

**Volpe v Paniccioli**

2017 NY Slip Op 32409(U)

November 15, 2017

Supreme Court, New York County

Docket Number: 159739/2015

Judge: Carmen Victoria St.George

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 34**

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LEONORA VOLPE,

Plaintiff,

Index No. 159739/2015  
Motion Sequence 002

-against-

**Decision and Order**

ANTHONY CARMINE PANICCIOLI individually,  
And ACP PROPERTIES LLC,

Defendants.

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**ST. GEORGE, J.S.C.:**

In this action (*Volpe v Paniccioli*, Sup Ct, New York County, St. George, J., Index No. 159739/2015 [*Volpe*]), plaintiff Leonora Volpe alleges that, while she worked for defendants on a motion picture relating to the ballet world, defendant Anthony Carmine Paniccioli sexually harassed her. The complaint describes in detail numerous alleged acts of harassment. In addition, she sues Mr. Paniccioli for \$150,000, the remaining amount allegedly due to her under the film contract. She alleges that defendants' counterclaims are retaliatory. She alleges causes of action under the city's Civil Rights Laws (Administrative Code of City of NY tit 8), sections 8-107 (1) (a), 8-107 (1) (e), 8-107 (19), and 8-107 (13)), as well as under State law (Executive Law §§ 296, 296 [7], and 296 [6])). Plaintiff further asserts causes of action for assault and battery, intentional infliction of emotional distress, aggravated sexual abuse in the first degree,<sup>1</sup> gender motivated violence, and breach of contract.

<sup>1</sup> Plaintiff may assert a civil cause of action for the alleged crime under CPLR § 213-c.

In their answer, defendants deny all of plaintiff's allegations against them and assert several counterclaims. In their first and second counterclaims they assert defamation, based on the allegations in the lawsuit and their publication in the NEW YORK POST, and on the filing plaintiff's husband made to Mr. Paniccioli's insurance carriers and with the Department of Education. They argue that these allegations threaten Mr. Paniccioli's license as a pharmacist. They additionally set forth a summary of the assertions in their own action, *Paniccioli v Mulligan* (Sup Ct NY County, St. George, J., Index No. 157882/2016 [*Paniccioli*]),<sup>2</sup> and they argue that, through her husband, non-party Howard Mulligan, plaintiff lied to the Department of Education and to Mr. Paniccioli's insurers, notifying them of this lawsuit and asserting that Mr. Paniccioli had engaged in illegal activities in his capacity as a pharmacist.<sup>3</sup>

Currently, the Court has before it plaintiff's motion to dismiss defendants' counterclaims. She contends that the statements she has made are absolutely privileged as they were made in the context of judicial proceedings. She claims that under common law as well as Section 74 of the New York Civil Rights Law, she has the right to distribute her complaint to the press. She argues that defendants do not assert a connection between her and the information that her husband caused to be published, and their conclusory assertion must be dismissed. Finally on the issue of defamation, she states that defendants have not shown that the statements are false, and thus they do not establish a prima facie case.

Plaintiff also seeks to dismiss defendants' counterclaim based on fraud. She argues that the second counterclaim relies largely on the actions of her husband, who is not a party to this lawsuit.

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<sup>2</sup> The Court discusses the *Paniccioli* lawsuit in its decision on motion sequence number one.  
<sup>3</sup> At oral argument before this Court, plaintiff alleged, and defendant conceded, that the third and fourth causes of action relate to damages and are not independent claims. Therefore, the Court indicated on the record that it would dismiss the third and fourth causes of action.

She states that absent evidence of fraud, the claim must be dismissed. She asserts that the third counterclaim – which asserts that this case was commenced in bad faith and with the purpose of distracting from plaintiff and her husband’s fraudulent conduct – should also be dismissed. She argues that her husband’s actions are not relevant to her lawsuit for sexual harassment. She states that defendants’ argument -- that this lawsuit was commenced to deflect attention from her and her husband’s alleged fraudulent business transactions with defendants – makes no sense, as this case was commenced first. She notes that defendants’ comment -- that she waited years to assert her claims, and thus clearly fabricated them in anticipation of defendants’ lawsuit -- lacks merit, as the case is timely commenced and their argument is entirely speculative.

