Azzopardi v Giorgio Armani Corp.
2014 NY Slip Op 30284(U)
January 27, 2014
Sup Ct, New York County
Docket Number: 150376/13
Judge: Joan A. Madden
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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 : 150376/2013
AZZOPARDI, KELLE
vs
GIORGIO ARMANI CORPORATION
Sequence Number : 001
DISMISS ACTION

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______

The following papers, numbered 1 to ____ , were read on this motion to/for ______

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ | No(s). ______

Answering Affidavits — Exhibits ______ | No(s). ______

Replying Affidavits ______ | No(s). ______

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision and Order.

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

Dated: January 27, 2014

______, J.S.C.
HON. JOAN A. MADDEN
J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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KELLE AZZOPARDI,

Index No. 150376/13

Plaintiff,

- against -

GIORIO ARMANI CORPORATION,
NADIA MOHAN, AND LAURA
GIULINI,

Defendants.

---x

JOAN A. MADDEN, J.:

Plaintiff moves to dismiss the counterclaims asserted against her by defendant Laura Giulini ("Giulini"). Defendants oppose the motion, which is granted for the reasons below.

Background

This action seeks to recover damages for alleged sexual harassment, retaliation, wrongful discharge and hostile work environment in violation of New York State Human Rights Law and the New York City Human Rights Law. Plaintiff was formerly employed as an executive assistant at defendant Georgia Armani Corporation ("GAC"). During the period at issue, defendant Nadia Mohan ("Mohan") was the Director of Human Resources at GAC, and Giulini was a Senior Vice President at GAC. Plaintiff was Giulini's Executive Assistant.

Plaintiff filed her original complaint against GAC only. Subsequently, she served a supplemental summons and amended complaint adding the Mohan and Giulini as defendants. In her verified answer, Giulini asserts five counterclaims alleging : 1) libel per se based on damage to professional reputation and resulting in Giulini's termination by a recent employer, 2) libel per se based on damage to professional reputation, 3) libel per se based on allegedly false accusations of improper sexual conduct and harassment, 4) libel based on statements made

recklessly and with malice, and 5) the intentional infliction of emotional distress based on the statements made by plaintiff. The allegedly defamatory statements are contained in the complaint and amended complaint and in articles published in New York Daily News and other publications ("the Articles").[1]

Discussion

On a motion pursuant to CLR 3211 (a) (7), the court is limited to ascertaining whether the pleading states any cause of action and not whether there is evidentiary support for the pleading Guggenheimer v Ginzburg, 43 NY2d 268 (1977). The complaint must be liberally construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true. Id.; Morone v Morone, 50 NY2d 481 (1980).

The elements for a claim for defamation are "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum a negligence standard, and, it must either cause special harm or constitute defamation per se." Dillon v. City of New York, 261 AD2d 34, 38 (1st Dept 1999) (citation omitted). Defamation arises from "making a false statement which tends to 'expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of [her] in the minds of right-thinking persons, and to deprive [her] of their friendly intercourse in society.'" Foster v. Churchill, 87 NY2d 744, 751 (1996) (citations omitted). In determining whether a claim for defamation has been adequately pleaded "the words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not

[1] The Articles are attached to Giulini's verified answer.

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reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction." See Dillon v. City of New York, 261 AD2d at 38 (citation omitted). A statement that tends to injure plaintiff in its business or trade may be actionable as defamation per se without a showing of any special damages. Liberman v. Gelstein, 80 NY2d 429, 435 (1992).

While the four counterclaims for libel appear to meet the pleading requirements for such a claim, the issue on this motion is whether the statements are protected by the absolute privilege accorded to statements made in connection with judicial proceedings.

"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 & Wamflash, 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.

Under this standard, the first, second and third counterclaims are clearly subject to an absolute privilege as they are based on the allegations in the complaint and amended complaint. Moreover, to the extent the counterclaims are based on statements made by plaintiff to New York Daily News, which were later published in that newspaper and in other publications, they are protected by the privilege created under Civil Rights Law § 74 , which "applies to comments about proceedings." Lachter v. Engel, 33 AD3d 10, 17 (1st Dept 2006)(holding that attorney's statements made to the New York Law Journal pertained to a legal malpractice action were protected by the absolute privilege provided under Civil Rights Law § 74).

