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

PRESENT: Sherry Klein Heitler Justice PART 30

RHONA A. SILVERMAN, ESQ.

-v-

BRUCE G. CLARK

INDEX NO. 120690/02

MOTION DATE

MOTION SEQ. NO. 001

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

is decided in accordance with the memorandum decision dated 7/7/04.

FILED

JUL 15 2004

COUNTY CLERK'S OFFICE NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 7-7-04

SHERRY KLEIN HEITLER J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 30

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RHONA **A.** SILVERMAN, ESQ.,

Index No. 120690/02

Plaintiff,

DECISION & ORDER

-against-

BRUCE G. CLARK, BRUCE G. CLARK & **ASSOCIATES,** P.C., JUDITH CLARK and any and all successors in interest to BRUCE G. CLARK and/or BRUCE G. CLARK & ASSOCIATES, P.C., and other persons or parties whose names are unknown,

Defendants.

----------X

SHERRY KLEIN HEITLER, J.:

Motions 001 and 002 are consolidated for disposition. Under motion 001, plaintiff moves to strike defendants' answer for failure to comply with discovery, dismiss defendants' first and second affirmative defenses, and dismiss defendants' counterclaims and the affirmative defenses associated with them, as a matter of law. Under motion 002, defendants move, pursuant to CPLR 3212, for *summary* judgment dismissing the complaint, and to **strike** irrelevant and prejudicial statements in the complaint.

As stated in the Report of the Special Referee (July 9, 2003), this action sounds in defamation and breach of contract. Plaintiff Rhona **A.** Silverman, Esq. (Silver▪▪) is suing her former employer, the law firm of Bruce G. **Clark** & Associates, P.C., its principal Bruce G. Clark (hereinafter the **Clark law firm),** and his wife, Judith **Clark.** Plaintiff was employed by the law firm from November 1997 to June 2001. When Silverman left the law firm, several clients terminated their relationship with the Clark law firm, and engaged Silverman as their attorney. Defendants accuse Silver▪▪ of "poaching" those clients, and removing their case files without permission. The complaint alleges that, after plaintiff terminated her employment with the Clark law firm, letters were sent to former clients, affidavits were filed in the context of attorney lien applications, and

comments were made to various individuals, that accused Silverman of ineptitude and unprofessional conduct, thus defaming her. Defendants' answer contains several affirmative defenses and counterclaims. Defendants have withdrawn their sixth, seventh and eighth counterclaims, concerning their assertion that they are entitled to legal fees in the *Gates, Lunger and Moller* litigations'. The issue of legal fees in those matters was submitted to the appropriate court for a determination.

That part of defendants' motion seeking summaryjudgment dismissing the complaint, with respect to Judith **Clark,** is granted. The third cause of action in the complaint contains the only direct allegations against Judith **Clark.** One of the clients who engaged Silverman as counsel was the plaintiff in ***Lunger** v Westchester **County** Med. **Center.*** The complaint states that Mrs. Clark accompanied her husband on a visit to the Lungers' home "in a concerted campaign to solicit legal business on behalf of the infant, Avrum Lunger, away from the attorney retained to provide legal representation to said infant, Plaintiff, Rhona **A.** Silverman, Esq." (Complaint, ¶ **44).** The complaint lists **a** series of 33 statements made by "Mr. **And** Mrs. **Clark"** (Complaint, ¶ SO), during the visit to the Lungers' home, without delineating the identity of the speaker, or to whom, precisely? the statements were made.

Defendants have supplied the court with a series of affidavits which demonstrate that Judith Clark was not an employee or a principal of the law firm. Maureen Kelly, the law firm's receptionist and bookkeeper? states that Judith Clark was not an owner or employee of the law firm, and that Kelly "never wrote payroll checks from the firm's accounts for Judith **Clark."** (Reply Affirmation

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[1] ***Gates v** Goldstein,* Index No. 119491/00, **Sup.** Ct., New York County
Lunger v ***Westchester** County **Med. Center,*** Index No. 7147/98, Sup. Ct. Westchester County
*Moller **v** Zervoudakis,* Index No. 104359/00Sup. Ct., New York County

of Peter Gale, Esq., Exhibit A). The law firm's accountant since its inception, CPA Eric S. Goldfarb, states that Judith Clark has never been an employee of the law firm. Goldfarb also states that, "[f]or a period of time, as a convenience to the Clarks, a portion of Mr. Clark's paycheck would be deducted .... [and] a separate check, not a paycheck, would be delivered to Mrs. Clark. This check was not for services rendered and was simply included as part of Mr. Clark's income" (Reply Affirmation of Peter Gale, Esq., Exhibit B). Defendants have also submitted a print out from the Social Security Administration with respect to Judith Clark, which shows that she received no reported earnings between 1968 and 2001 (Reply Affirmation of Peter Gale, Esq., Exhibit C).

