a finding as a matter of law as to whether Fusto and Castillo were engaged in an investigatory or advocacy function when they allegedly fabricated billing records. Morse, 2012 WL 3202963, at *10. Accordingly, Defendants' motion for reconsideration on absolute immunity grounds was denied. Morse's claim for denial of the right to fair trial due to fabrication of evidence is currently set for trial.

Now pending before the Court is Defendants' motion for partial summary judgment on Morse's claims stemming from a press release issued by the New York Attorney General's office publicizing Morse's indictment—the fifth, sixth, and seventh claims in the second amended complaint (the ninth, tenth, and eleventh claims in the original complaint). The claims are asserted against Defendants Spitzer and Fusto. (DE 35, 38.) Morse alleged that the issuance of the press release violated his right to fair trial, deprived him of a liberty interest without due process of law, and defamed him in violation of New York state law.

Also pending before the Court is Morse's Rule 56(d)[1] request to be permitted to take

[1] Morse styles his request as one made pursuant to Rule 56(f). The substance of former Rule 56(f) was "carrie[d] forward without substantial change" by Rule 56(d) in the 2010 Amendments to the Federal Rules of Civil Procedure. Fed. R. Civ. P. 56(d) advisory committee's note on 2010 amendments. The Court accordingly construes Morse's Rule 56(f) request as one made under Rule 56(d).

Defendant Spitzer's deposition before the Court decides Spitzer's summary judgment motion. The Honorable Robert M. Levy, United States Magistrate Judge, previously granted Defendant Spitzer's motion for a protective order quashing a deposition subpoena directed at Spitzer. (Minute Entry for proceedings held on 11/29/12.) The parties agreed that any objections to Judge Levy's ruling regarding the Spitzer deposition would be addressed in the briefing on the motion for partial summary judgment rather than in the form of separate objections pursuant to Rule 72. (Minute Entry for proceedings held on 12/6/12.)

STANDARD OF REVIEW

Summary judgment is appropriate if the record shows that there is "no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-52 (1986). On a motion for summary judgment, the court views the evidence in the light most favorable to the nonmoving party and draws all reasonable inferences in its favor. Thomas v. Roach, 165 F.3d 137, 142 (2d Cir. 1999). However, the non-moving party cannot rest on mere allegations or denials but must instead come forward with specific facts showing that there is a genuine issue for trial. Caldarola v. Calabrese, 298 F.3d 156, 160 (2d Cir. 2002).

DISCUSSION

I. Fair Trial Claim

In his memorandum in opposition of Defendants' motion, Morse stated that he did not oppose Defendants' motion on this claim. (DE 95, Pl.'s Mem. in Opp'n, at 45 n.11.) Accordingly, Defendants are granted summary judgment on this claim.

II. Defamation Claim

Morse brings a defamation claim under New York state law, claiming that the press

release issued by Defendants publicizing his indictment lead to severe reputational damage and the loss of his career as a dentist. The press release at issue stated the following:

> BROOKLYN DENTIST INDICTED FOR MILLION DOLLAR MEDICAID THEFT
>
> Attorney General Spitzer announced today that a grand jury has charged a Brooklyn dentist with stealing more than $1 million from the Medicaid program.
>
> The indictment unsealed last week in Kings County Supreme Court alleges that Leonard Morse fraudulently billed Medicaid for new dentures that he never delivered and for denture repairs that he never performed.
>
> According to prosecutors, these billings—which included claims for repairing broken or missing teeth, broken clasps and for denture relinings—were often submitted for services provided to Medicaid patients who did not even wear dentures.
>
> The indictment alleges that Morse submitted his false claims to Medicaid through 580 Dental P.C., a company located at 580 Fifth Avenue in Brooklyn of which he was the proprietor, and that Medicaid paid over $1 million on the basis of those claims.
>
> Morse 47, of Kings Point in Nassau County, was charged with one count of Grand Larceny in the First Degree, a class "B felony, carrying a maximum sentence of 25 years and 11 Counts of Offering a False Instrument for Filing in the First Degree, a Class "E" felony. Morse surrendered to investigators of the Attorney General's office and pleaded not guilty before Acting Supreme Court Justice John P. Walsh, who presided at the arraignment.
>
> The case is being prosecuted by Special Assistant Attorney General John Fusto, of the Attorney General's Medicaid Fraud Control Unit. Senior Special Investigators Robert Flynn and James Serra and Senior Special Auditor Investigator Jose Castillo assisted in the investigation.
>
> The charges against Morse are accusations and the defendant is presumed innocent until and unless proven guilty.