The remaining question is whether the fourth counterclaim, which is based on allegations in the complaint and amended complaint and statements in the Articles that Giulini exposed herself to plaintiff in the workplace,[2] are also subject to the absolute privilege. Giulini asserts

[2]Specifically, the amended complaint alleges that Giulini took off her pants and exposed herself to plaintiff who "feeling extremely uncomfortable turned around in disbelief and fear" (Amended Complaint, ¶ 18(b). It is further alleged that "[d]espite

that the statements are not protected by the privilege as they are false, made with malice, and are not pertinent to the litigation, citing Halperin v. Salavan, 117 AD2d 544, 548 (1st Dept 1986). Furthermore, Giulini argues that plaintiff has abused the privilege and has lost her right to assert it, particularly as the statements that Giulini exposed herself in the work place essentially accuses Giulini of a crime of indecency constituting either "Exposure of a Person" as defined in Penal Law § 241 or Public Lewdness as set forth in Penal Law § 245.

Here, contrary to Giulini's position, it cannot be said that the action was commenced without any basis or for solely malicious purposes, or that the statements at issue are "impertinent" to this action. Moreover, Giulini's unsubstantiated statements in her affidavit that the allegations in the complaint are false and that the action was commenced to extort money,[3] are insufficient to defeat the privilege. In fact, it has been held that "an offending statement pertinent to the proceeding in which it was made is absolutely privileged, regardless of any malice, bad faith, recklessness or lack of due care with which it was spoken or written, and regardless of its truth or falsity." Sexter & Warmflash, P.C. v. Margrabe, 38 AD3d at 172 (citation omitted). Instead, "[t]o be actionable, a statement made in the course of judicial proceedings 'must be so outrageously out of context as to permit one to conclude, from the mere fact that the statement was uttered, that it was motivated by no other desire than to defame'" Sexter & Warmflash, P.C.

[plaintiff's] clear demonstration of distress and uneasiness, Giulini proceeded to tell [plaintiff], "You don't have to do that. I am not a prude." Id.

[3]In this connection, Giulini's citing of friendly text messages sent to her by plaintiff after the alleged incidents do not prove the falsity of the allegations in the complaint nor malicious motive.

v. Margrabe, 38 AD3d at 173, quoting Martirano v. Frost , 25 NY2d 505, 508 (1969). Under this standard, statements that Giulini exposed herself to plaintiff are not actionable as they are pertinent to plaintiff's claims that she was sexually harassed, subjected to a hostile work environment and retaliated against, including for reporting the exposure incident to GAC.

Furthermore, contrary to Giulini's position, the narrow exception to the absolute privilege set forth in Halperin v. Salavan, does not apply here. In that case, the Appellate Division, First Department, noted that the absolute privilege afforded to statements made in judicial proceedings may be "lost if abused," and that the privilege is limited to statements which are not only pertinent to the subject matter of the lawsuit but are made "in good faith and without malice."117 AD2d at 548. However, in its later ruling in Lachter v. Engel, the First Department clarified that its finding of malicious intent in Halperin was based on "the fact that the plaintiffs had not moved forward with the lawsuit, and because of the inflammatory language describing the purported class in the caption." 33 AD3d at 14. In this connection, the First Department rejected the argument that the privilege was lost based on conclusory allegations that the lawsuit was "a sham" or simply because the complaint was dismissed for failure to state a cause of action, writing that "[i]f the privilege existed only in cases that were ultimately sustained, none of the persons whose candor is protected by the rule—parties, counsel or witnesses—would feel free to express themselves" Id. As there is no evidence that plaintiff here does not intend to pursue this action or that it is otherwise "a sham," the limited holding in Halperin is not controlling here.

As for the fifth counterclaim for the intentional infliction of emotional distress, this cause of action has four elements: (1) extreme and outrageous conduct, (2) intent to cause, or disregard

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of a substantial probability of causing, severe emotional distress, (3) a causal connection between the conduct and injury, and (4) severe emotional distress.. Howell v New York Post Co., 81 NY2d 115, 120 (1993). To state such a claim, it must be shown that the alleged conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society." Murphy v American Home Products Corp., 58 NY2d 293, 303 (1983).

The counterclaim, which is based on the filing of this action and the making statements to the press, are insufficient to demonstrate outrageous conduct required to state a claim. McRedmond v. Sutton Place Restaurant & Bar, Inc., 48 AD3d 258 (1st Dept 2008)(dismissing counterclaim for intentional infliction of emotional distress finding that statements to media about the litigation were insufficient to state such a claim); Artzt v. Greenburger, 161 AD2d 389 (1st Dept 1990)(filing of a civil action insufficient to support a claim for the intentional infliction of emotional distress). Accordingly, the fifth counterclaim must be dismissed.

In view of the above, it is

ORDERED that the motion to dismiss Giulini's counterclaims is granted, and the counterclaims are dismissed; and it further

ORDERED that the parties shall appear on February 6, 2014 at 9:30 am, for a previously scheduled compliance conference in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: January 27, 2014

J.S.C.

HON. JOAN A. MADDEN
J.S.C.