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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

TRIAL TERM PART: 48

GALASSO LANGIONE & BOTTER, LLP,
PETER J. GALASSO and JAMES LANGIONE,

Plaintiffs,

-against-

THOMAS F. LIOTTI,

Defendants.

INDEX NO.: 019276/07

MOTION DATE:3-21-08
SUBMIT DATE:3-28-08
SEQ. NUMBER - 001

MOTION DATE: 3-28-08
SUBMIT DATE: 3-28-08
SEQ. NUMBER - 002

THOMAS F. LIOTTI,

Third-Party Plaintiff,

-against-

FREDERICK K. BREWINGTON,

Third-Party Defendant

The following papers have been read on this motion:

Notice of Motion, dated 2-15-08.....1
Affirmation, dated 2-15-08.....2
Memorandum of Law in Support, dated 2-15-08.....3
Notice of Motion , dated 3-5-08.....4
Memorandum of Law in Support, dated 3-5-08.....5
Affidavit in Opposition, dated 3-12-08.....6
Affidavit in Opposition, dated 3-19-08.....7
Reply Affidavit, dated 3-19-08.....8
Reply Memorandum of Law, dated 3-19-08.....9
Reply Affidavit, dated 3-26-08.....10

Motion by plaintiffs Galasso, Langione & Botter, LLP, Peter J. Galasso and James Langione pursuant to CPLR 3211(b) and, in effect, CPLR 3212, to dismiss stated affirmative defenses and pursuant to CPLR 3211(a)(7) to dismiss stated counterclaims is granted in its entirety. Motion by third party defendant Frederick K. Brewington *pro se* pursuant to CPLR 3211(a)(7) and CPLR 1007 for an order dismissing the third party complaint and imposing sanctions upon defendant Liotti is granted to the extent that the third party complaint is dismissed and a hearing shall be held to determine an appropriate financial sanction in the form of costs.

This action arises out of alleged defamatory statements made by defendant Thomas Liotti of and concerning the plaintiff law firm Galasso Langione & Botter, LLP, and partners Peter J. Galasso and James Langione (hereafter collectively referred to as plaintiff, or the firm). Liotti made the statements to a newspaper reporter for Newsday while commenting about a criminal prosecution against his client, the firm's former office manager Anthony Galasso. Liotti made the statements at the courthouse after Anthony's arraignment. Anthony is the brother of plaintiff Peter J. Galasso, and was charged with the theft of six million dollars from various bank accounts maintained by the firm while he was employed as its bookkeeper. The crimes included the theft of $4.4 million from the escrow account of a matrimonial client of the firm, Stephen Baron. Anthony pleaded guilty to all counts of the indictment.

With respect to the Baron escrow account, Anthony prepared and submitted an account application to the Signature Bank wrongfully designating his signature as an

authorized signature. He forged the signatures of partners Galasso and Langione to the application and diverted bank statements to a post office box. He withdrew approximately $4 million and created genuine-looking but false computer-generated bank statements, which he distributed to plaintiff and the client's accountant. The theft was discovered in January of 2007, at which time Anthony confessed to plaintiffs.

Anthony lived a lavish lifestyle with the stolen funds, taking private jets to Atlantic City with his wife and her family for gambling weekends, attending shows and concerts, purchasing luxury automobiles for himself and his family, paying tuition for his son and daughter, and staying at the Ritz Carlton in New York City. As noted, he pleaded guilty to all counts of the resulting indictment.

The precise defamatory words complained of and attributed to Liotti in the October 25, 2007 edition of Newsday are:

> [my] client didn 't do anything that he was not instructed to do by his superiors . . .
> "Whatever he did, he did with their full knowledge and consent" . . .
> [D]ipping into company accounts was a common practice among attorneys there. "Is the Galasso firm going to say they never went to a concert or sporting event using this money" I think that should be addressed."

