

**Pecile v Tital Capital Group, LLC**

2011 NY Slip Op 31943(U)

June 23, 2011

Sup Ct, NY County

Docket Number: 110490/10

Judge: Eileen A. Rakower

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

HON. EILEEN A. RAKOWER

PART 15

Index Number : 110490/2010

PECILE, DANIELLE

vs

TITAN CAPITAL GROUP

Sequence Number : 002

DISMISS

INDEX NO. 110490/10

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
1, 2	
3, 4	
5	

Cross-Motion:  Yes  No

**FILED**

Upon the foregoing papers, it is ordered that this motion

JUN 24 2011

NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: 6/23/11

  
HON. EILEEN A. RAKOWER

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X  
DANIELLE PECILE and CRISTINA CULICEA,

Plaintiffs,

**FILED**

Index No.  
110490/10

JUN 24 2011

Seq No.:  
002  
&003  
Decision  
and Order

- against -

NEW YORK  
COUNTY CLERK'S OFFICE

TITAN CAPITAL GROUP, LLC; MARC ABRAMS in his professional and personal capacity; RUSSELL ABRAMS in his professional and personal capacity; SANDRA ABRAMS; RONALD M. GREEN in his professional and personal capacity; BARRY ASEN in his professional and personal capacity; EPSTEIN BECKER & GREEN, P.C. and STEVE SKALICKY in his professional and personal capacity,  
Defendants.

-----X  
HON. EILEEN A. RAKOWER, J.S.C.

Plaintiffs bring this action for, among other things: discrimination, retaliation and defamation, as against defendants Titan Capital Group, LLC, Marc Abrams, Russell Abrams and Steve Skalicky<sup>1</sup> ("Titan defendants"). Sandra Abrams (Ms. Abrams"), Ronald M. Green, Barry Asen, and Epstein Becker & Green, P.C. ("EBG defendants")<sup>2</sup>, are alleged to have commenced a retaliatory lawsuit against plaintiffs. Ms. Abrams and the EBG defendants are also alleged to have aided and abetted the Titan defendants in their retaliatory and discriminatory practices.

Danielle Pecile and Cristina Culicea were employed at Titan Capital from

<sup>1</sup>The allegations against Mr. Skalicky only relate to the defamation claim.

<sup>2</sup>The EBG defendants formerly represented Ms. Abrams but withdrew as counsel in or about July 2010.

March 27, 2008 until April 8, 2009. Among other things, it is alleged that in December 2008, Russell gave Pecile two CDs and asked her to get photos developed at Duane Reade. The CDs contained several topless photographs of Russell's wife. Pecile claims she saw the photos when she inserted the CDs in the photo machine, and that "upon handing the photographs back to Russell Abrams, he smirked callously, taking pleasure in [her] obvious embarrassment and discomfort." Culicea claims that Russell did the same thing to her. Russell asserts that he never told plaintiffs what photographs were on the CDs or that they should view the photographs. Pecile concedes that she kept one of the CDs, albeit "inadvertently."

Both Pecile and Culicea voluntarily resigned from Titan, but allege they were "constructively discharged." Thereafter, Russell was notified by Pecile's attorney that he was in possession of the nude photographs, and Russell demanded they be returned. Pecile's counsel refused, asserting that the photographs were evidence of the sexual harassment. Pecile's attorney allegedly offered to return the photographs if Russell agreed to settle the claim for \$2.5 million.

The parties failed to reach a settlement, and Pecile and Culicea filed their claims with the EEOC on June 5, 2009, attaching the topless photographs of Ms. Abrams to the EEOC complaint. The report alleged that both Marc and Russell subjected plaintiffs to "a continuing pattern of disparate treatment and discrimination based on gender, including Sexual Harassment." On August 7, 2009, Ms. Abrams commenced an action against Pecile, Culicea, and their counsel, Douglas Wigdor and Thomas Wigdor & Gilly, LLP ("the Abrams matter").

In her complaint, Ms. Abrams alleged that, as a result of the publication of the photographs, she suffered from "severe emotional distress," which caused her to have problems with her pregnancy, that she has been "emotionally unable to prepare a nursery for her baby . . . for several days , [and] that she was afraid to leave her home because reporters stalked her."

On, or about, April 30, 2010, after an investigation, the EEOC dismissed both Culicea and Pecile's complaints. The EEOC found, in both cases, that there was "insufficient evidence" to indicate that either Pecile or Culicea were discriminated against because of their sex. Nor was the EEOC able "to conclude" that Culicea and Pecile were the victims of retaliatory conduct.

