

**Cordell-Reeh v Nannies of St. James Inc.**

2004 NY Slip Op 30189(U)

March 12, 2004

Supreme Court, New York County

Docket Number: 0112543/2002

Judge: Joan Madden

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

PRESENT: HON. JOANA. MADDEN  
J.S.C.  
Justices

PART 11

Danica Cordell-Reeb

INDEX NO.

112543/02

MOTION DATE

- v -

MOTION SEQ. NO.

001

Nannies of St. James Ave

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *and cross-motion are determined in accordance with the annexed decision and order.*

**FILED**

MAR 22 2004

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NEW YORK COUNTY

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: March 17, 2004

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

-----X  
DANICA CORDELL-REEH,

Plaintiff.

INDEX NO. 112543/02

-against-

NANNIES OF ST. JAMES INC. and  
MICHELLE PADILLA,

Defendant.

-----X  
JOAN A. MADDEN, J.:

In this action for damages for personal injuries based on claims of negligence and intentional infliction of emotional distress, plaintiff moves for an order pursuant to CPLR 3211(a)(1), (a)(5) and (a)(7), dismissing defendant Michelle Padilla’s counterclaims for libel and slander.’ Defendant Padilla opposes the motion, and cross-moves for an order pursuant to CPLR 3211(d) for further discovery, for an order pursuant to CPLR 3101 and 3024 striking information from the pleadings, and for an order pursuant to CPLR 3025 granting leave to amend her answer.

I. Background

The events underlying this action began on October 8, 2001, when defendant Padilla began to work as a nanny for plaintiff’s five-year old twins. Defendant Padilla had been referred through the defendant agency, Nannies of St. James (the “Nannies”). Plaintiff alleges that on

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‘Plaintiff’s original motion also sought to dismiss the counterclaims of defendant Nannies of St. James (the “Nannies”) on identical grounds. Plaintiff, however, subsequently moved (motion sequence no. 003) to strike the Nannies’s answer and to dismiss its counterclaims, based on its failure to comply with the court’s order directing it to appoint substitute counsel. The Nannies defaulted on that motion, and by an order dated January 4, 2004, that motion was granted. Consequently, as the Nannies’s counterclaims have already been dismissed, that portion of the instant motion to dismiss those same counterclaims is denied as superfluous.

October 24, 2001, she informed the Nannies that she wished to terminate Padilla's employment and on that same day defendant Padilla moved out of plaintiff's home. On that day or the following day, Padilla went to the office of Teitler & Teitler, the attorney for plaintiff's former husband, Henry F. Owsley, III. Padilla provided the attorney with an affidavit that plaintiff was engaging in inappropriate behavior of a sexual nature toward her children, and that plaintiff was neglecting the children's nutritional needs. Plaintiff's former husband then used Padilla's affidavit in support of his emergency order to show cause for temporary custody of the children. Plaintiff alleges that this affidavit was also provided to the New York State Office of Children & Family Services. Owsley was granted temporary custody pending a hearing on October 29, 2001. At that hearing on October 29, 2001, the Hon. Jacqueline W. Silbermann determined that Owsley should continue having temporary custody pending further court action.

On June 11, 2002, plaintiff commenced the instant action for \$20 million in compensatory and punitive damages, asserting a claim of negligence against defendant Nannies, and a claim of intentional infliction of emotional harm against defendant Padilla. The complaint alleges that defendant Padilla knew she was making false and malicious accusations against plaintiff, when she provided the affidavit in the custody proceeding, and when she spoke to the children's teachers and father, plaintiff's therapist and the Administration for Children's Services. The complaint further alleges that such "conduct was grounded and premised upon the worst kind of malice and extreme vindictiveness, and was expressly intended to inflict upon plaintiff intense emotional distress and harm."

The factual portion of the complaint contains a separate section entitled "Padilla's Prior History of Lies, Deceit and Mental Illness," which alleges that defendant made similar false

accusations against a former employer, “Christopher ‘R’”, and that “Christopher ‘R’” did not write a letter of recommendation on her behalf. This portion of the complaint further alleges that in **1994**, Padilla was “treated for significant psychological and mental disturbances at New Hope Counseling Center,” where she “repeatedly informed her treating therapists that she had been sexually abused in her youth by a family member; had been a prostitute; and suffered from anorexia; and had charged such family member with raping her; and had experienced other significant disorders throughout her life.” The complaint states that plaintiff commenced a lawsuit against New Hope Counseling Center in October 1997, “alleging among other things, that it had improperly and unlawfully released her medical records to the very family member who she had accused of sexually abusing and raping her on numerous occasions,”

On June 12, 2001, one day after plaintiff commenced the instant action, both the New York Daily News and the New York Post, carried stories about plaintiff’s lawsuit against Padilla and the Nannies, which included quoted statements from plaintiff and her attorney, Bernard E. Clair. On June 16, 2002, the London Sunday Times also published an article about the lawsuit, with quotes from both plaintiff and Clair. Then, on July 2, 2002, plaintiff and Clair appeared on the television show known as CNN Connie Chung Tonight, and were interviewed about the specific circumstances underlying plaintiff’s lawsuit against Padilla and the Nannies.

On July 9, 2002, Justice Silbermann commenced a custody hearing. Apparently several witnesses testified, but Padilla did not do so before the parties settled the action by stipulation.<sup>2</sup>

In or about August 2002, defendant Padilla served and filed her answer in the instant

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<sup>2</sup>In his memorandum of law, plaintiff’s counsel states that after five days of trial, Owsley agreed to stipulate to a restoration, in all material respects, of the custody arrangement that had existed before defendant Padilla was fired.

action, asserting several affirmative defenses and two separate counterclaims for libel and slander. The counterclaim for libel alleges that on June 12, 2002 and June 16, 2002, Cordell-Reeh and her agents maliciously published specific words about Padilla which are “wholly false,” in the New York Daily News, the New York Post and the London Sunday Times. The allegedly libelous words are quoted in the complaint as follows:

New York Post, June 12, 2002, “Cordell-Reeh’s Lawyer, Bernard Clair, said, ‘This case represents the true underbelly of the ‘Nanny Diaries.’ [Padilla] worked for my client for 2 ½ weeks and did a lifetime of damage. . .”

Daily News - June 12, 2002, “Talk about a nanny from hell . . .” “It is scary beyond belief that a person who you bring into the house to care for your children can cause so much harm and destruction.” Cordell-Reeh said. . .” ...” “Clair said the nanny’s allegations are “pure malicious retribution” for the firing.”

The [London] Sunday Times, June 16, 2002, “This is not only about an evil nanny. My children want their mother back,” she said . . .” “Padilla worked for my client for 2½ weeks and did a lifetime of damage,” said Clair. . . “Yet in court papers filed by Cordell-Reeh it is claimed that one of Padilla’s alleged references was also accused of abusing his children after he let her go. . .” “We showed him a copy of his reference and he said, “That’s not my signature. I’d never have recommended her in a million years,” said Clair. . .” She told them she was wrestling with going back into the trade,” Clair added. . .” “An affidavit by Padilla alleging sexual abuse and neglect was the main evidence at an emergency custody hearing.

The counterclaim for slander alleges that on July 2, 2002, Cordell-Reeh appeared on CNN Connie Chung Tonight, and maliciously spoke and published false and defamatory words about Padilla. The complaint quotes the following allegedly slanderous words, which appear to be taken from a transcript of the program:

CHUNG: We have a story now about a parent’s worse fears coming to life, Danica Cordell-Reeh hired a nanny to help care for her 5-year-old twins, Not just any nanny, but Michelle Padilla, author of ‘The Official Guide to Finding a Great Nanny and Keeping Her.’ But two-and-a half weeks later, Danica fired her. And the very next day, her world turned upside down.

The nanny went to authorities claiming Danica sexually abused and starved the children. The next day a court took her kids away from her, turning them over to Danica's estranged husband.

CLAIR: Let me clarify something if I can too. You know, under our law, there was already an agreement of custody and parenting time. So in order to change that, Henry Owsley had *to* come in with something of an exceptional nature, because we respect prior agreements. So he came in with the allegations of Padilla. If, at that time, we knew what we know now, the investigation would never have occurred. Danica would never have been put under the microscope and the spotlight that she . . .

CHUNG: And what do you now know?

CLAIR: We know that Michelle Padilla not only acted in bad faith, but manipulated the system because she is, as far as we are concerned, unstable and has a history of making these same allegations in prior circumstances, in prior situations where she had been terminated.

CHUNG: We heard from two of her family members. And one of her family members left a message saying he was unaware of these recent allegations and cannot believe this is happening to another family. And also, another relative said to us that she has had some mental problems.

CLAIR: Yes.

CHUNG: Do you have any evidence to suggest that is true?

CLAIR: Yes. Once we discovered that Michelle Padilla had made similar allegations against other innocent families in the past, we investigated whether she had ever brought a lawsuit, because that is somewhat typical as far as a *modus operandi*.

And, in fact, in **1994**, she sued a mental health clinic where she was seeking and attaining treatment. And during those sessions, she made certain startling revelations about herself. One, that she had been sexually abused herself as a child by family members. And the second was that she had engaged in prostitution, along with other assertions. And, in fact, because she sued the clinic, these session notes that we have become a matter of public record because they had to defend themselves for the allegations that she was making against them, namely, that they had let her records be disseminated to third parties. By the way, that suit was dismissed.

CLAIR: Now, I should say that the order is only temporary and we are in court in the next week or so, where we will be given the opportunity to show that once this case took that terrible awesome spin, that evil spin, if you will, she never had a chance with the process. And Mr. Owsley saying that there is a bunch of support is dead wrong only because the kinds of support that he's looking for is, for example, my client was wooden when she was with the children. Well, who being accused of sexual abuse would be any different?

## II. Plaintiff's Motion to Dismiss

Plaintiff is now moving to dismiss defendant Padilla's counterclaims for libel and slander, on the ground that the allegedly defamatory statements are absolutely privileged under Civil Rights Law §74.

Civil Rights Law §74 creates a "fair reporting privilege" which forbids the maintenance of a civil action "against any person, firm or corporation, for the publication of a fair **and** true report of any judicial proceeding." Misek-Falkoff v. American Lawyer Media, Inc., 300 AD2d 215 (1<sup>st</sup> Dept 2002), lv **app den** 100NY2d 508 (2003). "The privilege with respect to judicial proceedings exists because of the 'public interest in having proceedings of courts of justice public, not secret, for the great security thus given for the proper administration of justice.'" Branca v. Mavesh, 101 AD2d 872, 873 (2<sup>nd</sup> Dept), aff'd 63 NY2d 994 (1984)(quoting Lee v. Brooklyn Union Pub. Co., 209 NY 245,248 [1913]). Historically, the statutes preceding Civil Rights Law §74 limited the privilege to members of the media acting without malice, but the protection of section 74 extends to "any person" regardless of whether she or he acts with malice. Williams v. Williams, 23 NY2d 592, 597 (1969); Branca v. Mavesh, *supra*. "For a report to be characterized as 'fair and true' it is enough that the substance of the article be substantially accurate. . .[T]he language used therein should not be dissected and analyzed with a lexicographer's precision." Holy Spirit Ass'n for the Unification of World Christianity v. New York Times Co., 49 NY2d 63, 67 (1979); see

also Misesk-Falkoff v. American Lawyer Media, supra.

Here, taking the statements attributed to plaintiff in the newspaper articles and on the television program, and comparing them with the allegations set forth in the complaint in the instant action, which was the subject of the articles and the program, leads to the conclusion that plaintiff's allegedly defamatory statements constitute a substantially accurate report of at least one or two judicial proceedings, and thus, are privileged under Civil Rights Law §74.

The statements by plaintiff and her counsel to the media accurately reflect the substance of plaintiff's lawsuit against Padilla, and neither suggest more egregious conduct than that recounted in the complaint, nor present Padilla's purported wrongdoing as established fact rather than allegation. Hughes Training Inc. v. Pegasus Real-Time Inc., 255 AD2d 729,730 (3<sup>rd</sup> Dept 1998). In speaking to the media, plaintiff and her counsel simply described plaintiff's position in the lawsuit, and the underlying factual and legal basis for her claims of negligence and intentional infliction of emotional distress, as set forth in the complaint. The complaint is replete with allegations setting forth details by which it is alleged that Padilla's conduct in failing to disclose accurate information about her references, in making false and malicious accusations to various persons, and in providing an affidavit making false and malicious accusations, which was used by plaintiff's former husband to challenge plaintiff's custody of their children, "was grounded and premised upon the worst kind of malice and extreme vindictiveness intended to inflict upon plaintiff intense emotional distress and harm."

Some of the allegedly defamatory statements to the media are nearly identical to many of the allegations in the complaint. For example, Clair stated that the reference letter Padilla had provided was not signed by her former employer, and after her employer fired her, Padilla also

accused him of abusing and neglecting his children. These statements are nearly identical to the detailed allegations in the complaint regarding Padilla's former employer, "Christopher R." Clair also stated that Padilla provided an affidavit alleging sexual abuse and neglect which was the "main evidence at an emergency custody hearing." The complaint contains the same and more detailed allegations as to the substance of Padilla's affidavit, its use in the custody proceeding and the custody proceeding itself. These statements relating to the custody proceeding are likewise privileged as a substantially accurate report of the custody proceeding itself. Clair's further statements about Padilla's lawsuit against a mental health clinic and his description of the information Padilla had revealed about herself during her treatment at that clinic, are nearly identical to the detailed allegations in the complaint regarding Padilla's treatment at and subsequent lawsuit against New Hope Counseling Center.

Other statements to the media, such as Clair's statements that the "case represents the true underbelly of the 'Nanny Diaries,'" and Padilla "did a lifetime of damage" in 2 1/2 weeks and was the "nanny from hell," are expressions of opinion and "rhetorical hyperbole," which cannot form the basis of a defamation claim. Gross v. New York Times Co., 82 NY2d 146, 151-152 (1993).