It is well settled that, on a motion for summary judgment, once a proponent has established a prima facie entitlement to judgment as a matter of law, the party opposing the motion must come forward with proof, in admissible form, to establish the existence of a material issue of fact *(see, Winegrad* v *New York Univ. Med. Center,* 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]). In response to defendants' papers, plaintiff submits her own affirmation, and an excerpt from an administrative matter, dated December 10, 2001. That excerpt states, in pertinent part,

> Ms. Silverman has probably heard Mr. Clark's bookkeeper refer to 'Judy's check' when she makes out the payroll checks. Mr. Clark takes his own bi-weekly salary from the professional corporation in two checks, one of which the bookkeeper deposits in Mr. Clark's wife Judith's account. Mi. Clark has also, since his daughter became a registered nurse and midwife, given her a salary. His daughter regularly works for Mr. Clark doing medical research and discussing his cases. Payments to his daughter are never charged to clients or case disbursements.

(Plaintiffs Sur Reply Affirmation, Exhibit A).

Plaintiffs affirmation quotes Ms. Kelly as telling her that Judith Clark drew a "pay check", drawn from the firm's operating account and referred to Judith Clark as an "owner" or "employee"

of the firm (Silver", Supplemental Affirmation). Silverman states that defendants have failed to produce the records of the accounts in question. In addition, Silverman argues that because the Lungcrs are an orthodox Jewish family and place a premium on family and community, "it is reasonable to infer that Mrs. Clark's presence at the January, 2002 meeting in the Lunger home served one, and only one, purpose. She was present to demonstrate that she-like her husband-shared the Lungers' ethical and family values." (*id,* at 3).

Plaintiff's arguments with respect to the cause of action against Judith Clark are unpersuasive. The excerpt from the administrative hearing does not contradict the affidavits of the bookkeeper and accountant, but rather supports their respective averments. Plaintiff has laid conjecture upon conjecture as to the reason for Judith Clark's presence at Bruce Clark's meeting with the Lungers. Bruce Clark admits that he asked his wife to accompany him for the drive to Westchester; however, plaintiff can attribute no specific statements to Judith Clark, nor does she demonstrate that Judith Clark took part in the meeting in any way. Silver" has attached to her attorney's affirmation in opposition to the summary judgment motion an affidavit from Naomi Lunger, dated January 24, 2002, filed in the Westchester County action, In that affidavit, Mrs. Lunger describes Bruce Clark's attempts to become the Lungers' attomey, including telephone calls and face-to-face meetings held at Bruce Clark's request. Mrs. Lunger states that "Mr. Clark brought his wife with him on this second occasion" (Attorney's Affirmation, Exhibit P). Not one word of any kind is attributed to Judith Clark. Plaintiff's rebuttal fails to raise any issue of fact with respect to the request for summary judgment dismissing Judith Clark as a defendant, because she has no interest in the Clark law firm, and therefore, not even vicarious liability can attach to her. Equally fatal is plaintiff's inability to set forth any alleged defamatory statements made by Judith Clark, thus violating the rule that claims of defamation set forth the precise words giving rise to the defamation

(Johnson v Markman, 288 AD2d 165, 166 [1st Dept 2001]). Therefore, the complaint, as against Judith Clark, is dismissed. In addition, the third cause of action is dismissed in its entirety because it fails to specify who made the alleged defamatory statements, and to whom they were made.

There are several classes of statements which plaintiff alleges are defamatory. The first class consists of letters or statements sent by the Clark law firm to two clients who retained Silverman after she left the Clark law firm (first and second causes of action). The legal discussions with respect to defendants' defenses pertain to both letters, however, the letters are discussed individually to highlight some of the reasons for the determination herein.

The first cause of action alleges that defendants defamed Silverman in a letter written November 11, 2001 to Beverly Garrett. This letter is quoted in its entirety below.

> Dear Ms. Garrett
>
> I am sorry to have received your Consent to Change Attorneys appointing Ms. Silverman as your attorney. I will honor that and turn over your file upon Ms. Silverman reimbursing me for my disbursements and recognizing that I have a lien against the attorney's fee for the amount of work done by my office. Unfortunately, she and I have not been able to agree on the division of fees on any cases and must ask a court to decide.
>
> I have no way of knowing what Ms. Silverman has said to you that has caused you to wish to discharge my firm and therefore, I have no way of answering her charges. She has been contacting many of my clients with whom she has had contact and is establishing her law practice with my clients. Several of the clients she has contacted have reported very disturbing things she has said.
>
> You should be aware that Ms. Silver ▪▪ has been an attorney barely five years. In the three and a half years she has been with my firm she won only two cases, In each of those cases there was no defendant to defend against her allegations. In one, the doctor was in a mental institution and in the other she was suing a hospital for its emergency room practices, both of these cases had been prepared by my office before Ms. Silverman became involved. I disbursed approximately $50,000 for disbursements on one of the cases.

While she was with me Ms. Silverman lost four cases she took to verdict. She has gone on record as describing her own representation of a client in a childbirth case as "woefully inadequate."

The first case she tried after she left my office was a major case in which she was representing a young law professor who is dying of cancer that his urologist failed to diagnose. This is the first case she tried where she personally did all of the legal work on the case. I was present at a conference when the judge laughed at Ms. Silverman for misrepresenting that her client was too sick to appear at a deposition when defendant had surveillance photos showing him teaching a class and traveling to his vacation home in Montreal. Ms. Silverman lost that case. The defendant's attorney told me that Ms. Silverman had not prepared her major witness. The witness was unfamiliar with the medical records when questioned on cross examination. It is unfortunate that the client had to pay the cost of Ms. Silverman's inexperience and lack of preparation.