On July 30, 2010, plaintiffs commenced an action for discrimination, sexual

harassment and retaliation, in the US District Court for the Southern District of New York. The following day an article about the case appeared in the New York Daily News, which contained a quote by the Titan defendants:

The Equal Employment Opportunity Commission completed a full investigation and concluded there was no basis to believe that Titan Capital engaged in any unlawful conduct toward Danielle Pecile and Cristine (Cristina) Culicea. [Titan said in a statement]. It thus dismissed their charges. *This meritless lawsuit is nothing but a shakedown attempt by two former employees.* (emphasis added).

Plaintiffs, referring to the last sentence, which is the only part of the statement contained in the complaint, claim that it was made in retaliation for their commencing the federal lawsuit. On August 6, 2010, plaintiffs withdrew, without prejudice, their federal claims. On that same date, plaintiffs commenced the instant action.

The Titan defendants now move to dismiss, as against Marc, Russell and Titan, the eleventh cause of action for defamation, the second cause of action for retaliation in violation of NYSHRL as it relates to the alleged defamatory statement, and the sixth cause of action, for retaliation in violation of the NYCHRL as it relates to the alleged defamation. Titan moves to dismiss the complaint in its entirety as against Skalicky. Additionally, the Titan defendants move to dismiss, as against Sandra Abrams, the third and eighth causes of action, only as those claims allege that Ms. Abrams aided and abetted the ongoing discrimination by the Titan defendants. Plaintiffs oppose the motion.

In support of their motion, the Titan defendants submit: the complaint, several pieces of correspondence between the parties; an amended complaint; the decision issued by the Honorable Walter B. Tolub, dated November 4, 2009; and a copy of the EEOC report. The Titan defendants argue that the alleged defamatory statement is non-actionable because it is expressing an opinion, and that plaintiffs have failed to allege damages as a result of the defamation. Further, the Titan defendants claim that, as the statement was non-defamatory, it cannot be used as a basis for plaintiffs' retaliation claims.

Plaintiffs, in opposition, submit: the Daily News article which contained the alleged defamatory statement. Plaintiffs argue that they were defamed because the term "shakedown" is defined as "an extortion of money using threats of violence . .

.” Thus, not only was the statement defamatory, but it rises to the level of defamation per se, as it charges a serious crime against plaintiffs.

CPLR 3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

“It is a settled rule that expressions of an opinion false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions . . . a pure opinion is a statement of opinion which is accompanied by a recitation of the facts upon which it is based . . .” (*Steinhilber v. Alphonse*, 68 NY2d 283[1986]).

The Titan statement, given at the end of the Daily News article<sup>3</sup>, asserts that the EEOC “completed a full investigation and concluded there was no basis to believe that Titan Capital engaged in any unlawful conduct . . . [i]t thus dismissed their charges.” This is followed by the alleged defamatory statement that “this meritless lawsuit is nothing but a shakedown attempt . . .” The relevant portion of the actual EEOC report states:

There is insufficient evidence to indicate that you were discriminated against because of your sex. We were unable to conclude that you were the victim of retaliation.

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<sup>3</sup>The Daily News article documents the history leading up to plaintiffs’ complaints of sexual harassment. The article refers to the CD given to Pecile that contained topless photos of Ms. Abrams, and the attachment of the photos to plaintiffs’ EEOC complaint.

Although there is a disparity between the facts contained in the EEOC report, and the facts as recited by Titan, it is undisputed that the alleged defamatory remark was preceded by a recitation of facts supporting it. "So long as the opinion is accompanied by a recitation of the facts upon which it is based it is deemed a 'pure opinion' and is afforded complete immunity even though the facts do not support the opinion . . . [t]he rationale for this broad protection of an expression of opinion accompanied by a recitation of the facts upon which it is based is that the reader has the opportunity to assess the basis upon which the opinion was reached in order to draw his or her own conclusions concerning its validity." (*Parks v. Steinbrenner*, 131 AD2d 60[1st Dept. 1987]).

As plaintiffs fail to state a cause of action for defamation, the eleventh cause of action is dismissed in its entirety, and the second and sixth causes of action, to the extent that they relate to defamation, are likewise dismissed. The only claim against Mr. Skalicky is for defamation. Thus, the complaint as against him is dismissed in its entirety.

Executive Law §296(6) states:

It shall be unlawful discriminatory practice for any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this article, or attempt to do so.

In order to make a prima facie case for aiding and abetting discrimination, the alleged defendant must have "actually participated in the alleged discriminatory acts." (*Forrest v. Jewish Guild for the Blind*, 3 NY3d 295[2004]). "An aider and abettor must share the intent or purpose of the principal actor, and there can be no partnership in an act where there is no community of purpose." (*New York Times Co. v. City of New York Commission on Human Rights*, 79 Misc.2d 1046[Sup. Ct. NY County 1974]).

