SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARBARA JAFFE** **PART** **12**

Justice

----------X

PATRICIA LEMANSKI,

Plaintiff,

- v -

SFM REALTY CORP. and LONICA SMITH,

Defendants.

----------X

INDEX NO. 150261/2021

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6-37 were read on this motion for dismissal.

Defendants SFM Realty Corp. (SFM) and Smith (collectively, movants) move pursuant to CPLR 3211(a)(5) and (a)(7) for an order dismissing plaintiff's complaint, claiming that plaintiff is collaterally estopped from proceeding and that she fails to state a cause of action. Plaintiff opposes, and cross-moves for expedited discovery pursuant to CPLR 3211(d). Defendants oppose plaintiff's cross-motion.

I. PERTINENT BACKGROUND

a. Verified complaint (NYSCEF 1)

Plaintiff alleges the following:

SFM is a real estate company, one of several entities within the Sapir Organization, which is privately owned by a Jewish family. From 2011 to January 2020, SFM employed plaintiff as a paralegal working under its general counsel. In 2019, a bitter and widely reported intra-family dispute resulted in the general counsel's departure from SFM. SFM's chief executive officer (CEO) then directed plaintiff to find a "smoking gun" to use against the former

general counsel and his family, and he instructed SFM's information technology department to increase plaintiff's access to SFM files accordingly.

In August 2019, defendant Smith was hired as SFM's new general counsel. Shortly thereafter, Smith removed plaintiff from existing projects and re-assigned her to lower-level administrative tasks, re-scheduled meetings without notice for days when plaintiff worked from home, and publicly criticized her. Plaintiff eventually complained to Sapir Organization executives that she was being discriminated against based on, *inter alia*, her age, gender, and religion. The Sapir executives reassured plaintiff that she was a valued employee and instructed her to meet with Smith. Smith ignored plaintiff's request to meet with her and, on information and belief, her complaints were never forwarded to SFM's human resources administrator.

On January 9, 2020, a judge in the Southern District of New York (SDNY) granted SFM's motion for a temporary restraining order (TRO) enjoining plaintiff from accessing, disclosing, copying, reproducing or otherwise conveying SFM's trade secret information, and signed an order to show cause requiring plaintiff to demonstrate why she should not be preliminarily enjoined from possessing, without authorization, SFM files containing trade secrets, even though she had obtained them at Smith's specific instruction. Then, on January 10, 2020, plaintiff was served with the TRO and fired without warning, although she had received only positive performance reviews.

On January 14, 2020, an article was published in a real estate trade publication about the circumstances of plaintiff's termination and the SDNY lawsuit. (NYSCEF 3). Plaintiff states, on information and belief, that defendants encouraged this publication, or that they at least knew that their lawsuit would be publicized given the public and media interest in the Sapir family dispute.

On January 30, 2020, SFM voluntarily withdrew its motion for a preliminary injunction and voluntarily discontinued its complaint in the SDNY before the motion for a preliminary injunction was decided and an answer was required.

Based on the foregoing, plaintiff advances as her first cause of action a violation of the New York City Human Rights Law (NYCHRL), claiming that defendants discriminated against her on the basis of her being (i) a woman; (ii) over the age of 50; and (iii) a non-Jew, contending that her gender, age, and religion factored into Smith's discriminatory treatment of her and eventual termination from SFM. In support, plaintiff contends that she was treated worse than similarly-situated male Jewish employees who engaged in the conduct of which SFM accuses her, such as routinely copying work emails to their personal email without repercussion, that all Jewish SFM employees terminated within the last few years of her employment there were offered a severance package whereas she was not, and that she was replaced by someone approximately 20 years younger.

Plaintiff advances as her second cause of action retaliation in violation of the NYCHRL, contending that the temporal nexus between her complaints to Sapir Organization executives about Smith's discriminatory treatment and her termination, as well as SFM's failure to consult with its human resources provider prior to her termination, "suggest" an improper motive.