(DE 92-1, Second Am. Compl., at 33.)

A. Legal Standards

Under New York law, defamation is defined as "the making of a false statement which 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.'" Foster v. Churchill, 87 N.Y.2d 744, 751 (1996) (quoting Rinaldi v. Holt, Rinehart, & Winston, 42 N.Y.2d 369, 379 (1977)). "Generally, spoken defamatory words are slander; written defamatory words are libel." Albert v. Loksen, 239 F.3d 256, 265 (2d Cir. 2001) (citing Matherson v. Marchello, 100 A.D.2d 233, 239 (N.Y. App. Div. 1984)). Morse's claim is based on the press release publicizing his indictment; accordingly, it is a claim for libel. To recover for libel in New York, a plaintiff must establish five elements: "1) a written defamatory statement of fact concerning the plaintiff; 2) publication to a third party; 3) fault (either negligence or actual malice depending on the status of the libeled party); 4) falsity of the defamatory statement; and 5) special damages or per se actionability (defamatory on its face)." Celle v. Filipino Reporter Enters. Inc., 209 F.3d 163, 176 (2d Cir. 2000) (citing, *inter alia*, 43A NY Jur. 2d: Defamation and Privacy § 1, at 198 (1994)).

Claims based on reports of judicial proceedings are governed by Section 74 of the New York Civil Rights Law, which provides that "[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." N.Y. Civil Rights Law § 74 (McKinney's). "New York courts have broadly construed the meaning of an official proceeding as used in Section 74," Test Masters Educ. Servs., Inc. v. NYP Holdings, Inc., 603 F. Supp. 2d 584, 588 (S.D.N.Y. 2009), and the protection "extends not only to a transcript of the proceeding itself, but also to any pleading made within the course of the proceeding." Branca v. Mayesh, 101 A.D.2d 872, 873 (N.Y. App. Div. 1984) (citing Campbell v. New York Evening Post, 245 N.Y. 320 (1927)). New York courts have applied Section 74's privilege to fair and accurate

reports of indictments. E.g., Becher v. Troy Pub. Co., Inc., 183 A.D.2d 230 (N.Y. App. Div. 1992); Liffiton v. Buffalo Evening News, 143 A.D.2d 515 (N.Y. App. Div. 1988); Hornyak v. Hearst Corp., 66 N.Y.S.2d 848, 850 (N.Y. Sup. Ct. 1946) aff'd, 272 A.D. 866 (N.Y. App. Div. 1947); see also 43A N.Y. Jur. 2d Defamation and Privacy § 138.

"For a report to be characterized as 'fair and true' within the meaning of the statute, . . . it is enough that the substance of the article be substantially accurate." Holy Spirit Ass'n for Unification of World Christianity v. New York Times Co., 49 N.Y.2d 63, 67 (1979). "A report is 'substantially accurate' if, despite minor inaccuracies, it does not produce a different effect on the reader than would a report containing the precise truth." Karedes v. Ackerly Group, Inc., 423 F.3d 107, 118 (2d Cir. 2005) (internal quotation marks omitted). An exception to this privilege (the "Williams exception") applies where parties "maliciously institute a proceeding alleging false and defamatory charges and publicize them in the press." McNally v. Yarnall, 764 F. Supp. 853, 856 (S.D.N.Y. 1991) (citing Williams v. Williams, 23 N.Y.2d 592 (1969)).

B. Application

Morse argues that New York Civil Rights Law § 74 does not apply for three reasons: (1) the press release contained new (and false) allegations that were not mentioned in the indictment, thus going beyond a "fair and true" report, (2) because a reasonable jury could conclude that Fusto fabricated evidence presented to the grand jury that was material in securing the indictment, a reasonable jury could also conclude that the press release publicizing the fraudulently obtained indictment was false and misleading, and (3) section 74 does not apply to defendants who publicize their own improperly brought legal proceedings. The Court addresses each argument in turn.

1. New Allegations in the Press Release

Morse argues that the following statement in the press release was not claimed anywhere in the original indictment:

> According to prosecutors, these billings—which included claims for repairing broken or missing teeth, broken clasps and for denture relinings—**were *often* submitted for services provided to Medicaid patients *who did not even wear dentures***.

