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| **Galanos v Northwestern Mut. Inv. Servs., LLC** |
| 2023 NY Slip Op 35259(U) |
| August 29, 2023 |
| Supreme Court, Dutchess County |
| Docket Number: Index No. 2022-50449 |
| Judge: Maria G. Rosa |

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa, Justice

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NICOLE GALANOS,

Plaintiff,

-against-

NORTHWESTERN MUTUAL INVESTMENT SERVICES, LLC and JEFFREY POLANCO INDIVIDUALLY,

Defendants.

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DECISION AND ORDER

Index No.: 2022-50449

Motion Sequences: 1, 2, 3

The following papers were considered on the motions for summary judgment filed by Defendant Jeffrey Polanco (Motion Sequence #1) and Defendant Northwestern Mutual Investment Services, LLC ("Defendant NMIS") (Motion Sequence #2), and the motion of Defendant NMIS seeking a stay of discovery and/or protective order:

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| NOTICE OF MOTION – Seq. #1 | 38 |
| MEMORANDUM OF LAW | 39 |
| MEMORANDUM OF LAW IN OPPOSITION | 119 |
| REPLY MEMORANDUM OF LAW | 121 |
| NOTICE OF MOTION – Seq. #2 | 40 |
| STATEMENT OF MATERIAL FACTS | 41 |
| AFFIRMATION IN SUPPORT and EXHIBITS A–Q | 42–58 |
| MEMORANDUM OF LAW | 49 |
| RESPONSE TO STATEMENT OF MATERIAL FACTS | 99 |
| AFFIRMATION IN OPPOSITION and EXHIBITS 1–17 | 100–117 |
| MEMORANDUM OF LAW IN OPPOSITION | 118 |
| REPLY MEMORANDUM OF LAW | 120 |

BACKGROUND

This is an action for defamation based upon statements made by Defendants concerning Plaintiff during the course of an investigation into the alleged forging of client signatures. Plaintiff had been employed as an assistant to Defendant Polanco, who was a contracted insurance agent for Defendant NMIS. In October of 2020, a routine quality assurance review by Defendant NMIS of account paperwork submitted by Defendant Polanco indicated possible forging of client signatures or filling in information on forms that had been pre-signed by clients. Defendant NMIS thereafter began an internal investigation into Defendant Polanco, which culminated in a meeting on February 25, 2021 between Defendant Polanco, Plaintiff and representatives of Defendant NMIS. During that meeting Defendant Polanco admitted to altering pre-signed customer forms in violation of Defendant NMIS's policies, but denied forging client signatures by copying and pasting them from one electronic document to another. Plaintiff was not asked any questions and did not speak at the meeting. Near the end of that meeting, Plaintiff was asked to leave. When she was no longer present, Defendant Polanco and Defendant NMIS's representatives agreed to terminate his contract, and Defendant Polanco allegedly stated to at least one of the representatives, "to be honest with you Nicole [Plaintiff] did copy the signature."

Thereafter, Defendant NMIS sent written communications and/or filings to two regulatory agencies, the Financial Industry Regulatory Authority ("FINRA") and the New York State Department of Financial Services ("NYSDFS"), concerning the termination of Defendant Polanco's contract. On March 5, 2021, Defendant NMIS filed with FINRA a "Form U5" which stated that the reason for Defendant Polanco's termination was that "his assistant copied and pasted customer signatures" on client documents. In a letter to NYSDFS dated March 10, 2021, Defendant NMIS stated that Plaintiff was terminated from employment with Defendant NMIS because "his [Polanco] assistant copied and pasted customer signatures" on client documents. This letter further stated that Plaintiff's appointments with Defendant NMIS were terminated for cause effective March 10, 2021 due to said alleged misconduct. Further correspondence by Defendant NMIS with both regulatory agencies reiterated these statements. Plaintiff became aware of these statements upon receiving copies of certain of the correspondence and finding evidence of the FINRA filing on the website brokercheck.com.

Plaintiff commenced this action on February 14, 2022, asserting three causes of action against Defendants: defamation, defamation *per se*, and intentional infliction of emotional distress.

Plaintiff alleges that the statement that she copied and pasted customer signatures was false, that Defendants knew it to be false, and that as a result she suffered termination, a *de facto* prohibition on employment with Defendant NMIS, as well as other adverse employment consequences and damages.

Defendant NMIS now moves for summary judgment to dismiss the complaint as asserted against it, arguing that its filings and communications with FINRA and NYSDFS were made pursuant to required regulatory reporting and investigation activities, to which an absolute privilege applies. Defendant NMIS further argues that the statements it conveyed to the agencies were substantially true, and that Plaintiff did not suffer any compensable damages. Defendant Polanco separately moves for summary judgment, incorporating Defendant NMIS's arguments by reference.

DISCUSSION

A motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action . . . shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party," but such a motion "shall be denied if any party shall show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]). Summary judgment is designed to expedite civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law. Since it deprives litigants of their day in court, it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues (*Andre v. Pomeroy*, 35 NY2d 361 [1974]). The function of the Court on such a motion is issue finding, rather than issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)" (*Vega v Restani Const. Corp.*, 18 NY3d 499, 505 [2012]).

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If a movant has met this threshold burden, to defeat the motion the opposing party must present the existence of a triable issue of fact using admissible evidence (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding a motion for summary judgment, "the trial court must afford the party opposing the motion every inference which may be properly drawn from the facts presented, and the facts must be considered favorable to the nonmovant" (*Szczerbiak v Pilat*, 90 NY2d 553 [1997]). Where there is any doubt about the existence of a material and triable issue of fact, summary judgment must not be granted (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

*Defendant NMIS's Motion for Summary Judgment*

"The elements of a cause of action 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*" (*Tsatskin v Kordonsky*, 189 AD3d 1296, 1299 [2d Dept 2020] [emphasis added]).

Forms required to be filed and communications with regulatory authorities are protected by an absolute privilege if they are part of the "preliminary or investigative stages of [a judicial or quasi-judicial] process, particularly where compelling public interests are at stake" (*Rosenberg v MetLife, Inc.*, 8 NY3d 359, 365 [2007]). Such "compelling public interests" include protecting the "general investing public . . . [from] the potential for substantial harm if exposed to unethical brokers" (*Id.* at 368).

The facts of this matter are similar to those in *Rosenberg*, where the plaintiff, a financial services representative, asserted defamation claims against his former employer premised upon the filing of a Form U-5 with the relevant regulatory authority. The Court of Appeals upheld dismissal of those claims based on an absolute privilege, notwithstanding the risk of publication or republication of false and defamatory statements in such a regulatory filing (*Id., and see dissent at* 368–371). Here, it is undisputed that Defendant NMIS was required to report the termination of Defendant Polanco to both FINRA and NYSDFS (*see* FINRA Rule 4530[b]; Insurance Law § 2112[d] [which further states: "Every statement made pursuant to this subsection shall be deemed a privileged communication"]). There is no allegation that Defendant NMIS published any statement regarding Plaintiff's alleged copying and pasting of client signatures to any other person or entity. As a result, Defendant NMIS's statements to both FINRA and NYSDFS were subject to an absolute privilege when made regardless of the fact that Plaintiff was not Defendant NMIS's direct employee, requiring dismissal of Plaintiff's first and second causes of action as against Defendant NMIS.

Regarding Defendant's third cause of action for intentional infliction of emotional distress, there is no evidence that Defendant NMIS's conduct approached the essential element of such a claim, *i.e.*, "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 community" (*Davydov v Youssefi*, 205 AD3d 881, 883 [2d Dept 2022]).

Based on the foregoing, it is hereby

**ORDERED** that Defendant NMIS's motion for summary judgment is granted; and it is further

**ORDERED** that the complaint is dismissed as against Defendant NMIS; and it is further

**ORDERED** that Defendant NMIS's motion for a stay of discovery or protective order (Motion Sequence #3) is denied as moot.

*Defendant Polanco's Motion for Summary Judgment*

In contrast to the reporting performed by Defendant NMIS to FINRA and NYSDFS, Defendant Polanco's alleged statement to a representative of Defendant NMIS at the conclusion of the February 25, 2021 meeting was not absolutely privileged, since Defendant Polanco and

Defendant NMIS were business associates (*see Geraci v Probst*, 15 NY3d 336 [2010]). At the time Defendant Polanco made the challenged statement to Defendant NMIS, there was no regulatory investigation or proceeding ongoing to which an absolute privilege may apply, and Defendant Polanco provides no legal authority for his contention that his statement was similarly privileged due to being made during an "internal investigation." At best, a qualified privilege may apply in such circumstances (*see Toker v Pollak*, 44 NY2d 211 [1978]), but this issue was not briefed.

Defendant Polanco has denied ever having made the challenged statement. Defendant NMIS's representative testified, however, to having a clear recollection of Defendant Polanco making the statement to him. There is also evidence that, if he did make the statement, Defendant Polanco knew it was false and intended to pass the professional consequences of his misconduct to Plaintiff, supporting a claim for defamation *per se* (*Levy v Nissani*, 179 AD3d 656, 658 [2d Dept 2020] ["A statement is defamatory per se if it . . . tends to injure the plaintiff in her or his trade, business or profession . . ."]). If Plaintiff is successful in establishing Defendant Polanco's liability for defamation *per se*, she need not prove actual damages to sustain the claim (*see generally* N.Y. Pattern Jury Instr.--Civil 3:29 [Plaintiff entitled to at least nominal damages if defamation *per se* is proven]). Therefore, there remain triable issues of fact as to whether Defendant Polanco made the challenged statement, the alleged falsity of the statement and Defendant Polanco's knowledge thereof, and the extent of damages suffered by Plaintiff as a result.

Finally, Plaintiff's third cause of action for intentional infliction of emotional distress as asserted against Defendant Polanco must be dismissed for the same reasons stated above.

Based on the foregoing, it is hereby

**ORDERED** that Defendant Polanco's motion for summary judgment is granted as to dismissal of Plaintiff's third cause of action only, and is otherwise denied; and it is further

**ORDERED that the caption of this action is amended to hereafter read as follows:**

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NICOLE GALANOS,

Plaintiff,

-against-

Index No.: 2022-50449

JEFFREY POLANCO,

Defendant.

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; and it is further

**ORDERED** that jury selection shall take place on July 15, 2024 at 9:15 a.m.

The foregoing constitutes the decision and order of the Court.

Dated: August 29, 2023
Poughkeepsie, New York

ENTER:

MARIA G. ROSA, J.S.C.

Scanned to the E-File System only

Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

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