



By the order of the court, Judge David A Wiseman

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FOR PUBLICATION

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

CARMEN FERNANDEZ,

Plaintiff,

v.

JANET HAN KING, MARIA (PAZ)
CASTRO YOUNIS, ANDREW L. ORSINI,
FRANK RABULIMAN, OSCAR RASA,
NORTHERN MARIANAS COLLEGE,
AND DOES 1 TO 10,

Defendants.

CIVIL CASE NO. 11-0147

ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS

I. INTRODUCTION

THIS MATTER came for hearing on September 15, 2011 at 1:30 p.m. in Courtroom 223A. At the hearing, the parties presented arguments regarding Janet Han King, Maria (Paz) Castro Younis, Andrew L. Orsini, Frank Rabauliman (collectively “the Individual Defendants”)¹ and Northern Marianas College (“NMC”) (collectively “Defendants”)’s Motion to Dismiss and Motion to Take Judicial Notice. Defendants were represented by Michael W. Dotts, Esq. Plaintiff Carmen Fernandez, (“Plaintiff” or “Fernandez”) was represented by, Brien Sers Nicholas, Esq.

After considering oral and written arguments the Court **GRANTS** Defendants’ motions to take judicial notice and to dismiss.

¹ Defendant Oscar Rasa is not joined as one of the Individual Defendant’s for purposes of this Order, as he is represented *pro se* and has filed separate responsive pleadings.

1 **II. FACTUAL AND PROCEDURAL BACKGROUND**

2 Plaintiff served as President of NMC college. Her employment was pursuant to a contract which
3 contained an early termination provision providing that she could only be terminated for cause upon thirty
4 days notice and a hearing.² Investigations were conducted by Defendants into the conduct of Plaintiff
5 relating to student grade changes she had allegedly authorized. Plaintiff was placed on suspension during
6 the investigations. On April 12, 2010, a hearing was held regarding her termination. On April 19, 2010,
7 the Individual Defendants as regents of NMC, terminated Plaintiff’s employment for wrongdoing and failure
8 to perform her duties in accordance with policies and procedures of NMC. Plaintiff was notified in writing
9 of the decision to terminate her employment.

10 Plaintiff filed a 42 U.S.C. § 1983 suit and demand for jury trial in the U.S. District Court, District
11 of the Northern Mariana Islands (“District Court”). The complaint also included pendant state based claims
12 and generally alleged she was wrongfully terminated and defamed. On May 3, 2011, the District Court
13 issued an order dismissing with prejudice the federally based causes of action and dismissed without
14 prejudice the remaining pendant jurisdictional state based claims. On June 7, 2011, Plaintiff filed a
15 Complaint before this Court alleging: Breach of Contract against NMC (Count I); Breach of the Covenant
16 of Good Faith and Fair Dealing by NMC (Count II); Wrongful Termination against NMC (Count III);
17 Defamation against the Individual Defendants (Count IV); and Conspiracy to Defame against the Individual
18 Defendants (Count V); and Intentional Interference with Contract and Economic Relations by Defendant
19 Rasa (Count VI).³

20 In response to the Complaint, Defendants have now moved the court to take judicial notice of two
21 public documents, to dismiss the defamation based claims, and to dismiss the tort based wrongful
22 termination claim.

23 _____
24 ² The employment contract is identified as Contract No. 2290 and is attached as Exhibit “A” to Plaintiff’s Complaint.

25 ³ Each count included in the Complaint before this Court is verbatim to the pendant state claims filed in the District Court with the exception of Count VI against Defendant Rasa which was not included in the District Court suit.

1
2 **III. LEGAL STANDARD**

3 A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in a complaint. Under NMI
4 R. Civ. P. 12(b)(6), a complaint or pleading is subject to dismissal where it lacks a cognizable legal theory
5 or fails to allege facts constituting a cognizable legal theory. *See Bolain v. Guam Publications, Inc.*, 4 NMI
6 176 (1994). In deciding a motion to dismiss under Rule 12(b)(6), the court must assume as true all factual
7 allegations in the challenged pleading and construe them in a light most favorable to the non-moving party.
8 *Cepeda v. Hefner*, 3 NMI 121, 127-28 (1992); *Govendo v. Marianas Pub. Land Corp.* 2 NMI 482, 490
9 (1992).