Plaintiff's third and fourth causes of action for, respectively, abuse of process and malicious prosecution, derive from the SDNY action, which she claims was filed with the intention of taking control of her property, tarnishing her reputation and that of SFM's business rivals, and creating a pretext for firing her. According to her, SFM's voluntary withdrawal of the SDNY action less than a month after its commencement demonstrates that it had filed the suit for improper reasons.

Plaintiff advances as her fifth cause of action defamation *per se* and a violation of Judiciary Law § 487, contending that defendants made false statements about her which were reported in the media by third parties. She claims that as the SDNY action was brought in bad faith, the litigation privilege ought not apply, and that Smith engaged in misconduct as a party attorney in violation of the Judiciary law.

b. SDNY proceedings (NYSCEF 9)

In response to SFM's voluntary discontinuance of the SDNY action, plaintiff filed an application, by order to show cause, to vacate SFM's notice of voluntary discontinuance, deny its motion for a preliminary injunction on the merits, dismiss the complaint with prejudice, and award her attorney fees and costs. She also sought leave to file a motion for sanctions. Plaintiff's motion was denied after a hearing, but the court retained jurisdiction to consider other issues such as sanctions. Plaintiff then moved for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure (FRCP) and the court's inherent power.

By decision dated January 4, 2021, the SDNY court denied plaintiff's motion for sanctions based on its findings that plaintiff had not complied with the safe harbor provision of FRCP rule 11(c)(2) and even had she, sanctions were not warranted as "[t]he [c]ourt is not aware of any intentional effort by [SFM's] counsel to make false representations to the [c]ourt." The court also declined to impose sanctions under its inherent power, concluding that, while it was a close issue, SFM had a colorable, good faith basis and proper motives for bringing the lawsuit.

While the court denied plaintiff's motion for sanctions, it admonished SFM for bringing the lawsuit in haste and *ex parte* before conducting a more thorough investigation, and opined that "[i]t is unfortunate that [SFM] does not share this view, and that [SFM] has done little to remediate the damage to [plaintiff's] reputation that its litigation has wrought."

On March 11, 2020, plaintiff filed a complaint against SFM in the SDNY asserting causes of action for a wrongful and excessive seizure in violation of 18 USC § 1836(b)(2)(G), a violation of her fourth amendment rights, and abuse of process (NYSCEF 11), which she voluntarily discontinued on June 8, 2020 (NYSCEF 13).

II. SFM'S MOTION TO DISMISS

A. Abuse of process and malicious prosecution

1. Contentions

Defendants contend that, as a threshold matter, plaintiff is collaterally estopped from advancing her third and fourth causes of action, as essential issues underlying those claims were litigated in the SDNY, where the court held that SFM had filed the action in good faith and with proper motives. Even if she is not estopped, defendants argue, plaintiff fails to state a cause of action for malicious prosecution, as a voluntarily discontinued action, in which all significant judicial determinations were not in plaintiff's favor, does not constitute a termination in plaintiff's favor, and she does not plead special damages. Plaintiff's cause of action for abuse of process also fails, defendants argue, absent an allegation that process was used improperly after it issued. (NYSCEF 13).

In response, plaintiff maintains that, as defendants voluntarily discontinued their claims in the SDNY action before a decision was reached on the merits, and as that action did not address issues identical to those presented here, she is not estopped from raising any issue here that was decided in the SDNY. Additionally, she claims, she is not estopped by the TRO or the claims discontinued in the second SDNY action from asserting them here.

Plaintiff also argues that she states a cause of action for abuse of process and for malicious prosecution, per the dicta of the SDNY court who characterized the first SDNY action

as an "ill-[conceived] overreach," and as SFM's voluntary discontinuance should be construed in her favor for the purpose of maintaining a claim for malicious prosecution. (NYSCEF 29).

Defendants concede in reply that plaintiff is not estopped by the TRO and her discontinued federal claims but assert that the SDNY decision denying her motion for sanctions constitutes an adjudication on the merits that precludes plaintiff from re-litigating issues decided against her in that decision, noting that although the claims need not be identical, the issues must be identical, and that as the court determined that SFM had brought the SDNY action in "good faith" with "proper motives" and did not mislead the court, it constitutes a bar to proceeding here. That the decision was based on the safe harbor provision of FRCP rule 11 is of no moment, they contend, as it constitutes a separate and additional basis for the decision. (NYSCEF 37).

