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

PRESENT: Hon. Doris Ling-Cohan PART 36

Index Number : 116459/2006
DICKERT, SANFORD
VS
MASSA, ERIC J.J.
Sequence Number : 003
DISMISS ACTION

INDEX NO. 116459/06
MOTION DATE
MOTION SEQ. NO. 003
MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2
Answering Affidavits — Exhibits	3,4,5,6
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion to dismiss is decided in accordance with the attached memorandum decision.

RECEIVED
OCT 04 2007
IAS MOTION SUPPORT OFFICE

FILED
OCT 11 2007
COUNTY CLERK'S OFFICE
NEW YORK

JUSTICE DORIS LING-COHAN

Dated: 10/2/07

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE MIAY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36
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SANFORD DICKERT,

Plaintiff,

-against-

Index No. 116459/06

Motion Seq. No.: 003

ERIC J. J. MASSA,

Defendant.

----------X

Doris Ling-Cohan, J.:

Defendant Eric J. J. Massa (Massa) moves to dismiss the complaint in this action for defamation, on grounds of absolute and qualified privilege.

In 2006, Massa ran as the Democratic candidate for Congress in the 29th Congressional District of New York State. In April 2006, he hired plaintiff Sanford Dickert (Dickert) as his campaign manager, pursuant to a written contract. [Massa Aff. In Support of Motion, Exh. Q]. The contract contained an arbitration clause.

Massa terminated Dickert's employment in early June 2006, based on what Massa terms "gross incompetence." Massa Aff., ¶ 17. This action is based on certain communications in which Massa detailed the nature of Dickert's alleged incompetence.

In an e-mail dated June 13, 2006 (June 13 e-mail)(Notice of Motion, Ex. C), Massa notified Dickert of his termination. This

e-mail was copied to an individual named Eric Mullen (Mullen), whom Massa describes as having been a person "privy to most, if not all, campaign decisions," in the role of Massa's "de facto" campaign manager during and after Dickert's employ. Massa Aff., ¶ 14. Dickert describes Mullen as only a person "in the business of political consulting." Amended Complaint, ¶ 17. The June 13 e-mail was sent in response to a demand for payment of wages and expenses from Dickert to Massa.

In the amended complaint's first cause of action, which is based on the June 13 e-mail, Dickert refers to the following statements, among others, from Massa, as being defamatory: that Dickert "forged my signature to a Verizon contract that resulted in our monthly bill jumping from 280 dollars to over a thousand" (Amended Complaint, ¶ 19); that Dickert's "actions in the City of Corning were unacceptable from any legal and campaign point of view. We have as yet[1] compiled a full accounting of the damage that you caused this campaign - both financially and politically, ..." (*id.*, ¶ 20); and that:

> I have had to deal with angry parents of those under age children you offered a job to. High School kids who you [Dickert] talked with on the street, invited into the office, and offered a job. Not only is that against my specific direction - it is illegal in the State of New York. It falls directly under the solicitation of minors and is not an insignificant matter that I now have to deal with.

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[1]The court assumes that this is meant to read "have not as yet ... ."

Id., ¶ 21.

Dickert maintains that these statements were false and defamatory per se, and were made in order to injure "Dickert's business, professional and personal reputations in retaliation for Dickert's demanding payment of his wages and expenses under the employment contract, and to weaken the credibility of Dickert's claim for his wages." *Id.*, ¶ 23. Dickert alleges that, as a result of the publication of the June 13 e-mail to Mullen, "Dickert has been subjected to public hatred, contempt, ridicule and/or disgrace," and that his business was harmed. *Id.*, ¶ 27.

In his second cause of action, Dickert references a second e-mail, dated June 15, 2006 (June 15 e-mail)(Notice of Motion, Ex. C), which was also sent to Mullen, as well as to a second person, Ethan Rabin (Rabin), in which Massa discussed an apartment rented by Dickert for three campaign interns. Dickert describes Rabin as a person who "was doing work for Massa's campaign," but that he was not "under any confidentiality agreement or employment contract with Massa's campaign on or before June 15, 2006." *Id.*, ¶ 34. In the June 15 e-mail, Massa stated:

> The landlord of the damaged apartment has also informed both myself and the city Mayor that they removed both a case of empty beer bottles and an empty bottle of Vodka from the apartment that was used by the three 18 year old college student intern [*sic*] you brought to corning [*sic*]. Those adult beverages were supplied by you to

> them. That violation of local and state laws is a significant and meaningful issue of liability to both this campaign and to myself personally.

Id., ¶ 35.

Dickert states that this statement, which allegedly accuses him of the "indictable crime" of serving alcohol to minors (Amended Complaint, ¶ 35, ¶ 39), was also defamatory per se, and was sent to injure Dickert. He further alleges that the publication of the June 15 e-mail "was malicious, wanton, reckless, and in willful disregard for Dickert's rights, motivated by Massa's ill will, hatred, and spite, and embodying the essence of a hostile tenor." *Id.*, ¶ 43.

Dickert commenced an arbitration proceeding against Massa for his wages and expenses. On August 25, 2006, Massa petitioned, in the Supreme Court of Steuben County, for a stay of arbitration. Dickert served an order to show cause, to which Massa replied with an affidavit (the Affidavit). Notice of Motion, Ex. E. In his third cause of action, Dickert objects to several statements in the Affidavit, including: that Dickert "[l]ured college age boys under the legal drinking age into the above referenced apartment and provided for their consumption [of] more than a case of beer and a bottle of vodka" (Amended Complaint, ¶ 50); that "Dickert solicited illegal furniture donations from various merchants on Market Street in Corning ... Dickert solicited young high school boys for employ by the

campaign ... In direct violation of my stated instruction, Dickert attended County Democratic Committee meeting and presented himself, without authorization, as my spokesperson ... Dickert's illicit activities left a wake of negativity among constituents local players and my family." *Id.*, ¶ 51.

The complaint also maintains that the Affidavit "accused Dickert of lude [*sic*] and lascivious behavior" in that it stated that "Dickert invited my then 16 year old son to spend the night with him." *Id.*, ¶ 52.

Dickert relates that these statements were reported in two newspapers, and on the internet, and that they caused him injury similar to the injury caused him by the two e-mails.[2]

In his fourth cause of action, Dickert complains of a conversation, which allegedly took place on June 15, 2006, between Massa and Nancy Mindes (Mindes), who is identified by Dickert as someone who "did not work for Massa or for the Massa for Congress campaign" (Amended Complaint, ¶ 65), but whom Massa describes as, among other things, his "life's coach." Massa Aff., ¶ 31. Massa allegedly told Mindes that "Dickert had made homosexual advances toward Massa's son, Justin, and that Dickert

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[2]Dickert also claims that a similar affidavit was produced in a motion brought by Dickert for an attachment in the arbitration, but that, in this context, Justice Lonnie Wilkins of the Supreme Court, Steuben County, demanded that the language of which Dickert now complains be removed or redacted. The affidavit was then redacted to remove the offending language. Dickert Aff., at ¶ 19 and Ex. E.

had invited Justin to stay with Dickert to seduce Justin." *Amended Complaint*, ¶ 64. Again, Dickert claims that the alleged statements were made maliciously, with the result that his "future career prospects and income as a campaign advisor has been substantially destroyed, with no reasonable prospect of mitigation or recovery." *Id.*, ¶ 69.

On this motion, Massa maintains that the statements contained in the two e-mails, and in the alleged conversation with Mindes, are excused by virtue of a qualified privilege, in that all three parties to whom the statements were made were closely associated to Massa during his campaign. Massa also claims that the statements made in the Affidavit are protected by the absolute privilege accorded statements made in judicial and quasi-judicial proceedings.

On a motion to dismiss, "the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff with the benefit of every possible inference." *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005); *see also Lobel v Maimonides Medical Center*, 39 AD3d 275 (1st Dept 2007); *Gorelik v Mount Sinai Hospital Center*, 19 AD3d 319 (1st Dept 2005). Further, "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC 1, Inc. v Goldman Sachs & Co.*, 5 NY3d at 19.

Massa does not attack the sufficiency of Dickert's pleading as to the elements of libel and slander, and, therefore, there is no ground upon which to dismiss the amended complaint at this time based on a failure to state a cause of action. Rather, Massa's motion is based on the defense that all of the communications are protected by either a qualified or an absolute privilege.

"[A] qualified privilege arises when a person makes a good-faith bona fide communication upon a subject in which he or she has an interest, or a legal, moral or societal interest to speak, and the communication is made to a person with a corresponding interest [internal quotation marks and citation omitted]." *Demas v Levitsky*, 291 AD2d 653, 661 (3d Dept 2002).

Dickert defends his first, second and fourth causes of action on the argument that none of the persons to whom the various communications were made is a person with a sufficient interest in Massa's campaign to warrant a qualified privilege. Dickert also maintains that he can establish the element of malice on the part of Massa. To this end, Dickert produces an e-mail from Massa to Mullen, dated June 12, 2006 (June 12, 2006 e-mail), in which Massa complains about the damage which the student interns allegedly caused to the apartment rented for them by Dickert, for which Massa allegedly had to pay. In the e-mail, Massa says that perhaps Mullen should tell Dickert that "if he

[Dickert] pushes [his action for payment] I'll make it my life's drive to make sure that he never holds another job on this planet." Dickert Aff., Ex. B.

On a motion to dismiss, the question of qualified privilege has been found by the Appellate Division, First Department, to be premature, in that it is "an affirmative defense to be raised in defendant's answer. Defendants may then move for summary judgment on any such defense available to them and, upon their making a prima facie showing of ... qualified privilege, the burden would shift to plaintiff ... ." *Garcia v Puccio*, 17 AD3d 199, 201 (1st Dept 2005); *see also Clark v Schuylerville Central School District*, 24 AD3d 1162, 1163 (3d Dept 2005)(same re affirmative defense of truth); *Demas v Levitsky*, 291 AD2d at 661, *supra* (same); *Ward v Klein*, 10 Misc 3d 648, 651-52 (Sup Ct, NY County 2005)(same). The rationale for this rule is that a defendant raising this defense should not be permitted to "'short-circuit that procedure' and improperly place the burden on plaintiff of anticipating their affirmative defense prior to joinder of issue." *Garcia v Puccio*, 17 AD3d at 201, quoting *Demas v Levitsky*, 291 AD2d at 662. Therefore, it is premature to address the issue of qualified privilege, and the motion to dismiss is denied as to the first, second and fourth causes of action.[3]

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[3]While defendant insists that this Court can address the issue of qualified privilege on a motion to dismiss, the cases he supplies to support his position are not persuasive. Both *Hanlin*

Massa's defense of qualified privilege would not serve as a ground to dismiss these causes of action in any event at this juncture, because Massa cannot yet establish that his defense of qualified privilege defeats Dickert's complaint, due to factual disputes concerning each of the third parties' relationships to Massa, and the question of the existence of malice, as evidenced in the June 12, 2006 e-mail. The third cause of action, based on the statements made in the Affidavit, is, on the other hand, amenable to dismissal at this time. Unlike the defense of qualified privilege, which must be "pleaded and proved" (*Duffy v Kipers*, 26 AD2d 127, 129 [4th Dept 1966]), the defense of absolute privilege "may be discerned from the facts alleged in the complaint" (*id.*), and so, may be addressed on the motion to dismiss.

"[P]ublic policy mandates that certain communications, although defamatory, cannot serve as the basis for the imposition of liability in a defamation action [interior quotation marks and citation omitted]," thus providing grounds for an absolute privilege. *Rosenberg v MetLife, Inc.*, 8 NY3d 359, 365 (2007). "When compelling public policy requires that

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v Sternlicht (6 AD3d 334 [1st Dept 2004]) and *Serratore v American Port Services, Inc.* (293 AD2d 464 [2d Dept 2002]) predate *Garcia*. *Ferguson v Sherman Square Realty Corp.* (30 AD3d 288 [1st Dept 2006]), an additional case cited by defendant in support of his position, involves a motion for dismissal following the joinder of issue, and does not address the issue presented here.

the speaker be immune from suit, the law affords an absolute privilege, while statements fostering a lesser public interest are only [qualifiably] privileged [internal quotation marks and citation omitted]." *Id.* Statements made during the course of a judicial or quasi-judicial proceeding are "clearly protected by an absolute privilege 'as long as such statements are material and pertinent to the questions involved ... .'" *Id.*, quoting *Wiener v Weintraub*, 22 NY2d 330, 331 (1968); *see also Lacher v Engel*, 33 AD3d 10, 13 (1st Dept 2006)(an absolute privilege is "limited to statements which are not only pertinent to the subject matter of the lawsuit but are made in good faith and without malice [internal quotation marks and citation omitted])." A statement made in judicial proceedings is privileged "'if, by any view or under any circumstances, it may be considered pertinent to the litigation.'" *Sexter & Warmflash, P.C. v Margrabe*, 38 AD3d 163, 173 (1st Dept 2007), quoting *Martirano v Frost*, 25 NY2d 505, 507. (1969); *see also Lacher v Engel*, 33 AD3d at 13). Thus, "[t]o be actionable, a statement made in the course of judicial proceedings 'must be so outrageously out of context as to permit one to conclude, from the mere fact that the statement was uttered, that it was motivated by no other desire than to defame.'" *Sexter & Warmflash, P.C. v Margrabe*, 38 AD3d at 173, quoting *Martirano v Frost*, 25 NY2d at 508.

Dickert argues that the statements made by Massa in the Affidavit were not material to the question of whether there was an agreement to arbitrate. However, Massa's statements made in the course of the arbitration were allegedly made in support of his argument that Dickert grossly misled Massa concerning Dickert's suitability for the position of campaign manager, such as to warrant rescission of their agreement. Massa expresses his belief, among other things, that Dickert's actions betrayed his lack of knowledge of state and federal law with regard, especially, to campaign finance limitations, and the state laws regarding the solicitation of minors for work. Rescission of the agreement would negate the agreement between the parties, vitiating the arbitration provision. Therefore, no matter how ill-conceived the Affidavit, it was made for a permitted purpose, and it cannot be said that the statements were "so outrageously out of context" as to be "motivated by no other desire than to defame." *Sexter & Warmflash, P.C. v Margrabe*, 38 AD3d at 173.

Considering the strong public policy protecting statements made in the context of judicial and quasi-judicial proceedings, this Court finds that the statements in the Affidavit are protected by an absolute privilege and therefore, dismissal of plaintiff's third cause of action is warranted.

Accordingly, it is

ORDERED that defendant's motion to dismiss the complaint is granted as to the third cause of action, and is otherwise denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days of service of this notice with order of entry; and it is further

ORDERED that within 20 days of entry of this order, plaintiff shall serve a copy upon defendant with notice of entry; and it is further

ORDERED that the stay on discovery issued on April 2, 2007 is lifted and discovery shall continue.

Dated: 10/11/07

Hon. Doris Ling-Cohan, J.S.C.

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