In opposition, defendants allege the counterclaims are relevant and necessary because they provide a broader context for this lawsuit. They argue that plaintiff’s statements to the NEW YORK POST are not privileged under the Civil Rights Law or common law as they do not constitute “mere reporting on judicial proceeding[s]” (Def’s Mem of Law, at p 5). They cite *D’Annunzio v Ayken, Inc.* (876 F Supp 2nd 211, 216-17 [EDNY 2012]) and *Herlihy v Metropolitan Museum of Art* (214 AD2d 250, 258 [1st Dept 1995]) for the proposition that the distribution of pleadings to the press and comments about the pleadings at a press conference are not covered by the privilege. Relying on the same cases, as well as *McNally v Yarnall* (764 F Supp 853, 856 [1991]), they further assert that the privilege does not apply here because plaintiff was motivated by malice. They state that Mr. Mulligan’s statement that his wife “has been advised by NYPD to publicize the lawsuit” provides the necessary connection between Mr. Mulligan’s allegedly defamatory statements and plaintiff. They point out that plaintiff’s argument that defendants have not established their allegations lack merit because plaintiff has brought a CPLR § 3211 motion, which does not involve evidentiary issues and factual disputes. They state that their allegations make out a cognizable

claim, and that is all that is required of them at this stage of the litigation. They claim that their fraud counterclaims are appropriate because they allege Ms. Volpe was involved in the fraud her husband perpetrated, and Mr. Mulligan's involvement does not absolve her from liability. Mr. Paniccioli's affidavit adds that plaintiff personally phoned and made false statements to his karate instructor, Louis Neglia, and that she also defamed him to other parties.

### DISCUSSION

The Court denies plaintiff's motion as it relates to the first and second causes of action. "On a motion to dismiss for failure to state a cause of action, '[w]e accept the facts as alleged in the [counterclaims] as true, accord [counterclaim] plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'" (*Wilson v Dantas*, 29 NY3d 1051, 1056-57 [2017] [quoting *Leon v Martinez*, 84 NY2d 83, 87-88 (1994)]). Here, to set forth a viable cause of action for defamation, defendants' first counterclaim "must allege that [plaintiff] published a false statement, *without privilege* or authorization, to a third party . . ." (*Rodriguez v Daily News, L.P.*, 142 AD3d 1062, 1063 [2nd Dept 2016]). Contrary to plaintiff's contention, defendant has satisfied this threshold burden with respect to the common law. They have stated that plaintiff set forth false claims in her complaint which she shared with the press, that she was available for interview regarding the claims, and that she directed her husband to release a defamatory email on her behalf. Further, they have stated that the claims of sexual abuse and sexual fetishes are likely to "expose [him] to public contempt" and harm him in his position as a pharmacist (*Greenberg v Spitzer*, -- AD3d --, --, 2017 Slip Op 06432 [2nd Dept 2017]).

In arguing for dismissal of this counterclaim, plaintiff alleges that the release of court documents to the press, and her comments to the NEW YORK POST article, are absolutely privileged.

One of the principle cases on which she relies, however, distinguishes between in-court statements, which enjoy “considerable broader” protection “than that for out-of-court reports relating to the proceeding” (*D’Annunzio v Ayken, Inc.*, 876 F. Supp. 2d 211, 217 [EDNY 2012]). The court in *D’Annunzio* went on to state that “out-of-court statements, such as those made in a press conference or press release, are not covered by the absolute privilege” (*Id.*) The court therefore concluded that “the delivery of a copy or report of a complaint to the press is not a statement made during the course of judicial proceedings and therefore is not protected by the common law privilege” (*Id.*). Thus, the principle on which plaintiff relies is not applicable to defendants’ claim.

Moreover, defendants have set forth a viable cause of action under Civil Rights Law § 74, which precludes claims asserted “against any person . . . for the publication of a fair and true report of any judicial proceeding . . . .” Under a long line of precedent starting with *Williams v Williams* (23 NY2d 592, 596-99 [1969]), courts have found that “it was never the intention of the Legislature in enacting section 74 to allow ‘any person’ to maliciously institute a judicial proceeding alleging false and defamatory charges, and then circulate a press release or other communication based thereon and escape liability by invoking the statute” (*Id.* at 599). In *Reszka v Collins* (136 AD3d 1299 [4th Dept 2016]), the Fourth Department ruled that a defendant’s counterclaim that the plaintiff held a press conference at which she made defamatory statements about the defendant stated a viable cause of action (*See also Halcyon Jets, Inc. v Jet One Group, Inc.*, 69 AD3d 534, 534-35 [1st Dept 2010] [denying motion to dismiss defamation claim under CPLR 3211 (a) (7)]). At this stage of the litigation, defendants have adequately alleged that plaintiff provided the complaint and made public statements with malicious intent. To the extent that plaintiff argues, here and with respect to the fraud claim, that defendants have provided no evidence in support of

their counterclaims, plaintiff confuses the standard for summary judgment under CPLR § 3212 with the standard for dismissal under CPLR § 3211.

As for defendants' claim that Mr. Mulligan published defamatory statements at his wife's behest, the statement in Mr. Mulligan's email that plaintiff was advised by the police to publicize the lawsuit at least raises an issue as to whether she authorized her husband to disseminate the email. "Although [o]ne who makes a defamatory statement is not responsible for its recommunication without [her] authority or request by another over whom [she] has no control . . . , reading the [counterclaim] as a whole, and giving [defendants] the benefit of all reasonable inferences," defendants have sufficiently pleaded a viable claim based on the email. (*National Puerto Rican Day Parade, Inc. v Casa Publications, Inc.*, 79 AD3d 592, 594-95 [1st Dept 2010] [citation and internal quotation marks omitted]).

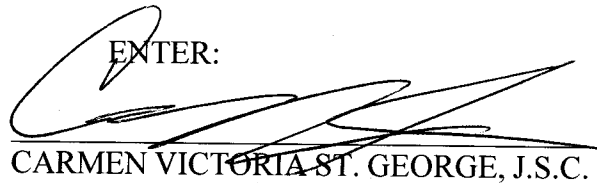
Next, the Court turns to defendants' counterclaim for fraud. As plaintiff correctly notes, a prima facie case of fraud must allege "a misrepresentation or a material omission of fact which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance, and injury" (*Nerey v Greenpoint Mortgage Funding, Inc.*, 144 AD3d 646, 647 [2nd Dept 2016]). Plaintiff also correctly asserts that "conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss" (*Godfrey v Spano*, 13 NY3d 358, 373 [2009] [under General Municipal Law § 800 *et seq.*, relating to fraud or wasted public resources]). Plaintiff's entire argument is that defendants' counterclaim for fraud is conclusory and without evidentiary support. The counterclaim, however, is sufficiently specific, and asserts that plaintiff acted in concert with her husband to swindle defendants. To the extent that plaintiff argues defendants lack evidentiary support, her argument has no merit here, in the context of a CPLR § 3211 motion. Here, the Court's

role is to see whether the pleading sets forth a claim and not to determine whether the claim has any merit.<sup>4</sup>

The Court has considered all the parties' other arguments and they do not change its decision. Therefore, it is

ORDERED that the motion is granted to the extent of dismissing the third and fourth counterclaims and is otherwise denied.

Dated: November 5, 2017

ENTER:  
  
CARMEN VICTORIA ST. GEORGE, J.S.C.

HON. CARMEN VICTORIA ST. GEORGE  
J.S.C.

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<sup>4</sup> To the extent that plaintiff challenges the appropriateness of asserting the fraud counterclaim in this action, plaintiff's assertion of her breach of contract claim make her alleged fraud in connection with the contract relevant.