2. Governing law

Parties are collaterally estopped from "relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party… whether or not the . . . causes of action are the same." (*Simmons v Trans Express Inc.*, 37 NY3d 107, 112 [2021], *quoting Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). Only where "the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action" is a party estopped, if that party "had a full and fair opportunity to litigate the issue in the earlier action" (*Simmons,* 37 NY3d at 112, *quoting Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999]). "[T]he fundamental inquiry is whether relitigation should be permitted in a particular case in light of what are often competing policy considerations, including fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results." (*Simmons,* 37 NY3d at 112, *quoting Gilberg v Barbieri* 53 NY2d 285, 292 [1981]). The party seeking to estop the other bears the

burden of identifying the issues in the present litigation and the prior determination, whereas the opposing party has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action. (*Juan C. v Cortines*, 89 NY2d 659, 667 [1997]; *Kaufman v Eli Lilly and Co.*, 65 NY2d 449, 456 [1985]).

The elements of a claim for abuse of process are (1) regularly issued process, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective. (*Curiano v Suozzi*, 63 NY2d 113, 116 [1984]; *Casa de Meadows Inc. [Cayman Islands] v Zaman*, 76 AD3d 917, 921 [1st Dept 2010]). The elements of a claim for malicious prosecution are (1) the initiation of a proceeding, (2) its termination favorably to plaintiff, (3) lack of probable cause, and (4) malice. (*Hernandez v City of New York*, 100 AD3d 433 [1st Dept 2012], *quoting Colon v City of New York*, 60 NY2d 78, 82 [1983]).

3. Analysis

A judicial determination as to whether to impose sanctions may collaterally estop a party from relitigating issues underlying that decision in a subsequent action. (*In re Neroni*, 135 AD3d 97, 99-100 [4th Dept 2015]; *In re Capoccia*, 272 AD2d 838, 840 [4th Dept 2000], *lv denied* 95 NY2d 887 [2000]; *see also Matter of Morrissey*, 217 AD2d 74 [1st Dept 1995] [prior ruling in attorney disciplinary proceeding given estoppel effect]; *compare Melcher v Greenberg Traurig LLP*, 135 AD3d 547, 553 [1st Dept 2016] [decision on motion to strike pleadings had no estoppel effect as issue not fully litigated]). As the SDNY court, in denying plaintiff's motion request for sanctions, held that SFM had brought its action with "a colorable basis and proper motives," defendants meet their burden of demonstrating that plaintiff is estopped from arguing that defendants intended to do harm without excuse or justification to bring their claims. Plaintiff is thus estopped from advancing her cause of action for abuse of process. (*See Greco v*

Christoffersen, 70 AD3d 769, 770 [2d Dept 2010] [denying leave to amend pleading add claim for abuse of process where there was no evidence of intent to do harm without excuse or justification]; *Fisk Bldg. Assoc. LLC v Shimazaki II, Inc.* 76 AD3d 468, 469 [1st Dept 2010] [dismissing counterclaim for abuse of process where the defendants failed to raise triable issue as to intent to do harm without excuse or justification]).

Defendants also meet their burden of demonstrating that the SDNY's ruling precludes plaintiff from relitigating the issue of whether the SDNY action was brought without probable cause or with malice, without which she cannot prove malicious prosecution. (*See Neulist v County of Nassau*, 108 Misc 2d 160, 168 [Sup Ct, Nassau County 1981], *aff'd* 88 AD2d 587 [2d Dept 1982], *lv denied* 57 NY2d 606 [1982] [prior ruling that defendant acted in good faith precluded plaintiff from establishing probable cause and malice elements of malicious prosecution]).

For these reasons, and absent an allegation that plaintiff was deprived of a full and fair opportunity to litigate these issues in the SDNY proceeding, she is precluded from establishing the necessary elements of her causes of action for abuse of process and malicious prosecution.

In any event, plaintiff fails to state a cause of action for abuse of process, as she does not contend that SFM abused process after it was issued, only that the action was filed for an improper, collateral purpose. (*Curiano*, 63 NY2d at 117; *Ivancev v Garrido*, 184 AD3d 422, 423 [1st Dept 2020] [mere filing of petitions not legally considered process that can be abused]).