Addressing so much of the motion as seeks to dismiss the affirmative defenses, the first alleges that the statements are true; the second that the complaint does not allege defamation per se; the third that Liotti made the statements while acting as a criminal attorney; the fourth that Liotti made the statements in a courthouse; sixth that the action

was commenced to avoid disciplinary or criminal charges against plaintiffs; seventh that plaintiffs' attorney was in the courthouse at the time the statements were made; eighth that plaintiffs delayed service of process; and tenth that Liotti and his client refuse to be a "sitting ducks".

Several of the foregoing clearly do not constitute any cognizable legal defense to a cause of action for defamation, specifically the defenses alleging that the suit's purpose was to avoid plaintiffs' own potential legal and professional trouble (sixth), the deliberate "delayed process" defense (eighth) and the "sitting ducks" contention (tenth). The first is without legal force in that it refers to some wrongful collateral purpose, but this applies only where the party so charging is asserting an abuse of process claim. *See,*. e.g. *Berisic v. Winckelman*, 40 AD3d 561, 562 (2d Dept 2007)[one of the three elements of abuse of process is a purpose to harm without justification]. However, even reading the allegations of the third party complaint and defendant's affidavit in opposition generously, no such claim is made out. The defendant does not deny making the statements that underlie the defamation action, which means that there was at minimum a justification for the law suit. Arguing that the suit is without merit does not undermine the fact of those statements.

Further, the claim that service of process was somehow timed to withhold plaintiff's claims for nefarious purposes does not constitute a defense, as process was timely served in accordance with law. Indeed, commencement of this action began with the filing of the complaint, as a public record, in the County Clerk 's office, and was

accessible by the defendant. The alleged "sitting duck" defense does not merit comment beyond stating the obvious – that it constitutes, at best, a characterization of the defendant's statements to the press as expressing his willingness to defend his client and himself from any charges made against them. However, that has nothing to do with the truth, falsity or harmful effect of such statements. Accordingly, the sixth, eighth and tenth affirmative defenses are dismissed.

The defendant also alleges in the third, fourth and seventh affirmative defenses that he was a criminal attorney representing a client at the time the statements were made, that he was in the courthouse at the time the statements were made and that plaintiffs were also there. Regarding the various assertions which apparently attempt to loosely assert an absolute privilege for judicial proceedings, the uncontroverted evidence indicates that the statement was made to a reporter, not to anyone connected with the criminal prosecution.

It is true that a statement made "in the course of legal proceedings is absolutely privileged if it is at all pertinent to the litigation." *Sexter & Warmflash, P.C. v. Margrabe*, 38 AD3d 163, 171 (1st Dept 2007). However, while Liotti avers that the statements were pertinent to the criminal proceeding in which he represented Anthony Galasso, statements to reporters are not part of judicial proceedings. They are therefore not protected by the absolute privilege accorded to such proceedings. *See Petrus v. Smith*, 91 AD2d 1190 (4th Dept 1983)[attorney called his client's adversary a liar and a

thief outside the courthouse, no absolute privilege under circumstances]; *see also, McRedmond v Sutton Place Restaurant and Bar, Inc.*, 48 AD3d 258 (1st Dept. 2008). Public policy limits the privilege "to permit persons involved in a judicial proceeding to write and speak about it freely *among themselves* . . . in the course of such proceedings . . ." *Sexter & Warmflash, P.C. v. Margrabe, supra* at 172 [emphasis supplied]. Counsel has provided no authority which supports an absolute privilege to criminal attorneys for defamatory statements made to reporters for publication. Nor is the court able to discern in what manner the insufficiency of the claim of privilege is cured by plaintiffs' alleged presence in the courthouse.

If it is counsel's claim that he is entitled to a qualified privilege, that claim too is deficient. Initially, he has not identified any claimed privilege, and thus fails to identify "the material elements of each . . . defense." CPLR 3013.

Moreover, the proffered defenses do not satisfy the requirements for any qualified privilege. The common interest privilege attaches to a good faith communication "upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty . . . if made to a person having a corresponding interest or duty . . . " *Hoffman v. Landers*, 146 AD2d 744, 747 (2d Dept 1989). Defendant, like the attorney in *Hoffman*, has offered nothing which aligns his duty or interest with that of a Newsday reporter. Nor does he contend that the statements were alleged as a defense in the criminal proceeding, thus making them part of that proceeding, and subject to the fair comment privilege. *See, Rivera v. Greenberg*, 243 AD2d 697 (2d Dept 1997). They also do not constitute a "fair and true report" of the judicial proceedings against Anthony.

Civil Rights Law § 74; *McRedmond v Sutton Place Restaurant and Bar, Inc., supra.* Accordingly, the third, fourth and seventh affirmative defenses are dismissed.

The second affirmative defense, which states that the comments do not constitute defamation *per se,* is also dismissed. A statement which tends to harm another in his business or profession constitutes slander per se. *Liberman v. Gelstein*, 80 NY2d 429, 435 (1992). Stating that it was a common practice for attorneys at the firm to dip into client escrow accounts, and that they instructed an employee to do so, clearly harms plaintiffs in their profession, and no allegation of special damages is required. *Id.* Moreover, given the magnitude of the theft, the statement also may be read to charge plaintiffs with a serious crime, an additional exception to the requirement for special damages. *Id.*

The first affirmative defense alleging truth is dismissed. It is undisputed that Anthony Galasso pleaded guilty to all the charges against him. This plea, and the evidence submitted by the movants, constitute overwhelming evidence that the firm was not aware of the defalcation nor participated in any of the acts leading to the criminal case against Anthony. He forged signatures, diverted and produced false bank statements to the partners and client. The lavish lifestyle supported by the thefts is uncontroverted. In response, the defendant does not produce any evidence otherwise, notwithstanding his obvious contact with his client and documents that would have been material to the criminal matter. Thus, the defense of truth has been shown to be devoid of merit. *Town of Hempstead v. Lizza Indust.*, 293 AD2d 739, 740 (2d Dept. 2002); *Vita v. New York Waste Services, LLC*, 34 AD3d 559 (2d Dept 2006).

CPLR 3211(b) requires dismissal of a defense which is "not stated or has no merit". Plaintiff has met its initial burden of coming forward with sufficient proof and argument demonstrating that the defenses discussed above cannot be sustained. In response, defendant has not come forward with sufficient admissible proof demonstrating the existence of triable issues regarding such defenses. In sum, that branch of the plaintiffs' motion that is to dismiss affirmative defenses is granted, and all but the fifth and ninth affirmative defenses, not raised by plaintiffs on this motion, are dismissed.

Turning to the counterclaims, defendant's second and third claims for defamation against plaintiffs allege that the institution of this action and complaints by plaintiffs to the Grievance Committee constitute defamation. Since the counterclaims "failed to set forth the allegedly defamatory words" of the plaintiffs, the second and third counterclaims must be dismissed. *Wyllie v. District Atty. of County of Kings*, 2 AD3d 714, 719 (2d Dept 2003). CPLR 3016[a] requires that the "particular words complained of" be specified.

Moreover, unlike public statements to the Newsday reporter, the pleadings in this action and the complaint by the plaintiffs to the Grievance Committee about defendant are protected by absolute privilege. *Sexter & Warmflash, P.C. v. Margrabe*, 38 AD3d 163, 171 (1st Dept 2007), *supra*; *Wiener v. Weintraub*, 22 NY2d 330 (1968). Accordingly the second and third counterclaims are dismissed.

The fourth counterclaim alleges abuse of process by the institution of this action. To state a claim of abuse of process, the counterclaiming defendant must plead facts that 1) there was regularly issued process, compelling the performance or forbearance of some