10 The Supreme Court has formulated a two-pronged approach for reviewing the legal sufficiency of
11 a complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009). The court must, first, identify the
12 legal conclusions in the complaint, because they are not entitled to the assumption of truth. *Id.* at 1951.
13 “[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable
14 to legal conclusions. *Id.* at 1949. “While legal conclusions can provide the framework of a complaint, they
15 must be supported by factual allegations.” *Id.* at 1950. “Threadbare recitals of the elements of a cause of
16 action, supported by mere conclusory statements, do not suffice.” *Id.* at 1949 (*citing Bell Atl. Corp. v.*
17 *Twombly*, 550 U.S. 544, 550 (2007)).

18 The second prong of this analysis requires the court to assume the veracity of any “well-pleaded
19 factual allegations” and then determine “whether they plausibly give rise to an entitlement to relief.” *Id.*
20 at 1950. “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as
21 true, to ‘state a claim to relief that is plausible on its face.’” *Id.* at 1949 (quoting *Twombly*, 550 U.S. at 570)).
22 A claim is plausible on its face when the plaintiff pleads factual content that allows the court “to draw the
23 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at 1949. This test is
24 satisfied where the complaint pleads facts that are more than “‘merely consistent with’ a defendant’s
25 liability.” *Id.* (quoting *Twombly*, 550 U.S. at 557). Thus, the plaintiff must allege enough factual content

1 to “nudge” his claim “across the line from conceivable to plausible.” *Id.* at 1952 (quoting *Twombly*, 550
2 U.S. at 570).

4 **IV. DISCUSSION**

5 **A. THE COURT TAKES JUDICIAL NOTICE OF THE PUBLIC DOCUMENTS**

6 The Individual Defendants have requested the Court take judicial notice of two public documents:
7 the District Court Verified Complaint (“Verified Complaint”) filed in *Carmen Fernandez v. Janet Han King*
8 *et al.*, Civil Case No. 10-00015, and the Memorandum Opinion and Order Re: Defendants’ Motion for
9 Summary Judgment in Civil Case No. 10-00015 (“District Court Order”).

10 Rule 201 of the Commonwealth Rules of Evidence provides for judicial notice of adjudicative facts.
11 “A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally
12 known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination
13 by resort to sources whose accuracy cannot reasonably be questioned.” NMI R. Evid. 201(b).

14 Plaintiff agrees the documents are public record, but argues the documents are not relevant to the
15 current motion. (Pls Opposition to Defs Mot. to Take Judicial Notice at 2.) Defendants, here, have argued
16 collateral estoppel as a result of the previous claim filed with the District Court. The documents in question
17 are the Verified Complaint and the District Court Order deciding Defendants’ motion for summary
18 judgment. These documents are relevant to Defendants’ claim of collateral estoppel regarding the
19 defamation based claims in Counts IV and V because the Court must look to the previous claim in making
20 a decision regarding collateral estoppel. Thus, the Court takes judicial notice of the public documents which
21 are “capable of accurate and ready determination.” NMI R. Evid. 201(b).

22 **B. DEFAMATION BASED CLAIMS**

23 The Individual Defendants have moved to dismiss the causes of action for Defamation (Count IV)
24 and Conspiracy to Defame (Count V) on the basis of collateral estoppel. Defendants argue the issue of
25 falsity has already been addressed by the District Court in a prior final decision on the merits.

1 “Under the doctrine of collateral estoppel, a judgment in a prior suit ‘precludes re-litigation of issues
2 actually litigated and necessary to the outcome of the first action.’” *Estate of Guerrero v. Quitugua*, 6 NMI
3 67 (2000) (citing *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 n.5 (1979)). Collateral estoppel
4 requires five elements be met:

5 (1) the issue sought to be precluded from relitigation must be identical to that
6 decided in a former proceeding; (2) the issue must have been actually
7 litigated in the former proceeding; (3) it must have been necessarily decided
8 in the former proceeding; (4) the decision in the former proceeding must be
9 final and on the merits; and (5) the party against whom preclusion is sought
10 must be the same as, or in privity with, the party to the former proceeding.

11 *Villanueva v. City Trust Bank*, 2002 MP 1 ¶ 21. The party asserting collateral estoppel bears the burden of
12 proof. *See State Farm Fire & Casualty, Inc. v. Century Home Components Co.*, 550 P.2d 1185, 1189.

13 Once the court has concluded that the evidence is sufficient to establish that
14 an identical issue was actually decided in a previous action . . . [t]he burden
15 then shifts to the party against whom estoppel is sought to bring to the court's
16 attention to circumstances indicating the absence of a full and fair
17 opportunity to contest the issue in the first action or other considerations
18 which would make the application of preclusion unfair.

19 *Id.* at 105.

