

Depalo v Lapin

2009 NY Slip Op 31443(U)

June 30, 2009

Supreme Court, New York County

Docket Number: 114656/2008

Judge: Joan A. Madden

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

PRESENT: Hon. Judge A. M. ...

PART 1

Index Number: 114656/2008

DEPALO, ROBERT

VS.

LAPIN, BENJAMIN

SEQUENCE NUMBER: # 001

DISMISS COMPLAINT

Justice

INDEX NO.

114656-08

MOTION DATE

MOTION SEQ. NO.

#001

MOTION CAL. NO.

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 AMPLIFIED Memorandum Decision + order.

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

FILED JUL 02 2009 COUNTY CLERK'S OFFICE NEW YORK

Dated:

June 30 2009

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X INDEX NO. 114656/2008

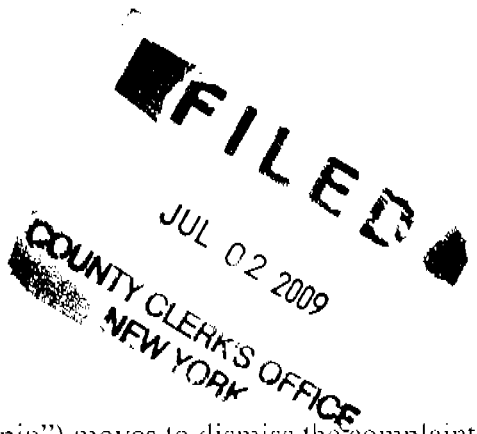
ROBERT DEPALO, RONALD HEINMAN,
GARY SCHOWNWALD, GEORGE D'AVANZO,
and ROBERT FALLAH,

Plaintiffs,

--against--

BENJAMIN LAPIN,

Defendant.



-----X
JOAN A. MADDEN, J.:

In this defamation action, defendant, Benjamin Lapin ("Lapin") moves to dismiss the complaint on the grounds that the statements at issue are subject to an absolute privilege. Plaintiffs oppose the motion, which is granted for the reasons below.

Background

Lapin is a non-lawyer who is employed by Stock Market Recovery Consultants, Inc., which represents customers of securities broker/dealers in connection with claims to recover for investment losses in arbitration proceedings before Financial Industry Regulatory Authority (FINRA). On or about June 20, 2008, Lapin filed an Statement of Claim with FINRA on behalf of claimant Lenora Palermo ("Palermo") and against Arjent Ltd. On or about August 7, 2008, Argent Services, LLC filed a petition in the Supreme Court, New York County, to stay the arbitration proceeding alleging that Palermo's accounts were maintained by a separate entity, named Arjent Ltd.¹

¹The record, however, contains a report from FINRA indicating that both Arjent Ltd. and Argent Services LLC are 100% owned by Arjent Services Limited

The stay petition was granted on default, and Palermo amended the petition to name Argent Services LLC and Arjent Services Limited and Plaintiffs, who are principals of these entities, as respondents in the arbitration. The complaint in this action alleges that Lapin filed the Amended Statement of Claim in retaliation of the stay petition and that the Amended Statement of Claim contained “false and libelous statements” concerning Plaintiffs’ handling of Palermo’s investments, and that these statements have jeopardized Plaintiffs’ personal and professional reputations.

Specifically, the complaint alleges that the Amended Statement of claim asserted that Plaintiffs, who are high-level executives of the firm from whom Palermo had allegedly received financial services, committed direct personal fraud against Palermo, even though documents in Lapin’s possession demonstrated that Plaintiffs never personally communicated with Palermo or managed her account. Plaintiffs further allege that the Amended Statement of Claim did not contain allegations establishing a chain of command and participation in the conduct that would allow the fraud of any low-level account executive to be legally imputed to Plaintiffs. Moreover, Plaintiffs allege that the statements in the Amended Statement of Claim were made with malicious intent, knowledge that they were false, or at the very least, that the statements were made with reckless disregard for their probable falsity.

Lapin now moves to dismiss the complaint on the grounds that the absolute privilege applies to shield him from liability based on the allegations contained in the Amended Statement of Claim.

Plaintiffs oppose the motion, arguing that absolute privilege does not extend to a non-lawyer purporting to represent a client for compensation in an arbitration proceeding. Plaintiffs maintain that extending the privilege to protect non-lawyers like Lapin would result in serious detriment to the public because lawyers are subject to professional disciplinary authorities, and without these constraints lay representatives are free to inflict with impunity any damage they chose. In the alternative, Plaintiffs

assert that the statements at issue should be afforded qualified immunity and thus whether they are subject to such immunity must be determined after discovery is complete.

Discussion

The issue on this motion is whether absolute immunity applies to the allegations contained in the Amended Statement of Claim filed during an arbitration proceeding by Lapin, who is a non-lawyer. “The Court of Appeals long ago established that a statement made in the course of judicial proceedings is absolutely privileged if it is at all pertinent to the litigation.” Mosesson v. The Jacob D. Fuchsberg Law Firm, 257 AD2d 381, 382 (1st Dept), lv app denied, 93 NY2d 808 (1999)(citing Younjans v. Smith, 153 NY 214, 219 [1897]). “In judicial proceedings, the protected participants include the Judge, the jurors, the attorneys, the parties and the witnesses.” Park Knoll Assocs. v. Schmidt, 59 NY2d 205, 209 (1983). The absolute privilege rule is “complete irrespective of the motive with which the statements are made.” Mosesson v. The Jacob Fuchsberg Law Firm, supra at 382-383; Sexter & Warmflash. P.C. v. Margrabe, 38 AD3d 163, 170-171 (1st Dept 2007)(citations omitted). “[A]ll that is required for a statement to be privileged is a minimal possibility of pertinence or the simplest rationality.” Id. Pertinency is a question of law for the court, and any doubt should be resolved in favor of relevancy and pertinency. Id.

Moreover, the absolute immunity afforded to statements made in connection with judicial proceedings. also applies to the statements made in the course of an arbitration proceeding, like the one at issue here. Lacher v. Engel, 33 A.D.3d 10, 15 (1st Dept 2006); Rolon v. Henneman, 389 F. Supp.2d 517, 520 (S.D.N.Y 2005), aff’d 517 F3d 140 (2008).. Accordingly, the remaining issue is whether absolute immunity should attach to the Amended Statement of Claim since Lapin is a non-lawyer. In support of their argument that immunity should not attach, Plaintiffs’ rely on The Florida Bar Re

Advisory Opinion on Non-lawyer Representation in Securities Arbitration, 696 So. 2d 1178 (Sup. Ct. Fla.1997) in which the Supreme Court of Florida enjoined the activities of non-lawyer securities arbitration representatives, and noted that no federal or state rules or regulations specifically authorize these non-lawyer representatives to engage in such activities. In addition, plaintiffs argue that since the shield of absolute immunity in judicial proceedings is for the benefit of the public and designed to promote the administration of justice and only incidentally for the protection of the participants (Park Knoll Assoc. v. Schmidt, 59 NY2d at 209), it should not be used to protect the statements of non-lawyers whose representation is contrary to New York's public policy against the unauthorized practice of law and contrary to the public interest.

However, this argument ignores that FINRA regulations specifically permit parties to be represented by someone who is not an attorney unless "state law prohibits such representation." See FINRA Code of Procedure Rule 12208. Moreover, New York has no prohibition which would have prevented Lapin from representing an individual in a FINRA arbitration. See Williamson v. John D. Quinn Construction, 537 F.Supp. 613, 616 (S.D.N.Y. 1982)(noting that under New York law representation of a party in an arbitration proceeding by a non-lawyer does not constitute the unauthorized practice of law); Prudential Equity Group, LLC v. Ajamie, 538 F. Supp2d 605 (SD NY 2008)(participation an arbitration by non-New York lawyer is not the unauthorized practice of law). Thus, it cannot be said that Lapin's role as non-lawyer representative of Palmero in the arbitration proceeding violated New York public policy such that the absolute immunity should not attach to the allegations in the Amended Statement of Claim.

Furthermore, since Lapin made the statements at issue in the Amended Statement of Claim as a legitimate representative of a claimant to the arbitration proceeding, such statements should be afforded

absolute immunity even though he is a non-lawyer. Park Knoll Assoc. v. Schmidt 59 NY2d 205, 209-210 (absolute immunity depends on role as participant in proceeding rather than status as a judge or attorney)²; Gondol v. New York Stock Exchange 27 AD3d 271, 272 (1st Dept 2006) (Plaintiff's claims were "barred by the absolute immunity enjoyed by arbitrators, lawyers, and other participants in the arbitration").

As absolute immunity applies, there is no basis for finding that the statements in the Amended Statement of Claim are subject to qualified immunity. Furthermore, the cases relied upon by Plaintiffs are not controlling here (See Leberman v. Gelstein, 80 N.Y.2d 429 (1992) and Toker v. Pollak 44 N.Y.2d 211 (1978))³ since they did not concern statements made by participants in a judicial proceeding or quasi judicial proceeding. Therefore, as the statements made in the Amended Statement of Claim that are the subject of this action are protected by an absolute privilege, the complaint must be dismissed.

Conclusion

In view of the above, it is

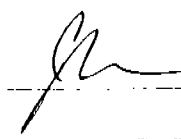
In Park Knoll Assoc. v. Schmidt, the court held that defendant, the President of a tenant's association, who assisted as a volunteer in preparing tenants' applications to the State Division of Housing and Community Renewal ("DHCR") alleging rent overcharges by the landlord was not protected by absolute immunity since he was not a participant in the proceedings before DHCR. In contrast, as the official representative of a claimant in an arbitration proceeding before FINRA, the statements made by Lapin in the Amended Statement of Claim are entitled to absolute immunity.

In Leberman the plaintiff was the landlord of a building where disputes between the landlord and tenants had been prevalent for about a decade. The court granted qualified immunity rather than absolute immunity to the statements made by the defendant, who was a tenant in the building, to another tenant because both tenants were members of an association formed to protect the tenants' interests, and therefore had a right to communicate suspicions about the landlords illegal behaviors. In Toker, the court held that qualified immunity applied to the defendant's statements made to the District Attorney because a qualified privilege is all that is necessary to encourage citizens to come forth with information concerning criminal activity.

ORDERED that the motion by defendant Benjamin Lapin ("Lapin") to dismiss the complaint is granted, and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the complaint.

Dated: June 30 2009



J. S. C.

FILED
JUL 02 2009
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