Plaintiff also fails to state a cause of action for malicious prosecution, as a voluntary discontinuance without prejudice does not constitute a disposition in plaintiff's favor. (*Hudson Valley Marine, Inc. v Town of Cortlandt*, 79 AD3d 700, 703 [2d Dept 2010] [discontinuation without prejudice by agreement not favorable termination for plaintiff]; *Winklevoss v Steinberg*,

2018 WL 4491202, 13 [Sup Ct, New York County 2018], *aff'd* 170 AD3d 618 [1st Dept 2019], *lv denied* 33 NY3d 1043 [2019] [voluntary discontinuance without prejudice not a favorable termination for plaintiff]; *see also Shawe v Elting*, 161 AD3d 585 [1st Dept 2018], *lv denied* 32 NY3d 907 [2018] [voluntarily discontinued claim in first action not favorable termination]; *compare Louvad Realty Corp. v Anafang*, 267 AD 567, 568 [1st Dept 1944] [voluntary discontinuance "on the merits" constituted favorable termination for plaintiff where not resulting from inducement or compromise]; *but see Mobile Training & Educ., Inc. v Aviation Ground Schools of America*, 28 Misc 3d 1226[A] [Sup Ct, New York County 2010] [voluntary dismissal with defendant's consent but without inducement or compromise supports malicious prosecution claim]).

B. NYCHRL claims

1. Contentions

Defendants argue that plaintiff's first and second causes of action for, respectively, discrimination and retaliation under the NYCHRL fail to state a cause of action, as she does not allege that defendants commented on or referenced her age, religion, or gender. Rather, they claim, she relies on anti-Semitic stereotypes about the Sapir family's faith and support of Chabad to support her conclusory allegations of religion and gender discrimination. Additionally, her claims are undermined as Smith is a non-Jewish woman of plaintiff's approximate age, and are based on the implausible notion that Smith, an experienced attorney, was threatened by plaintiff's status as an older female paralegal with extensive experience.

According to defendants, plaintiff also fails to establish a causal link between the alleged discrimination or protected activity and adverse employment action nor does she allege that Smith was aware that plaintiff was engaging in protected activity. Plaintiff's causation argument,

they moreover argue, is also undermined by the allegation that her termination resulted from her association with the former general counsel and his family, which would not constitute protected activity. Additionally, they assert that plaintiff is estopped from claiming that defendants discriminated against her given her allegation that the SDNY action constituted a pretext to discriminate against her, whereas the court found that defendants acted in good faith. (NYSCEF 13).

In response, plaintiff argues that her allegations of disparate treatment compared to similarly-situated male and Jewish employees support her claim of discrimination, as does the allegation that she was replaced by someone 20 years younger, which constitutes evidence of age discrimination. She argues that she states a claim for retaliation under the liberal pleading standards of the NYCHRL by alleging facts sufficient to infer the existence of a causal connection between her complaints to her superiors and her termination. (NYSCEF 29).

Defendants reply that plaintiff's allegations of discrimination and retaliation are vague, conclusory, and contradictory. (NYSCEF 37).

2. Governing law

In considering a motion to dismiss pursuant to CPLR 3211(a)(7) for a failure to state a cause of action, the court must construe the pleadings liberally, accept the facts alleged as true, and afford the plaintiff "the benefit of every possible favorable inference." (*JP Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334 [2013] [citation omitted]; *AG Cap. Funding Partners, LP v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). "The motion must be denied if from the four corners of the pleadings 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002],

quoting Polonetsky v Better Homes Depot, Inc., 97 NY2d 46, 54 [2001]; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

Pursuant to Administrative Code § 8-107(7), as pertinent here, "[i]t shall be an unlawful discriminatory practice … to retaliate or discriminate in any manner against any person because such person has … opposed any practice forbidden under this chapter." To state a cause of action for retaliation under the NYCHRL, the plaintiff must allege that she was engaged in a protected activity, that her employer was aware of the activity, that she suffered an adverse employment action, and that there exists a causal connection between the protective activity and the adverse action. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 313 [2004]).