prescribed act, 2) the person activating the process was moved by a purpose to harm without that which has been traditionally described as economic or social excuse or justification, and 3) the defendant must be seeking some collateral advantage or corresponding detriment to the plaintiff which is outside the legitimate ends of the process. *Berisic v Winckelman,* 40 AD3d 561 (2d Dept. 2007), *supra,* quoting *James v Saltsman,* 99 AD2d 797 (2d Dept. 1984). Thus, in order to state a claim for abuse of process something more than the mere institution of a lawsuit must be proven. In accord with the foregoing authority, a "necessary element" of a cause of action abuse of process might be interference with person or property "through the use of a provisional remedy" *Niagara Mohawk Power Corp. v. Testone*, 272 AD2d 910, 913 (2000). However, an action for abuse of process will not lie when premised "merely upon the commencement of a civil action, even if such action is commenced with malicious intent." *I.G. Second Generation Partners, L.P. v. Duane Reade*, 17 AD3d 206 (1st Dept 2005); *see also, James v Saltsman, supra*. Accordingly, the fourth counterclaim is dismissed.

The fifth counterclaim sounds in intentional infliction of emotional distress. The four elements of this tort are : "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress". *Howell v. New York Post Co.*, 81 NY2d 115, 121 (1993). The required element of outrageous conduct, which is "susceptible to determination as a matter of law" and is "rigorous, and difficult to satisfy." *Id.* Its purpose is to "assure that the claim of severe emotional

distress is genuine". *Roach v. Stern*, 252 AD2d 488, 491 (2nd Dept 1998). Liability will be found only where the conduct has been "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency" , and is regarded as "atrocious, and utterly intolerable." *Murphy v. American Home Prods. Corp* ., 58 NY2d 293, 303 (1983), quoting Restatement [Second] of Torts § 46, comment d. The commencement of a civil lawsuit cannot satisfy this rigorous standard. *Hartman v 536/540 E. 5th St. Equities*, 19 AD3d 240, 240-241 (1st Dept 2005).

With respect to the grievance letter, providing false statements to enforcement authorities does not serve as a basis for intentional infliction of emotional harm. *Slatkin v. Lancer Litho Packaging Corp.,* 33 A.D.3d 421, 422 (1st Dept 2006) [threatening arrest and criminal prosecution, instigation of arrest by alleged false statements to police insufficient]; *see also, Brown v. Sears Roebuck & Co.*, 297 AD2d 205, 212 (2d Dept 2002). If reporting to authorities that may result in arrest and prosecution is not "atrocious, and utterly intolerable" conduct, it is clear that a complaint made to the Grievance Committee for review does not rise to that level. Accordingly, the counterclaim for intentional infliction of emotional distress is also dismissed.

The Third-Party Complaint

Liotti has also asserted claims of defamation and abuse of process against Frederick K. Brewington, Esq., attorney for the plaintiffs, via a third party complaint for his role in bringing this action and filing a claim with the Grievance Committee. The

cause of action against Brewington for the intentional infliction of emotional harm is premised solely upon the commencement of this action on behalf of plaintiffs. On this motion Brewington seeks dismissal of the third party complaint and sanctions.

The first cause of action asserted by the third-party plaintiff is for costs and sanctions. The second and third sound in defamation. The fourth is for abuse of process, and the fifth is for intentional infliction of emotional distress. The sixth is for declaratory relief.

They must all be dismissed pursuant to CPLR 3211(a)(7). All but the first suffer from the same fatal infirmities as the counterclaims discussed above, pursuant to the authority cited. The second and third must be dismissed because statements made in the pleadings enjoy an absolute privilege, and do not contain the specific defamatory words complained of. The fourth does not lie because institution of a lawsuit, even if made with venal intent, is insufficient to sustain a claim of abuse of process. The fifth must be dismissed because the filing of the action does not provide a basis for a claim of intentional infliction of emotional harm.

The sixth seeks an unspecified declaration "in order to punish, penalize and deter" the third-party defendant, but as no new facts are asserted it too is based on no more than the commencement of the main action. Therefore, in view of the insufficiency of every legal claim made, a cause of action for declaratory relief can provide no additional cognizable claim. Finally, given the rulings made above regarding affirmative defenses in the main action, the Court has implicity found, and expressly finds here with regard to

the third party action, that the action of Brewington in commencing the action against Liotti on behalf of Brewington's clients was not frivolous as that term is defined by 22 NYCRR §130-1.1. Accordingly, this cause of action, based on this section of the Uniform Rules, must be dismissed as well. In sum, all six causes of action fail to state causes of action upon which relief can be granted and are dismissed for that reason. CPLR 3211(a)(7).

In addition, CPLR 1007 mandates dismissal and the imposition of costs against the third-party defendant. This section provides that "a defendant may proceed against a person not a party who is or may be liable to that defendant for all or part of the plaintiff's claim against that defendant." Thus, third-party complaints are limited to a situation where a person not a party "is or may be liable to defendant for all or part of the plaintiff's claim against him" and the liability "must be one rooted in indemnity or contribution." *BRC Elec. Corp. v. Cripps*, 67 AD2d 899 (2d Dept 1979). Notwithstanding "liberal pleading rules applicable to third-party complaints" there is no view of the facts upon which the third-party defendant could be liable to plaintiff on its claim for defamation against defendant Liotti. *See BRC Elec. Corp. v. Cripps, supra*. Without a sharing or shifting to Brewington of Liotti's liability to plaintiff in the main action, the third party complaint must be dismissed. *Dor Motors Ltd. V Graphic Arts Mutual Ins. Co.*, 97 AD2d 455 (2d Dept 1983).

Given the wholly improper impleader of counsel for plaintiff, and the apparent lack of foundation for a claim over or against him, a hearing shall be held pursuant to 22

NYCRR § 130-1.1 for the imposition of costs for the commencement of a frivolous third party action.

The term frivolous is defined as "completely without merit in law" and refers to an act which "cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" and/or "is undertaken primarily to . . . harass or maliciously injure" (22 NYCRR 130-1.1). The Rules of the Chief Administrator, provide that an award of costs may be made for such frivolous conduct. 22 NYCRR 1301.1(c). *Yan v. Klein*, 35 AD3d 729 (2d Dept. 2006). There is a duty upon the attorney, not met here, to make an analysis of the case in the context of the entire record and to make a determination of merit. *Heilbut v. Heilbut*, 18 AD3d 1 (1st Dept. 2005).

Although at times an evidentiary hearing is required to make a determination of whether costs or sanctions should be imposed (*Walker v. Weinstock*, 213 AD2d 631 [2d Dept. 1995]), that is not necessary here because the request was specifically made in third-party defendant's notice of motion, third-party plaintiff has been afforded the opportunity to respond, and there are no factual disputes to be decided. The Court thus may find on the present record, that the third-party complaint lacks legal merit, and that the third-party defendant should not have been put to the expense of having to make the motion to dismiss. Hence, in this instance it is not necessary to hold an evidentiary hearing on the issue of whether defendant's conduct was frivolous. *Gordon v. Marrone*, 202 AD2d 104 (2d Dept. 1994).

Accordingly, all that remains is to determine the amount of costs that should be paid by the third-party plaintiff to the third-party defendant for making necessary the motion to dismiss, granted by this order.

Subject to the approval of the Justice there presiding and provided a Note of Issue has been filed at least 10 days prior thereto, this matter is referred to the Calendar Control Part (CCP) for a hearing on **June 9, 2008**, at 9:30 A.M., to assess the amount of sanctions and costs against the third-party plaintiff in accordance with this decision and order.

A copy of this order shall be served on the Calendar Clerk and accompany the Note of Issue when filed. The failure to file a Note of Issue or appear as directed may be deemed an abandonment of the claims giving rise to the hearing.

The directive with respect the hearing is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer or a Court Attorney/Referee as he or she deems appropriate.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: May 12, 2008

HON. DANIEL PALMIERI
Acting Supreme Court Justice

TO: **Law Offices of Frederick K. Brewington**
Attorney for Plaintiff and
Third-Party Defendant Pro Se
50 Clinton Street, Ste. 501
Hempstead, NY 11550

Law Offices of Thomas F. Liotti
Defendant
Third-Party Plaintiff
600 Old Country Road Ste. 530
Garden City, NY 11530