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

PRESENT: Hon Joan A. Madden Justice

PART 11

Index Number : 401347/2010

COYLE, TIMOTHY

VS.

TIPTON, LAURIE

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n 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 annexed memorandum Decision + Order.

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

FILED

JAN 31 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: January 24, 2011

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

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

----------X

TIMOTHY COYLE,

Plaintiff,

INDEX NO. 401347/10

-against-

LAURIE TIPTON,

Defendant

----------X

JOAN A. MADDEN, J.:

In this action seeking damages for defamation, defendant, Laurie Tipton (hereinafter "Tipton"), moves for summary judgment dismissing the complaint on the ground that the statements that are the subject of the complaint are absolutely privileged as they were made in connection with a judicial proceeding. Tipton also moves for summary judgment on her counterclaim for sanctions, costs and attorney's fees pursuant to CPLR 8303-a. Plaintiff, Timothy Coyle (hereinafter "Coyle"), who is pro se, opposes the motion and cross moves for summary judgment on the complaint and dismissing the counterclaim.

Background

This action arises out of a proceeding brought pursuant to Article 81 of the Mental Hygiene Law for the appointment of a guardian of the person and property of Tipton's uncle, Lawrence P. Fraiberg, who at the time of the proceeding was 87 years-old. Coyle worked as a personal assistant/geriatric care manager for Mr. Fraiberg from October, 2008 until June 9, 2009.

On February 18, 2009, Eugene Taylor, who was previously Mr. Fraiberg's personal assistant, commenced an Article 81 proceeding in this court, alleging the inability of Mr. Fraiberg to provide for his personal needs and property management.[1] After a hearing held on May 27, 2009, Justice Laura Visitacion-Lewis issued an interim order dated May 29, 2009, that

[1] The Article 81 petition alleges that a guardian is necessary due to, inter alia, Mr. Fraiberg's physical and mental health and the existence of alleged superseding instruments creating competing documents giving power-of-attorney and a competing health care proxy.

found that Mr. Fraiberg was an incapacitated person and directed that Paul D. Siegfried be appointed the guardian for Mr. Fraiberg's person and property. Justice Visitacion-Lewis noted in the interim order that it had "come to the court's attention that Mr. Fraiberg geriatric care manager, Tim Coyle, intends to immediately cease serving in such capacity." Consequently, the court appointed Mr. Siegfried as temporary guardian pending the issuance of his commission and ordered him to immediately exercise his power to retain Gary Elias, who is a professional geriatric care manager, as a substitute for Coyle. The interim order further provided that Mr. Siegfried was to consult Tipton and Mr. Fraiberg's other niece "regarding all major decisions with respect to Mr. Fraiberg's person."

Annexed to the interim order is a May 27, 2009 Settlement Agreement ("the Settlement Agreement") agreeing, inter alia, to the appointment for Mr. Fraiberg of a guardian of the person and property. The Settlement Agreement is executed by counsel for each of Mr. Taylor, Sean Coyle, who is Mr. Fraiberg's physician and Coyle's brother, and the University of Denver. The Settlement Agreement states that it would be provided to the "other interested parties," specifically Tipton, her sister and the appointed counsel for Mr. Fraiberg, for their review at least two days prior to the hearing.

On June 9, 2009, Mr. Siegfried submitted to Justice Visitacion-Lewis his first Summary Report and Recommendations of Temporary Guardian. In the "Investigation and Actions" part of the report, Mr. Siegfried alleges that on June 2, 2009, he was advised (by someone not identified in the report) that Coyle visited Mr. Fraiberg's apartment on the evening of June 1, 2009, and that a few days later, on either June 5 or June 6, he was advised by Tipton that Coyle has been observed removing documents from Mr. Fraiberg's apartment by a night duty aide on the evening of June 1, 2009.

On or about June 24, 2009, Coyle commenced this action[2] seeking $9 million in actual and punitive damages, asserting claims of slander and slander per se against Tipton in connection with her statements made in the Summary Report and Recommendations that he removed documents from Mr. Fraiberg apartment.

Specifically, the complaint bases its claims on the following statements in the Summary Report and Recommendations written by Mr. Siegfried:[3]

> On June 4, I received from Tim Coyle a letter/statement claiming $42,307.69 for services rendered and reimbursement due of $704.40.
>
> With respect to Mr. Coyle, I was advised on June 2 at the time the locks were changed that he had visited the apartment the prior evening, found the door chained and, after gaining access, removed the door chain. (I replaced the chain on June 2) When I gained access to the locked closets and the two filing cabinets I found them virtually empty (the file cabinet completely empty), without a single financial record or document in them. Moreover, I found no financial records elsewhere in the apartment at that time.
>
> Ms Tipton orally advised me on either June 5 or June 6 that she had been informed by the June 1 night duty aide that he had observed Mr. Coyle removing documents that same evening.

Complaint, ¶ 10.

The complaint further alleges that "Tipton made [these] false, malicious and defamatory statements to Paul Siegfried, Esq. with the intent of having [Coyle] fired from the employment of ...[Mr. Fraiberg]... Coyle was fired from the employment of [Mr. Fraiberg] by

[2] Coyle originally commenced this action in the Supreme Court, Suffolk County. By decision and order dated January 29, 2010, Justice Melvyn Tanenbaum granted Tipton's motion to change the venue of this action from the Supreme Court of Suffolk County to this court

[3] The Summary Report and Recommendations is attached to the complaint

Paul Siegfried as a result of these false statements which were sent to Judge Laura Visitacion-Lewis...." Complaint ¶'s 11,12.

On October 9, 2009, Justice Visitacion-Lewis issued a final order and judgment appointing Mr. Siegfried permanent guardian of the person and property of Mr. Fraiberg. The final order and judgment refers to Tipton as an interested person in the first paragraph and provides that she would continue to be served with all legal papers and notices in the proceeding.

Tipton moves to dismiss the complaint, arguing that statements on which the complaint is based are protected by the judicial proceeding privilege. Additionally, Tipton argues that summary judgment should be granted on her counterclaim and Coyle should be sanctioned under CPLR 8303-a for bringing frivolous claims against her since this action was brought for the improper purpose of preventing Mr. Siegfried from performing his commission, including exercising his power to conduct investigations and gather information and to consult with Tipton and her sister.

Coyle opposes the motion and cross moves for a summary judgment on the complaint and to dismiss the counterclaim, asserting that Tipton's communication is not protected by the judicial proceeding privilege since she was not a party to the Article 81 proceeding. In support of this contention, Coyle points out that Tipton's was not a signatory to the Settlement Agreement, and is not a named party in the caption of the proceeding. Coyle also argues that the statements are not privileged as they were not made in court at a hearing, and were made subsequent to the completion of the proceeding which was resolved by the Settlement Agreement, and that the statements were not pertinent to the proceeding. Coyle further argues that Tipton's counterclaim must be dismissed as his claims are not frivolous.

In reply, Tipton argues that the privilege protects the statements since they were pertinent to the Article 81 proceeding and that pertinency is broadly defined in the context. Tipton also argues that Coyle misconstrues the term "parties" in an Article 81 proceeding so as to mean an individual or entity named in the caption. Tipton argues that she and her sister are Mr. Fraiberg's closest blood relatives and his only statutory distributees and thus had legal standing to take action on Mr. Fraiberg's behalf. She also points out that she received notice of every event in the proceeding and that she appeared on the May 27, 2009, hearing and was instructed by the judge to assist the temporary guardian. Tipton also points out that the Settlement Agreement indicates that it was to be supplied to her, her sister and Mr. Fraiberg's appointed counsel for their review.

In addition, Tipton asserts that the Article 81 proceeding was not concluded at the time of the May 27, 2009 settlement agreement, but only after the court issued the final order and judgment on October 9, 2009.

Discussion

"The Court of Appeals long ago established that a statement made in the course of judicial proceedings is privileged if it is at all pertinent to the litigation." Mosesson v. The Jacob D. Fuschberg Law Firm, 257 AD2d 381,382 (1st Dept), lv denied, 93 NY2d 808 (1999)(citing Youmans v. Smith, 153 NY 214,219 (1897)). "The privilege with respect to judicial proceedings exists because of the 'public interest in having proceedings of courts of justice public, not secret, for the great security thus given for the proper administration of justice.'" Branca v. Mayesh, 101 AD2d 872, 873 (2nd Dept), aff'd, 63 NY2d 994 (1984) (quoting Lee v. Brooklyn Union Pub. Co., 209 NY 245, 248 (1913)). The absolute privilege

rule is "complete irrespective of the motive with which the statements are made." Mosesson v. The Jacob Fuchsberg Law Firm, 257 AD2d at 382-383.

