

Cordell-Reeh v Nannies of St. James Inc.

2004 NY Slip Op 30190(U)

October 14, 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. JOAN A. MADDEN

PART 11

J.S.C.

0112543/2002

CORDELL-REEH, DANICA
vs
NANNIES OF ST. JAMES, INC.,

SEQ 5

SUMMARY JUDGMENT

INDEX NO. _____

NOTION DATE _____

NOTION SEQ. NO. _____

NOTION 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 *is determined in accordance with the amended decision and order.*

FILED

OCT 22 2004

NEW YORK
COUNTY CLERK'S OFFICE

Dated: October 14, 2004

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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

Check if ...

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, plaintiff Danica Cordell-Reeh is suing her former nanny for \$10 million in compensatory and punitive damages, claiming intentional infliction of emotional harm.¹ The former nanny, defendant Michelle Padilla, is moving for an order pursuant to CPLR 3211(a)(1) dismissing the complaint as against her, or alternatively for an order pursuant to CPLR 3212 granting summary judgment. Plaintiff Cordell-Reeh opposes the motion.

As the background of this action has been discussed in detail in two previous decisions issued by this Court, only the facts directly relevant to the instant motion will be recited herein.

The events underlying this action began on October 8, 2001, when Padilla began working as a nanny for Cordell-Reeh’s five-year old twins. Padilla had been referred through the defendant agency, Nannies of St. James, Inc. Cordell-Reeh alleges that on October 24, 2001,

¹Plaintiff seeks an additional \$10 million in damages against Nannies of St. James (“Nannies”), based on a claim of negligence. Plaintiff previously moved to strike the Nannies’s answer and to dismiss its counterclaims, and that motion was granted on default in an order dated January 4, 2004.

she informed the Nannies that she wished to terminate Padilla's employment and on that same day Padilla moved out of Cordell-Reeh's home. On that day or the following day, Padilla went to the office of Teitler & Teitler, the attorney for Cordell-Reeh's former husband, Henry F. Owsley, III, and provided an affidavit that Cordell-Reeh was engaging in inappropriate behavior of a sexual nature toward her children, and neglecting the children's nutritional needs. The affidavit was sworn to on October 25, 2001 and included specific facts describing the conduct Padilla allegedly witnessed with respect to Cordell-Reeh and her children, and conduct that the children allegedly described to Padilla. The affidavit also states that Padilla had already reported Cordell-Reeh's conduct to the State child protective services, and had also told the children's father, psychologist and teacher.

Owsley's attorney then submitted Padilla's affidavit in support of Owsley's emergency order to show cause for temporary custody of the children. That order to show cause was filed under the caption and index number of the parties' original divorce proceeding, Henry F. Owsley, III v. Danica Cordell-Reeh, Index No. 350238/00 (Supreme Court, New York County), which was commenced in 2000 and had been settled. Pursuant to the order to show cause, Owsley was granted temporary custody pending a hearing that was held on October 29, 2001, and at which the Hon. Jacqueline W. Silbermann determined that Owsley should continue having temporary custody pending further court action.

On June 11, 2002, Cordell-Reeh 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. In the complaint, Cordell-Reeh alleges that Padilla knew she was making false and malicious

accusations regarding Cordell-Reeh's abuse and neglect of her children, when Padilla provided the affidavit that was submitted to the Court in the custody proceeding, when she contacted the Administration for Child Services ("ACS"), and when spoke to the children's father, teachers, plaintiff's therapist and the children's therapist. Specifically, the complaint alleges that as a result of Padilla's affidavit and Owsley's custody application, Cordell-Reeh immediately lost custody of her children, the court appointed a forensic mental health professional to investigate the abuse and neglect charges, and Cordell-Reeh "was made to endure hours of psychological testing" and "intensive interviews." The complaint also alleges that Padilla repeated "her false abuse and neglect charges directly to the Court appointed forensic expert . . . thereby skewing the ultimate findings and recommendations made . . . regarding the plaintiff's fitness as a parent." The complaint further alleges that Padilla's "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" and that "[s]uch intentional infliction of emotional harm on the part of Padilla was so beyond the realm of human decency and societal norms that plaintiff is entitled to an award of both monetary and punitive damages."

On July 9, 2002, Justice Silbermann conducted a hearing in the custody proceeding.

Although several witnesses testified, it appears that Padilla never testified. Owsley and Cordell-Reeh ultimately agreed to a settlement and executed a Stipulation and Order dated May 7, 2003, which Justice Silbermann so-ordered.

