SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Kornreich, Shirley Werner / Justice PART 54

0109525/2004

LACHER, MICHAEL A.
VS
ENGEL, THOMAS E.

INDEX NO. 109525/04

MOTION DATE 12/16/04

SEQ 1

MOTION SEQ. NO. 1

DISMISS ACTION

MOTION CAL. NO.

The following papers, numbered 1 to 6 were read on this motion to/for dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2
Answering Affidavits — Exhibits	3,4
Replying Affidavits	5,6

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Decision, Order and Judgment.

FILED
MAY 11 2005
COUNTY CLERK'S OFFICE
NEW YORK

Dated: April 28, 2005

SHIRLEY WERNER KORNREICH J.S.C.

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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MICHAEL A. LACHER,

Plaintiff,

Index No.: 109525/04

-against-

DECISION, and ORDER

THOMAS E. ENGEL,

Defendant.

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KORNREICH, SHIRLEY WERNER, J.:

This is a defamation action by plaintiff Michael A. Lacher. The complaint alleges defamation arising from statements made in: (1) the complaint in the action *Parametric Capital Management, LLC v. Lacher* (Index No. 603889/03) (the "Malpractice Action"); (2) an article in the July 3, 2003, New York Law Journal ("NYLJ"), entitled "Malpractice Suit Claims Attorney Padded Bills" (the "Article"); and (3) the course of the arbitration proceeding entitled *Richard O. Berner v Erik Postnieks* (AAA No. 13-Y-169-02230-01) (the "Berner Arbitration"). Defendant Thomas E. Engel now moves to dismiss the complaint, pursuant to CPLR 3211(a)(1) and (a)(7), and for sanctions. In support of his motion, defendant submits copies of: case law; a transcript from the Arbitration, dated July 17, 2003; and correspondence to plaintiff's counsel, dated August 13, 2004. Plaintiff has opposed, submitting the affirmation of counsel and a copy of the complaint with its exhibits, *viz.*, the Malpractice Action's summons and complaint, the Article, and the Court's Decision, Order and Judgment, dated November 21, 2003; defendant has replied.

I. ***Statement of Facts***

Plaintiff alleges the following in his complaint. In December 2001, Erik Postnicks,

Parametric Capital Management, LLC and Diversified Capital management, Ltd. (collectively, the "PCM clients"), pursuant to a written agreement, retained plaintiff's law firm to represent them as defendants in an Arbitration, as well as in a Supreme Court action. Compl., para. 3. Mr. Lacher and his firm (the "Lacher firm") represented the PCM clients for approximately eighteen months in the Berner arbitration, an arbitration seeking to collect "well over $300 Million" from the PCM clients. *Id.*, paras. 3, 4. Thereafter, on or about June 5, 2003, Mr. Lacher "was required to resign by reason of irreconcilable ethical considerations which arose during the testimony of Erik Postnieks in the arbitration, as well as Postnieks' breach of the retainer agreement." *Id.*, para. 5.

Defendant Engel and his law firm were then substituted in as the PCM clients' counsel in the Berner Arbitration, and also provided legal counsel to them regarding an investigation by the New York Attorney General and other regulatory agencies. Compl., para. 6. Plaintiff claims that defendant, in an attempt to divert attention away from "possible exposure of the ethical issues which prompted the Lacher firm to withdraw" and to divert his "clients' attention from his own incapacity[,]" filed the complaint in the Malpractice Action. *Id.*, para. 7.

A. *The Malpractice Action*

On July 2, 2003, defendant filed the complaint in the Malpractice Action (the "Underlying Complaint"), on behalf of the PCM clients. Compl., para. 8. The Underlying Complaint alleged eight causes of action against plaintiff and his firm, *viz.*, (1) deceit and collusion under Judiciary Law Section 487; (2) fraud; (3) legal malpractice; (4) breach of implied contract; (5) breach of fiduciary duty; (6) unjust enrichment; (7) rescission; and (8) injunction--all arising from plaintiff's legal representation of the PCM clients. *See id.*, Ex. A. The Underlying

Complaint also contained various allegations regarding Mr. Lacher's representation of the PCM clients. Specifically, it stated that Mr. Lacher, *inter alia, extorted payments* from the PCM clients (para. 12); "secretly planned to bilk [the PCM clients] of millions of dollars under the guise of rendering legal services which [the Lacher firm] never intended to provide" (para. 13); "engaged in a chronic and extreme pattern of legal delinquency, *defrauded [the PCM clients]*, and engaged in conduct intended to deceive [the PCM clients], on a daily basis, over an 18-month period" (para. 35) (emphasis supplied).

On November 21, 2003, the Court granted the dismissal motion of Mr. Lacher and other defendants, "to the extent that the first, second, fourth, sixth, seventh and eighth causes of action [were] dismissed with prejudice and the third [legal malpractice] and fifth [breach of fiduciary duty] causes of action [were] dismissed with leave to replead when these claims becomes [sic.] ripe." *See* Compl. at Ex. C "Decision, Order and Judgment" dated November 21, 2003,[1] p. 13.

B. *The NYLJ Article*

In a *New York Law Journal* Article written by Anthony Lin, entitled "Malpractice Suit Claims Attorney Padded Bills," Mr. Engel made the following statement: "My client [the PCM clients] was very poorly served by a member of my profession to whom duty came well after other aims and interests." Compl., Ex. B, 7/3/2003 NYLJ 1, (col. 3). Plaintiff alleges that, at the time this statement was made to the NYLJ, the Underlying Complaint had not yet been filed. *See* Aff. of Edward B. Safran, para. 8.

C. *The Statements made during the Berner Arbitration*

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[1] The Appellate Division affirmed the decision. *Parametric Capital Mgmt., LLC v. Lacher*, __ A.D.3d __, 791 N.Y.S.2d 10 (1st Dept. 2005).

At a hearing for the Berner Arbitration, held on the record on July 17, 2003 (the "Subject Hearing"), and in the presence of various parties,[2] Mr. Engel made, *inter alia*, the following statements: "Mr. Lacher was *committing a fraud of enormous proportions*"; "It was clear, for example, that the lawyers [i.e. Lacher and his firm] never really did the work that should have been done. It was clear they never did the work that they were asked to be paid for. And it was clear that they never worked anything close to the hours that they claim"; "it became utterly clear to me also that in addition to being a thief, *Mr. Lacher was a liar*"; and "*Mr. Lacher was sort of a pathological character*" (emphasis supplied).

II. ***Conclusions of Law***

A party may move to dismiss a cause of action asserted where "a defense is founded upon documentary evidence; or . . . the pleading fails to state a cause of action[.]" CPLR 3211(a)(1), (a)(7). When addressing such a motion to dismiss, the Court must accept as true the facts as alleged in the complaint as well as submissions in opposition to the motion, according plaintiff the benefit of every possible favorable inference. *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 (2001). However, allegations that consist only of bare legal conclusions are not entitled to such consideration. *Kliebert v. McKoan*, 228 A.D.2d 232 (1st Dept. 1996) (citations omitted). Dismissal obligates a defendant to demonstrate that the facts as alleged by plaintiff fit within no cognizable legal theory. *CBS Corp. v. Dumsday*, 268 A.D.2d 350, 352 (1st Dept. 2000), *citing Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). The CPLR 3211 viability of

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[2] The transcript from July 17, 2003 of the Berner Arbitration indicates that John H. Wilkinson, Hon. Walter M. Shackman, Richard L. Mattiaccio, Anneliese R. Tursi, Roger E. Podesta, Maura Kathleen Monaghan, Steve Vaccaro, Jessica Reilly, Richard O. Berner, Erik Postnieks, Jan Greer and Ani Setrakian were present at the subject hearing. *See* Horan Aff., Ex. B, pp. 2338-39.

plaintiff's claims is assessed below.

"The elements [of 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." *Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dept. 1999). Plaintiff is not required to plead special damages where the alleged slander, *inter alia*, either charges plaintiff with a serious crime or tends to injure plaintiff in his trade, business or profession. *See Harris v. Hirsh*, 228 A.D.2d 206, 208 (1st Dept. 1996); *see also Chiavarelli v. Williams*, 256 A.D.2d 111, 113 (1st Dept. 1998). To constitute libel *per se*, "the challenged statements must be more than a general reflection upon the plaintiff's character or qualities, and must suggest improper performance of his duties or unprofessional conduct[.]" *Chiavarelli* at 113 (internal citations omitted) *citing Golub v. Enquirer/Star Group, Inc.*, 89 N.Y.2d 1074, 1076 (1997).

It is well settled, however, that oral or written statements are absolutely privileged and protected from defamation claims, when such statements are "made in the course of a judicial proceeding, [and] are material or pertinent to the litigation[.]" *Baratta v. Hubbard*, 136 A.D.2d 467, 468 (1st Dept. 1988). The Court, in determining whether the statements are pertinent to the underlying action, must construe them "liberally." *Id.* at 469 ("[i]t is enough if the offending statement *may possibly bear on the issues in litigation* . . . strict legal materiality or relevancy is not required to confer the privilege") (emphasis supplied) (internal citations omitted); *see also Seldon v. Rabinowitz*, 706 F. Supp. 13, 14 (S.D.N.Y. 1989) ("courts have construed pertinency or relevancy liberally, resolving any doubts in favor of upholding the privilege").

Statements contained in the Malpractice Action's Complaint

It is apparent that various statements made in the Underlying Complaint would ordinarily be libelous *per se*.[3] Defendant argues that he is entitled to dismissal because the Underlying Complaint is absolutely privileged and, therefore is protected from liability herein. The Court agrees with defendant.

Many of the statements contained in the Underlying Complaint were pertinent to the legal issues set forth by the PCM clients in their various causes of action. Although the Court dismissed all of those causes of action, the Court granted PCM leave to replead the legal malpractice and breach of fiduciary duty claims. In light of the liberal standard with which this privilege is applied and the arguable relevance of many of the allegations in the Underlying Complaint, defendant may not be found liable for those statements contained in the Complaint.

On the other hand, the statements that Lacher "used [the retainer's] provision as a club with which to extort immediate payments of their fees" (para. 12) and "defrauded [the PCM clients]" (para. 35) are superfluous and incendiary allegations of criminal conduct, which are not protected. When according plaintiff every favorable inference, they have stated a cause of action for defamation arising from these statements.

Statements made during the Arbitration

Similarly, Mr. Engel's statements during the Subject Hearing are to some degree privileged as they were statements made in the course of a quasi-judicial proceeding to explain

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[3] Specifically, the Underlying Complaint contained allegations that Mr. Lacher, *inter alia*, extorted payments from the PCM clients (para. 12); "secretly planned to bilk [the PCM clients] of millions of dollars under the guise of rendering legal services which [the Lacher firm] never intended to provide" (para. 13); "engaged in a chronic and extreme pattern of legal delinquency, defrauded [the PCM clients], and engaged in conduct intended to deceive [the PCM clients], on a daily basis, over an 18-month period" (para. 35).

the Lacher firm's sudden departure from the case, the prejudice to the PCM clients and the need for a rehearing. *See Herzfeld & Stern v. Beck*, 175 A.D.2d 689, 691 (1st Dept. 1991) (statements made in course of quasi-judicial proceeding are absolutely privileged "so long as they are material and pertinent to the questions involved notwithstanding the motive with which they are made") (internal citations omitted). Indeed, a number of the statements were pertinent to questions asked of Mr. Engel by the Arbitration's panel. Since absolute privilege applies to those statements, plaintiff's claim of defamation may not stand as against them. *See Wiener v. Weintraub*, 22 N.Y.2d 330, 332 (1968).