A cause of action for employment discrimination under NYCHRL is set forth, *prima facie*, upon a showing that (1) the plaintiff is a member of a protected class; (2) she was qualified to hold the position; (3) she was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination. (*Forrest*, 3 NY3d at 305; *Harrington v City of New York*, 157 AD3d 582, 584 [1st Dept 2018]).

The provisions of the NYCHRL are construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" (*Albunio v City of New York*, 16 NY3d 472, 478 [2011]), with due regard for fulfilling the law's remedial goals (*Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 34 [1st Dept 2011], *lv denied*, 18 NY3d 811 [2012]; *Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 [1st Dept 2009], *lv denied* 13 NY3d 702), and "more broadly" than "similarly-worded federal or State antidiscrimination provisions" (*Singh v Covenant Aviation Sec., LLC*, 131 AD3d 1158, 1161 [2d Dept 2015]; *Bennett*, 92 AD3d at 34).

3. Analysis

As the SDNY court decided only that the SDNY action had been commenced in good faith and did not decide whether plaintiff had been terminated from SFM in good faith, plaintiff is not estopped from advancing her NYCHRL claims. Moreover, a determination that plaintiff was terminated by SFM in good faith was not necessary to the decision on her motion for sanctions, which addresses only SFM and its counsel's conduct in the course of litigation. (*Simmons,* 37 NY3d at 112; *Liddle, Robinson & Shoemaker v Shoemaker*, 309 AD2d 688, 691-92 [defendant not precluded from litigating an issue that was not "focus" of prior hearing]).

a. Discrimination

The sole element of plaintiff's *prima facie* claim for discrimination under the NYCHRL challenged by defendants is that her discharge occurred under circumstances giving rise to an inference of discrimination. To satisfy this element, a plaintiff must plead facts sufficient to support such an inference beyond conclusory allegations of bias. (*Wolfe-Santos v NYS Gaming Commission*, 188 AD3d 622 [1st Dept 2020]; *Askin v Dept. of Educ. Of City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013]). Such a cause of action may be supported by allegations of discriminatory comments by an employer (*O'Rourke v Natl. Foreign Trade Council*, 176 AD3d 517 [1st Dept 2019]; *Whitfield-Ortiz v Dept. of Educ. Of City of N.Y.*, 116 AD3d 580, 581 [1st Dept 2014]) or by allegations of the disparate treatment of similarly-situated employers (*Brown v City of New York*, 188 AD3d 518, 519 [1st Dept 2020]; *Whitfield-Ortiz*, 116 AD3d at 581).

Here, while plaintiff does not allege that Smith or any SFM employee commented on her gender, age, or religion, she alleges facts indicating that she was disparately treated based on religion and gender by claiming that similarly-situated Jewish male employees had engaged in conduct for which defendants which she had engaged without suffering adverse employment

consequences. That plaintiff was replaced by someone 20 years younger, however, does not constitute disparate treatment absent additional facts. (*See Green v Citibank, N.A.*, 299 AD2d 182 [1st Dept 2002] [replacement by a younger employee not enough to support claim of age discrimination absent other facts]; *Demay v Miller & Wrubel P.C.*, 262 AD2d 184, 185 [1st Dept 1999] [allegation that plaintiff was replaced by younger employee insufficient to support age discrimination claim absent age-related comments or evidence that younger employee was desired]). In light of the liberal pleading standards of the NYCHRL, plaintiff's assertions of disparate treatment based on gender and religion are sufficient to give rise to an interference of discrimination.

b. Retaliation

As it is undisputed that plaintiff suffered an adverse employment action and engaged in protected activity by complaining to her employer about defendants' alleged discrimination, and as she sufficiently pleads that her employer was aware of her complaints, the sole issue as to her claim of retaliation is whether she sufficiently pleads a causal connection between her complaints and her termination.