(DE 95, Pl.'s Mem. in Opp'n, at 31.) The original indictment accused Morse of the following:

> The defendant, Leonard Morse, a dentist licensed to practice in New York State, submitted and caused to be submitted to Computer Sciences Corporation, a fiscal agent of the State of New York, numerous claims in the name of 580 Dental P.C., a provider of dental services in the New York State Medical Assistance Program, (Medicaid), knowing that these claims falsely represented that various dental procedures were rendered to Medicaid recipients when in truth and fact, as the defendant well knew, that the recipients had not been provided the services as claimed. Among the services falsely billed were repair or replacement of broken clasps on partial dentures, replacement of broken or missing teeth on complete dentures and on partial dentures, relining of complete dentures and on partial dentures, relining of complete dentures and relining of partial dentures. In reliance upon these false claims, the State of New York, through its fiscal agent, paid 580 Dental P.C. in excess of $1,000,000.00 to which neither the corporation nor defendant was entitled.

(DE 92-8, Indictment, at 3.)

The Court finds that the press release easily falls into the category of a "substantially accurate" report that would "not produce a different effect on the reader than would a report containing the precise truth." Karedes, 423 F.3d at 118. Although the indictment did not specifically state that Morse was accused of submitting claims for services rendered to patients who did not wear dentures, it stated that he was alleged to have falsely billed various repair and replacement procedures on dentures. The plain import of the press release was exactly that: that Morse was being accused of submitting claims to the state for services not rendered. Substituting "patients who did not wear dentures" with "patients who did not require denture repair or replacement services" does not lead to a "different effect on the reader." The press

release did not go beyond a "fair and true report" of the judicial proceedings based on this slight difference in expression.

2. Fraudulently Obtained Indictment

Morse's second argument in support of his claim that Section 74 does not apply is that because there is a fact dispute regarding whether Fusto and Castillo fabricated billing records presented to the grand jury, there is also a fact dispute regarding whether the press release was false. Morse also argues that the Williams exception should apply because a reasonable jury could find that Fusto created the press release knowing that the indictment was procured by fabricated evidence.

Morse's arguments are without merit. That there may have been problems in securing an indictment does not render a report on the fact of the indictment's issuance false. In Carlton v. Nassau Cnty. Police Dep't, 306 A.D.2d 365 (N.Y. App. Div. 2003), the Second Department found that notwithstanding issues of fact regarding whether police had probable cause to arrest the plaintiff for not paying disputed portions of a restaurant bill ('theft of services"), plaintiff had not stated a claim for defamation based on published statements about his arrest because the fact of his arrest for theft of services was true. Just as a question of fact regarding the legality of the arrest in Carlton did not render a report on the fact of the arrest false, so here a question of fact regarding the propriety of the indictment does not render a press release accurately describing the charges therein false. See also Glantz v. Cook United, Inc., 499 F. Supp. 710, 715 (E.D.N.Y. 1979) ("[E]ncompassed within the [§ 74] privilege is the right to publish a 'fair and true' report which contains information that is 'false' as a matter of fact.").

Of course, an exception to the § 74 privilege applies where "it appears that the public policy goals of the statute are being thwarted by the commencement of litigation intended as a

device to protect a report thereof and thereby disseminate defamatory information." Halcyon Jets, Inc. v. Jet One Group, Inc., 69 A.D.3d 534, 534 (N.Y. App. Div. 2010) (citing Williams, 23 N.Y.2d at 599). In the New York Court of Appeals case establishing the exception, Williams v. Williams, 23 N.Y.2d 592 (1969), the defendant had previously initiated a lawsuit against plaintiff, alleging that plaintiff conspired to misappropriate and misuse the trade secrets and assets of the defendant's company. The defendant then sent copies of the summons and complaint in that case to members of the trade. In such circumstances, even though the defendant's actions "appear[ed] to fit within the wording of section 74," the Court concluded "it was never the intention of the Legislature in enacting section 74 to allow 'any person' to maliciously institute a judicial proceeding alleging false and defamatory charges, and to then circulate a press release or other communication based thereon and escape liability by invoking the statute." Williams, 23 N.Y.2d at 599. "New York courts have consistently held that the Williams exception is a narrow one and does not apply 'in the absence of any allegation that the . . . action was brought maliciously and solely for the purpose of later defaming the plaintiff.'" D'Annunzio v. Ayken, Inc., -- F. Supp. 2d --, 2012 WL 2906248, at *5 (E.D.N.Y. July 17, 2012) (quoting Riel v. Morgan Stanley, No. 06-CV-524, 2007 WL 541955, at *12 (S.D.N.Y. Feb. 16, 2007)); see also Hughes Training, Inc., Link Div. v. Pegasus Real-Time Inc., 255 A.D.2d 729, 730 (N.Y. App. Div. 1998) ("[A]side from bald speculation, defendants have tendered no proof that the action was commenced *solely* as a shield against liability for the dissemination of defamatory accusations." (emphasis added)); Cuthbert v. Nat'l Org. for Women, 207 A.D.2d 624, 626 (N.Y. App. Div. 1994) (describing Williams exception as "narrow").

