

**Gill v Dougherty**

2019 NY Slip Op 34077(U)

May 13, 2019

Supreme Court, Westchester County

Docket Number: 70666/17

Judge: Gerald E. Loehr

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This opinion is uncorrected and not selected for official publication.

**FILED**  
**AND ENTERED**  
 ON 5/13/ 2019  
**WESTCHESTER**  
**COUNTY CLERK**

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF WESTCHESTER

-----X  
 KATHLEEN GILL,

Plaintiff,

**DECISION AND ORDER**

Index No.: 70666/17

-against-

ANTHONY D. DOUGHERTY, TARTER KRINSKY  
 & DROGAN LLP, IONA COLLEGE, AND  
 KATHLEEN MCELROY,

Defendants.

-----X

LOEHR, J.

The following papers numbered 1-10 were read on the motions of all Defendants pursuant to CPLR 3211(a)(1) and (a)(7) for an order dismissing the Amended Complaint.

	<u>Papers Numbered</u>
Notice of Motion (#3) - Affirmation - Exhibits	1
Memorandum of Law in Support	2
Affirmation in Opposition - Exhibit	3
Memorandum of Law in Opposition	4
Reply Memorandum of Law	5
Notice of Motion (#4) - Affirmation - Exhibits	6
Memorandum of Law in Support	7
Affirmation in Opposition - Exhibit	8
Memorandum of Law in Opposition	9
Reply Memorandum of Law	10

Upon the foregoing papers, as alleged in the Amended Complaint, it appears that Plaintiff, an attorney, was employed by the City of New Rochelle (the "City") in its Law Department from 1995 to 2013, having become Corporation Counsel in 2009. In 2013, having been recruited by Iona College, Plaintiff left the City and became first, Senior Policy Advisor/Secretary to the Iona Board of Trustees, and later General Counsel. Prior to her appointment, the law firm of Tarter Krinsky had earned substantial income annually as outside counsel for Iona. After her appointment, Plaintiff was assigned, in consultation with Iona's insurance broker and adjuster, to conduct an audit of the cases that has been assigned to Tarter Krinsky. The audit found incompetence and excessive billing and led to a claim against Tarter Krinsky for the mishandling of a litigation file by a Tarter Krinsky attorney, Anthony Dougherty. Tarter Krinsky resolved the claim by paying Iona in excess of \$200,000 and Tarter Krinsky retention as Iona outside counsel was not renewed. In September 2015, Plaintiff returned to work for the City.

In 2016, Iona intended to expand its campus to include 11 lots located in a residential neighborhood adjacent to its campus. Iona claimed that under a long standing interpretation of Ordinance 91 of the Code of New Rochelle, it was free to merge these lots without a special permit. Plaintiff disagreed with this interpretation as inconsistent with the language of the zoning provision.<sup>1</sup> At this point, Plaintiff offered to recuse herself. In response, Joseph Nye, then the President of Iona, specifically requested that Plaintiff not recuse herself. That notwithstanding, in order to avoid even an appearance of impropriety, Plaintiff retained Harris Beach PLLC as outside counsel for the City with respect to this dispute. On November 10, 2016, Iona filed an application for expansion of its campus by merger of certain tax lots with the City of New Rochelle's Assessor's Office, which application was denied by the City on December 22, 2016 based on the lack of a special permit under Ordinance 91 as amended. At about the same time, Kathleen McElroy, who had replaced Plaintiff as General Counsel of Iona, sent a letter to the City announcing that Dougherty of Tarter Krinsky had been retained by Iona to commence litigation related to the denial of its application. On December 14, 2016, Plaintiff and Dougherty had a telephone conversation wherein Dougherty stated to Plaintiff that President Nye's contract

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<sup>1</sup> Ordinance 91 was then apparently amended to make the special permit requirement more explicit.

with Iona had been terminated, that certain members of the Board of Trustees were now in control of Iona and that an Article 78 Petition/Complaint had been drafted which would “be extremely hard for her to read,” and would “be very uncomfortable for” her because the Board wants to vent against her,” and that it would “be better for you” to “work this out quietly,” the alternative being he would file the Petition/Complaint which would publically embarrass her. McEelroy also made similar threats. After further threats and a cease and desist instruction from the City’s outside counsel, on February 23, 2017, Iona commenced an Article 78 proceeding. Although the City was the only named Respondent, Plaintiff’s name appears on almost every page of the 20-page Petition/Complaint and alleges unethical conduct by her. In the proceeding, Iona sought a declaration that the Amendment to Ordinance 91 was invalid; that under Ordinance 91 prior to the amendment, it did not need a special permit; and sought an injunction enjoining Plaintiff from handling any Iona-related matters for the duration of her employment by the City. Although Plaintiff had recused herself in this zoning matter, in the Petition/Complaint, Defendants asserted that Plaintiff had, in fact, continued to participate in the dispute and submitted a handwritten note, signed “KG” as proof of same. Although Plaintiff submitted her own Affidavit and the Affidavit of a handwriting expert that she had not written the note, Defendants continued to assert in court papers that she had. On April 19, 2017, during the pendency of the proceeding, Dougherty drafted and sent a letter to Harris Beach which was also forward by Iona to, among others, the Mayor of New Rochelle. The letter states:

“Perhaps even more egregious, are the continued unethical actions by Kathleen Gill, Esq. whose conduct, as you know, precipitated the litigation and is the subject of Iona’s request for injunctive relief based upon her misuse of Iona’s privileged and confidential information. Despite the court’s impending scrutiny into her actions and conduct, Ms. Gill signed the Supplement and “approved; the Supplement “as to form,” evidencing her steadfast refusal to recuse herself from Iona-related matter, including this one. Consequently, Iona will be notifying the court of Ms. Gill’s brazen disregard for Iona and her ethical responsibilities, and will take any and all efforts to protect its privileged and confidential information.”

On July 24, 2017, the Article 78 proceeding was dismissed for a failure to exhaust administrative remedies as was the requested injunction against Plaintiff. Plaintiff then commenced this action

on December 19, 2017. The Amended Complaint asserts three causes of action: Judiciary Law § 487(1) based on the handwritten note; defamation based on the July 24, 2017 letter; and prima facie tort based on both. All of the Defendants have moved to dismiss pursuant to CPLR 3211.

When determining a motion to dismiss, the Court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference. The First Cause of Action asserts a violation of Judiciary Law § 487. Judiciary Law § 487 provides that “[a]n attorney or counselor who . . . [i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . [i]s guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.” To state a claim pursuant to Judiciary Law § 487, a plaintiff must allege that: an attorney deceived or attempted to deceive or colluded or consented to any deceit or collusion, (2) with the intent to deceive the court or any party, and (3) which cause damages (*Amalfitano v Rosenberg*, 12 NY3d 8 [2009]; *Izko Sportswear Co. v Flaum*, 25 AD3d 534, 536 [2d Dept 2006]).

The Defendants move to dismiss the Judiciary Law cause of action on the grounds that, even if the allegations are true, Plaintiff has no such cause of action as she was not a party to the Article 78 proceeding. First, although there is dictum that to have a Judiciary Law cause of action the plaintiff had to have been a party in the action in which the deceit was perpetrated (*see Gorbatov v Tsirelman*, 15 AD3d 836 [2d Dept 2017]; *Barouth v Abelove*, 131 AD3d 988, 991 [2d Dept 2015]), cases where the plaintiff has not been a party have been sustained inasmuch as such is not required by the statute (*see Papa v 24 Caryl Avenue Realty Co.*, 23 AD3d 361 [2d Dept 2005; *accord, Schindler v Issler & Schrage, P.C.*, 262 AD2d 226 [1s Dept 1999]). In any event, as relief was sought against her in the Article 78 proceeding, Plaintiff was, to all intents and purposes, a party to that proceeding.

Defendants also assert that their deceit has not been sufficiently plead. To the contrary, the submission to the Court of a note the Defendants allegedly knew to be fraudulent after repeatedly threatening Plaintiff with public embarrassment is sufficient. Finally, Defendants assert that, inasmuch as the Article 78 proceeding was dismissed, Plaintiff suffered no damages from the submission of the note. As the Court of Appeals held in *Amalfitano v Rosenberg* (12 NY3d 8, 15 [2009]), the plaintiff’s litigation expenses necessarily incurred in defending against the deceit are recoverable as treble damages. Accordingly, the motions to dismiss this claim are

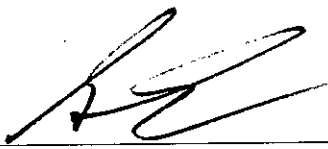
denied.

As to the defamation claim, the Defendants move to dismiss on the basis that the letter was absolutely privileged as a pertinent and material communication between the attorneys and parties in a pending litigation.<sup>2</sup> While true (*Strujan v Kaufman & Kaufman, LLP*, 168 AD3d 1114, 1116 [2d Dept 2019]; *Weinstock v Sanders*, 144 AD3d 1019, 1020 [2d Dept 2016]; see also *Front, Inc. v Khalil*, 24 NY3d 713 [2015]; *Park Knoll Associates v Schmidt*, 59 NY2d 205 [1983]), the Courts have recognized that as the privilege is capable of being abused, it will not be conferred where the underlying lawsuit was a sham action brought solely to defame the defendant (*Flomenhaft v Finkelstein*, 127 AD3d 634, 638 [1<sup>st</sup> Dept 2015]; *Lacher v Engel*, 33 AD3d 10, 13-14 [1<sup>st</sup> Dept 2006]; *Halpern v Salvan*, 117 AD2d 544 [1s Dept 1986]). Here, based on the allegations that Defendants submitted a fraudulent document to the Court after having threatened to publically embarrass her, the publication of the letter reiterating the same defamatory accusations based on the document may well not be privileged. Accordingly, the motions to dismiss this claim is denied.

Finally, the Defendant moves to dismiss the cause of action for prima facie tort as being duplicative of the other causes of action. The motion is denied (*compare Halpern v Salvan*, 117 AD2d 544 [1s Dept 1986] with *Fleisher v NYP Holdings, Inc.*, 104 AD3d 536, 539 [1<sup>st</sup> Dept 2013]). The parties shall appear at the Preliminary Conference Part, courtroom 800, on June 3, 2019 at 9:30am.

This constitutes the decision and order of the Court.

Dated: White Plains, New York  
May 13 2019

  
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HON. GERALD E. LOEHR  
J.S.C.

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<sup>2</sup> The Defendants also assert that the April 19, letter contains only non-actionable opinion. To the contrary, it asserts actionable facts.

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