[*1]

SCANNED ON 4/6/2006

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

PRESENT: HON. JUDITH J. GISCHE PART 10

Justice

Index Number : 114077/2005

OGUAGHA, CHIKA M.D.

vs

ROPES & GRAY

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE 3/2/06

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers numbered in 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

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED
APR 06 2006
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: MAR 29 2006

J.S.C.

Check one: ☒ FINAL DISPOSITION (EK) ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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CHIKA OGUAGHA, M.D.,

Plaintiff,

-against-

ROPES & GRAY and JOHN C. KANE, JR.,

Defendants.

----------x

Decision/Order
Index No.: 114077/05
Seq. No. : 001

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Defs motion [dismiss] w/WIS affirm in support, exhs	1
Pltf's affid in oppos (CO) w/exhs	2
Pltf's affirm in oppos (KCO) w/exhs	3
Defs affirm in reply (WIS) w/exhs	4

Upon the foregoing papers, the decision and order of the court is as follows:

Presently, before the court is defendants' pre-answer motion to dismiss plaintiff's complaint based upon documentary evidence and failure to state a cause of action. CPLR § 3211 [a] [1], [7]. Plaintiff opposes the motion in all respects.

Background

Plaintiff has sued defendant John C. Kane, Jr., Esq. and the law firm of Ropes & Gray for defamation. Attorney Kane is a lawyer at the firm. These attorneys represent defendants named in another action pending in Supreme Court, Kings County. Dr. Oguagha is also the plaintiff in that case (Chika Oguagha, M.D. v. Midwood Chayim Aruchim Dialysis Associates, Inc., Gennady Kiselman and Michael Shtern, Index No. 39905/04) [hereinafter the "Brooklyn action"]. In the Brooklyn action, Dr. Oguagha

alleges that the Midwood defendants forged his signature numerous times on patient care plans, and that this resulted in an investigation by the New York State Attorney General. Plaintiff was previously employed as the medical director at Midwood Dialysis, but the Midwood defendants suspended his privileges in the wake of numerous disputes.

Thereafter, allegations of misconduct were lodged against Dr. Oguagha with the State of New York Department of Health, Office of Professional Medical Conduct ["OPM"]. Among the allegations were that Dr. Oguagha had removed original patient files from Midwood's premises. The investigation was eventually concluded and "the case closed without further action anticipated" according to OPM's letter dated November 15, 2005.

Discussion

In this defamation action, Dr. Oguagha alleges Attorney Kane sent his attorney (K.C. Okoli, Esq.) a letter containing false statements that are libelous per se because they accuse him of dishonesty. Dr. Oguagha claims further that these statements have affected him in his profession as a physician.

The letter he claims is libelous contains these statements:

> "Re: Oguagha vs. Midwood
>
> Dear Mr. Okoli:
>
> As you know, this office with David Elkind as trial counsel, represents Midwood Chayim Aruchim Dialysis Associates Inc. ("Midwood") in the above-captioned lawsuit. We have recently learned that your client, Chika Oguagha, MD, has placed numerous phone calls to an employee of Midwood, a Ms. Manaluz, gone to her home at a time when she was ill, and obtained her signature on a certain document on the basis of a false representation. Given the ethical implications of Dr. Oguagha's solicitation of a

> signature from an employee of an adverse party in pending litigation, we demand immediately to be informed whether or not Dr. Oguagha's actions were at your direction, or with your prior knowledge; if you refuse to provide that information, we will understand that he acted at your direction. We further demand that Dr. Oguagha and your office immediately cease any such contacts with employees of Midwood, an adverse party in the lawsuit you have brought on Dr. Oguagha's behalf, and that we be supplied forthwith a copy of any and all documents signed by Ms. Manaluz or any other Midwood employee."

Plaintiff admits he contacted Ms. Manaluz and obtained a signed affidavit from her, sworn to on February 14, 2005. In her affidavit, Ms. Manaluz states that she has been employed by Midwood Dialysis since 2003. She further deposes that she oversees patients' care plans. Ms. Manaluz avers that Dr. Oguagha "never asked me to remove or provide him with the *originals* of patients' records from Midwood." She further states that "I was never aware of Dr. Oguagha removing any *originals* of patients' records from Midwood." Finally, she avers that "I have never heard anyone complain that Dr. Oguagha had ever removed the *originals* of patients' records from the [sic] Midwood."

It is plaintiff's contention that the affidavit he obtained from Ms. Manaluz was voluntary, and offered to him in connection with the OPM investigation. Dr. Oguagha contends, therefore, that the affidavit, and the letter about the affidavit, are entirely separate and disconnected from the Brooklyn action.

Defendants contend that the letter they sent to Attorney Okoli is absolutely privileged because the statements pertain to the ongoing litigation in Brooklyn. Attorney Kane further states Ms. Manaluz is employed by the Midwood defendants and Dr. Oguagha's actions in contacting their employee were wrong, and possibly unethical, if sanctioned by his attorney.

Defamation is the injury to one's reputation, either by written expression (libel) or oral expression (slander). Morrison v. National Broadcasting Co., 19 NY2d 453 (1967). The elements of libel are: 1) a false and defamatory statement of fact; 2) regarding the plaintiff; 3) which are published to a third-party; and 4) which result in injury to plaintiff. Idema v. Wager, 120 FSupp2d 361 (SDNY 2000); Ives v. Guilford Mills, 3 FSupp2d 191 (NDNY 1998). Certain statements are considered libelous per se. They are limited to four categories of statements that: [1] charge plaintiff with a serious crime; [2] tend to injure plaintiff in its business, trade or profession; [3] plaintiff has some loathsome disease; or [4] impute unchastity. Liberman v. Gelstein, 80 NY2d 429 (1992); Harris v. Hirsh, 228 AD2d 206 (1st dept. 1996).

This allegedly defamatory letter was written by Attorney Kane to Attorney Okoli while the two were engaged as attorneys for the parties litigating the Brooklyn action. See: Joseph v. Larry Dorman, P.C., 177 AD2d 618 (2nd dept. 1991). It is, therefore, privileged. Park Knoll Associates v. Schmidt, 59 NY2d 205 (1983). Plaintiff's efforts to disassociate the OPM investigation from the Brooklyn action by setting up an artificial wall between the two is entirely ineffective. By his own account, the OPM investigation was (probably) triggered by the legal disputes between himself and his former Midwood colleagues. Nor is his characterization of the Brooklyn action as being "inactive" availing. That case has not yet been tried or finally disposed. The mere fact that there are no appearances or motions pending before Judge Jacobson does not make it "inactive."

The absolute privilege will apply to any statement that may possibly or plausibly be relevant or pertinent, "with the barest rationality" to pending action. Joseph v. Larry

Dorman, *supra* at 619. The letter defendants rely upon is conclusive documentary proof that the absolute privilege applies to its allegedly libelous contents. R.W.P. Group, Inc. v. Holzberg, 202 AD2d 410 (2nd dept. 1994). An absolute privilege is based upon a communicator's official participation in the process of government and it is intended to insulate him from any inhibitions in carrying out that function. Caplan v. Winslet, 218 AD2d 148 (1st dept. 1996).

Although the privilege will not protect a gratuitous statement that is wholly "outside the cause," there is clear appellate authority that trial courts broadly construe what constitutes an out-of-court communication relating to pending or contemplated litigation. Caplan v. Winslet, *supra* at 153; Lemberg v. John Blair Communications, Inc., 258 AD2d 291 (1st dept. 1999). Thus, for example, a comment between lawyers that the other is a drug user as they leave the courthouse is absolutely privileged, even though it is clearly nasty and reprehensible. Caplan v. Winslet, *supra*.

In determining whether a complaint is sufficient as to withstand a motion to dismiss pursuant to CPLR § 3211 "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." Guggenheimer v. Ginzburg, 43 NY2d 268 (1977). The facts as alleged must be accepted by the court as true, for purposes of such a motion, and are to be accorded every favorable inference. Morone v. Morone, 50 NY2d 481 (1980); Beattie v. Brown & Wood, 243 AD2d 395 (1st dept. 1997).

Defendants have proved that, as a matter of law, the complaint fails to state a cause of action, and they have documentary proof to support their arguments.

Therefore, they have sustained their burden on this motion, and it must be granted. Plaintiff's complaint is hereby dismissed. The Clerk shall enter judgment in favor of defendants Ropes & Gray and John C. Kane, Jr. against plaintiff Chika Oguagha, M.D., dismissing the complaint and this action in its entirety.

In addition to seeking the dismissal of the complaint and this action, defendants urge the court to impose CPLR § 8303-a sanctions upon plaintiff, arguing that this lawsuit is entirely frivolous. The imposition of such sanctions is, however, discretionary. Poley v. Rochester Community Savings Bank, 159 AD2d 944 (4th dept. 1990); Schwartz v. Bartle, 51 Misc2d 215 (Sup. Ct. 1996). Based upon this record, as a whole, and the general character of this action, defendants' motion is denied.

Conclusion

Defendants' motion for the dismissal of this action is granted. The Clerk shall enter judgment in favor of defendants Ropes & Gray and John C. Kane, Jr. against plaintiff Chika Oguagha, M.D., dismissing the complaint and this action in its entirety.

Defendants' motion for sanction against plaintiff (CPLR § 8303-a) is, however, denied.

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
March 29, 2006

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.