Peck v Peck
2018 NY Slip Op 30990(U)
May 23, 2018
Supreme Court, New York County
Docket Number: 157281/2017
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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IAN S. PECK,

Plaintiff,

- v -

LILIANE PECK,

Defendant.

INDEX NO. 157281/2017

MOTION DATE _____

MOTION SEQ. NO. 1

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this application for summary dismissal

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HON. BARBARA JAFFE:

In this defamation action, defendant moves pursuant to CPLR 3211 (a) (1) and (7) for an order dismissing the complaint. Plaintiff opposes.

I. THE COMPLAINT (NYSCEF 2)

The facts set forth in the complaint are deemed true for the purposes of this motion, and are either quoted or paraphrased below, whether or not pertinent to the resolution of the motion.

A. The parties

Plaintiff is defendant's stepson. His father, Norman Peck, a wealthy real estate investor, married defendant when plaintiff was a young boy. She brought "no meaningful assets" into the marriage and never worked outside the home. Defendant and Norman enjoyed a lavish lifestyle, and from the beginning, defendant was antagonistic toward plaintiff. On April 24, 2006, Norman made his last will and testament, designating defendant as executor.

B. Plaintiff's businesses and his business relationship with his father

Plaintiff, the principal of entities that extend loans collateralized by fine art and other assets, describes himself as and his flagship company as, respectively, "widely regarded" as a "founding pioneer," and a leader in the field of art financing. He sits on "numerous industry boards, has appeared on several expert panels, and is frequently quoted in major publications and on television." Moreover, over the past 12 years, entities he controls have underwritten transactions with "an average net return to investors of over 25 percent on more than $2 billion of invested capital," and have "lent and been repaid all loans without a single loss over the past 16 years," all of which he accomplished with "very limited" financial support from Norman, notwithstanding Norman's great "liquid" wealth. Plaintiff and Norman jointly owned real estate companies with "substantial holdings in Manhattan."

In addition to occasional short-term business loans extended to plaintiff or to entities in which plaintiff had an interest, Norman loaned plaintiff $100,000, memorialized by a promissory note dated August 8, 2013, and $850,000, memorialized by a secured promissory note dated October 17, 2014. He also loaned Stubbs Holdings, LLC, $2,021,000, memorialized by a secured promissory note dated February 12, 2015, which plaintiff guaranteed. The latter two notes are "appreciably over-secured by several assets, including plaintiff's house on Long Island and

interests in two real estate companies jointly owned" by him and Norman. Mindful of defendant's resentment of plaintiff, Norman asked plaintiff not to tell defendant or anyone else about the two loans

In late November or early December of 2015, Norman learned that he had an esophageal tumor, and soon thereafter, he extended the due dates on the notes to September 30, 2016.

C. Norman's estate plan

In addition to his will, Norman created a revocable trust which he amended in March 2016 (2016 amendment) by providing that all of his property including his residuary estate was to pour into it. Within the trust, Norman created a sub-trust for defendant, giving her income for life, and upon her death, he provided that the remainder would be divided equally between their daughter and a trust for plaintiff and his two sons. The plan was drafted by a member of the firm that had recently represented defendant and Norman; the lawyer who drafted it holds an ownership interest in estate real estate assets.

> Pursuant to article fourth/section 10 of the 2016 amendment, if the remaining property includes any promissory note(s) and/or loan obligation(s) of which [plaintiff], is the borrower, such promissory note(s) and/or loan obligation(s) shall be used to fund any share or part of a share or property set aside to or for the benefit of [plaintiff], or for a primary beneficiary who is [plaintiff].

In article eighteenth/section B, Norman expressed the wish that upon his demise, his family members "cooperate with each other and with the Trustee in the administration of the trust estate to promote harmony and happiness among each other." He passed away on April 16, 2016.

D. Proceedings in New York County Surrogate's Court

Soon thereafter, defendant commenced an *ex parte* proceeding in the Surrogate's Court, New York County, seeking the admission of Norman's will to probate. In the verified petition in support thereof, defendant responded "none" to the question of whether "any cause of action

exists on behalf of the estate." In her *ex parte* application for preliminary letters testamentary, which were granted on May 4, 2016, defendant stated that there was a need to avoid delay in probating Norman's will and appointing successor managers for Norman's real estate companies.

Although plaintiff's counsel had agreed to sign a stipulation accepting service of the probate papers, defendant attempted to serve plaintiff during the memorial service for Norman whereby a process server "thrust the probate papers at [him] as he left the podium after delivering a eulogy."

In early May 2016, the parties discussed defendant's request that plaintiff sign a waiver and consent for the probate of Norman's will. Plaintiff sought "basic information" about his father's estate plan, including how the promissory notes are addressed therein and complete copies of the instruments referenced in the petition for probate. Defendant's lawyer represented to plaintiff that she had drafted article fourth/section 10 of the 2016 amendment at Norman's request to "essentially forgive[ ]" the notes by transferring them to plaintiff via a charge against his share of the estate.

Plaintiff refused to sign a waiver of any contest to the estate plan absent "sufficient information about the estate and possibly exercising his right to obtain formal disclosures and conduct examinations under section 1404 of the Surrogate's Court Procedure Act." In response, defendant threatened to sue on the notes and foreclose on plaintiff's house.

E. Defendant's actions on the notes

1. New York County Supreme Court

On August 23, 2016, in her capacity as preliminary executor of Norman's estate, defendant commenced an action in this court against plaintiff and Stubbs Holdings to recover the amounts due on the notes dated October 17, 2014 and February 12, 2015. She filed and served

plaintiff and Stubbs with a motion for summary judgment in lieu of complaint. In her affidavit in support of the motion, defendant stated, based on her personal knowledge of all of the facts and circumstances surrounding the action, that "[t]here is no dispute concerning (i) [plaintiff's] execution of the notes on behalf of himself and Stubbs; (ii) their defaults and unconditional liability to the Estate; or (iii) the amount due to the Estate, including the ongoing accrual of interest at specified rates."

Under the heading "Norman's Philanthropic and Paternal Generosity and [Plaintiff]'s Financial Irresponsibility," defendant falsely depicted plaintiff as an "incompetent and profligate beneficiary of his father's largesse," "whose lifestyle and management of matters business and financial, unfortunately, are best described as prodigal." She alleged that after paying for plaintiff's "elite, private-school education and obtain[ing] for him a position at Christie's in London," "followed by various art-financing enterprises in New York," Norman connected him with wealthy contacts who provided him with "capital support." Defendant described most if not all of plaintiff's ventures as producing "discord and dissension with his business partners."

Under the heading "[Plaintiff]'s Exploitation of Norman's Deteriorating Physical Health," defendant accused plaintiff of engaging in "elder abuse by taking advantage of his dying father" and seeking waivers of his defaults on the October 2014 and February 2015 notes on which he had defaulted with an extension on each to March 31, 2016. She characterized the October 2014 loan as financing plaintiff's indebtedness to his former counsel and the February 2015 note as financing his contribution to the settlement of a commercial litigation with a hedge fund. Defendant also maintained that Norman conditioned the extensions on the payment of accrued interest and that, concerned with plaintiff's business practices, retained counsel to draft the notes to protect his interests. She also alleged that rather than pay the interest, plaintiff sought

a further extension to September 30, 2016, to which Norman agreed, whereby plaintiff avoided paying the accrued interest.

Moreover, "[i]n early April 2016, after Norman was permanently hospitalized and had fallen into a coma," defendant also stated, "it appears that [plaintiff] became intent on taking what he could get before his father passed" and promised to, but never paid the accrued interest, having waited until Norman was in a coma before futilely seeking his signature on the amendment for the extension.

In her memorandum of law in support of the motion, defendant described her case against plaintiff as "a straightforward collection case" seeking the repayment of two loans plus interest at specified rates and attorneys' fees, and argued that she had established her entitlement to judgment in lieu of complaint.

On September 23, 2016, defendant commenced a second action against plaintiff in this court, again in her capacity as preliminary executor, seeking to recover the amount allegedly due on the August 2013 note based on plaintiff's personal guaranty, and she sought summary judgment in lieu of complaint, advancing the same allegations and arguments set forth in her motion relating to the other notes, attaching the moving papers from the first action as an exhibit, and expanding on her allegations in her affidavit in support of the second action. Knowing that the case would attract media attention, defendant alleged that

> [plaintiff] has borrowed millions of dollars from his father over the last several years in order to, among other things, bail himself out of lawsuits in which he and his companies have been named due to Ian's habitual failure to attend to financial obligations owed to his lawyers, lenders, and landlords.

In her reply memorandum of law, defendant again stated that the two note actions concern:

> straightforward, stand-alone, and unambiguous promissory notes and a personal guaranty,

> under which Defendants' unconditional obligations remain entirely undisputed, and, it is respectfully submitted, outside of which the Court may not refer. In other words, Defendants' debt obligations to the Estate for sums certain are clear on the face of the Notes and Guaranty, without reference to Norman's will and/or Revocable Trust, which are the subject of a separate and distinct Surrogate's Court proceeding.

Defendant's actions on the notes were assigned to the commercial division of this court, wherein plaintiff cross-moved for orders striking the accusations leveled against him in defendant's papers and transferring the actions to Surrogate's Court. At a conference held on the record, the justice presiding prevailed upon defendant to delete from her affidavits the "irrelevant, scandalous type of material," and summarized the litigation as "second wife wants the money and [son] wants a distribution pursuant to the last will and testament," observing that the will and trust "mean less money for" defendant. Defendant's litigation counsel sought to justify the accusations against plaintiff and represented to the court that the affidavits "tell[] the story . . . [of] why [plaintiff's] own father spent $40,000 on a premier law firm to paper the loans that he made to his own son . . ."

By decision and order orally set forth on the record on March 29, 2017, the justice held that defendant had filed her two actions in the "wrong court," and granted plaintiff's motion to transfer them to the Surrogate's Court, finding that each action is "inextricably connected" to the probate of Norman's estate based on the 2016 amendment. The court also observed that the actions circumvent article fourth/section 10 of the 2016 amendment and reflect an attempt at a "second bite at the apple."

2. New York County Surrogate's Court

By notice of motion dated April 12, 2017, defendant sought from the surrogate immediate money judgments for the two actions based on her counsel's affidavit "and all of the pleadings and prior proceedings." In his moving affidavit, defendant's counsel described the note

actions as "standard CPLR 3213 collection cases, based on simple promissory notes," seeking nothing other than "the payment of money due on commercial paper" as set forth "within the four corners of the notes and guaranty," and without any need to reference extrinsic evidence. By reply affidavit, another attorney for defendant described the note actions as "accelerated collection proceedings," and maintained that it "would be improper to look beyond the four corners of the unambiguous Notes and Guaranty and without needless, time-consuming, inappropriate, and expensive discovery."

F. Plaintiff's cause of action for defamation

In support of his cause of action against defendant for defamation, plaintiff contends that when defendant commenced the two note actions, she knew that he had no reason to seek to extend the due dates, because article fourth/section 10 of the 2016 amendment resolved the notes, regardless of whether he was in default, whether the due dates had been extended, and whether interest had been paid on them. He also maintains that as defendant was not present when he discussed the notes with Norman, she has no basis for stating that he had attempted to manipulate Norman, and in any event, he denies that the statements are true.

Defendant's allegation of elder abuse, plaintiff asserts, is also baseless as he did not ask his father to extend the maturity date for the loans. Rather, Norman did so unilaterally. Nor did he have a chance to ask Norman to extend the due dates after he became ill, as defendant kept him from spending "much time" with Norman. Thus, during the "little time he had with Norman," they discussed matters "more important than money," and he learned about the extensions from Norman's lawyers.

Plaintiff also asserts that defendant knew that the cooperation clause in the 2016 amendment expressed Norman's "intention that the notes not be used by [her] as leverage against

his son," and observes that defendant fails to mention in the actions on the notes the amendment or any other provision of Norman's estate plan or that she had sworn in the probate pleadings that the estate held no causes of action against anyone as of the date of Norman's death.

As a resolution of defendant's motions for summary judgment in lieu of complaint needed no supporting evidence, plaintiff argues, defendant's affidavits were intended solely to defame him, and the information set forth therein is "totally impertinent" to whether the three notes were enforceable and whether he could be held liable on them. Thus, he denies that any of the statements is privileged, and argues that each is presented not as opinion or argument, but as facts with "precise, readily understood meaning[s]" that are capable of being proven true or false.

All of defendant's statements, plaintiff maintains, are false, and were published by defendant with knowledge of their falsity or with reckless disregard of their truth or falsity, intending each solely to defame him, and that they are libelous *per se* as they accuse him of immoral, illegal, and unethical conduct both generally and in his chosen office, profession, or trade. Moreover, republication of each of the statements, plaintiff asserts, was intended by defendant to injure him generally and in his chosen office, profession, or trade, and that she published each to "his professional colleagues, competitors, and current and prospective clients and counter-parties," some of whom have used the defamatory accusations in defending their failure to repay loans they owe to his companies, resulting in a loss to him of "an equity investment of $100 million in [his] companies . . . .[which were prevented] from securing a $200 million credit facility from a major bank."

II. DISCUSSION

A. Particularity

While defendant argues that plaintiff is insufficiently particular in setting forth the

allegedly defamatory statements in his complaint, she surmises that the following four statements from her affidavits are the bases for plaintiff's cause of action: 1) plaintiff's "lifestyle and management of matters business and financial, unfortunately, are best described as prodigal"; 2) he "borrowed millions of dollars from his father over several years in order to, among other things, bail himself out of lawsuits in which he and his companies have been named due to [plaintiff]'s habitual failure to attend to financial obligations owed to his lawyers, lenders, and landlords"; 3) "virtually all [of] [plaintiff]'s ventures have resulted in discord and dissension"; and 4) "he exercised undue influence over his dying father or had engaged in elder abuse."

Plaintiff denies any failure to specify the statements that he alleges are libelous *per se*, arguing that the affidavits containing the statements are attached to the complaint and are set forth in defendant's memoranda of law.

Pursuant to CPLR 3016(a), a cause of action for defamation must be pleaded with specificity. The plaintiff must thus identify "the particular words that were said, who said them and who heard them, when the speaker said them, and where the words were spoken," although every statement need not be quoted *in haec verba*. (*Glazier v Harris*, 99 AD3d 403, 404 [1st Dept 2012]). Having attached the challenged affidavits to the complaint, which defendant quotes liberally, plaintiff has pleaded his cause of action for defamation with sufficient specificity to afford defendant notice of the claim against her. (*See Pezhman v City of New York*, 29 AD3d 164, 168 [1st Dept 2006] [specificity requirement satisfied where plaintiff quoted letters in which defendant accused him of drug abuse, paranoia, incompetence and racism]; *cf. Khan v Reade*, 7 AD3d 311, 312 [1st Dept 2004] [claim dismissed for lack of specificity, as plaintiff alleged neither specific words giving rise to defamation, nor time, place or manner of publication]).

B. Motion to dismiss

In considering a motion to dismiss pursuant to CPLR 3211(a) (7) for failing to state a cause of action, the court must construe the pleading liberally, accept the facts alleged to be true, and afford the plaintiff "the benefit of every possible favorable inference." (*JP Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334 [2013] [citation omitted]; *AG Cap. Funding Partners, LP v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). "The motion must be denied if from the four corners of the pleadings 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002], quoting *Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001]; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

The elements of a cause of action for defamation are 1) a false statement, and 2) publication of it to a third party, 3) absent privilege or authorization, which 4) causes harm, unless the statement is defamatory *per se*, in which case harm is presumed. (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014]; *Frechtman v Gutterman*, 115 AD3d 102, 104 [1st Dept 2014], citing *Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]; *see Franklin v Daily Holdings, Inc.*, 135 AD3d 87, 91 [1st Dept 2015]). If privileged, however, defamatory statements are not actionable.

1. Privilege

Analysis begins with whether the challenged statements are privileged, a question of law to be resolved by the court in the first instance. (*People ex rel. Bensky v Warden of City Prison*, 258 NY 55, 60 [1932]; *Flomenhaft v Finkelstein*, 127 AD3d 634, 637 [1st Dept 2015]; *Sexter & Warmflash v Margrabe*, 38 AD3d 163 [1st Dept 2007], *abrogated on other grounds by Front,*

Inc. v Khalil, 24 NY3d 713, 718 [2015]). On a motion to dismiss a cause of action for defamation on account of privilege, the complaint must be construed in the light most favorable to the plaintiff, and any question as to the applicability of a privilege should be decided at trial and not on a motion to dismiss. (*Flomenhaft*, 127 AD3d at 637-638).

Statements made in connection with a proceeding before a court are privileged if "material and pertinent to the questions involved." (*Youmans v Smith*, 153 NY 214, 220 [1897]; (*Front, Inc.*, 24 NY3d at 718; *Sexter*, 38 AD3d at 171). The privilege advances the interest in permitting "those discharging a public function [to] speak freely to zealously represent their clients without fear of reprisal or financial hazard" (*Park Knoll Assoc. v Schmidt*, 59 NY2d 205, 209 [1983]), and to avoid hampering the "search for truth" or preventing broad inquiry by guaranteeing the "freedom and boldness which the welfare of society requires" (*Front, Inc.*, 24 NY3d at 718, citing *Youmans*, 153 NY at 220). In light of these interests, the privilege is liberally applied "irrespective of an attorney's motive" for making the challenged statement (*Wiener v Weintraub,* 22 NY2d 330, 331 [1968]; *Sexter*, 38 AD3d at 171), notwithstanding the merits of the underlying action (*Lacher v Engel*, 33 AD3d 10 [1st Dept 2006]), and whether the challenged statement is made by the attorney or by a party (*Peters v Coutsodontis*, 155 AD3d 540, 540 [1st Dept 2017]). The determination of whether a statement made in the course of judicial proceedings is pertinent to the proceeding also constitutes a question of law for the court. (*People ex rel. Bensky,* 258 NY at 60).