On November 7, on your case, a meeting was scheduled among Justice McKeon, the defendant's attorney and the person authorized by the New York City Health and Hospitals Corporation to set an amount for settlement and to settle the case. I was also present to discuss Ms. Silverman's motion to become your attorney. Ms. Silverman was not present. The judge's clerk stated that every time he attempted to call her, there was no one in her office and her answering machine was full. My calendar person also tried several times without success. We then sent Ms. Silverman a letter telling her that the case was scheduled before Judge McKeon for November 7. I can only conclude that, as Ms. Silverman was notified by my office by letter of that date, that she chose not to be present. Had she been present the case may well have settled. It is possible that she chose not to show up because a settlement would have occurred when she had done no work as your attorney of record and would, therefore, only have been entitled to a very small fee. If this is true, she placed her own interests above those of yours.

Because of her unexplained absence, the case was adjoumed for over a month, This type of incident sends a message to the defense attorney that if plaintiffs attorney is so low on funds that she cannot afford a secretary and a good answering machine, she might not be able to finance the lawsuit, and therefore, may be easy to negotiate with and settle for a lower figure.

As I will receive a portion of the fee in your case if Ms. Silverman is able to be successful for you, it is in my interest that you receive the best possible settlement. **As** I have told you, I represented another client who has essentially the same injury as you. I tried her case and obtained a verdict of $3,500,000. The case was sent back for a new trial by the appellate court. The second time I obtained a verdict of $3,400,000. I tried the case in Nassau County, a jurisdiction that is much more hostile to plaintiffs than the Bronx. You, therefore, have a very valuable case. Please for your sake and mine take the following precautions:

1. **Ask** Ms. Silverman to report to you in writing every development in your case and the scheduling of every event. Tell Ms. Silverman that you wish to be present at every deposition or court conference.

2. Direct Ms. Silverman in writing not to enter into any settlement negotiations on your case without speaking first to you, discussing her settlement strategy, and obtaining your approval of the amounts she will demand and will be willing to settle for.

3. If Ms. Silverman tells you that the defendants have made an offer of settlement, **ask** her to so inform you in writing. **Ask** her to document who was present at the negotiations, what demand she made, what offer was made by the defense, who made the offer, and what recommendation she makes regarding settlement. **Ask** her to give you reasons. Very often attomeys will verbally report to their client a much lower figure than is actually made by the defendant to soften the client to take the amount the defendant has offered.

4. Make it **very** clear to Ms. Silverman that she is not to accept any offer of settlement without your explicit written consent. Malpractice cases are very expensive to try. Very often, new attorneys who have not been winning cases will hasten to accept a low offer to get some money into their till to keep the office open and not be concerned about maximizing the recovery for the client.

5. I would suggest that before you accept any offer of settlement, you discuss the case with me, at no cost to you, or with some other experienced medical malpractice attorney for the *sake* of having a second opinion and hearing other options. If you are uncomfortable speaking with me, I could give you the names of several medical malpractice attomeys who would probably be willing to speak to you. Your case is the first oral surgery case that Ms. Silverman will be handling. She does not have the experience in evaluating or trying cases such as this and has very little rapport with the defense bar and the doctor's insurance companies.

> Justice McKeon, the judge handling your case, is a very intelligent and reputable judge. After Ms. Silverman was assigned to him on a recent case for trial, she called the court saying that her father was taken to the hospital. She had expressed fear to me and Mr. Gale of going before Justice McKeon. Her trial was adjourned. She then spent the day in the office rather than going to see her father in the hospital, if he was in the hospital.
>
> You may be asked to come in and be present when there is a settlement discussion. Sometimes the defendant's attorney will ask the judge to try to persuade the plaintiff to accept the settlement offer. This is a very critical point, because it is hard to say no to a judge. In the present climate in the courts there is a great deal of pressure on judges to clear out cases. You will need an attorney who is confident and able to stand up to the judge and be an advocate for you if this happens.
>
> Thank you for having allowed me to represent you. I wish you the best of luck.
>
> Very truly yours,
>
> Bruce G. Clark

Defendant asserts that *summary* judgment should be granted, and the causes of action dismissed, with respect to the letters, because they are subject to the qualified common interest privilege, the attorney client privilege, because the statements are true, and/or constitute opinion and legal advice.

> A qualified privilege arises 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

(*Santavicca v City of Yonkers,* 132 AD2d 656,657 [2d Dept 1987], citing *Byam v Collins,* 111 NY 143, 150 [1888]; see *also Liberman* v *Gelsten,* 80 NY2d 429,437 [1992]). "[T]he relation of the parties should be such as to afford reasonable ground for supposing an innocent motive for giving the information, and to deprive the act of an appearance of officious intermeddling with the affairs

of others" (*Lewis v Chapman*, 16 NY 369, 375 [1857]).