In or about August 2002, defendant Padilla served and filed an answer in the instant action, asserting eight affirmative defenses, including failure to state a cause of action, that the statements plaintiff complains of are true and were not willful or malicious, failure to comply

with the pleading requirements of CPLR 3014 and CPLR 3015, contributory negligence, the absolute privilege of Civil Rights Law §74, and the absolute privilege attaching to statements made in the course of judicial proceedings.² In her answer, Padilla admits that she provided the affidavit that was submitted in connection with the custody proceeding, which “merely states what personal observations [she] made while present in Plaintiff’s household together with several opinions concerning the bizarreness of the activities going on in the home of the Plaintiff.” The answer further admits that Padilla contacted ACS, and spoke to the children’s father, teachers and therapist, “regarding all aspects of the care being given the children, including the observations sworn to in [her] affidavit.”

Defendant Padilla is now moving to dismiss the complaint as against her. For the reasons that follow, the motion is granted in part and denied in part.

At the outset, the Court notes that defendant’s reliance on the fair reporting privilege of Civil Rights §74, is misplaced, as that statute is inapplicable to the facts underlying this action. Section 74 creates an absolute 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 (1st Dept 2002), lv app den 100 NY2d 508 (2003). The purpose of section 74 is the protection of published *reports* of judicial proceedings. Williams v. Williams, 23 NY2d 592, 599 (1969). Generally, the immunity provided under Civil Rights §74 is invoked when newspapers and other media outlets have published a report about a lawsuit; section 74 protects not only the entity which published

²The answer also included counterclaims for libel and slander, which were dismissed in a decision and order of this Court dated March 23, 2004.

the report, but also individuals who communicate publically about a lawsuit, either to the media or through another public forum. See e.g. Millennium of Rochester, Inc. v. Town of Webster, 305 AD2d 1014 (4th Dept 2003)(newspaper article); Hudson v. Goldman Sachs & Co., Inc., 304 AD2d 315 (1st Dept 2003)(statements to newspaper); Pelayo v. Celle, 270 AD2d 469 (2nd Dept 2000)(newspaper article); Fishof v. Abody, 280 AD2d 417 (1st Dept 2001)(statements at press conference); Hughes Training Inc, Link Division v. Pegasus Real-Time Inc., 255 AD2d 729 (3rd Dept 1998)(memorandum posted by employer on its bulletin board describing its lawsuit against former employees); Mulder v. Donaldson, Lufkin & Jenrette, 208 AD2d 310 (1st Dept 1995)(statement to the Wall Street Journal); Branca v. Mayesh, 101 AD2d 872 (2nd Dept 1984)(comments at bar association lecture).

Here, Cordell-Reeh is not suing Padilla for the publication of any statement by Padilla which was a “report of any judicial proceeding.” Rather, Cordell-Reeh’s claim for intentional infliction of emotional harm is based upon statements Padilla made to ACS, and the children’s father, therapist and teacher, which were made before Owsley filed his emergency application for custody. As to the statements in Padilla’s October 25, 2001 affidavit, that document was used to support Owsley’s custody application, as opposed to reporting about the custody proceeding. Furthermore, the complaint contains no allegation that Padilla was in contact with or spoke to any media outlet about the contents of her October 25, 2001 affidavit, or any of the events which occurred while she was employed as Cordell-Reeh’s nanny, or any aspect of the custody proceeding or Cordell-Reeh’s lawsuit against her. To the contrary, as noted in the Court’s decisions on the prior motions in this action, only Cordell-Reeh and her attorney spoke to the

media about the custody proceeding and Cordell-Reeh's lawsuit against Padilla, and that was only after Cordell-Reeh commenced the instant action against Padilla.

Notwithstanding the inapplicability of the absolute privilege of Civil Rights §74, the statements contained in Padilla's October 25, 2001 affidavit are protected by the absolute privilege for statements made in the course of a judicial proceeding, as Padilla's affidavit was submitted to the Court in support of Owsley's emergency order to show cause for temporary custody of the children.

"The Court of Appeals long ago established that a statement made in the course of judicial proceedings is absolutely privileged if it is at all pertinent to the litigation." Mosesson v. The Jacob Fuchsberg Law Firm, 257 AD2d 381, 382 (1st Dept), lv app den 93 NY2d 808 (1999)(citing Youmans v. Smith, 153 NY 214, 219 [1897]). "In judicial proceedings, the protected participants include the Judge, the jurors, the attorneys, the parties and the witnesses." Park Knoll Assocs. v. Schmidt, 59 NY2d 205, 209 (1983). The absolute privilege rule is broad and liberal, in order to protect the participants to a judicial action, and the privilege is "complete irrespective of the motive with which the statements are made." Mosesson v. The Jacob Fuchsberg Law Firm, supra at 382 -383. "[A]ll that is required for a statement to be privileged is a minimal possibility of pertinence or the simplest rationality." Id. Pertinency is a question of law for the court, and any doubt should be resolved in favor of relevancy and pertinency. Id.

Thus, a written statement by a witness set forth in an affidavit that is submitted in the context of a judicial proceeding is absolutely privileged, if by any view or under any circumstances, the statements may be considered pertinent to the litigation. See Martirano v. Frost, 25 NY2d 505, 508 (1969); Regan v. Coldwell Banker Residential Real Estate Services,

Inc., 176 AD2d 864 (2nd Dept 1991); Hinckley v. Resciniti, 159 AD2d 276 (1st Dept 1990); Mack v. Olsen, 90 AD2d 482 (2nd Dept 1982); Resciniti v. Padilla, 72 AD2d 557, 558 (2nd Dept 1979); Cooper v. Van Cortlandt Assocs, 54 AD2d 545, 547 (1st Dept 1976); Rosa Furniture Corp. V. Banco de Ponce, 54 AD2d 647 (1st Dept 1976).

Applying this standard, the Court finds that Padilla's affidavit was submitted to the Court in connection with Owsley's emergency custody application, and the statements in that affidavit were clearly relevant and pertinent to the issues raised in that application, in that they were intended to provide a factual basis to support Owsley's assertion that Cordell-Reeh's was no longer fit to maintain custody of their children. There can be no doubt that allegations that a mother is abusing and neglecting her children are pertinent to an emergency application to the Court to have the children removed from her custody.

In opposing the motion, plaintiff relies on the Court of Appeals decision in Toker v. Pollak, 44 NY2d 211 (1978), to argue that Padilla's affidavit is not absolutely privileged. That case is distinguishable on its facts, as it involved oral and written statements to a district attorney at an investigatory stage, prior to the commencement of a criminal proceeding. The Court of Appeals held that the statements were entitled to only a qualified privilege, as they were not made in the course of any judicial proceedings. In contrast, the statements in Padilla's affidavit were clearly made in the course of a judicial proceeding, as Owsley submitted the affidavit to the Supreme Court as the factual basis necessary to support his emergency order to show cause for custody, which was brought under the caption and index number of the parties' original action for divorce that was commenced in 2000.

Thus, as the statements in Padilla's affidavit were made in the course of the custody proceeding and were pertinent to the issues raised in that proceeding, they are absolutely privileged, and that portion of Cordell-Reeh's claim which is based on the affidavit must be dismissed.

Contrary to Padilla's assertion, this determination does not dispose of Cordell-Reeh's claim against her entirely. While Padilla asserts that Cordell-Reeh's claim for intentional infliction of emotional harm derives *solely* from the allegations in Padilla's affidavit, it is clear from the allegations in the complaint that Cordell-Reeh is also basing her claim on statements Padilla made to ACS, and to the children's father, therapist and teachers, and to Cordell-Reeh's therapist. Based on the answer and the affidavit itself, Padilla admits that before she prepared the affidavit, she spoke to at least some, if not all of these persons with respect to the information she subsequently included in the affidavit. Padilla's motion papers provide no legal basis for concluding that these statements are absolutely privileged, as they were not made in the course of any judicial proceeding. At best, these statements would be entitled to the qualified privilege arising "when a person makes a bona fide communication upon a subject in which he or she has an interest, or a legal, moral or social duty to speak, and the communication is made to a person having a corresponding interest or duty." Garson v. Hendlin, 141 AD2d 55, 60 (2nd Dept 1988), app den 74 NY2d 604 (1989). However, even assuming without deciding that a qualified privilege attaches to these statements, the complaint cannot be dismissed on that basis, as Cordell-Reeh has sufficiently pleaded actual malice to overcome any qualified privilege asserted by Padilla. Skarren v. Household Finance Corp., 296 AD2d 477 (2nd Dept 2002).

Accordingly, it is hereby


ORDERED that defendant Padilla's motion is granted only to the extent of dismissing that portion of the complaint based upon Padilla's affidavit dated October 25, 2001; and it is further

ORDERED that in all other respects defendant Padilla's motion is denied; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on October 21, 2004, at 9:30 am, Part 11, Room 351, 60 Centre Street.

DATED: October 14, 2004

ENTER:



J.S.C.

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OCT 22 2004
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