Given the interest in permitting free inquiry, the test for determining whether a statement is "at all pertinent to the litigation" is "extremely liberal." Thus, "if, by any view or under any circumstances, [a statement] may be considered pertinent," it is pertinent. (*Sexter*, 38 AD3d at 173 [citations omitted]). "Narrow" and "technical" rules regarding the admissibility of evidence

do not apply to the determination; "[p]ossibly pertinent" statements need be neither relevant nor material to the "threshold degree required in other areas of the law." (*Id.*; *see Martirano v Frost*, 25 NY2d 505, 509 [1969] [that statement later found to be "not technically relevant to the issue involved," should not be permitted to "hamper the search for truth, and prevent making inquiries with that freedom and boldness which the welfare of society requires"]). Thus, "the barest rationality, divorced from any palpable or pragmatic degree of probability, suffices to establish the offending statement's pertinence to the litigation." (*Id.*; *see People ex rel. Bensky*, 258 NY at 61 ["any discretion which appellant or his counsel could possibly have believed would tend to influence the court to grant the order cannot be said to be impertinent beyond any question."]).

Lest there remain any doubt as to the leniency of the standard for determining pertinence, the reviewing court is also advised that "'any doubts are to be resolved in favor of pertinence'" (*Flomenhaft*, 127 AD3d at 637, quoting *Sexter*, 38 AD3d at 173), "such that the offending statement, to be actionable, must be so outrageously out of context as to permit one to conclude, from the mere fact that the statement was uttered, that it was motivated by no other desire than to defame." (*Martirano*, 25 NY2d at 508). Thus, where

> in order to gratify their own vindictive feelings, [parties] go beyond the bounds of reason and by main force bring into a lawsuit matters so obviously impertinent as not to admit of discussion, and so needlessly defamatory as to warrant the inference of express malice, they lose their privilege and must take the consequences. In other words, if the privilege is abused, protection is withdrawn.

(*Youmans*, 153 NY at 220).

The privilege protecting defamatory statements made in the course of a legal proceeding may also be withdrawn where the proceeding is a sham. (*Peters*, 155 AD3d at 540; *Casa de Meadows Inc. (Cayman Islands) v Zaman*, 76 AD3d 917, 920 [1st Dept 2010]; *Flomenhaft*, 127 AD3d at 638; *Sexter*, 38 AD3d at 172, n 5; *Lacher*, 33 AD3d at 13-14; *Halperin v Salvan*, 117

AD2d 544 [1st Dept 1986]). A proceeding may be found to be a sham where it is abandoned or withdrawn or discontinued, thereby permitting an inference that it was brought solely to defame. That a proceeding is ultimately unsuccessful, however, does not negate the privilege as such a limitation would "substantially contravene the policy that underlies the privilege." (*Lacher*, 33 AD3d at 14).

2. Contentions

Defendant maintains that she is protected from liability for defamation as the challenged statements were advanced in the course of her litigation of the two notes, and pertain to the litigation as they explain how plaintiff borrowed money from Norman, why he borrowed the money, and that he failed to repay it. She denies that the actions on the notes constitute "sham litigations" as she had fully briefed and argued the motions for summary judgment in lieu of complaint before the justice in the commercial division and in the Surrogate's Court, where a decision now pends. Moreover, she contends, plaintiff's allegation that the actions on the notes constitute sham litigations is "clearly conclusory and contradicted by the facts." (NYSCEF 9-18).

According to defendant, the information contained in her affidavits explains why the notes were created ("[plaintiff's] lavish lifestyle," "significant sums of money [he spent] on lawyers and the settlement of lawsuits in which he and his companies have been involved"), why they remain unpaid ("it appears that [plaintiff] became intent on taking what he could get before his father passed"), and why Norman paid large attorney fees for notes evidencing loans made to his middle-aged son ("concerns about [plaintiff's] business practices" and an intent "to protect his interests"). In brief, she maintains, plaintiff's "prodigal" conduct provides the context of the actions on the notes. Notwithstanding the comments made by the justice presiding when the actions pended in the commercial division, which defendant maintains were made without the

benefit of having read her papers, defendant observes that the justice transferred the actions to Surrogate's Court without comment beyond stating that the issues were inextricably connected to the proceedings in Surrogate's Court. (*Id.*).

Defendant next relies on Norman's will and the 2016 amendment in arguing that plaintiff violated the *in terrorem* clause by withholding his consent to the probate of the will and rendering the notes actions necessary. That clause provides for the disinheritance of any beneficiary who:

> in any manner, directly or indirectly, contest[s] or oppose[s] the validity [of the 2016 Amendment] or the validity or effectiveness of the exercise of any power of appointment thereby[] in any court or commence[s] or prosecute[s] any legal proceeding of any kind in any court to set aside the [2016 Amendment].

Consequently, her argument goes, Norman intended that the will be probated quickly and without opposition, and that in her capacity as preliminary executor of the estate with a fiduciary duty to collect on debts owed Norman, and given plaintiff's conduct in withholding his consent to probate, she was "compelled" to file the two actions demanding repayment of the notes. She also relies on other portions of Norman's estate plan whereby she was given a power of appointment, and a bank was appointed trustee of plaintiff's share, as evidencing Norman's intent to prevent plaintiff from "thwarting" his plan, and she accuses plaintiff of initiating the instant action to pressure her. (*Id.*).

Plaintiff contends that the affidavits are unnecessary to the actions on the notes which require no evidence other than the notes themselves, that the statements contained in the affidavits are "unrelated to any legitimate claim" on the notes, and that the actions were brought solely to defame him and constitute sham litigations. He argues that the actions on the notes constitute an inappropriate attempt to collect without regard to the 2016 amendment, and that the transfer of the actions to Surrogate's Court estops defendant from defending based on the notes

actions. Moreover, plaintiff denies that defendant was "compelled" to bring the actions, as the exercise of his discovery rights does not constitute a violation of the *in terrorem* clause, and he otherwise accuses defendant of thereby improperly attempting to compel him to consent to probate, and of seeking to cloak herself in a fiduciary duty which, given the estate plan, is illegitimate. He observes that there was no explanation needed for why the "big law firm" drafted the notes, nor is there a basis for asserting that he "utterly failed to repay" Norman, as pursuant to the estate plan, he would either pay the notes during Norman's lifetime, or receive a smaller distribution from the estate, with the debt discharged either way. Thus, he maintains, even the assertion that he failed to pay the notes is defamatory. (NYSCEF 21).

In reply, defendant observes that the privilege attaching to judicial proceedings is absolute regardless of whether the challenged statements are malicious or made in bad faith, and argues that plaintiff fails to demonstrate that the actions on the notes constitute sham litigations given her diligent prosecution of them for over a year. Invoking the "extremely liberal" test for pertinence, she claims that her affidavits explaining the actions pass the test and maintains that the affidavits were also offered in anticipation of plaintiff's defenses on the notes. And, as plaintiff himself alleges that she brought the actions to enrich herself and to compel him to consent to probate, defendant contends that plaintiff in effect concedes that the actions were brought for reasons "having nothing to do with reputational harm," and thus, were not brought solely to defame him. In any event, she reiterates that she brought the actions in a good faith attempt to fulfill her duty as preliminary executor. (NYSCEF 22, 24-25).

Defendant also takes issue with plaintiff's claim that the statements are not pertinent to the notes because they were unnecessary to the motion for summary judgment in lieu of complaint, arguing that plaintiff erroneously associates pertinence with a "strict necessity

standard" that is inimical to the "extremely liberal" test that protects "anything that may possibly or plausibly be relevant or pertinent." Pursuant to the correct standard, she insists that her statements are pertinent because they offer a factual background for the notes, and constitute a rebuttal of plaintiff's argument that the notes are unenforceable given the 2016 amendment. According to defendant, because the 2016 amendment followed plaintiff's repeated failure to pay on the notes, the notes are enforceable. Thus, the statements in rebuttal of plaintiff's argument, even if advanced in anticipation thereof, remain privileged. (*Id.*).

Given the "policy interest" in recognizing the absolute judicial privilege in an emotional, high stakes case such as this, the privilege ought not be set aside, defendant argues. Asserting that plaintiff conflates the concepts of sham actions and impertinent statements, she argues that having pursued the actions vigorously, they are not shams as a matter of law. She also denies being estopped by the transfer of the actions to Surrogate's Court, claiming that the requirement that they be adjudicated by another branch of the court system is insignificant, and that even if the transfer were deemed "adverse" to her, the privilege does not exist only where an action is ultimately sustained. (*Id.*).