The complaint alleges that Ms. Abrams "directly participated" in the unlawful employment practices and discrimination that occurred at Titan. Indeed, in the background section of the complaint, plaintiffs allege that Ms. Abrams "wields influence over Russell and Marc Abrams with regard to business-related decisions,"

and that she would participate in inappropriate physical conduct with Russell “while looking directly at” plaintiffs<sup>4</sup>. It is alleged that Ms. Abrams did this in order to “intimidate female employees.”

In light of the above, and affording plaintiffs every favorable inference, the complaint states a cause of action against Ms. Abrams for aiding and abetting the Titan defendants’ sexual harassment of plaintiffs, and discrimination flowing therefrom.

By separate motion, the EBG defendants move to dismiss the complaint as against them. Plaintiffs oppose the motion. Initially, plaintiffs concede that they have no cause of action against the EBG defendants for the harassment and discrimination that allegedly occurred while they worked at Titan. However, plaintiffs maintain that the EBG defendants aided and abetted the Titan defendants in retaliating by counseling Ms. Abrams to commence a lawsuit against them.

The EBG defendants are alleged to have “colluded with Russell, Marc and Sandra Abrams, to retaliate against Plaintiffs for exercising their rights,” by bringing a retaliatory preemptive state court action. Generally, attorneys should be free to advise their clients without fear of liability to third parties in the absence of “fraud, collusion or a malicious or tortious act.” (*Beatie v. DeLong*, 164 AD2d 104[1st Dept. 1990]).

Plaintiffs allege that the EBG defendants colluded with the Titan defendants, and improperly used their influence to commit “a malicious and tortious act.” However, plaintiffs’ primary “evidence” of bad faith and maliciousness is that the EBG defendants have a pattern and practice of bringing preemptive and retaliatory lawsuits.

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<sup>4</sup>The exact allegations, as contained in the complaint, are that Ms. Abrams would “sometimes come to Titan in skimpy clothing and would then ‘make out’ with Russell Abrams in open, common areas, while looking directly at Ms. Pecile or Ms. Culicea. Ms. Abrams did this to intimidate female employees . . .”

Plaintiffs also point to the Honorable Justice Walter B. Tolub's November 4, 2009 decision, issued after plaintiffs moved to dismiss the Abrams matter as against them and their attorneys. Justice Tolub dismissed the action as to Culicea, and as to Pecile and Culicea's attorneys, but denied the motion as to Pecile. Sanctions were imposed on the EBG defendants after Justice Tolub found that the action had "no basis in law," and was brought only to harass plaintiffs, and that "counsel's actions [were] sanctionable."<sup>5</sup> The Appellate Division, First Department issued a decision on May 24, 2011, affirming the dismissal, but reversing the imposition of costs and sanctions against the EBG defendants, finding that "the assertion of those claims is unwarranted."

In the Abrams matter, where the situation was reversed, and it was the EBG defendants alleging malicious conduct against plaintiffs' attorney, the court found that, "[t]o the extent the complaint alleges fraud, collusion, malice or bad faith on the part of Wigmor, the allegations are wholly conclusory. If the shield does not deflect these allegations, it is so flimsy as to be of little use." (*Abrams v. Pecile*, 2011 WL 199054[1st Dept. 2011]).

Plaintiffs allegations here of collusion and bad faith against the EBG defendants are no less generalized or conclusory than those made against Wigmor in the Abrams matter. Plaintiffs essentially base their claims against the EBG defendants on allegations of questionable legal strategies, and on the imposition of sanctions against them in a related action, which was found on appeal to be unwarranted. Those charges, without more, are insufficient to form a cause of action as to the EBG defendants.

Wherefore it is hereby

ORDERED that defendants Titan Capital Group LLC, Marc Abrams, Russell Abrams, and Sandra Abram's motion to dismiss is granted to the extent that the second cause of action, as it relates to defamation only is dismissed, the sixth cause of action, as it relates to defamation only is dismissed, and the eleventh cause of

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<sup>5</sup> Justice Tolub ordered the EBG defendants to pay Pecile and Culicea's law firm one thousand dollars "resulting from the frivolous claims asserted against them."

action is dismissed in its entirety; and it is further

ORDERED that the complaint is dismissed as against defendant Steve Skalicky in its entirety; and it is further

ORDERED that defendants Ronald M. Green, Barry Asen, Epstein Becker & Green, PC's motion to dismiss is granted, and the third, seventh, and eighth causes of action are dismissed as to it; and it is further

ORDERED that the defendants are directed to serve an answer to the complaint within 20 DAYS after service of a copy of this order with notice of entry.

This constitutes the decision and order of the Court. All other relief requested is denied.

Dated: June 23, 2011



Eileen A. Rakower, J.S.C

**FILED**

JUN 24 2011

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