A causal connection between a protected activity and a negative employment outcome may be reasonably inferred from the passing of a brief period of time between the two. (*Harrington v City of New York*, 157 AD3d 582, 586 [1st Dept 2018]). And, although there is no bright line rule, absent additional facts, a gap of five months or greater has been held to be too great to establish causation based on temporal proximity alone. (*Matter of Parris v New York City Dept. of Educ.*, 111 AD3d 528 [1st Dept 2013], *lv denied* 23 NY3d 903 [2014]). The relevant period is measured from when the employer became aware of it, not from when the protected activity occurred. (*Dotson v J.C. Penney Co., Inc.*, 159 AD3d 1512, 1514 [4th Dept

2018]; *Matter of Parris*, 111 AD3d at 529).

Here, while plaintiff does not specify the date on which she complained about Smith's conduct, she states that it was in "late 2019" and that she was fired in January 2020. As Smith was hired in August 2019, it is reasonably inferred that the period between when SFM learned of the complaint and her termination was less than five months. Thus, and in light of the liberal pleading standards of the NYCHRL, it is reasonable to afford plaintiff the favorable inference of a temporal proximity of her complaint to her termination.

B. Defamation *per se* and Judiciary Law § 487 claims

1. Contentions

Defendants argue that plaintiff fails to state a cause of action for defamation as she does not set forth a defamatory statement with particularity as required by CPLR 3016(a), and as statements made in the course of litigation are absolutely privileged. Plaintiff's Judiciary Law § 487 claim against Smith also fails, defendants maintain, because she was acting as a party representative rather than as SFM's attorney, and in any event, the claim is not stated with particularity. Additionally, they contend, plaintiff may only pursue a remedy under section 487 in the action in which an alleged violation occurs and is barred from asserting such a claim in a plenary action. And for both claims, plaintiff is precluded from arguing that the SDNY proceeding was brought in bad faith. (NYSCEF 13).

In response, plaintiff argues that her allegation that defendants disseminated false information to third parties about her alleged unprofessional conduct constitutes defamation *per se* and that the statements made in anticipation of litigation or after litigation ends are entitled to only a qualified privilege. She also seeks an opportunity to obtain discovery to substantiate the claim.

Plaintiff also maintains that Smith acted in her capacity as in-house counsel, which is covered by the statute, and that her claim is set forth with sufficient particularity to permit an inference that Smith violated section 487, with discovery enabling her to clarify her claim. Additionally, plaintiff denies that she is estopped from raising a claim under Judiciary Law § 487, and asserts that it can be brought in a plenary action where the claim does not collaterally attack a prior adverse judgment or order on the ground that it was procured by fraud. (NYSCEF 29).

Defendants reiterate their claims, and in response to plaintiff's argument, contend that Judiciary Law § 487 applies only to conduct occurring during a pending judicial proceeding. Thus, pre-suit conduct or even the act of filing a pleading cannot form the basis for the claim. (NYSCEF 37).

2. Governing Law

A statement that "suggests improper performance of one's professional duties or unprofessional conduct" (*Frechtman v Gutterman,* 115 AD3d 102, 104 [1st Dept 2014]), or otherwise "tend[s] to injure another in his or her trade, business or profession" may be actionable as defamation *per se* without proof or special damages (*Liberman v Gelstein,* 80 NY2d 429, 435 [1992]; *see Geraci v Probst,* 15 NY3d 336, 344 [2010]). "Reputational injury to a person's business, or to a company, consists of a statement that either imputes some form of fraud or misconduct or a general unfitness, incapacity, or inability to perform one's duties." (*Enigma Software Grp. USA, LLC v Bleeping Computer LLC,* 194 F Supp 3d 263, 290 [SD NY 2016], *quoting Van–Go Transp. Co. v New York City Bd. of Educ.,* 971 F Supp 90, 98 [ED NY 1997]). The challenged statement "must be more than a general reflection upon [the plaintiff's] character or qualities… [it] must reflect on her performance or be incompatible with the proper conduct of

her business" (*Golub v Enquirer/Star Group, Inc.,* 89 NY2d 1074, 1076 [1997] [citations omitted]), and relate to "a matter of significance and importance for that purpose" (*Liberman,* 80 NY2d at 436, citing Prosser and Keeton, Torts § 112, at 791 [5th ed]; *see also Kerik v Tacopina,* 64 F Supp 3d 542, 570 [SD NY 2014]).

