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SHORT FORM ORDER

INDEX No. 10-307

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 4-12-10
ADJ. DATE 5-28-10
Mot. Seq. # 001 - MG; CASEDISP

RUSSELL J. VON-FRANK,	:	FALLON & FALLON, LLP
	:	Attorney for Plaintiff
Plaintiff,	:	53 Main Street, Suite 1, P.O. Box 423
	:	Sayville, New York 11782
- against -	:	
	:	L'ABBATE, BALKAN, COLAVITA &
SAUL D. ZABELL,	:	CONTINI, L.L.P.
	:	Attorney for Defendant
Defendant.	:	1001 Franklin Avenue
		Garden City, New York 11530

Upon the following papers numbered 1 to 13 read on this motion to dismiss ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 6 ; ~~Notice of Cross Motion and supporting papers~~ ___; Answering Affidavits and supporting papers 7 - 8 ; ~~Replying Affidavits and supporting papers~~ ___; Other memorandum of law 9 - 10, 11, 12 - 13 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendant for an order pursuant to CPLR 3211 (a) (7) dismissing the complaint is granted.

This action has as its genesis a dispute between the plaintiff and his former employer. The defendant was acting as the attorney for the former employer, which was seeking to recover certain monies from the plaintiff. The plaintiff claims, inter alia, that the defendant sent two defamatory e-mails to his attorney accusing the plaintiff of embezzling funds from the former employer. The complaint alleges four causes of action against the defendant, including two causes of action for libel per se, a cause of action for abuse of process, and a cause of action for intentional infliction of emotional distress.

The plaintiff had been employed as an insurance agent by Executive Insurance Brokerage & Financial Services, Inc. (Executive) until his termination on or about January 12, 2009. The complaint alleges that Executive claimed that the plaintiff had embezzled Executive funds and that the plaintiff "has consistently denied these charges." The complaint indicates that the plaintiff asked his attorney, Douglas E. Rowe, Esq. (Rowe), to help him retrieve his personal property after his termination. The defendant, acting as the attorney for Executive, sent an e-mail to Rowe on January 26, 2009, which

stated "your client has not taken any steps to repay the monies he has absconded with." It is alleged that the defendant knew that the claim of theft was only an allegation, which had not been proven, and that it was published with reckless disregard for the truth. The similarly based second cause of action involves a second e-mail sent to Rowe by the defendant on February 5, 2009, which stated "we have assumed that your client has no intention on (sic) voluntarily repaying either the embezzled funds or the acknowledged overdraw of funds."

Pursuant to CPLR 3211(a)(7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs (***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (***Guggenheimer v Ginzburg***, 43 NY2d 268, 401 NYS2d 182 [1977]). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (***Matter of Board of Educ., Lakeland Cent. School Dist. of Shrub Oak v State Educ. Dept.***, 116 AD2d 939, 498 NYS2d 516 [3d Dept 1986]). Only affidavits submitted by the plaintiff in support of the causes of action may be considered on a motion of this nature (***Rovello v Orofino Realty Co.***, 40 NY2d 633, 389 NYS2d 314 [1976]). In addition, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (***Leon v. Martinez***, *supra*; ***Thomas McGee v City of Rensselaer***, 174 Misc2d 491, 663 NYS2d 949 [Sup Ct, Rensselaer County 1997]). Furthermore on a motion to dismiss, a pleading will be liberally construed and such motion will not be granted unless the moving papers conclusively establish that no cause of action exists (***Chan Ming v Chui Pak Hoi***, 163 AD2d 268, 558 NYS2d 546 [1st Dept 1990]).

A review of the complaint establishes that plaintiff's defamation claim is not viable because the statements contained in the subject e-mails are absolutely privileged. New York courts have consistently held that a communication of the kind at issue here, between attorneys for the parties and regarding potential litigation, enjoys the protection of the absolute privilege for judicial proceedings (***Sexter & Warmflash, P.C. v Margrabe***, 38 AD3d 163, 828 NYS2d 315 [1st Dept 2007]; *see also* ***Oguagha v Ropes & Gray***, 38 AD3d 298, 830 NYS2d 660 [1st Dept 2007]; ***Caplan v Winslett***, 218 AD2d 148, 637 NYS2d 967 [1st Dept 1996]). A statement made by counsel during a judicial proceeding, even if made with malice or bad faith, is protected by absolute privilege as long as the statement may, in some way, be considered pertinent to the litigation (***Rabeia v Stein***, 69 AD3d 700, 893 NYS2d 224 [2d Dept 2010]). The privilege is based on a policy that attorneys should be given maximum freedom in the quest for justice for their clients, and that discussions between attorneys representing opposing parties tends to conserve judicial and client resources (***Caplan v Winslett***, *supra*). In that light, the rule that an absolute privilege attaches to pertinent written or oral statements in judicial proceedings is liberally construed to include any statement that may possibly become material or pertinent, and any doubt is resolved in favor of upholding the privilege (***Impallomeni v Meiselman, Farber, Packman & Eberz, P.C.***, 272 AD2d 579, 708 NYS2d 549 [2d Dept 2000]; ***Mosesson v Jacob D. Fuchsberg Law Firm***, 257 AD2d 381, 683 NYS2d 88 [1st Dept 1999]).

Accordingly, the first and second causes of action for libel per se are dismissed.

The plaintiff's third cause of action alleges that the defendant 1) served subpoenas without legal authority on third parties, including the plaintiff's bank, and 2) sent a letter to the State Insurance Department accusing the plaintiff of embezzlement and fraud and naming a friend and/or his business as being complicit in the fraud and embezzlement. The complaint further alleges that the defendant's "objective was to achieve the unlawful collateral benefit of harming the business reputation of the plaintiff and to cause [the friend or his business] not to enter into a business relationship with the plaintiff."

To establish a claim for abuse of process, a plaintiff must prove three essential elements, to wit, regularly-issued process either civil or criminal, an intent to do harm without excuse or justification, and the use of process in a perverted manner to obtain a collateral objective (*see* ***Curiano v Suozzi***, 63 NY2d 113, 480 NYS2d 466 [1984]; ***Marks v Marks***, 113 AD2d 744, 493 NYS2d 206 [2d Dept 1985]). However, where the complaint fails to allege some irregular activity in the use of judicial process for a purpose not sanctioned by law, or that the process unlawfully interfered with the plaintiff's property, an action to recover damages based upon the alleged abuse of process must fail (*see* ***Curiano v Suozzi***, *supra*; ***Williams v Williams***, 23 NY2d 592, 298 NYS2d 473 [1969]; ***Mago LLC v Singh***, 47 AD3d 772, 851 NYS2d 593 [2d Dept 2008]; ***Panish v Steinberg***, 32 AD3d 383, 819 NYS2d 549 [2d Dept 2006]; ***Reisman v Kerry Lutz, P.C.***, 6 AD3d 418, 774 NYS2d 345 [2d Dept 2004]). Moreover, an action for damages against an attorney by a non-client third-party generally will not lie unless the attorney has improperly abused his or her authority, or where he or she has committed fraud or collusion, or engaged in some malicious or tortious conduct (*see* ***AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.***, 5 NY3d 582, 808 NYS2d 573 [2005]; ***Mokay v Mokay***, 67 AD3d 1210, 889 NYS2d 291 [3d Dept 2009]).

A review of the complaint establishes that plaintiff's claim for abuse of process based on the defendant's issuance of several subpoenas is not viable because it fails to allege any facts which indicate how the subpoenas were improperly used after their issuance. "The gist of the action for abuse of process lies in the improper use of process after it is issued" (***Dean v Kochendorfer***, 237 NY 384 [1924]). In his pleading, the plaintiff has failed to set forth how process was abused after it had been issued. The issuance of subpoenas for their proper purpose of obtaining documents and/or testimony does not constitute abuse of process even if the defendant acted with wrongful motive (***Curiano v Suozzi***, *supra*; ***Anderson v Pegalis***, 150 AD2d 315, 540 NYS2d 843 [2d Dept 1989]; ***Miller v Stern***, 262 AD 5, 27 NYS2d 374 [1st Dept 1941]). "If the process is employed from a bad or ulterior motive, the gist of the wrong is to be found in the uses which the party procuring the process to issue attempts to put it. If he is content to use the particular machinery of the law for the immediate purpose for which it was intended, he is not ordinarily liable, notwithstanding a vicious or vindictive motive. But the moment he attempts to attain some collateral objective, outside the scope of the operation of the process employed, a tort has been consummated" (***Hauser v Bartow***, 273 NY 370 [1937]).

There is an obvious deficiency in the pleading as it relates to the defendant's issuance of subpoenas seeking information and documents regarding the plaintiff. However, the plaintiff also

alleges that the defendant is liable for abuse of process based on a letter that he sent to the New York State Insurance Department on May 21, 2009. The complaint alleges the letter was sent as an attempt to destroy the plaintiff's reputation and to improperly restrain the plaintiff's right to earn a living. A copy of the letter is attached to the complaint as Exhibit C. A review of the letter reveals that it sets forth the facts of the dispute between the plaintiff and his former employer, the defendant's client, relative to that agency's investigation into the former employer's claims that the plaintiff acted improperly. In addition, the letter requests that the agency consider possible discipline of the plaintiff's friend and/or his business for improperly aiding the plaintiff in soliciting Executive clients.

It has been held that a communication to a licencing agency relative to its licensing function is entitled to an absolute privilege (***Julien J. Studley, Inc. v Lefrak***, 50 AD2d 162, 376 NYS2d 200 [2d Dept 1975] affd 41 NY2d 881, 393 NYS2d 980 [1977]; ***Poplawski v Metropolitan Prop. & Cas. Ins. Co.***, 262 AD2d 543, 692 NYS2d 438 [2d Dept 1999]). In addition, the filing of such a communication, even for an ulterior purpose, does not, without more, constitute a legally sufficient claim for abuse of process (***Julien J. Studley, Inc. v Lefrak***, *supra*). In fact, it has been held that such communications do not amount to "process" at all. A communication alleging misdeeds by an individual and merely requesting that the agency take whatever steps it deems appropriate cannot be regarded as process for it is not a "direction or demand that the person to whom it is directed perform or refrain from the doing of some prescribed act" (***Julien J. Studley, Inc. v Lefrak***, 41 NY2d at 884, 393 NYS2d at 982 [1977]).

Accordingly, the plaintiff's third cause of action is dismissed.

The plaintiff's fourth cause of action for intentional infliction of emotional distress is dismissed, as legally insufficient. Liability arises for an intentional inflection of emotional distress only when a defendant's conduct is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency tolerated, as to be regarded as atrocious and utterly intolerable in a civilized community" (***Murphy v American Home Products Corp.***, 58 NY2d 293, 461 NYS2d 232 [1983]; *see* ***Howell v New York Post Co.***, 81 NY2d 115, 596 NYS2d 350 [1993]). There are four elements: [1] extreme and outrageous conduct; [2] intent to cause or disregard of a substantial probability of causing, severe emotional distress; [3] a causal connection between the conduct and the injury; and [4] severe emotional distress (*id.*). As a matter of public policy, the tort of intentional inflection of emotional distress does not lie against persons acting in their official capacity, even if they acted with malicious intent (*id.*). The plaintiff has failed to allege any facts that the defendant's actions were purposeful, extreme or outrageous.

Accordingly, the plaintiff's complaint is dismissed in its entirety.

Dated: 7/9/10

THOMAS F. WHELAN, J.S.C.