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

PRESENT: HON. JUDITH J. GISCHE PART 10

Justice

Index Number : 110535/2007

SMYTH, CAROL

VS.

CROCITTO, MARIA

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 110535-07

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: May 30, 2008

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

Check one: ☒ FINAL DISPOSITION ☐ 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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Carol Smyth,

Plaintiffs,

-against-

Maria Crocitto, Pierangela Crocitto, and Advantage Communications, LLC,

Defendants.

----------x

DECISION/ ORDER
Index No.: 110535/07
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' n/m (3211) w/ DSS affid, exhs	1
Pltff opp w/MPM affirm	2
Defs' reply w/ DSS affid, exh	3

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

Plaintiff claims that defendants made defamatory statements about her to third parties which are defamatory *per se*. Before the court is defendants' pre-answer motion to dismiss this action on the grounds that the statements are absolutely privileged, subject to a qualified privilege, and/or plaintiff has failed to plead special damages. CPLR 3211 (a) (7). Defendants also assert a defense founded upon documentary evidence. CPLR 3211 (a) (1). Plaintiff opposes the motion.

On a motion to dismiss, the facts as alleged in the complaint must be accepted by the court as true, 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). In deciding these motions to dismiss the court will consider whether, accepting all of the

plaintiff's alleged facts, they support the causes of action asserted (Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 634 [1976]), unless clearly contradicted by documentary evidence submitted by the moving parties in connection with the motion (*see* Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 [1st Dept 2006]). Where a motion is based upon documentary evidence, such evidence must definitively dispose of plaintiff's claims. Bronxville Knolls Inc. v. Webster Town Center Partnership, 221 AD2d 248 (1st dept. 1995).

Facts considered and arguments presented

Plaintiff Carol Smyth ("plaintiff" or "Dr. Smyth") is a medical doctor. She was hired by the defendants in 2002 as the medical director for Advantage Communications LLC ("Advantage"). Advantage is in the business of medical communications. Following a clash between herself and the defendants, plaintiff was terminated from employment on August 2, 2006, the very same day a summons and complaint in another, prior action served on Dr. Smyth (Advantage Communications LLC v. John V. Capri, JVC Communications, LLC, Valerie Capri and Carol Smyth, Index No. 602655/06) ("prior action"). That action was filed in court on July 27, 2006, and assigned to Hon. Charles E. Ramos.

Plaintiff claims she was fired because defendant, Maria Crocitto, was in the process of getting a divorce from John Capri ("Mr. Capri"), the Executive Vice President of Advantage. Plaintiff had been sympathetic to, and worked well with Mr. Capri and plaintiff attributes her termination to siding with the "wrong" party in the divorce.

The day she was served with the complaint in the prior action, the defendants in this action made statements to fellow employees that Dr. Smyth contend are

defamatory *per se*. The statements are that Dr. Smyth had: 1) "stolen business" from Advantage; 2) "lied" about the theft; 3) "had been working with John to steal clients;" 4) acted "inappropriately" while employed at Advantage and been terminated and sued because of the "inappropriate" actions. Plaintiff contends these are statements are defamatory *per se* because they accuse her of criminal activities. She generally contends they have exposed her to public hatred, contempt, ridicule or disgrace, and affected her personal and professional reputation, although she does not explain how in her complaint, nor has she provided her affidavit in opposition to defendants' motion.

Defendants contend they fired plaintiff because she collaborated with Mr. Capri to divert business from Advantage to his competing business. The claims in the prior action were that Dr. Smyth and the other named defendants in that action ("the JVC defendants"), had "pilfered corporate assets, stole confidential client information and data files, and usurped business opportunities from Advantage in order to begin [JVC] . . ." while stilled employed by and working for Advantage. The Advantage plaintiffs accused Dr. Smyth of aiding the JVC defendants in diverting business opportunities from Advantage to JVC.