Statements made by attorneys in connection with a proceeding before the court are entitled to absolute immunity from liability for defamation, whereas statements made before the commencement of anticipated litigation are qualifiedly immune unless the statements are "not pertinent to a good faith anticipated litigation." (*Front, Inc. v Khalil*, 24 NY3d 713, 720 [2015]).

Judiciary Law § 487 is violated when an attorney is guilty of "any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party." *(Izmirligil v Steven J. Baum, P.C.*, 180 AD3d 767, 771 [2d Dept 2020]). The essential elements of the claim include intentional deceit by an attorney and damages proximately caused by the deceit. *(Jean v Chinitz*, 163 AD3d 497 [1st Dept 2018]). Relief for a violation based on Judiciary Law § 487 "is not lightly given" (*Facebook, Inc. v DLA Piper LLP*, 134 AD3d 610, 615 [1st Dept 2015], *quoting Chowaiki & Co. Fine Art Ltd. v Lacher*, 115 AD3d 600, 601 [1st Dept 2014]), and requires a showing of "egregious conduct or a chronic and extreme pattern of behavior" on the part of the defendant attorney that caused damages (*Facebook*, 134 AD3d at 615, *quoting Savitt v Greenberg Traurig, LLP*, 126 AD3d 506, 507 [1st Dept 2015]). Allegations of an act of deceit or intent to deceive must be stated with particularity. (*Facebook*, 134 AD3d at 615; *Armstrong v Blank Rome LLP*, 126 AD3d 427, 427 [1st Dept 2015]).

3. Analysis

Plaintiff's failure to specify a defamatory statement made by defendants and the time, place, and manner of the purported defamation is fatal to her cause of action for defamation.

(*Offor v Mercy Medical Ctr.*, 171 AD3d 502, 503 [1st Dept 2019]; *Mañas v VMS Assoc., LLC*, 53 AD3d 451, 454-55 [1st Dept 2008]; CPLR 3016[a]). But even if sufficiently particular, all of the statements are immune from liability as having been made in connection with a proceeding before the court, which determined that the proceeding had been commenced in good faith. (*Khalil*, 24 NY3d at 720).

Plaintiff's Judiciary Law § 487 claim is also defeated by her failure to set forth allegations with particularity (*Doscher v Mannatt, Phelps & Phillips, LLP*, 148 AD3d 523, 594 [1st Dept 2017]; *Facebook*, 134 AD3d at 615; CPLR 3016[a]), allege conduct by Smith occurring during the SDNY proceeding (*US Suite LLC v Baratta, Baratta & Aidala LLP*, 171 AD3d 551 [1st Dept 2019] [dismissing section 487 claim where alleged deceit did not occur during pending judicial proceeding]), or that that the conduct was sufficiently egregious or part of a chronic and extreme pattern of behavior (*see Strumwasser v Zeiderman*, 102 AD3d 630 [1st Dept 2013] [single act of deceit not sufficiently egregious to support a claim under section 487]).

III. PLAINTIFF'S CROSS-MOTION

Plaintiff's cross-motion for expedited discovery fails absent specification as to how additional discovery would enable her to state a sufficient claim with respect to the dismissed allegations (*Sitomer v Goldweber Eptstein, LLP*, 139 AD3d 642, 644 [1st Dept 2016]), nor does she demonstrate that expedited discovery is warranted as to her remaining claims.

VI. CONCLUSION

In light of the foregoing, it is hereby

ORDERED, that defendants' motion to dismiss is granted to the extent of severing and dismissing plaintiff's third, fourth, fifth and sixth causes of action, and denied as to the first and second causes of action; it is further

ORDERED, that plaintiff's cross-motion is denied; it is further

ORDERED, that defendants file an answer responding to plaintiff's complaint within 30 days of the date of this order; and it is further

ORDERED, that the parties are directed to submit a preliminary conference stipulation, by email to cpaszko@nycourts.gov, on or before January 12, 2022.

20211026134837BJAFFECAB37C1AC367440CAA2390BCD4AACAA9

10/26/2021
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE