SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY PART IAS MOTION 48EFM
Justice

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DONALD LEWIS,

Plaintiff,

- v -

PIERCE BAINBRIDGE BECK PRICE HECHT LLP, JOHN PIERCE, DENVER EDWARDS, CAROLYNN K. BECK, LITTLER MENDELSON, P.C., SYLVIA JEANINE CONLEY, PUTNEY TWOMBLY HALL & HIRSON LLP, MICHAEL YIM, and JANE DOE,

Defendants.

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INDEX NO. 155686/2019
MOTION DATE N/A
MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 46, 47, 48, 49, 50, 56, 65, 66, 112, 113

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

Defendants Littler Mendelson, PC (LM) and its partner Jeanine Conley (collectively the LM Defendants) move pursuant to CPLR 3211(a) (7) to dismiss the July 26, 2019 First Amended Complaint (FAC).[1] (NYSCEF Doc. No. [NYSCEF] 48, FAC.)

Plaintiff Donald Lewis initiated this defamation action against his former law firm, Pierce Bainbridge Beck Price & Hecht LLP (PB), PB partners, John Pierce, Denver Edwards, and Carolynn Beck, PB's former counsel, the LM Defendants, and Putney Twombly Hall & Hirson LLP, Michael Yim, and Jane Doe. (NYSCEF 2, Complaint.) This action arises from an action PB filed on May 15, 2019 against plaintiff in California for civil extortion, defamation, and intentional and negligent interference with PB's

[1] Plaintiff's motion sequence number 004, seeking leave to file a second amended complaint, was denied without prejudice. (NYSCEF 192, Decision and Order, May 12, 2020.)

ongoing and prospective economic relations (LA Action). (NYSCEF 28, LA Action Complaint; NYSCEF 48, FAC ¶33 n 3.) Plaintiff also initiated an action against PB, certain PB partners, Putney Twombly Hall & Hirson LLP, Michael Yim, and Lauren Schaefer-Green, seeking damages for breach of contract and nineteen other causes of action. (*Lewis v Pierce Bainbridge, et al.*, Index No. 652931/2019 [Sup Ct, NY County] [NY Action I].)

Plaintiff alleges the following relevant facts in the FAC[2] unless noted otherwise, and for purposes of this motion, they are accepted as true.

Plaintiff, an attorney, worked at PB's New York office from June 17, 2018 to November 12, 2018 pursuant to a May 15, 2018 agreement. (NY Action I, NYSCEF 79, Amended Complaint, ¶¶77, 175.) On October 4, 2018, a PB employee accused plaintiff of sexual harassment on July 7, 2019 and July 20, 2018 and retaliation. (NY Action I, NYSCEF 79, Amended Complaint ¶¶5 n 2, 158, 166.) On October 12, 2018, PB placed plaintiff on administrative leave pending the outcome of an investigation. (NY Action I, *id.* ¶¶132.) In an October 12, 2018 e-mail, PB instructed Lewis not to contact any PB personnel other than defendant Carolynn Beck. (NY Action I, NYSCEF 25, Email.) On November 12, 2018, plaintiff sent an e-mail to various PB personnel which disclosed aspects of the investigation including the identity of the accuser. (NY Action I, NYSCEF 26, Lewis Email of November 12, 2018; NY Action I, NYSCEF 79, Amended Complaint ¶177.) Later that day, PB terminated plaintiff for violating the terms of his leave. (NY Action I, NYSCEF 27, Termination Email and Letter.) The Termination Email and Letter

[2] The facts alleged in NY Action I are relevant to this action and plaintiff states that they are incorporated in the FAC ¶3.

stated that plaintiff was fired for just cause in that, among other things, he violated of the terms of his administrative leave. (*Id.*)

On May 16, 2019, plaintiff filed NY Action I. On July 1, 2019, represented by the LM Defendants, PB filed a motion to dismiss that action. (NY Action I, NYSCEF 13.)

On June 7, 2019, plaintiff initiated this defamation action. In the FAC, filed on July 26, 2019, plaintiff alleges the following against the LM Defendants: aiding and abetting defamation (NYSCEF 48, FAC ¶¶ 230-244 [second cause of action]), violating Judiciary Law §487 (*id.* ¶¶ 245-250 [third cause of action]); intentional infliction of emotional distress (*id.* ¶¶ 251-263 [fourth cause of action]); and prima facie tort (*id.* ¶¶279-285 [sixth cause of action]).[3] The alleged factual bases for all four of these claims are: (1) Conley's involvement in PB's motion to dismiss in NY Action I (*see id.* ¶¶22, 23, 116); (2) Conley's statements during the race to the court (*id.* ¶¶99-116, 121, 123, 137, 217, 259, 271, 272); and (3) Conley's statements and conduct during settlement negotiations, prior to any litigation commencing. (*id.* at ¶¶21, 94-114, 121, 122, 125.)

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].)

The LM Defendants assert both an absolute and a qualified privilege which

[3] Plaintiff voluntarily withdrew the fourth cause of action against the LM Defendants for abetting intentional infliction of emotional distress. (NYSCEF 65, Plaintiff's Memorandum of Law in Opposition to LM Defendants' Motion to Dismiss the FAC at 1 n 1.)

require dismissal unless plaintiff establishes that the objectionable statements are not pertinent and immaterial. (*Front, Inc. v Khalil*, 24 NY3d 713, 718 [2015], *rearg denied* 25 NY3d 1036 [2015].) Without any legal support, plaintiff opines that the privileges cannot apply here because he did not plead a direct defamation claim against the LM Defendants, only an aiding and abetting defamation claim and other non-defamation claims. Indeed, the law is otherwise. (*See e.g. Chutko v Ben-Ami*, 150 AD3d 582, 583 [1st Dept 2017] [applying absolute privilege to tortious interference with contract].) Likewise, plaintiff cannot avoid the privilege by repackaging a defamation claim against the LM Defendants as something else, e.g. violation of Judiciary Law §487; intentional infliction of emotional distress; and prima facie tort.