At oral argument and in reply to defendant's contention that her statements were made in anticipation of a defense he would assert based on the 2016 amendment, plaintiff observed that defendant not only failed to mention the 2016 amendment in her affidavits but her attorneys repeatedly stated that the motions on the notes were to be decided without reference to extrinsic evidence. He also claimed that defendant has no choice but to proceed with her actions on the notes, mainly because she herself triggered the *in terrorem* clause of commencing the actions, and that she is estopped not only from defending the instant action based thereon, but in claiming that she brought them in good faith given the findings of the justice who transferred them to

Surrogate's Court. Moreover, he maintained, the list of his ventures that have resulted in was defendant described as "discord and dissension" have nothing to do with the notes. (NYSCEF 28).

In defense of her claim that she was attempting to fulfill her fiduciary duty in bringing the actions on the notes, defendant explained that the notes were the property of the estate, not of the trust, and if not enforced and were she to pass away without the notes being collected, they would fall into the estate and place her daughter and plaintiff at odds, a circumstance she sought to avoid. She concluded that the give and take of litigation and its "sharp language" ought not discourage people from setting forth their views with candor. Plaintiff rejoined with what he claimed is a countervailing public policy which requires lawyers and litigants to focus on the facts and the law without reference to extraneous and defamatory matters. (*Id.*).

3. Analysis

It is not disputed that the challenged statements were advanced in connection with a proceeding before a court and are thus analyzed in the context of defendant's motions for summary judgment in lieu of complaint. Pursuant to CPLR 3213, summary judgment in lieu of complaint may be obtained upon the submission of an unconditional instrument for the payment of money alone and proof of nonpayment "or a similar *de minimis* deviation from the face of the document." (*Weissman v Sinorm Deli*, 88 NY2d 437, 444 [1996]). Thus, where evidence beyond the instrument and proof of nonpayment is required to set forth a *prima facie* case, summary relief under CPLR 3213 is unavailable. (*Id.*).

a. Pertinence

Given the legal requirements for obtaining summary judgment in lieu of complaint, it is not disputed, nor may it be, that the affidavits accompanying the notes were unnecessary to

prevail on the motions. That they were unnecessary, however, is not dispositive, as pertinence is not synonymous with necessity. To find otherwise would improperly engraft onto the caselaw a requirement that the statements not only be pertinent, but necessary for the relief sought.

The allegations that plaintiff is the "incompetent and profligate beneficiary of his father's largesse," "whose lifestyle and management of matters business and financial, unfortunately, are best described as prodigal," while superfluous to the proceedings on the notes, provide the context for the notes and explain them as the product of plaintiff's financial troubles (most if not all of plaintiff's ventures as producing "discord and dissension with his business partners," having to "bail himself out of lawsuits in which he and his companies have been named due to [plaintiff's] habitual failure to attend to financial obligations owed to his lawyers, lenders, and landlords") which culminated in his attempts to avoid paying the notes (by "taking advantage of his dying father" when, "[i]n early April 2016, after Norman was permanently hospitalized and had fallen into a coma," plaintiff "became intent on taking what he could get before his father passed").

To the extent that these statements are irrelevant to the proceedings, and if pertinence is synonymous with relevance, the evidentiary standard for relevance is inapposite. (*Martirano*, 25 NY2d at 509; *Sexter & Warmflash v Margrabe*, 38 AD3d 163, 173 [1st Dept 2007]). Rather, context is key, and as the statements shed light and bear on the proceedings (*Brady v Gaudelli*, 137 AD3d 951, 951 [2d Dept 2016]), and as defendant apparently believed that they would tend to influence the court in granting her summary judgment in lieu of complaint (*People ex rel. Bensky*, 258 NY at 61), the statements pertain to the proceedings and are not outrageously out of context (*Martirano*, 25 NY2d at 509). Thus, notwithstanding defendant's alleged motives, and as any doubt as to pertinence is resolved in favor of finding pertinence (*Flomenhaft v Finkelstein*,

127 AD3d 634, 637 [1st Dept 2015]; *Sexter*, 38 AD3d at 173), the challenged statements are pertinent. That the justice presiding in the commercial part found the statements irrelevant is not dispositive, nor does it estop defendant from arguing their pertinence here, as the justice's comments were made in the course of what appears to be a somewhat informal, albeit of-record, court conference. Her comments upon ruling that the motions should be transferred to Surrogate's Court, where they presently pend, do not change this result, as pertinence does not depend on the merit of the actions. (*Lacher v Engel*, 33 AD3d 10, 14 [1st Dept 2006]).