20 On May 3, 2011, the District Court Order was issued, dismissing Counts I and II of Plaintiff's
21 complaint with prejudice and dismissed all other counts without prejudice. Count I of Plaintiff's complaint
22 was a cause of action for unconstitutional deprivation of a liberty interest in connection with termination
23 of public employment in violation of 42 U.S.C. § 1983. The District Court found that to establish such a
24 claim, Plaintiff must show among other elements that, “public officials made a false, defamatory,
25 stigmatizing statement about her.” (District Court Order at 11.) The District Court found, “[t]here is no
evidence that any of the Individual Defendants published any false, defamatory, stigmatizing statement
about her.” (*Id.* at 13.) The District Court went on to say “[t]he fact is that there is no evidence that the
Individual Defendants said anything that reasonably could be construed as suggesting that Plaintiff was
under criminal investigation. To infer otherwise would enlist the concept of defamation by implication,
which ‘is disfavored in this jurisdiction.’” (*Id.* at 14 (citations omitted).)

1 Plaintiff, in her current Complaint again alleges that the Individual Defendants comments to the
2 media amount to defamation, and in her Complaint use the language of the Verified Complaint filed with
3 the District Court verbatim.

4 The elements of a defamation claim are: (1) a false and defamatory statement concerning another;
5 (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the
6 publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special
7 harm caused by the publication. *See Bolalin v. Guam Publications, Inc.*, 4 NMI 176,183 (1994) (citing
8 Restatement (Second) of Torts § 558 (1977)).

9 The threshold question in an action alleging defamation is whether the statements made by
10 Defendant are false. Therefore, the decision of the District Court as to falsity in a 42 U.S.C. § 1983 context
11 was identical to the issue to be determined in the defamation based claims here. The issue of falsity was
12 actually litigated through the summary judgment motion before the District Court, and necessary to the
13 decision on the 42 U.S.C. § 1983 claim in the District Court. The decision of the District Court was final
14 on the merits and the time for appeal from that decision has lapsed. *See e.g. Kourtis v. Cameron*, 419 F. 3d
15 989, 996 n. 4 (9th Cir. 2005) (recognizing that summary judgment is final judgement on the merits for
16 preclusion purposes). Lastly, the parties to the District Court case are identical to the parties in the present
17 case.

18 The elements of collateral estoppel are therefore met. The issue of falsity having already been
19 decided in favor of Defendants precludes the issue from being decided again here and necessarily requires
20 a dismissal of Plaintiff's claims for Defamation (Count IV) and Conspiracy to Defame (Count V) because
21 falsity is an essential element of each claim.

22 **C. WRONGFUL TERMINATION CLAIMS**

23 Defendant NMC moves to dismiss Plaintiff's claim for Wrongful Termination (Count III) asserting
24 Plaintiff has failed to cite any public policy violation which is required for the tort based claim. Plaintiff
25 has brought both tort based and contractual based claims stemming from alleged wrongful termination.

1 NMC acknowledges that a wrongful termination claim can be brought based in tort or contract, but through
2 its motion attacks only the tort based claim.

3 In the Commonwealth, a tort based claim for wrongful termination requires the plaintiff to prove:

4 (1) there is a clear public policy (clarity element); (2) discouraging the
5 conduct in which he or she engaged would jeopardize the public policy
6 (jeopardy element); (3) the public policy-linked conduct caused the dismissal
(causation element); and (4) there is no overriding justification for the
dismissal (absence of justification element).

7 *Sablan v. Manglona*, Civ. No. 04-0166 (Super. Ct. February 27, 2006) (Order at 3-4) (citing *Hubbard v.*
8 *Spokane County*, 50 P.3d 602, 606 (Wash. 2002); *see also Greeley v. Miami Valley Maintenance*
9 *Contractors, Inc.*, 551 N.E.2d 981 (Ohio 1990).)

10 Plaintiff has failed to allege, or even mention, in her Complaint the violation of any public policy
11 in connection with her termination. Violation of public policy is an express element of a tort based wrongful
12 termination claim in the Commonwealth and therefore Plaintiff falls short of the announced standard by
13 failing to mention any public policy or allege facts supporting a violation thereof. Therefore, Plaintiff's tort
14 based wrongful termination claim is dismissed.

15
16 **V. CONCLUSION**

17 Based on the foregoing, Defendant's Motion to Dismiss is **GRANTED**.

18
19 **SO ORDERED this 10th day of February, 2012.**

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22 **David A. Wiseman, Associate Judge**
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