It is defendants' burden to plead and prove that the qualified common interest privilege is applicable in the instant matter (see *Toker v Pollak*, 44 NY2d 211 [1978]; *Garson v Hendlin*, 141 AD2d 55 [2nd Dept 19881). Defendants argue that "Ms. Garrett and Mr. Clark shared a common interest, namely the success of her case. .... Since Mr. Clark had done significant work on the case, he and his office were entitled to a share of the contingency fees" (Defendants' Attorney's Affirmation, at 14). In each of the cases cited by defendants in support of the defense of the common interest privilege, there was a clear connection between the speaker of the alleged defamatory speech, and the individuals to whom the statements were made. For example, the court in *Libernzan v Gelstein (80 NY2d 429 supra)*, held that statements alleging that the landlord was bribing policemen, made to the chairman of the board of a tenants' association, were entitled to the qualified privilege. The Court stated that the allegation was made to a member of the board formed to protect the tenants' interests, and if the statements were *true*, the landlord's acts would be inimical to those interests. Similarly, in *Stillman v Ford* (22 NY2d 48 [1968]), the common interest privilege was applied to statements made to members of the Belgian American Educational Foundation because they were generated by the speaker's desire to protect that organization. In each of the several cases cited, the parties involved had a corresponding interest or duty to speak (see *Shapiro v Health Ins. Plan of Greater New York*, 7 NY2d 56 [1959]; *Santavicca v City of Yonkers*, 132 AD2d at 656). Here, the only common interest between Garrett, Lunger, and the law firm is that of a pecuniary interest in the outcome of a law suit. Whether this is sufficient to invoke the requisite interest necessary to be afforded the qualified privilege, or whether, even if the qualified privilege is found to exist, plaintiff may be able to establish malice and defeat the claim of privilege, creates issues of fact in the instant case (*see Foster v Churchill*, 87 NY2d 744 [1996]; *Garson v Hendlin*,

141AD2d 55 *supra)* Defendants also claim that because these statements were made "in the course of, and are pertinent to, a judicial proceeding, ... in a letter' *(Klein* v *McGauley,* 29 AD2d 418,419 [2d Dept 1968]), between litigating parties or their attorneys or sent to the court", they are protected by an absolute privilege. ***(See*** Attorney's Affirmation at 62). Defendants cannot assert this privilege with respect to the letters, sent in November 2001, to Garrett and Lunger. While both of those individuals were involved in judicial proceedings, defendants were no longer representing them (*see* Plaintiff's Exhibit G, Garrett letter dated July 18,2001 relieving defendants; Plaintiffs Exhibit P, Order dated August 21, 2001 replacing the Clark firm with Silver"). In fact, in the *Garrett* litigation, it appears that the Clark firm was never the attorney of record, and that a retainer statement was not filed in that case by the firm.

Defendants also claim that the various statements complained of were either true, or represented a mixture of truth and opinion, and/or do not damage plaintiffs reputation, and therefore, do not provide a basis for a claim of defamation. Both plaintiff and defendants have parsed through the various statements seeking to show that one sentence or another is misleading, true or untrue, depending upon the side advancing the argument, or, defendants argue, the statements are not actionable because they are not reasonably susceptible of a defamatory meaning.

It is well settled that truth is an absolute defense to an action in defamation, and that, in the first instance, it is for the court to determine whether a statement is truthful. Such a determination can be made only when the assertion is supported by evidence (*Licitra v Faraldo,* 130 AD2d 555, 556 [2d Dept 1987]). However, summary judgment cannot be granted when such a determination is dependant upon defendants' credibility as to the veracity of the statement. Then the issue must be submitted to a jury (*Misek-Falkoff v Keller,* 153 AD2d 841, 842 [2d Dept 1989]).

Here, Clark's statements with respect to Silverman's conduct of her cases and what occurred at the conference before Justice McKeon, if true, would not be the bases for an action in defamation. However, there is no record or affidavit of a participant, other than Mr. Clark, demonstrating that these statements are true. In addition, the closing paragraphs of the Garrett letter give "general advice on relatively new attorneys, the judge involved in her case, the value of the case and advice on guaranteeing that, if the case is settled, Ms. Garrett will get the maximum recovery" (Attorney's Affirmation, at 58). Defendants may be correct in asserting that they were offering sound legal advice, however, the entire page of advice may be reasonably susceptible, when read in the context of the entire publication, to a defamatory connotation. In particular, the precaution stated at number **5**, suggests that the plaintiff may want to seek different counsel because Silverman lacked sufficient experience to represent the client's interests. This statement, which casts aspersions on Silverman's professional ability, is clearly susceptible to a defamatory meaning, and does not constitute personal opinion ***(see Armstrong*** v ***Simon*** & ***Schuster, 85*** NY2d 373 [1995]; *Wasserman* v *Huller*, 216 AD2d 289 [2d Dept 1995]). Finally, a question of fact exists as to whether the entire letter, even though some of the statements are true, may give rise to a finding of defamation by implication ***(Armstrong*** v ***Simon*** & ***Schuster,*** *Inc., 85* NY2d 373, ***supra).***

The second cause of action concerns a letter dated November 15, 2001 to Chaim **and** Naomi Lunger concerning the litigation in ***Lunger*** v *Westchester County Medical* ***Center.*** That letter states:

Dear Mr. and Mrs. Lunger:

> I feel that I must make you aware of concerns I have about Avrum's case. This is the only chance he has to receive a very substantial amount of money that will enable him to be cared for over the rest of his life. He deserves the best representation and I know that you feel it is your obligation to give him that representation. The attorney who handles the case is the difference between winning and losing. *And* I know that you brought the case to my office because of my reputation and experience.

You should be aware that Ms. Silverman has been an attorney barely five years. In the three and a half years she was with my firm she won only two cases. In each of those cases there was no defendant to defend against her allegations. In one, the doctor was in a mental institution and in the other she was suing a hospital for its emergency room practices. Both of those cases had been prepared for years by my office before Ms. Silverman became involved. I disbursed approximately $50,000 for disbursements on one of the cases.

While she was with me, Ms. Silverman lost four cases that she took to verdict. She has gone on record as describing her own representation as "woefully inadequate."

The first case she tried after she left my office was a major case in which she was representing a young law professor who is dying of cancer that his urologist failed to diagnose. This is the first case she tried where she personally did all the legal work on the case. Ms. Silverman lost that case. The defendant's attorney told me that Ms. Silverman had not prepared her major witness. The witness was unfamiliar with the medical records when questioned on cross examination. I was present at a conference when the judge laughed at Ms. Silverman for misrepresenting that her client was too sick to appear at a deposition when the defendant's attomey had surveillance photos showing him teaching a class and traveling to his vacation home in Montreal. It is unfortunate that that client has paid the cost of Ms. Silverman's inexperience and lack of preparation.

On November 7, ameeting was scheduled on another of the cases Ms. Silverman took from my office -- not your case -- among Justice McKeon, the defendant's attorney and the person authorized by the New York City Health and Hospitals Corporation to set an amount for settlement and to settle the case. I was present. Ms. Silverman missed the meeting. The judge's clerk said that every time he attempted to call her, there was no one in her office and her answering machine was full. My calendar person also tried several times without success. We then sent Ms. Silverman a letter telling her that the case was scheduled before Justice McKeon for November 7. I can only conclude that, as Ms. Silverman was notified by my office by letter of that date, that she chose not to be present. Had she been present the case may well have been settled.

> Because of her unexplained absence, the case was adjourned for over a month. This type of incident sends a message to the defense attorney that if the plaintiffs attorney is so low on funds she cannot afford a secretary or at least a good answering machine, she may not be able to finance a lawsuit, and therefore, may be easy to negotiate with and settle for a lower figure. I have heard that Ms. Silverman has not been able to pay her part-time secretary. She owes me tens of thousands of dollars in disbursements on the cases she took from my office.
>
> Conversely, if the defendants know that the attomey has a record of losing cases and limited experience in trying cases and is not able to finance the great expenses of a medical malpractice trial, they are likely to resist any settlement and force the case to trial as the defendant did in the case Ms. Silverman just lost. The defendant's judgment was correct in taking the case to trial.
>
> Another thing I worry about is that Ms. Silverman, in her need for money to pay her secretary and finance other cases, may attempt to settle your case for less than its full value. Your son's case is worth millions of dollars. It would be criminal to settle the case for anything less.
>
> I **would** like you to know that I feel you have a very strong case and I would like to represent you as your attorney. I **would** be happy to come to your house again and discuss this **with** you and would give you my commitment that I would do all of the **work** on the case.
>
> If you decide to stay with Ms. Silverman, please take the following precautions for you own protection.
>
> .[what follows is a list of precautions which is almost identical to the list in the Garrett letter].

The defendants' defenses to the statements from the Lunger letter in the second cause of action suffer from the same infirmities, and present the same issues of fact, as those stated in the discussion of the first cause of action (the Garrett letter). Defendants also argue that many of the statements in both letters are expressions of opinion and are not defamatory of Ms. Silverman. Defendants are correct, in that statements of pure opinion are not actionable (*Steinhilber* v *Alphonse,* 68 NY2d 283, 289 [1986]). However, statements **of** opinion must be accompanied by the facts upon

which they are based (*see Steinhilber v Alphonse,* 68 NY2d at **289-90).** Here, again, defendants have not established the underlying facts. For example, the statement in the letter that "[a]nother thing I worry about is that Ms. Silverman, in her need for money to pay her secretary and finance other cases, may attempt to settle your case for less than its full value, Your son's case is worth millions and it would he criminal to settle the case for anything less," is based upon the conjecture that because an answering machine answered defendant's calendar person's telephone calls to plaintiff's office, this indicates that Silverman lacks financial resources, **and** therefore that she might breach her duty to her client. **A jury** reading that statement, in the context of the entire letter, might consider whether defendants were disparaging plaintiff in her profession ***(see*** *Wasserman* ***v*** *Huller,* 216 AD2d 289, ***supra).***

The second group of statements that plaintiff alleges are defamatory are found in the third and fourth causes of action. The third cause of action alleges that Bruce Clark, during the course of meeting with the Lunger family, and "in telephone conversations preparing for ... the foregoing meetings, made additional verbal statements about Ms. Silverman that were false, willful, malicious **and** defamatory." (Complaint, ¶ **49).** This allegation is followed, in paragraph 50, by a recitation of many of the statements, with additions, contained in the Garrett and Lunger letters. The fourth cause of action states that "upon information and belief, between July 2001 and January 2002, Mr. Clark sent written ***ex parte*** communications to, or had telephone or personal conversations with Ms. Silverman's clients, in which he made additional defamatory statements against Ms. Silverman andor attempted to solicit business from Plaintiffs clients" (*id.,* ¶ **62).** In addition, Silverman alleges that Clark communicated with clients "and/or persons whose names are presently unknown"(*id.,* ¶ 63) , with former and present staff members and independent contractors (*id.,* ¶ 64), and with other attorneys, and clerks to Justices of the Supreme Court (Fourth Cause of Action at 65).

These averments are followed by a list of 21 allegedly defamatory statements (*id.*, ¶ 66), which Clark made.

The third and fourth causes of action are dismissed. CPLR 3016 (a) requires that, in an action for libel or slander, "the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally." The case law requires Silverman to identify who heard or read the alleged defamatory publication (*Bell v Slepakoff*, 224 AD2d 567, 568-69 [2d Dept 1996]), and to state the time, place and manner of the purported defamation (*see Buffolino v Long Island Sav. Bank, FSB*, 126 AD2d 508, 510 [2d Dept 1987]). Plaintiff's attempt to generically plead these causes of action cannot be sustained.

The third class of statements which plaintiff claims are defamatory are those found in causes of action five through nine, and concern statements made during the course of litigation between plaintiff and defendants concerning the division of fees in cases where Silverman had been substituted for the law firm as the attorney of record. The fifth cause of action lists a series of documents in which, plaintiff alleges, defendant Bruce G. Clark made defamatory statements. These documents are: 1. The affirmation dated November 6, 2001, in *Garrett v New York City Health and Hospitals Corp.* Index No. 15232/02, Sup. Ct., Bronx County; 2. Affirmation dated December 9, 2001, *in McAuliffe v Feigman*, Index No. 22574/93, Sup. Ct., Nassau County; 3. Affirmation dated December 12, 2001, in *Alstatt v Presbyterian Hosp. Med. Center*, Index No. 8414/94, Sup. Ct., New York County; 4. Affirmation dated December 13, 2001, in *Darlington v St. Barnabas Hosp.*, Index No. 13717/90, Sup. Ct., Bronx County; 5. Preliminary Hearing Memorandum dated January 24, 2002, in *Harve v Mancuso*, Index No. 8419/94, Sup. Ct., Bronx County; 6. Records of Hearings held January 25, 2002, February 11, 2002, and March 4, 2002, in *Harve v Mancuso*; 7. Memorandum dated April 8, 2002, in *Harve v Mancuso*; and 8. Record of hearing before Justice McKeon held July

5,2002, in ***Garrett v*** *New* ***York*** *City Health & Hosps. Corp.*

It is well settled that statements made in the context of litigation, even if actionable, are afforded an absolute privilege, so long as they are pertinent to the litigation (*Impallomeni* v *Meiselman, Farber, Packman & Eberz, P.C.,* 272 AD2d 579,580 [2d Dept 20001). **A** statement is deemed to be not pertinent, and the privilege vitiated, "when the language used goes beyond the bounds of reason and *is* so clearly impertinent and needlessly defamatory **as** not to admit of discussion" *(Klein v McGauley,* 29 AD2d at 420 [2d Dept 1968], quoting ***People*** *ex* ***rel.*** *Bensky v Warden of City Prison,* **258** ***NY*** *55, 59* [1932]).

Complicating the determination of this issue are two factors. First, plaintiffs causes of action do not specifically set forth which court document the alleged defamatory statements appeared in, and in some instances, defendants deny that the statement was ever made. Typical of the language complained of by Silverman is the assertion in the Clark affirmation, October 31, 2001, in *Harve* ***v*** *Mancuso* (Defendants' Motion to Dismiss, Exhibit F), where defendant Clark states:

> In preparation of affirmant's defense before the Disciplinary Committee, affirmant has done a complete audit of the cases handled by Ms. Silverman while she was employed by affirmant. Affirmant **has** discovered that in the case of Gates v, Goldstein Ms. Silverman started the action in affirmant's name and swore under penalties of perjury that affirmant was the plaintiffs attorney. She prosecuted the action in affirmant's name and had affirmant's other employees **work** on the case. She also directed affirmant's bookkeeper to pay over $2000 in disbursements in the Gates case. **As** the dates of the trial and of Ms. Silverman's resignation from affirmant's office approached, Ms. Silverman stopped placing affirmant's name upon documents submitted to the. Court and swore, again under penalties of perjury, that affirmant was never the attorney of record for Mr. Gates. It is submitted that Ms. Silverman did not hesitate to commit grand larceny by having affirmant's bookkeeper pay over $2000 on her behalfwhen Mr. Gates **was** not affirmant's client or by attempting to steal [remainder of quotation missing].

> Similarly, Ms. Silverman had affirmant's bookkeeper pay thousands of dollars in fees to a physician who was a very close friend of Ms. Silverman's, when there is no evidence in the files that that physician ever looked at the files or prepared or made any kind of report. It is anticipated that Ms. Silverman will be asked by the Disciplinary Committee to answer these and other accusations that are about to be submitted to the Disciplinary Committee.

(Defendants' Exhibit G; footnote 4; corresponding to Complaint, Fifth Cause of Action, ¶ 88, sections (a), (e) and [I]).

Clearly, defendants' submission in the *Harve* litigation discuss matters outside the scope of the fee dispute. However, these averments bring into play the second factor necessary in a determination of whether these pleadings are to be afforded complete immunity. Attached to the fee applications filed by plaintiff in the above cited-cases was Silverman's letter of resignation to the Clark firm which states, in pertinent part:

> I am hereby tendering my resignation, effective immediately, as an employee attorney in your firm.
>
> I have been advised by the Disciplinary Committee that I will probably be called as a witness in an ethics complaint filed against the firm. I have been advised that, although no complaints are pending against me personally, I have "an affirmative duty of candor".
>
> It is clear, from the Committee's comments, that they expect any attorney employed by your firm to come forward pursuant to this "affirmative duty." It is equally clear that they regard any failure to do so as a potential ethics violation.
>
> These circumstances have placed me in a position where the firm and I now have an irreconcilable conflict of interest. It is impossible for me to continue our present relationship.
>
> In addition - you have asked me that I provide you with a letter incriminating Janice Jessup. This would force me into fallacious statements. I have affirmatively refused to co-operate with your request.

When I refused your request, you stated that you are my boss and you expected me to "help" you in defending yourself against any and all complaints in any way you directed me. I cannot do this, nor will I jeopardize my license by so doing.

You also stated to me that you were meeting with Kim Wright to draft a defense to Janice Jessup's ethics complaint in an effort to get Janice "disbarred". It has come to my attention that I am described in that draft as a "co-conspirator" of Janice's. I don't know if you or Kim intend for this to be her final draft. However, this statement is false.

Your demand that I incriminate Janice, along with the draft Kim Wright letter describing me as a co-conspirator with Janice, indicate to me that - even without the Disciplinary Committee - you and I have irreconcilable conflicts of interest.

After the Disciplinary Committee spoke to me, I made every possible effort to conclude all pending matters assigned to me as swiftly as I could. I felt I owed it to the clients you assigned to me, to resolve their cases - if I could-before I left your employ.

Within the past few weeks I have settled:

A) *Harve* for $1 million.
B) *Alsett* for $600,000.
C) *Darlington* for $550,000.

These fees are uncollected. *Harve* requires an infant's compromise order and ***Darlington*** requires a Surrogate's compromise proceeding. In as much as these cases have very old index numbers, 1993 and 1999 respectively, I suggest you expedite final recovery without further delay.

Additionally, I an owed fees on *McAuliffe,* settled for $1.9 million (after a verdict of $4.5 million), and *Orsini,* settled for $250,000. This list does not include the myriad of cases on which 1have worked that will inevitably turn similar numbers. It should in no way be construed as complete.

The fees yet to be collected an the enumerated cases, supra amount to a little under a million dollars, As you are aware, you owe me my percentage of the fees once collected. I believe that the amount will be substantial. All of these cases are recoveries which you never would have obtained but for my employment.

**Y

I personally brought the following clients into the office, and have represented them personally:

.Gelbman v. Silverman
.Kramer v. Rappaport
.Lunger v. Westchester Co. Medical Center
. Muller v. Zervondakis
.Perez v. Boris.

I have informed my clients that I am resigning from your firm, and they have elected to discharge your firm and retain and remain with me to represent them.

1 have advised them to inform the DDC immediately should you or you staff have any further contact with them. Be advised that you are to cease and desist from any and all work on these cases.

You will shortly receive letters discharging your firm, and "Consents to Change Attorneys".

I recognize that in the past you have asserted liens and delayed transfer of files when you have been discharged and replaced by other attomeys. I am therefore, asking that you cooperate in an expeditious transfer of representation so that my clients' cases can be prosecuted without delays.

I further recognize that in the past you have engaged in *ex parte* communication with defense firms and carriers in an effort to extract a fee. I strongly caution you against such behavior.

I do not want to find myself in a position where I would be forced into making a complaint to the DCC or the Courts about obstructive tactics in the transfer of representation.

I further caution you about any contact you may contemplate with any firms I may associate with in the future. Any attempts to do so will be construed as tortious interference with a contract.

I recognize that my departure, along with my transfer of my personal cases, leaves us with issues to resolve. I do not believe that we should attempt to resolve these issues directly, since our discussions will probably become the subject matter of testimony before the Disciplinary Committee, EEOC or other subsequent bodies.

***

Very truly yours,

Rhona **A.** Silverman

cc: Jim Shed, Esq.
State of New York Appellate Division, 1st Dep't
Departmental Disciplinary Committee
61 Broadway
New York, New **York** 10006

(Defendants' Notice of Motion to Dismiss the Complaint, Exhibit G).

Clark argues that plaintiffs attachment of that letter was not pertinent to the issues in the fee application cases, and **was** "done in a way that characterizes herself as an ally of the Committee and me as a wrong-doer. ... Her only purpose must have been to create the strong impression with the Courts which would rule on her motions that I am a liar, a cheat, and the subject of action before the Departmental Disciplinary Committee for the Court deciding the Motion" (Clark Affirmation, ¶ 103). Defendants argue that once she included in her papers the fact that there was an ethics complaint before the Disciplinary Committee, intimating that the Committee had accepted her claims, they were entitled to defend the firm's and Clark's reputation by attacking Silverman's credibility with revelations of their own, albeit unrelated to the dispute before the court.*

For reasons of public policy the absolute privilege afforded speakers in a judicial proceeding is verybroad (*Goldfeder* **v** ***Weiss,*** AD2d 731 [2d Dept 19981; ***see*** *also* ***Park*** *Knoll* ***Assoc. v*** *Schmidt,* 59 NY2d 206 [1983]). Plaintiff, by interjecting the matters brought before the Disciplinary Committee into the fee dispute litigations, compels the court to find that, under the circumstances herein, plaintiff opened the door to defendants' statements, which are entitled to the protection of the absolute privilege ***(see,*** *Martirano* ***v*** *Frost,* 25 NY2d 505 [1969]). Therefore, the fourth through

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2 The court declines to read plaintiffs submission delineated as **an** "In Camera Affirmation', concerning the complaints before the Disciplinary Committee. Those complaints are not relevant to the instant matter, and it is for the Disciplinary Committee to decide if either party herein is guilty of professional misconduct.

ninth causes of action are dismissed, as a matter of law.

Defendants also seek dismissal of the tenth cause of action, concerning Silverman's right to recovery of "10% net attorney's fee earned on any case settled or won as a result of her work on the case" (Complaint, ¶ 155). The parties to this litigation have expressed sharply divergent views as to the terms of Silverman's verbal contract with the law firm. Silverman states that she could maintain some private clients while working for the firm, albeit with a special fee arrangement with respect to some of these clients (Silverman Affirmation, at 3). The law firm disputes this, stating that clients that Silverman represented during her tenure became clients of the firm, and that she was not allowed to have private clients while she worked for the firm. This dispute is also the subject of the first, second, third, and fourth counterclaims, for which defendants also seek summary judgment. Because there is no written contract, and the parties' views of the oral agreement are clearly at odds, summary judgment must be denied (*see Sillman* v *Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]).

Plaintiff moves to strike the defendants' answer for failing to provide discovery, or in the alternative, dismissing the defendants' first and second affirmative defenses and all of defendants' counterclaims and the affirmative defenses associated with them.

Since the inception of this case, plaintiff has attempted to obtain through discovery copies of other letters, similar to the Luger and Garrett letters, sent by defendants to clients of the law firm. Defendants have conceded that such letters exist, and at a conference held August 11, 2003, the Special Master ordered the law firm to produce those letters. Defendants' statement that when the court signed plaintiff's Order to Show Cause for Summary Judgment on January 15, 2004, all discovery, pursuant to CPLR 3214 (b), was stayed, is disingenuous. Defendants had five months to produce the disputed discovery, and chose not *to* do so. They are directed to produce the disputed

discovery within 20 days of service upon them of a copy of this decision and order, with notice of entry, or upon renewal of plaintiffs application, her motion to dismiss the answer will be granted.

Finally, plaintiffs motion to dismiss the remaining defendants' counterclaims and affirmative defenses is denied. The pleadings in this case make only one thing patently clear: that each side has a diametrically opposite view of the conduct of the litigants during Silverman's employment at the law firm, and her conduct after she left the firm. For example, defendants allege that plaintiff breached her contract of employment by practicing law in New Jersey while she was with the Clark law firm. Plaintiff categorically denies the allegation. Attached to defendants' Exhibit E is a computer printout indicating that Silverman had been conducting business, as an attorney, in New Jersey since 2000. Silverman states that her income tax returns demonstrate that she "earned no income from the 'secret' practice of law" (Plaintiffs Supplemental Affirmation, at 6). Plaintiff states that she has never heard of the web site posting this information which is called "NatInfoUSA," and that the information listed concerns her former employer, Drazin & Warshaw. Plaintiff submits a computer printout from "Switchboard.com," indicating the attorneys associated with that firm, and that she is not among them. There are simply too many issues remaining in this litigation that are not appropriate for a determination based on competing motions for summary judgment.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted to the extent that the complaint is hereby severed and dismissed as against defendant Judith Clark, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the third, fourth, fifth, sixth, seventh, eighth, and ninth causes of action are dismissed; and it is further

ORDERED that plaintiffs motion to strike defendants' answer is denied without prejudice to a renewal motion should defendants fail to provide the subject discovery materials to plaintiff within 20 days of service of a copy of this decision and order, with notice of entry, upon defendants; and it is further

ORDERED that relief not specifically granted herein is denied; and it is further

ORDERED that the remainder of this action shall continue.

The parties are directed to appear for a conference on **MONDAY, AUGUST 2, 2004,** at **12:00 NOON,** at 60 Centre Street, Room **438,** New York, New **York,** 10007

This shall constitute the decision and order of the court.

DATED: JULY 7 ,2004

SHERRY KLEIN HEITLER
J.S.C.