Morse has failed to raise a genuine issue of material fact as to whether the Williams exception applies. First, Morse has never alleged that the suit was commenced against him

solely for the purpose of taking refuge in § 74's privilege after disseminating false and defamatory charges. The theory of Morse's case has consistently been that he was the target of a shoddy investigation undertaken to show that then-Attorney General Spitzer took Medicaid fraud seriously, thereby boosting Spitzer's gubernatorial campaign. (E.g., Second Am. Compl. at ¶ 170.) Accordingly, the negative reputational impact upon Morse was the fallout from an overzealous campaign, rather than the goal of the criminal action. More importantly though, even had Morse made such an allegation, his argument would still fail as he cannot raise a triable issue of fact regarding whether his prosecution was maliciously instituted. The Court has already decided that even without the allegedly fabricated evidence, "arguable probable cause" existed to commence criminal proceedings against Morse, defeating Morse's malicious prosecution claim. Morse, 2011 WL 4625996, at *9. Because the Court has already found that the criminal proceeding against Morse was legally justified (at least to the extent meriting qualified immunity), the Williams exception cannot apply.

That being charged with a crime may cause reputational damage is indisputable. But it does not follow that every person charged and subsequently acquitted of a crime has an actionable cause for defamation. The Court finds that the press release was a "fair and true" report of the charges in the indictment entitled to § 74's privilege and that the prosecution was not brought maliciously as a shield to liability for disseminating false and defamatory statements.

3. Defendants' Own Publication

Lastly, Morse raises the point that the § 74 privilege is typically granted to an independent publisher who has reported on a judicial proceeding and that the Defendants here should not be able to assert the privilege to publicize their own improperly brought legal proceeding. Morse cites to Halcyon Jets, Inc. v. Jet One Group, Inc., 69 A.D.3d 534 (N.Y. App.

Div. 2010), which involved two business competitors, one of whom filed suit against the other alleging fraud and RICO claims and then issued a press release reporting the filing of the complaint and summarizing its allegations. The court found that "Defendants' intention to use the federal action as such a device [to commit defamation] is a factual issue that is sufficiently pleaded and cannot presently be decided." 69 A.D. at 534-35. It went on to note that "[w]hile not dispositive, defendants' self-publication tends to connect the litigation and report thereof more closely than in Williams, making this an a fortiori case and undermining defendants' argument that because their press release, unlike that in Williams, was not directed at members of the parties' industry but was disseminated as a general news item, Williams does not apply as a matter of law." Id. at 535.

First, the Court notes that though precursors to the current § 74 applied only to the media, New York courts have explained that the privilege now extends to "any person." E.g., Williams, 23 N.Y.2d at 597-98 (reviewing legislative history of section 74); Branca v. Mayesh, 101 A.D.2d 872, 873 (N.Y. App. Div. 1984) (the premise that "section 74 protection . . . extend[s] only to persons disinterested in the lawsuit which was being reported . . . [is] inconsistent with the broad terms of the statute"). Second, although self-publication may give rise to a stronger inference that a proceeding was brought to commit defamation, here, as explained above, Morse has failed to make such an allegation and, further, he could not show that his criminal proceeding was maliciously brought. Thus, for the same reasons as explained above, self-publication in this case fails to raise an issue of fact as to the applicability of the Williams exception.

III. "Stigma Plus" Claim

Morse brings a "stigma plus" claim pursuant to 42 U.S.C. § 1983, alleging that statements made in the press release were false and lead to a deprivation of his liberty interest in

obtaining employment in his chosen field without due process of law.

The Due Process Clause of the Fourteenth Amendment prohibits states from depriving any person of life, liberty, or property without due process of law. U.S. Const. Amend. XIV § 1. Procedural due process claims are analyzed in two steps, by examining "whether there exists a liberty or property interest which has been interfered with by the State . . . [and] whether the procedures attendant upon that deprivation were constitutionally sufficient." Ky. Dept. of Corr. v. Thompson, 490 U.S. 454, 460 (1989) (citation omitted).

The Supreme Court has recognized a protectible liberty interest in certain situations "[w]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him." Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). However, the Supreme Court has "never held that mere defamation of an individual . . . [is] sufficient to invoke the guarantees of procedural due process absent an accompanying loss of government employment." Paul v. Davis, 424 U.S. 693, 706 (1976) (footnote omitted). Rather, it is "the alteration of legal status . . . combined with the injury resulting from defamation [that] justifie[s] the invocation of [federal constitutional] procedural safeguards." Id. at 708-09. A § 1983 claim of this sort, alleging state-imposed harm to reputation in addition to some other tangible loss, is referred to as a "stigma plus" claim. See Valmonte v. Bane, 18 F.3d 992, 999 (2d Cir. 1994). A "stigma plus" plaintiff must allege "(1) the utterance of a statement about her that is injurious to her reputation, that is capable of being proved false, and that he or she claims is false, and (2) some tangible and material state-imposed burden . . . in addition to the stigmatizing statement." Velez v. Levy, 401 F.3d 75, 87 (2d Cir. 2005) (internal quotation marks omitted) (omission in original).

"To meet the stigma element of his claim, . . . the plaintiff is required to show a

stigmatizing statement about him made or to be made under color of law that is capable of being proved true or false." Doe v. Dep't of Pub. Safety ex rel. Lee, 271 F.3d 38, 48 (2d Cir. 2001) rev'd on other grounds sub nom. Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1 (2003). Though the Plaintiff need not prove that the stigmatizing statements are false, he must be able to "raise the falsity of [the] stigmatizing statements as an issue." Patterson v. City of Utica, 370 F.3d 322, 330 (2d Cir. 2004). Where no genuine dispute of fact exists as to a statement's truth, the due process clause is not implicated. See, e.g., Wiese v. Kelley, No. 08-cv-6348(CS), 2009 WL 2902513, at *5 (S.D.N.Y. Sept. 10, 2009) (collecting cases); Smith v. Lehman, 689 F.2d 342, 346 (2d Cir. 1982) (finding no liberty interest at stake where plaintiff could not "challenge the 'substantial accuracy'" of the allegedly stigmatizing statements); Flood v. Cnty. of Suffolk, 820 F.Supp. 709, 715 (E.D.N.Y. 1993) ("Even assuming that defendants' alleged statement . . . is stigmatizing and may foreclose future employment opportunities, plaintiff's liberty interest is not implicated where the defamatory statement is substantially true.").

As explained above, Morse has failed to raise a triable issue of fact regarding the falsity of the press release. Thus, as the Court has found the press release to be substantially true as a matter of law, the statements are not "capable of being proved false," and Morse's "stigma plus" claim must fail. Pisani v. Westchester Cnty. Health Care Corp., 424 F. Supp. 2d 710, 718 (S.D.N.Y. 2006) ("Because we have . . . found defendants' statements substantially true and thus not capable of being proved false, plaintiff's liberty interest claim . . . fails.").

IV. Deposition of Eliot Spitzer

Morse also requests pursuant to Fed. R. Civ. P. 56(d) to be permitted to take Defendant Spitzer's deposition before the Court decides Spitzer's summary judgment motion. Because all of Morse's press release-related claims fail as a matter of law, his request is moot.

CONCLUSION

For the reasons stated above, Defendants' motion for summary judgment on Morse's "press release claims"—the fair trial claim, defamation claim, and "stigma plus" clam—is granted. Morse's request to depose Defendant Spitzer is denied as moot. Trial is scheduled to proceed on Morse's one remaining claim in this action: whether Fusto and Castillo fabricated evidence material to securing the indictment.

SO ORDERED.

Dated: Brooklyn, New York
January 14, 2013

s/Carol Bagley Amon

Carol Bagley Amon
Chief United States District Judge