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SCANNED ON 12/22/2010

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

PRESENT: O. PETER SHERWOOD PART 61

Justice

ELIZABETH COMBIER,

Plaintiff,

-against-

KENNETH WASSERMAN, JULIA DANGER,

Defendants.

INDEX NO. 112808/09

MOTION DATE Oct. 26, 2009

MOTION SEQ. NO. 001

MOTION CAL. NO. 18

RECEIVED
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MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

The following papers, numbered 1 to 2 were read on this motion for summary judgment dismissing the complaint

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits	1-2
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, the motion of defendant Kenneth Wasserman for an order pursuant to CPLR § 3212 for summary judgment dismissing the complaint is decided in accordance with the accompanying decision and order.

FILED

NOV 10 2009

NEW YORK
COUNTY CLERK'S OFFICE

Dated: November 6, 2009

O. P.

O. PETER SHERWOOD, J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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ELIZABETH COMBIER,

Plaintiff,

-against-

KENNETH WASSERMAN, JULIA DANGER,

Defendants,

----------X

DECISION AND ORDER

Index No. 112808/2009

O. PETER SHERWOOD, J.:

Defendant Kenneth Wasserman *pro se* moves for an order pursuant to CPLR § 3212 granting summary judgment in his favor dismissing the complaint (motion sequence #001). Plaintiff Elizabeth Combier *pro se* separately moves for an order compelling defendants to produce discovery (motion sequence #002). Motion sequences #001 and #002 are consolidated for purposes of disposition and determined as follows:

The facts as derived from the record are as follows: Plaintiff Elizabeth Combier ("plaintiff" or "Combier") and defendant Julia Danger ("Danger") are identical twins. Defendant Kenneth Wasserman ("Wasserman") is an attorney who represents Danger in two actions, one of which is still pending. The first action, titled *Estate of Julia Elizabeth Taschereau* (Index No. 1042/1998), is pending in New York County Surrogate's Court and concerns a challenge by Danger to the probate of the will of Combier's and Danger's mother, who died on March 16, 1998 ("the Surrogate's Court proceeding"). The challenged will disinherited Danger in favor of Combier. The trial of that action was completed on September 14, 2009, with post-trial memoranda submitted on October 13, 2009. No decision has yet been rendered.

The second action, titled *Julia Danger v Elizabeth Combier* (Index No. 606258/1999), was commenced in this court and sought to recover damages for Combier's alleged conversion of moneys from a trust for the benefit of Danger's and Combier's mother which was held by the Bankers' Trust Company ("the Supreme Court proceeding"). Upon the death of the parties' mother, the trust terminated and the Bankers' Trust Company distributed the remaining principal and accrued interest to Combier and Danger. By order dated December 27, 2007, and entered January 2, 2008, Justice

Karla Moskowitz dismissed the action with prejudice finding that Danger did not have standing to bring the action as any recovery would belong to the trust. Danger appealed from that decision and order to the Appellate Division, First Department and was represented on appeal by attorney Wasserman. By decision and order dated October 1, 2009, the Appellate Division affirmed stating that the complaint was properly dismissed as Combier "neither controlled the trust nor determined how its assets were to be distributed" (*Danger v Combier*, ___ AD3d___, 885 NYS2d 594).

On or about September 9, 2009, Combier *pro se* commenced the instant action by which she seeks to recover compensatory and punitive damages for alleged defamation and perjury apparently arising out of objections filed in the Surrogate's Court probate proceeding (first cause of action) and for breach of an agreement signed by Danger and Combier in July 1999, (whereby the trust for the benefit of their mother at the Bankers' Trust Company was terminated), by the commencement of the Supreme Court action which is presently on appeal before the Appellate Division, First Department (second cause of action).

Issue was joined by service of defendants' respective *pro se* answers on or about September 25 and 28, 2009, respectively. Danger generally denied the material allegations of the complaint and asserted as an affirmative defense that the complaint fails to state a cause of action. Wasserman also generally denied the allegations of the complaint and asserted as affirmative defenses that the complaint fails to state a cause of action and the allegations of the complaint are barred by an absolute privilege protecting attorneys in judicial proceedings.

Simultaneously with service of his answer, defendant Wasserman moves for summary judgment dismissing the complaint. In his affirmation in support of the motion, Mr. Wasserman contends that the complaint must be dismissed as against him as the causes of action alleged in the complaint are predicated upon statements he made and documents he submitted in the course of judicial proceedings which he contends are absolutely privileged.

Plaintiff submitted no opposition to defendant Wasserman's motion for summary judgment. Instead, by Notice of Motion dated October 15, 2009, she demands "all documents and proof of lies and libelous statements made about [her] concerning her thievery, moral coercion, and trickery and all other libelous statements made by Defendants from March 1998 to present". In her affidavit in support of her motion, Combier proceeds to amplify the claims made in her complaint with regard

to defendants' alleged perjury and false and libelous statements allegedly made in the course of the Surrogate's Court probate proceeding. Specifically, plaintiff contends that defendants knew that Danger's objections to probate filed in the Surrogate's Court probate proceeding on August 4, 2009, were false, fraudulent and defamatory. Combier also makes new claims, not asserted in the complaint, concerning a campaign of harassment which defendants allegedly engaged in involving their making libelous, false and defamatory statements to plaintiff's church, her children's school, the New York Law Journal and her community regarding her being a "terrorist" and having robbed from her mother and stolen from the trust.

In opposition, Wasserman contends that plaintiff has not served any discovery demands in this action so to the extent that she seeks an order compelling defendants to produce documents such motion is premature. In any event, Wasserman avers that plaintiff's attempt to use the motion to formulate document demands for the first time is inappropriate. Lastly, defendant Wasserman states that plaintiff's motion should be denied since his motion for summary judgment serves to stay all discovery.

Combier submits a reply affidavit to which she annexes papers submitted in the Supreme Court action together with a copy of the decision and order of the Appellate Division, First Department, affirming the dismissal of the complaint in that action. In the reply affidavit, plaintiff does not respond to Wasserman's contentions, but rather again enumerates the instances of defendants' alleged fraudulent, defamatory and libelous conduct and statements.

In reviewing the plaintiff's motion, the Court recognizes plaintiff's *pro se* status and the fact that she may lack a familiarity with New York law governing the causes of action alleged in the complaint and pertinent legal procedures. Nevertheless, as Wasserman points out, plaintiff is no stranger to judicial and legal processes, having been involved in numerous lawsuits as both plaintiff and defendant. In any event, the fact that she is appearing *pro se* does not excuse her failure to proceed according to governing principles of law. Wasserman is correct that pursuant to CPLR § 3214 (b), the filing of a motion for summary judgment under CPLR § 3212 automatically stays disclosure. Thus, even if plaintiff had properly served discovery demands upon defendants, the course of discovery, including the running of defendants' time to respond thereto, would be stayed unless the court directed disclosure to continue. Here, Wasserman's motion was made before

plaintiff made her motion or even served any discovery demands and the Court has not ordered that the discovery process continue notwithstanding Wasserman's motion. Accordingly, plaintiff's motion to compel must be denied.

Turning then to the merits of Wasserman's motion for summary judgment, the standard applicable to such motion is well settled. Summary judgment is the procedural equivalent of a trial (*see, Capelin Assocs. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1973]). As such, summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see,* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation,* 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form (*see, Alvarez v Prospect Hosp., supra*; *Zuckerman v City of New York,* 49 NY2d 557 [1980]). Failure to make the requisite showing mandates denial of the motion regardless of the sufficiency of the opposing papers (*see, Winegrad v New York Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Once the prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see, Kaufman v Silver,* 90 NY2d 204,208 [1997]). In deciding the motion, the court must view the evidence in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see, Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]).

Application of these principles to the case at bar makes clear that defendant Wasserman has met his burden of demonstrating his entitlement to judgment as a matter of law.

The elements of a prima facie claim of defamation include a defamatory statement regarding the plaintiff that is false and published to a third party resulting in injury to the plaintiff (*see,* Pattern Jury Instructions § 3:23 [Intro] [2009]). However, statements made in the course of legal proceedings are absolutely privileged if they are pertinent to the litigation, regardless of the purpose or motive of the defendant in making the statement or how great the personal malice of the speaker (*see, Youmans v Smith,* 153 NY 214, 219 [1897]; *Marsh & Ellsworth,* 50 NY 309, 311 [1872]; *Pecue v West,* 233 NY 316, 319 [1922]). The policy underlying the privilege stems from a recognition that

"'the proper administration of justice depends upon freedom of conduct on the part of counsel and parties to the litigation,' which freedom 'tends to promote an intelligent administration of justice'" (*Sexter & Warmflash, P.C. v Margrabe*, 38 AD3d 163, 171, quoting *People ex rel. Bensky v Warden of City Prison*, 258 NY 55, 59-60 [1932]). Thus, any harm to individual litigants barred from recovering for defamatory statements made in the course of a judicial proceeding is deemed to be outweighed by the need to encourage parties, witnesses and attorneys to speak freely in the course of judicial proceedings (*id.* At 172). The test for determining whether statements are pertinent to the litigation is "extremely liberal". Thus, the offending statements to be pertinent to the litigation "'need be neither pertinent nor material to the threshold degree required in other areas of the law, and 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, supra* at 173).

Here, the basis of plaintiff's first cause of action is the filing of objections to the probate of plaintiff's and Danger's mother's will on August 4, 2009, which plaintiff contends defamed her. Clearly, the alleged offending statements were made in the context of a judicial proceeding and, since they related to the authenticity and execution of the will in question, they were directly related to the judicial proceeding. Accordingly, they are absolutely privileged and cannot form the basis of a cause of action for defamation.

The second cause of action to the extent that it is predicated upon statements defendants made concerning the trust at Bankers Trust Company must also be dismissed. Again such statements were made in the course of a judicial proceeding to which they were directly related and are, therefore, protected by an absolute privilege. To the extent the second cause of action asserts a claim for fraud, it is also subject to dismissal as the complaint does not contain the necessary elements for such cause of action, namely a material misrepresentation, made with knowledge of its falsity, with intent to deceive, justifiable reliance on the misrepresentation by the party claiming it was deceived and damages suffered by that party as a result of the reliance (*see, Desideri v D.M.F.R. Group [USA] Co.*, 230 AD2d 503, 505 [1st Dept 1997]). Plaintiff prevailed in the Supreme Court proceeding and upon the appeal in which the subject trust was at issue. In no way may it be said that plaintiff relied upon any fraud related to the agreement executed by Danger and herself by which the trust was

terminated. The fact that Danger commenced an action seeking to recover monies she claimed Combier had stolen from the trust does not serve to transform Danger's execution of the termination agreement into a fraud. Any alleged fraud upon the court in the Supreme Court proceeding is more appropriately raised in that proceeding.

Lastly, although Danger has not cross moved for summary judgment dismissing the complaint as against her and, indeed, has submitted no papers on these motions, the Court, upon searching the record pursuant to CPLR § 3212, finds that dismissal of the complaint as against her is also warranted.

Accordingly, it is

ORDERED that the motion of defendant Kenneth Wasserman for summary judgment dismissing the complaint (motion sequence #001) is granted, the complaint is dismissed and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff's motion to compel discovery (motion sequence #002)is denied as moot; and it is further

ORDERED that within 30 days of entry of this order defendant Kenneth Wasserman shall serve a copy upon plaintiff with notice of entry.

This constitutes the decision and order of the court.

DATED: November 6, 2009

ENTER,

O. PETER SHERWOOD
J.S.C.