Thomas v G2 FMV, LLC is distinguishable. There, the defendant companies commenced an action seeking a judgment declaring that the plaintiff had resigned from them without good reason, and included in their pleadings allegations purporting to demonstrate that they had cause to fire the plaintiff pursuant to their operating agreement. Based on that statement, the plaintiff sued the defendants for defamation, and the defendants moved to dismiss on the ground that the statements were made in connection with the action for a declaratory judgment. The motion court denied the motion on the ground that the statement was "not germane" to the relief sought, as the plaintiff could not have been terminated for cause without written notice, and no such notice had been given. (*Thomas v G2 FMV, LLC*, 2016 NY Slip Op 30143[U], *5 [Sup Ct, New York County 2016]). On appeal, the Court upheld the motion court's decision, holding that the statement had "no bearing" on the action. (147 AD3d 700, 701 [1st Dept 2017]).

Here, the challenged statements bear directly on the proceedings as they explain the notes and, in contrast to the statement in *Thomas*, they are not inconsistent with them. Also inapposite is *Klein v McGauley*. There, the plaintiff, a judgment-debtor, alleged that he was defamed by a statement made to him by an associate of a law firm representing the defendant judgment-creditor. Upon the plaintiff's arrival for an examination pursuant to a subpoena *duces tecum*, and

"in the presence of various people," the associate told the plaintiff that if he did not pay the judgment, he would call all of the newspapers and tell them that he is a crook. (29 AD2d 418, 419 [2d Dept 1968]). The statements were not only unnecessary to the proceeding, but were outrageously out of context, whereas here, even the most gratuitous of defendant's statements explain that the notes were necessary to ensure the payment of plaintiff's debts, which were attributable to his alleged impecunious conduct.

Nor are the statements challenged here comparable to those at issue in *Wiser v Koval*, where the plaintiff, former managing agent of the defendant's building, sued the defendant on a stopped check. In its counterclaim, the defendant accused the plaintiff of mismanaging and defrauding more than 100 other building owners who had no connection to the proceeding on the stopped check. As the accusation "add[ed] nothing to the cause of action," the Court found it libelous and not subject to dismissal as a matter of law. (50 AD2D 523, 524 [1st Dept 1975], *appeal dismissed* 39 NY2d 922 [1976]). To the extent that the Court thereby indicated that a superfluous statement is impertinent, the weight of the authority is to the contrary (*see supra*, at 12-14). In any event, the facts are distinguishable as the accusation challenged there was not only unnecessary to the proceeding, but was not even uttered in support of it and appears to have been spontaneous and intended solely to defame the plaintiff.

More on point is *Brady v Gaudelli*, where the Court found that defamatory statements advanced on a motion to compel a continued examination pursuant to SCPA 1404 were privileged as they concerned the same subject as the proceeding, "the contested last will and testament of the decedent." (137 AD3D 951, 951 [2d Dept 2016]).

b. Sham litigation

It is also undisputed here that the actions were and continue to be actively litigated. Thus, *Thomas* is distinguishable for the additional reason that there, as the motion court observed, the defendants withdrew the underlying action less than four months after commencing it and before any discovery. (2016 NY Slip Op 30143[U], *2). And, as plaintiff accuses defendant of harboring malicious motives other than to defame him, he thereby indicates that the actions on the notes were not brought solely to defame him. That the 2016 amendment requires that the notes be paid from plaintiff's testamentary share does not warrant a different result. (*Peters v Coutsodontis*, 155 AD3d 540, 541 [1st Dept 2017]; *Lacher*, 33 AD3d at 14).

III. CONCLUSION

I thus find that as a matter of law, defendant's statements are privileged; there is no need to address the other arguments.

Upon dismissing a defamation action on the ground of privilege, the Court in *Martirano v Frost*, observed that:

> It may be unfortunate that the plaintiff must suffer an attack on his professional integrity without any means of judicial redress. But the possible harm to him as an individual is far outweighed by the need—reflected in the policy underlying the privilege here involved—to encourage parties to litigation, as well as counsel and witnesses, to speak freely in the course of judicial proceedings. To decide that a party speaks at his peril, if it later be determined that some statement of his was not technically relevant to the issue involved, would be an impediment to justice, because it would hamper the search for truth, and prevent making inquiries with that freedom and boldness which the welfare of society requires.

(25 NY2d 505, 509 [1969]).

Accordingly, it is hereby

ORDERED, that defendant's motion to dismiss is granted and the complaint is dismissed.

5/23/2018
DATE

Barbara Jaffe , J.S.C.
HON. BARBARA JAFFE

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		DO NOT POST			FIDUCIARY APPOINTMENT		REFERENCE