In opposing the motion to dismiss her counterclaims, defendant has failed to identify any statement by plaintiff or her counsel which cannot be regarded as a substantially accurate report of the allegations in the complaint, i.e. a statement which considered in its context suggests more serious conduct that actually suggested in the underlying complaint. Daniel Goldreyer, Ltd. v. Van De Wetering, 217 AD2d 434, 435-436 (1<sup>st</sup> Dept 1995). While defendant objects to Clair's statements that Padilla "was wrestling with going back into the trade" and "worked as a prostitute," the complaint in the instant action explicitly alleges that Padilla informed the treating

therapist at New Hope Counseling Center that she had been a prostitute. The statement that Padilla "was wrestling with going back into the trade" does not appear in the complaint. Although this statement is extremely ambiguous, it does not suggest more serious conduct than alleged in the complaint, as the complaint already alleges prostitution.

Defendant also relies on the exception to the absolute privilege of Civil Rights §74, created by the Court of Appeals in Williams v. Williams, 23 NY2d 592 (1969), which is applicable when an action has been instituted *solely* as a shield against liability for dissemination of defamatory accusations. Based upon a consideration of the facts circumstances as presented herein, defendant has failed to allege a sufficient factual basis for concluding that plaintiff instituted the instant action maliciously and solely for the purpose of defaming defendant. Branca v. Mavesh, *supra*.

Thus, as the allegedly defamatory statements by plaintiff and her counsel to the media are of and concerning the complaint in the instant action, and constitute substantially accurate descriptions of the allegations in the complaint, those statements are protected under the absolute privilege of section 74 of the Civil Rights Law, and defendant Padilla's counterclaims for libel and slander must be dismissed.

### III. Defendant's Cross-Motion

Defendant cross-moves to amend the answer to add as counterclaim-defendants, Bernard Clair, plaintiff's counsel in the custody proceeding, and his firm, Katten Muchin Davis Rosenmann,<sup>3</sup> and to add a counterclaim for intentional infliction of emotional distress against

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<sup>3</sup>The privilege of Civil Rights §74 extends to comments made by attorneys to the press in connection with the representation of their clients. Fishof v. Abady, 280 AD2d 417,418 (1<sup>st</sup> Dept 2001); Branca v. Mavesh, *supra*; Ford v. Levinson, 90 AD2d 464 (1<sup>st</sup> Dept 1982).

plaintiff and the two new counterclaim defendants. This branch of the cross-motion is denied, as defendant's claim of intentional infliction of emotional distress is based upon the same statements which this Court has concluded are protected under the absolute privilege of Civil Rights Law §74. Komarov v. Advance Magazine Publishers, Inc., 180 Misc2d 658 (Sup Ct, NY Co 1999); Levin v. McPhee, 917 FSupp 230,242 (S.D.N.Y. 1996), aff'd 119 F3d 189 (2<sup>nd</sup> Cir 1997). Recasting the defamation counterclaims as a counterclaim for intentional infliction of emotional distress cannot impose liability on plaintiff or her counsel for same conduct already held to be protected under the absolute privilege of section 74. Id. In light of the foregoing determination, no counterclaims remain in this action, so that portion of the cross-motion to amend to add two counterclaim defendants is denied as moot.

Defendant further cross-moves for an order pursuant to CPLR 3024(b) striking from the complaint all allegations mentioning New Hope Counseling Center, asserting that her New Hope records were improperly obtained in violation of the social worker privilege, CPLR 4508. While CPLR 3024(b) provides that "[a] party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading," under subdivision (c), "[a] notice of motion under this rule shall be served within twenty days after service of the challenged pleading." Here, defendant Padilla was served with the complaint sometime before August 5, 2002, which is the date of her answer, but she did not move for section 3024 relief until January 2002, when she cross-moved in response to plaintiff's motion to dismiss her counterclaims. Under these circumstances, defendant's motion for CPLR 3024 relief must be denied as untimely. However, this denial is without prejudice to any further relief defendant may seek with respect to the issues of her treatment at New Hope and the New Hope records in plaintiff's possession. Even though

defendant's cross-motion raised an issue as to whether Padilla's New Hope session notes are privileged under the social worker privilege of CPLR 4508, as the instant motion and cross-motion were addressed to only the pleadings in this action, the issue regarding the confidentiality of Padilla's records need not be resolved at this time.

That portion of defendant's cross-motion for an order pursuant to CPLR 3211(d) directing plaintiff's to provide the complete transcript in the custody proceeding, is denied. Defendant has failed to made a sufficient showing that the transcript in its entirety is necessary the determination of the instant motions. However, defendant may renew this request, if necessary, during the discovery process.

Accordingly, it is hereby

ORDERED that the motion is granted and defendant Padilla's first and second counterclaims for libel and slander are dismissed; and it is further

ORDERED that defendant's cross-motion is denied in its entirety.

**FILED**

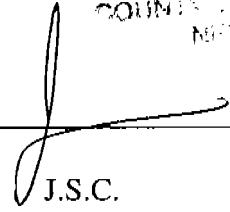
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