Dr. Smyth moved for summary judgment in the prior action. The motion was submitted, decided and granted on default by Judge Ramos in a short form order. Order, Ramos J., 5/7/07. It appears Judge Ramos ordered a hearing on sanctions before a special referee, which has not taken place[1]. According to Dr. Smyth, this was because James O'Gara, the husband of one of the defendants in this action, and an

[1]No copy of the order is provided, but the court assumes this is true for the purposes of this motion.

officer in Advantage admittedly made false statements in the prior action. Advantage discontinued the prior action (with prejudice) against the JVC defendants and Dr. Smyth contends this further supports her claims, that the statements which form the basis of this action were made were to humiliate her.

Defendants contend the statements are absolutely privileged because they were made in the course of a legal proceeding. Alternatively, defendants argue the statements are subject to a "qualified common interest privilege" because the statements were not made with malice, but simply imparted information to other employees who had a right to know why fellow staff member was being terminated. Defendants also contend the statements are not *per se* defamatory because they neither accuse her of a serious crime, nor injure her in her trade, business or profession. Defendants argue further that because she has not pled special damages, a necessary element of her claim, she has failed to state a cause of action against them.

In opposition, plaintiff contends that the statements are defamatory *per se* because they accuse her of stealing business, and disloyalty to her employer, and therefore not protected by any privilege, whether absolute or qualified.

Discussion

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) the 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).

If, however, the statements made relate or pertain to pending or contemplated litigation, they are subject to an absolute privilege that shields the speaker or writer from liability for an otherwise defamatory statement, regardless her or his motive in making the statement. Rosenberg v. Met life, Inc., 8 NY3d 359 (2007); Park Knoll Assocs v. Schmidt, 59 NY2d 205 (1983); Oguagha v. Ropes & Gray, 38 AD3d 298 (1st Dept 2007). A libel action based on an absolutely privileged statement is barred as a matter of law in this state. Rosenberg v. Met life, Inc., 8 NY3d 359 (2007); Oguagha v. Ropes & Gray, supra; Cicconi v. McGinn, Smith & Co., 27 AD3d 59 (2005).

While the privilege will not protect a gratuitous statement that is wholly "outside the cause," there is clear appellate authority that trial courts should broadly construe what constitutes an out-of-court communication relating to pending or contemplated litigation. Oguagha v. Ropes & Gray, supra; Sexter & Warmflash, P.C. v. Margrave, 38 A.D.3d 163 (1st Dept 2007). Consequently, any statement is subject to this absolute privilege if it may be considered pertinent to anything "possibly or plausibly" relevant, "with the barest rationality" to litigation. Martirano v. Frost, 25 NY2d 505 (1969); Oguagha v. Ropes & Gray, supra; Joseph v. Larry Dorman, P.C., 177 AD2d 618, 619 (2nd dept. 1991). The absolute privilege has been applied to statements by non-attorneys and the parties themselves. Joseph v. Larry Dorman, P.C., *supra.*

Defendants have proved that the statements plaintiff complains of are out of

court statements made in connection with, or related to, the prior action, even if made immediately before, or while, the summons and complaint were being served on Dr. Smyth. The statements are, therefore, absolutely privileged, even if defamatory. Rosenberg v. Met life, Inc., *supra*; Oguagha v. Ropes & Gray, *supra*.

Although defendants have presented several alternative defenses, including an argument that the statements are not defamatory *per se*, the court does not have to decide whether they are defamatory *per se*. Even if the statements are defamatory, they cannot serve as the basis for the imposition of liability in a defamation action because they are absolutely privileged. Rosenberg v. Met life, Inc., *supra*; Oguagha v. Ropes & Gray, *supra*. Therefore, defendants' motion to dismiss this action for failure to state a cause of action is granted, and the complaint is dismissed.

Conclusion

It is hereby

ORDERED that defendants' preanswer motion to dismiss this action is hereby granted for the reasons stated; and it is further

ORDERED that the clerk shall enter judgment in favor of defendants against plaintiff; and it is further

ORDERED that any relief requested that has not been addressed has nonetheless been considered by the court and is hereby expressly denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
May 30, 2008

So Ordered:

Hon. Judith J. Gische, J.S.C.