The court must determine whether Conley's statements are privileged. (*Ticketmaster Corp. v Lidsky*, 245 AD2d 142, 142 [1st Dept 1997] ["protection is complete irrespective of motive"].) The public policy behind the absolute privilege applying to "relevant statements made in judicial or quasi-judicial proceedings is so that those discharging a public function may speak freely to zealously represent their clients without fear of reprisal or financial hazard." (*Front, Inc.*, 24 NY3d at 718 [citation omitted]). "The principle underlying the absolute privilege for judicial proceedings is that the proper administration of justice depends upon freedom of conduct on the part of counsel and parties to litigation, which freedom tends to promote an intelligent administration of justice." (*Sexter & Warmflash, P.C. v Margrabe*, 38 AD3d 163, 171 [1st Dept 2007], quoting *People ex rel. Bensky v Warden of City Prison*, 258 NY 55, 59-60 [1932] [internal quotation marks omitted].)

As to Conley's "statements" after NY Acton I and the LA Action were filed, if any,

and her statements in the motion to dismiss NY Action I, the absolute privilege applies to the extent there are any statements. "In the interest of 'encourag[ing] parties to litigation to communicate freely in the course of judicial proceedings' the privilege is extended to all pertinent communications among the parties, counsel, witnesses, and the court. Whether a statement was made in or out of court, was on or off the record, or was made orally or in writing, the rule is the same—the statement, if pertinent to the litigation, is absolutely privileged." (*Frechtman v Gutterman*, 115 AD3d 102, 107 [1st Dep't 2014] [citations omitted].) The privilege "applies to statements made in the course of litigation when such words or writings are material and pertinent to the questions involved in the litigation." (*Front, Inc.*, 24 NY3d at 718). "The test for determining whether statements are pertinent to the litigation is 'extremely liberal.'" (*Combier v Wasserman*, 2009 NY Slip Op 33244[U], *9 [Sup Ct, NY County 2009].) To be pertinent to the litigation "'the barest rationality, divorced from any palpable or pragmatic degree of probability, suffices.'" (*Pomerance v McTiernan*, 51 AD3d 526, 528 [1st Dept 2008], quoting *Sexter & Warmflash, P.C. v Margrabe*, 38 AD3d at 173].)

Certainly, Conley's affirmation in support of PB's motion to dismiss NY Action I is pertinent to that action and merely attaches two relevant documents: the complaint in NY Action I and the contract at issue. The memo of law discusses relevant law pertinent to that action. (NY Action I, NYSCEF 13.) Calling PB's motion to dismiss NY Action I "frivolous" six times in a 70-page complaint with 286 paragraphs, not including subparts, does not make it so. (NYSCEF 48, FAC ¶¶116, 259, 260, 271, 272). Otherwise, plaintiff fails to identify any actual statements made by Conley after the actions were filed. Indeed, plaintiff alleges that Conley did not respond after the LA

Action was filed and "re-surfaced" to file the motion to dismiss. (NYSCEF48, FAC ¶¶115-116.)

As to Conley's pre-litigation statements, a qualified privilege applies. This qualified privilege applies "to statements pertinent to a good faith anticipated litigation. This requirement ensures that privilege does not protect attorneys who are seeking to bully, harass, or intimidate their client's adversaries by threatening baseless litigation or by asserting wholly unmeritorious claims, unsupported in law and fact, in violation of counsel's ethical obligations." (*Front, Inc.*, 24 NY3d at 720.) Here, plaintiff focuses on Conley's involvement in slowing plaintiff in his race to the court with PB. Plaintiff's objection to the LA Action does not make it baseless or a sham. (*See e.g. Flomenhaft v Finkelstein*, 127 AD3d 634, 638 [1st Dept 2015] [privilege did not apply because in separate litigation against former attorney, client admitted that he was induced by defendant's false statements to sue plaintiff]; *see also Halpern v Salvan*, 117 AD2d 544, 548 [1st Dept 1986] [absolute privilege did not apply because court found sham litigation was evidenced by failure to move forward in action].) Clearly, the filing of the LA Action was not an empty threat because it was actually filed. (*See Lacher v Engel*, 33 AD3d 10, 14 [1st Dept 2006].) Moreover, dismissal of the underlying litigation on a motion to dismiss does not alter application of the privilege. (*Id.*) Sustaining this privilege elevates "the greater interests of the judicial processes in its 'search for truth;'" it is not to be construed as approving the alleged activity. (*Dachowitz v Kranis*, 61 AD2d 783, 788 [2d Dept 1978] [dissent] [application of the absolute privilege "should not be construed as condoning defendant's untrue, intemperate and gratuitous accusations"].)

The court has considered the parties' remaining arguments and finds them not requiring an alternate result.

Accordingly, it is

ORDERED that the defendants' motion to dismiss is granted and the complaint is dismissed against defendants Littler Mendelson, PC (LM) and its partner Jeanine Conley with costs and disbursements to the defendants as taxed by the Clerk and the Clerk is directed to enter judgment dismissing the action; and it is further

ORDERED that the action is severed and continued against the remaining defendants in accordance with this decision; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the General Clerk's Office, in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases, who are directed to mark the court's records to reflect the change in the caption herein.

ENTER:

5/26/2020
DATE

CHECK ONE:		CASE DISPOSED			x	NON-FINAL DISPOSITION	
	x	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE