SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 5
NASSAU COUNTY

KEVIN FINN, ESQ.,

Plaintiff,

-against-

MOTION SEQ. NO.:001
MOTION DATE:5/4/10

SAMUEL DUNSTON, REGINA FELTON, ESQ. and FELTON & ASSOCIATES,

INDEX NO.: 181/10

Defendants.

SAMUEL DUNSTON, JESUS IS THE WAY MINISTRIES, INC., REGINA FELTON, ESQ. and FELTON & ASSOCIATES

Third Party Plaintiffs,

-against-

KEVIN FINN, ESQ., FINN & FINN, JEFFREY HERZBERG, ESQ., and ZINKER & HERZBERG, LLP,

Third Party Defendants.

The following papers having been read on the motion (numbered 1-4):

Notice of Motion.....1
Notice of Cross Motion.....2
Reply Affirmation.....3
Memorandum of Law.....4

Motion by plaintiff and third-party defendants for summary judgment pursuant to CPLR 3212 on plaintiff's defamation claim in the complaint, and dismissal pursuant to CPLR 3211 of the third-party complaint, is **denied** in part

and **granted** in part as set forth below.

Cross-motion by defendants/third-party plaintiffs for an order consolidating this action with the pending interpleader action, *Finn v Church for the Art of Living, Inc.*, Nassau Supreme Court, under Index #002560-10, is **denied** as moot.

The background of this action involves an aborted sale of property, which is being litigated in the interpleader action under Index #002560-10. The seller was Church for the Art of Living, Inc ("the Church"). The buyer was Jesus is the Way Ministries, Inc. ("Ministries"). Plaintiff herein represented the Church in that transaction, and holds the downpayment of $50,000 in his escrow account.

After the closing did not take place, the Church filed a petition in bankruptcy. Plaintiff filed a motion for relief from the automatic bankruptcy stay in connection with his claim for payment for his services in the amount of approximately $26,000. Apparently this motion was converted to an adversary proceeding.

In this action, plaintiff alleges a claim for defamation based upon statements made in papers submitted in the bankruptcy proceeding. Defendant Samuel Dunston, the Chairman of the Trustee Board of Ministries, stated in an affidavit that he was informed by Dr. Alfred Miller, the Founder and President of the Church, that Dr. Miller was dissatisfied with plaintiff's services, and that the Church filed a complaint with the New York State Grievance Committee and notified the Attorney General's Office of the inadequacy of plaintiff's representation. Plaintiff counters that no complaints were filed against him at the time that defendant Dunston's statements were made.

Defendant Regina Felton, and defendant Felton & Associates are the attorney, and law firm, respectively, that represent Ministries, the unsuccessful buyer that seeks the return of its downpayment. In papers in the bankruptcy proceeding Attorney Felton wrote that plaintiff had been discharged for cause from representing the Church. These defendants argue that plaintiff held the downpayment as a fiduciary, and that he should not be attempting to recoup his

fees from fiduciary funds.

Plaintiff denies that he was discharged for cause, and claims that Dr. Miller improperly usurped the authority of the Board of Trustees of the Church. Plaintiff alleges that his dispute with Dr. Miller arose when Dr. Miller sought the surplus net proceeds from the sale of the property to be made payable to him in his individual capacity, rather than to the Church (complaint, par. 13).

Ultimately the bankruptcy proceeding was dismissed. Plaintiff insists that defendants' false representations to the Bankruptcy Court impugned his professionalism, his character, and his integrity. At this time plaintiff seeks summary judgment on his defamation claim. Defendants argue that there can be no defamation based upon the absolute privilege accorded statements uttered in the course of judicial proceedings.

Summary judgment is the procedural equivalent of a trial [*S.J.Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 (1974)]. The function of the court in deciding a motion for summary judgment is to determine if triable issues of fact exist [*Matter of Suffolk County Dept. of Social Services on behalf of Michael V. v James M.*, 83 NY2d 178, 182 (1994)]. A motion for summary judgment permits the court to award summary judgment where appropriate to a non-moving party [CPLR 3212(b); *Merritt Hill Vineyards, Inc. v Windy Heights Vineyards, Inc.*, 61 NY2d 106, 110-112 (1984)].

Statements made in the course of a judicial proceeding are absolutely privileged if, by any view, or under any circumstances, the statements may be considered pertinent to the litigation [*Rosenberg v MetLife Inc.*, 8 NY3d 359, 365 (2007); *Martirano v Frost*, 25 NY2d 505 (1969); *Youmans v Smith*, 153 NY 214 (1897); *Goldfeder v Weiss*, 250 AD2d 731 (2nd Dept. 1998)]. The test of pertinence is extremely liberal [*Pomerance v McTiernan*, 51 AD3d 526, 528 (1st Dept. 2008); *Solomon v Larivey*, 49 AD3d 1274 (4th Dept. 2008); *Sexter & Warmflash, PC v Margrabe*, 38 AD3d 163, 172-173 (1st Dept. 2007)]. Any doubts are to be resolved in favor of pertinence [*Sexter & Warmflash, PC*]; the privilege is available even

when the statement is made with malice or bad faith [*Rabiea v Stein*, 69 AD3d 700 (2nd Dept. 2010); see *Pomerance* and *Sexter & Warmflash, PC*].

Whether true or not, the allegation of discharge for cause is certainly pertinent to plaintiff's claim for payment of his fees because an attorney discharged for cause has no right to payment of his fees, regardless of the existence of a retainer [*Campagnola v Mulholland, Minion & Roe,* 76 NY2d 38, 44 (1990); *Coccia v Liotti,* 70 AD3d 747 (2nd Dept. 2010)]. Complaints about services rendered are certainly pertinent to an alleged discharge for cause. Under these circumstances, pertinence is easily established and the statements at issue by defendants are clearly protected by absolute privilege.

Plaintiff's attempt to negate the absolute privilege by reliance upon Judiciary Law §90(10) is unavailing. This statute provides for the confidentiality of all records and documents relating to attorney disciplinary matters unless the disciplinary charges are sustained, or the justices of the appellate division permit disclosure [*Johnson Newspaper Corp. v Melino*, 77 NY2d 1, 10 (1990)]. The cases hereunder are cases where the disclosure is sought by the news media [*Johnson Newspaper Corp.],* or where sealing [*Silverman v City of New York*, 171 AD2d 414 (1st Dept. 1991)] or unsealing of records [*In re Aretakis*, 16 AD3d 899 (3rd Dept. 2005)] is sought by the attorney involved. Review of the case law construing this statute reveals not one single action where the accused attorney wields the statute as a sword, rather than as a shield. In short, there is absolutely no legal basis for the Court to find that a violation of Judiciary Law §90(10) "trump(s) or prime(s) the absolute privilege rule" as suggested by plaintiff.

Based on the foregoing, plaintiff has no viable cause of action against these defendants for defamation, and accordingly, the complaint must be dismissed.

The Court now turns to the third-party complaint, wherein four causes of action are set forth, namely, return of the downpayment to the Ministries, tortious interference with the rights of third-party plaintiffs and breach of fiduciary duty, a declaration that the complaint for defamation was frivolous pursuant to 22

NYCRR 130-1.1, and abuse of process. The third-party defendants are plaintiff, his law firm, his attorney, and his attorney's law firm; they seek dismissal of the third-party complaint pursuant to CPLR 3211.

On a motion to dismiss pursuant to CPLR 3211, the facts as alleged must be accepted as true, the pleader must be accorded the benefit of every favorable inference, and the court must determine only whether the facts as alleged fit within any cognizable theory [*Arnav Indus, Inc Retirement Trust v Brown Raysman, Millstein, Felder & Steiner, LLP*, 96 NY2d 300, 303 (2001)]. Where the ground for dismissal is 3211(a)(7), and evidentiary material is submitted, the criterion is whether the pleader has a cause of action, not whether it has stated one [*Leon v Martinez*, 84 NY2d 83, 87 (1994)].

In the first cause of action third-party plaintiffs, Dunston, Felton, and the Felton law firm seek return of the downpayment in the aborted real estate transaction. However the downpayment was paid by Ministries. One generally does not have standing to assert claims on behalf of another [see *Caprer v Nussbaum*, 36 AD3d 176, 182 (2nd Dept. 2006)]. Dunston, Felton, and the Felton law firm have presented no basis for deviation from the general rule. Accordingly, these third-party plaintiffs do not have standing to pursue the relief sought in the first cause of action, which must consequently be dismissed.

The same is true of the second cause of action, wherein the third-party plaintiffs complain that the Church allegedly directed plaintiff to return the monies to Ministries, and plaintiff refused. Neither the Church nor Ministries are before this Court. Furthermore, any fiduciary duty that plaintiff may have as an escrow agent would be a duty to Ministries and/or the Church. Under these circumstances, the third-party plaintiffs lack capacity or standing to pursue the second cause of action, which also must be dismissed.

New York does not recognize a separate cause of action to impose sanctions [*Greco v Christoffersen*, 70 AD3d 769, 771 (2nd Dept. 2010)], so the third cause of action must be dismissed.

The commencement of a lawsuit cannot serve as the basis for a cause of action alleging abuse of process because the institution of a civil action by summons and complaint is not legally considered process capable of being abused [*Curiano v Suozzi*, 63 NY2d 113, 116 (1984); *Greco* at 770]. A malicious motive alone does not give rise to a cause of action for abuse of process [*Curiano* at 117]. On this record, the fourth cause of action fails to state a claim for relief.

Based on the foregoing, the request by third-party defendants for dismissal of the third-party complaint is **granted.**

As both the complaint and the third-party complaint have been dismissed, the cross-motion by defendants/third-party plaintiffs must be **denied** as moot.

This Constitutes the Order of the Court.

Dated: July 12, 2010 ENTER:

J.S.C.

ENTERED
AUG 13 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE