

<b>Lever v Lee</b>
2020 NY Slip Op 31919(U)
June 15, 2020
Supreme Court, Kings County
Docket Number: 519703/2019
Judge: Wavny Toussaint
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At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 15th day of June, 2020

P R E S E N T:

HON. WAVNY TOUSSAINT,  
Justice.

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KENRIC LEVER,  
  
Plaintiff,

**DECISION AND ORDER**

Index No. 519703/2019

- against -

CYNTHIA LEE AND THE CHILD LAW CENTER,  
  
Defendants.

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The following papers numbered 1 to 4 read herein:

	Papers Numbered
Notice of Motion Affidavits (Affirmations) Annexed	1, 2
Answers/Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	4

Upon the foregoing papers, defendants, Cynthia Lee and The Children Law Center ("CLC defendants") move for an order, pursuant to CPLR 3211(a)(3) and (a)(7) granting their motion to dismiss the complaint of plaintiff, Kenric Lever ("Lever") for ) for failure to state a cause of action and for lack of standing.

***Background***

Plaintiff commenced the present action against defendants alleging claims of defamation, intentional infliction of emotional distress, deprivation of constitutional right

to parent, loss of enjoyment of life, and violation of 18 U.S.C. §§ 241 and 242. Plaintiff seeks punitive damages in the amount of three million dollars.

The CLC defendants were the court-appointed law guardian for the plaintiff's minor child in a custody proceeding. Defendant Lee was the attorney who represented the infant during the proceedings. Plaintiff alleges that on September 6, 2018, defendant Lee made defamatory statements to Honorable Dean T. Kusakabe of Kings County Family Court, that there are police reports which state that the police raided plaintiff's home in search of child pornography, and that plaintiff had erased all the evidence contained on his computer. Plaintiff further alleges that defendant Lee falsely stated to the court that the plaintiff had not seen his child since 2016 and that the child does not want to see him. Plaintiff states that he informed the court and defendant Lee that the statements were false, and that he possessed documentary evidence from the New York Police Department(NYPD), New York City Administration for Children Services, New Jersey Children Services, and the New Jersey Prosecutor's office, stating that he had no involvement with child pornography, and that the false claims were made by the mother of the child.

Defendants filed and served the instant motion on January 7, 2020. Defendants argue that plaintiff's complaint should be dismissed as plaintiff failed to state causes of action for defamation and intentional infliction of emotional distress, and that the CLC defendants are protected from liability by quasi-judicial immunity; as the challenged statements were made within the scope of their representation of the plaintiff's minor child during custody proceedings. Defendants also argue that because the CLC defendants are not a state actor, they are not subject to suit under 42 USC § 1983. Defendants further argue that the plaintiff lacks standing to bring claims arising under 18 U.S.C. §§ 241 and 242 as they are both criminal statutes, and a private citizen such as

the plaintiff, lacks a judicially cognizable interest in the prosecution or non-prosecution of another. In additional papers titled 'reply' filed on February 20, 2020, defendants argue that in addition to the reasons previously discussed in their moving papers, the CLC Defendants' motion should be granted as unopposed, as the defendant failed to timely file any opposition.

On March 10, 2020, five days after defendants had filed their additional papers plaintiff filed opposition. Plaintiff argues that "the shield of judicial immunity or privilege was dissolved when defendant grossly made egregious statements and assertions of matter of fact with malice". Further, that "[d]efendant made these statement with the ill will intent of keeping Plaintiff Kenric Lever away from his child." Plaintiff further alleges that on October 21 and 25, 2018, and then again on November 14, 2018, defendant Lee made statements that plaintiff was in possession of child pornography and viewed the images while the child was present in the home. On October 25, 2018, the Family Court issued an order granting temporary custody of the child to the grandmother.

In support of his opposition, defendant submits what appears to be a copy of a June 16, 2018 order by Hon. Stephen L. Petrillo (Exh. A); an August 2016 court report from the State of New Jersey Department of Children and Families (Exh. B); and a copy of *Ryan v. Department of Social Services of Albany County*, 16 Misc.3d 1134[A] [2007] (Exh. C). Plaintiff references police reports from the NYPD and NJ Police Department as being attached as Exhibit B, however, the documents are not attached.

Defendants filed a sur-reply titled 'Reply Memorandum of Law' on March 10, 2020, without permission from the Court.

### ***Discussion***

While plaintiff's opposition is untimely (CPLR 2214[b]), the CLC defendants submit a reply and sur-reply and make no claim of prejudice. onsequently, the

opposition is considered. (See *Narvaez v Wadsworth*, 165 AD3d 407, 408 [1st Dept 2018]).

“When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action. In considering such a motion, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Thaw v North Shore Univ. Hosp.*, 129 AD3d 937, 938 [2d Dept 2015]). On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must consider only “whether any reading of the complaint supports the defamation claim” *Trump Vil. Section 4, Inc. v. Bezvoleva*, 161 AD3d 916, 917 [AD2d 2018]).

“The law provides absolute immunity from liability for defamation based on oral or written statements made by attorneys in connection with a proceeding before a court ‘when such words and writings are material and pertinent to the questions involved’ ” (*Strujan v. Kaufman & Kahn, LLP*, 168 AD3d 1114, 1116 [2d Dept 2019]) A qualified privilege “places the burden of proof on this issue [of malice] upon the plaintiff” (*Stega v. New York Downtown Hosp.*, 31 N.Y.3d 661, 670 [2018]).

Various courts have endorsed quasi-judicial absolute immunity for law guardians (*Holland v Morgenstern*, 2013 WL 22375 50, at 4 [EDNY May 20, 2013]; *McKnight v Middleton*, 699 F. Supp 507, 528-529 [EDNY 2010]; *Bradt v White*, 190 Misc.2d 526 [Sup Ct Greene County 2002]). Here, CLC, through its attorney Cynthia Lee, acted as a law guardian representing the interests of the plaintiff’s child. Plaintiff concedes that the statements made by Lee were in connection with the proceeding before the court and within the scope of her employment. As such, the challenged statements were absolutely privileged as a matter of law and cannot be the basis for a defamation cause

of action (see Weinstock v Sanders, 144 AD3d 1019, 1021 [2d Dept 2016]); and the CLC defendants are immune from suit based on absolute, quasi-judicial immunity (Holland v Morgenstern, 2013 WL 2237550, at \*4 [E.D.N.Y. May 20, 2013]; see Yapi v. Kondratyeva, 340 F. App'x 683, 685 [2d Cir. 2009]).

Moreover, the challenged statements were not “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency” (Yuk Ping Ifantides v Wisniewski, 181 A.D.3d 575, 576 [2d Dept 2020]). Thus, the statements cannot be a basis for an intentional infliction of emotional distress cause of action.

Since all of the actions of which plaintiff complains of on the part of the CLC defendants occurred within the scope of their appointment as law guardian for plaintiff's child, and there are no factual allegations in the complaint indicating that Lee or CLC engaged in any criminal conduct or other intentional tort, defendants' motion seeking dismissal of plaintiff's claims are granted and the claims against CLC and Lee are dismissed in their entirety with prejudice (Allen v Mattingly, 2011 WL 1261103, at 15 [EDNY 2011), *aff'd*, 478 F. App'x 712 [2d Cir. 2012]).

Accordingly, it is

**ORDERED** that the defendants' motion to dismiss is granted in its entirety, with prejudice.

The foregoing constitutes the decision and order of this Court.

ENTER,



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J.S.C.