Nonetheless, defendant's statements accusing Mr. Lacher of fraud and calling him a "thief," a "liar," and a "pathological character," had no place in the legal proceedings. Thus, defendant's motion to dismiss must be denied as to these statements.

Statements in The NYLJ Article

Similarly, defendant has not shown that his statements to the NYLJ warrant protection, as they were not made "in the course" of a judicial proceeding. Plaintiff contends that the statements to the NYLJ were made prior to the filing of the complaint, and the documentary evidence submitted by defendant does not demonstrate otherwise.

New York Civil Rights Law 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[.]" NY Civ R § 74. The privilege of Section 74 applies "so long as the statement is a substantially accurate description of the allegation [in the judicial proceeding.]" *Fishof v. Abady*, 280 A.D.2d 417, 418 (1st Dept. 2001).

Here, the question of whether Mr. Engel's statements were a "fair and true report" of the

Malpractice Action remains at issue. Further, the complaint claims that Mr. Engel "maliciously filed a bogus . . . lawsuit against Lacher[.]" Compl., para. A; *see Williams v. Williams*, 23 N.Y.2d 592, 599 (1969) (section 74 not meant 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"); *see also Branca v. Mayesh*, 101 A.D.2d 872, 873 (2d Dept. 1984). Taking plaintiff's contentions as true on this motion, Section 74 may not apply.

Additionally, defendant's counsel argues that Mr. Engel's statements to the NYLJ were merely opinion and, therefore, constitutionally privileged. The Court should employ three factors in determining whether allegedly defamatory statements are opinions: "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact[.]" *Brian v. Richardson*, 87 N.Y.2d 46, 51 (1995).

In the instant action, when according plaintiff the benefit of every possible favorable inference, there remains a question as to whether the context of Mr. Engel's statement to the NYLJ, *viz.*, the Article, would signal readers that the information therein is opinion rather than fact. *See Sokoloff at* 414. The cases cited by defendant in support of his arguments are inapposite on either the facts and/or the law and, thus, are unavailing. *See, e.g., Brian*, 87 N.Y.2d 46 (statements made *on "Op Ed page"* of New York Times); *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235 (1991) (statements contained *in letter to editor* published in

Journal of Medical Primatology); *Steinhilber v. Alphonse*, 68 N.Y.2d 283 (1986) (statements made via *"tape-recorded telephone message" on union's private telephone number*); *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976) (appeal from *judgment after trial*); *Rand v. New York Times Co.*, 75 A.D.2d 417 (1st Dept. 1980) (opinion rendered *on motion for summary judgment*, not motion for dismissal). On the facts before it and pursuant to the standards of a motion to dismiss, the Court cannot determine that, as a matter of law, the statements in the Article are protected opinion.

Sanctions

Plaintiff's motion for sanctions is denied. Defendant's conduct does not rise to the level of sanctionable behavior. Accordingly, it is

ORDERED that the motion to dismiss is granted to the extent that only the portions of the instant complaint that arise from the following statements shall continue:

1. Statement that Mr. Lacher and his firm "used [the retainer's] provision as a club with which to extort immediate payments of their fees" (para. 13(C));
2. Statements that Lacher "defrauded [the PCM clients]" (para. 13(R));
3. Statement to the NYLJ that "[the PCM clients were] very poorly served by a member of [Mr. Engel's] profession to whom duty came well after other aims and interests" (para. 15);
4. Statements made during the Arbitrations, referring to Mr. Lacher as a "thief," a "liar," and a "pathological character" (para. 21(C), (D));

the remainder of the complaint shall be stricken; and it is further

ORDERED that defendant is directed to serve an answer to the complaint's surviving

claims within ten (10) days after service of a copy of this order with notice of entry; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that all parties are to appear for a conference before the Court at 9:30 a.m. on May 19, 2005 at 111 Centre Street, Room 1227, New York, NY 10013.

The foregoing constitutes the decision and order of the Court.

Dated: April 28, 2005
New York, New York

SHIRLEY WERNER KORNREICH