"The privilege is extended to all pertinent communications among the parties, counsel, witnesses and the court" regardless of "whether a statement was made in or out of court, was on or off the record, or was made orally or in writing."Sexter & Warmflash, P.C v. Margrabe, 38 AD3d 163, 170-171(1st Dept 2007)"[The statements] are granted this protection for the benefit of the public to promote the administration of justice" Park Knoll Assoc. v. Schmidt, 59 NY2d 205, 209 (1983). Thus, the "privilege attaches...to every step of the proceeding in question even if it preliminary and/or investigatory." Herzfeld & Stern v. Beck, 175 AD2d 689 (1st Dept 1991), appeal dismissed, 79 NY2d 914 (1992). "All that is required for a statement to be privileged is a minimal possibility of pertinence of the simplest rationality."Sexter & Warmflash, P.C. v. Margrabe, 38 AD3d at 170-171. (citations omitted). Pertinency is a question of law for the court, and any doubt should be resolved in favor of relevancy and pertinency. Id.

Here, the statements by Tipton to the guardian regarding the missing financial records belonging to Mr. Fraiberg were pertinent to the Article 81 proceeding in which the guardian was appointed to, inter alia, review and administer Mr. Fraiberg's financial affairs. Moreover, as noted above, in its interim order appointing Mr. Fraiberg as temporary guardian, the court directed Mr. Fraiberg to consult with Tipton, and the statements at issue were the result of such consultation. In addition, the Summary Report and Recommendations containing the statements was prepared by guardian for the court.

Moreover, contrary to Coyle's position, that privilege applies to statements made in or out of court. Sexter & Warmflash, P.C. v. Margrabe, 38 AD3d at 170-171. Furthermore, the record shows that the proceeding was still pending at the time of the statements were made.[4]

The remaining issue concerns whether Tipton has standing to assert the absolute privilege based on her role in the proceeding. As noted above, the privilege applies to statements made by various participants in judicial proceedings, including parties, counsel, witnesses and the court. Sexter & Warmflash, P.C. v. Margrabe, 38 AD3d at 170-171. As one court has written, the privilege extends "to all who take part in judicial proceedings, judge, attorney, counsel, printer, witness, litigant, a *right* to speak and to write, subject only to one limitation, that what is said or written bears upon the subject litigation." See Allan v. Allan Arts, Ltd. v. Rosenblum, 201 AD2d 136, 139 (2d Dept 1994), lv denied, 85 NY2d 921 (1995), cert denied, 516 US 914 (1995)(emphasis in the original)(internal citations omitted).

Under this standard, whether or not Tipton can be characterized as a formal party to the Article 81 proceeding need not be resolved since the record shows she was a participant in the proceeding by virtue of her status, along with her sister, as the closest remaining blood relatives of Mr. Fraiberg and the only statutory distributees, and that she was given notice of every aspect of the proceeding, and was directed by the court to consult with the guardian regarding all major decisions involving Mr. Fraiberg. At the very least, Tipton's role is equivalent to that of a witness whose input is sought by the court. See e.g., 55th Management Corp v. Goldman, 1 Misc3d 239 (Sup Ct NY Co. 2003)(tenant who made an out of court statement to the court evaluator during his investigation in connection with guardianship

[4]While the Settlement Agreement was entered into before the statements at issue were made, the Settlement Agreement did end the proceeding.

proceeding had standing to assert the privilege as her role was equivalent to a witness). Furthermore, as indicated above, the statements by Tipton were directly related to the proceeding since they concerned financial records of Mr. Fraiberg over which the guardian had been given responsibility in the proceeding.

Under these circumstances, the court finds that the statements which are the subject of the complaint are protected by the judicial proceeding privilege, and the complaint therefore must be dismissed.

The remaining issue concerns Tipton's counterclaim seeking sanctions pursuant to CPLR 8303-a which provides, *inter alia*, that a court may award costs and reasonable attorney's fees in tort actions in the event it is found that an action commenced by a plaintiff is frivolous. Of relevance here, to find that an action is frivolous, it must be found that the action was either brought "in bad faith...to harass or maliciously injure another " or was "without any reasonable basis in the law."

Here, while the court has found that the statements in the complaint were protected by the judicial proceedings privilege, it cannot be said that the complaint was so baseless as to warrant an award of sanctions, or that it was designed solely to harass Tipton. See Rittenhouse v. St. Regis Hotel Joint Venture, 180 AD2d 523 (1st Dept 1992). Accordingly, the request for sanctions is denied and the counterclaim is dismissed.

Conclusion

In view of the above, it is

ORDERED that the defendant Laurie Tipton's motion for summary judgment is dismissing the complaint is granted; and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the complaint in its entirety; and it is further

ORDERED that the Coyle's cross motion is granted to the extent of dismissing the counterclaim for sanctions.

DATED: January 24, 2011

J.S.C.