



Defendant Goff moves for summary judgment on his counter-claims, attorney fees, malicious prosecution, and abuse of process all arising from the matrimonial action in which he was initially named as a respondent.

There is also a cross-motion by Zhang to dismiss defendants' counter-claims; to grant him summary judgment against Gold and Goff for Libel and an inquest for damages, attorney's fees; and an Order disqualifying G&M from representing Gold and Goff.

The defendants' motion seeking dismissal alleges that Zhang's claim against them in the instant action arises from the difficult emotional context presented in the matrimonial action. That the alleged objectionable statements made in the matrimonial action which form the basis of the instant libel claim, are privileged. Defendant also argues that the instant action must fail because it was initiated by improper service.

In the initial matrimonial action on September 23, 2004, the Court [Stackhouse, J.] implored Zhang to retain counsel, advising him "to go to a lawyer". Zhang informed the Court that because of credit card debt he could not afford counsel, so Zhang for the "for [time] ever" assumed, over the Court's express statement to the contrary, the obligation of self representation in a very complex matrimonial action. On October 25, 2004 the Court "dismissed with prejudice" and struck that portion of plaintiff's verified complaint as to respondent Goff.

The facts asserted which form the basis of the instant law suit for libel is that during the course of the matrimonial action Zhang gave Gold, as Goff's counsel, a copy of his motion to compel discovery, which appeared to be unsworn. This led Gold to present, in his opposition papers, the argument that Zhang's affidavit in support of his motion was unsworn. It is this fact which gave rise to the instant suit.

Statements made in the course of Court proceedings are fully protected. Courts prefer a free and open dialogue of the issues presented rather than measure what statements should be the basis of a subsequent legal action. As stated in *Bingham v Gaynor*, [203 NY 27, 30]

A person on an occasion that rebuts any presumption of express malice may publish statements, although defamatory of the person referred to in the communication, if he does so in the performance of a legal or moral duty and in good faith believing that such statements so made by him are true, without being liable for damages arising from such publication.

In any case, Zhang's allegations against Goff and Gold are legally insufficient. The allegedly offensive comments of Gold are not assignable to Goff, or even if attributable to Goff, can not be said to expose Zhang to hatred, shame, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace. Nor were the words used in such a manner which would tend to disparage Zhang in his professional capacity, because, Zhang, although an attorney, was appearing *pro se*.

The absolute protection afforded individuals is designed to ensure that the fear of civil action

“whether successful or otherwise” does not adversely impact upon their ethical responsibility of representation (*see, Toker v Pollak*, 44 NY2d 211).

The Courts have long recognized that there is a public interest protecting communications which although defamatory are afforded absolute privilege, if part of a judicial proceeding, as long as that privilege is not abused. That shield can be breached if the plaintiff can demonstrate that the defendant spoke with “malice”. The definition of malice for the purpose of determining when a communication otherwise protected becomes actionable, requires that the plaintiff establish that the defendant made the statement with a high degree of awareness of the statements falsity and that such malice was the one and only cause for the offensive statement (*Lieberman v Gelstein*, 80 NY2d 429). This Court finds that the Plaintiff and Defendants have failed to meet that standard.

The written statements of Gold which asserted that Zhang’s allegations were unsworn, which were understandable under the facts presented, are not actionable and in any case are afforded absolute privilege, based on the status of the person making that representation and the circumstances of a contested matrimonial action in which the alleged adultery by Goff, G&M’s client, was an issue.

Statements made during the course of judicial proceedings are absolutely privileged, as long as they are “pertinent to the issue to be resolved” and the statements contained in the writings were properly submitted within the judicial proceedings are within the ambit of privilege (*Rosenberg v MetLife, supra; Sinrod v Stone, supra*). Both the plaintiff and defendants have failed to demonstrate that the allegedly offensive writings and speech were not material and pertinent to the questions involved (*see, Wiener v Weintraub*, 22 NY2d 330; *Romeo v Village of Fishkill*, 248 AD2d 700). This is different from a naked statement whose sole purpose is to cast dispersion on the professional character of an attorney (*Kleeberg v Sipser*, 265 NY 87). There is nothing presented which would constitute such an actionable wrong. The litigants here made their statements in good faith regarding subject matter which was material to the issues presented, and there is no showing of malice on the part of each litigant (*Missick v Big V Supermarkets, Inc.*, 115 AD2d 808 *app dismissed* 67 NY2d 938).

Therefore, statements made by counsel or a party to an action are absolutely privileged “not withstanding the motive with which they are made” as long as they are material and pertinent to the issue to be resolved (*Rosenberg v MetLife*, 8 NY3d 359; *Sinrod v Stone*, 20 AD3d 560). Further, this Court finds that Gold’s statement, was made in good faith in the performance of his duties and, therefore, privileged (*Wolf v Musnick*, 84 AD2d 503, *app dismissed* 56 NY2d 593).

Because Justice Stackhouse did not indicate in his Order anything other than that the plaintiff’s action in which Goff was named as a respondent was dismissed, there is no basis for the malicious prosecution and abuse of process. In any case, Goff’s motion for attorney fees should have been sought in the matrimonial action under the theory now espoused, that Zhong’s legal action was “frivolous” (22 NYCRR 130-1.1). The Court of Appeals has commented that it seeks to encourage “open access to the court” and avoid endless litigation because “in some measure” the frivolous litigation can be met by awarding costs and fees (*Engel v CBS, Inc.*, 93 NY2d 196, 204).

Goff's claim for malicious prosecution requires that he demonstrate that Zhang's action in which he was named as a respondent was "commenced maliciously" against him (*Pangburn v Bull*, 1 Wend 345, 351). Public policy requires that "all persons should freely resort to the courts for redress of wrongs, the law protects them when they act in good faith" (*Burt v Smith*, 181 NY 1, 9 *app dismissed* 203 US 129). In order for Goff to sustain the instant counter-claim he must show that not only did Zhang act out of malice, but that he acted without any probable cause, as perceived from Zhang's perspective (*Burt v Smith, supra*). An additional hurdle Goff bears in a suit for malicious prosecution is that Goff must demonstrate "special injury" and that injury must be an interference with Goff's person or property, and legal fees do not meet "the special injury requirement" (*Engel v CBS, Inc., supra*, 93 NY2d 195, 201).

An action founded on abuse of process, requires three elements: (1) regularly issues process, (2) intent to harm the party against whom the process is issued, and (3) use of process in a perverted manner in order to obtain a collateral objective (*Board of Education v Farmingdale Classroom Teachers Assn.*, 38 NY3d 397). However, there is "no unlawful interference with" Goff's "person or property because the institution of a civil action by summons and complaint is not legally considered process capable of being abused" (*Curiano v Suozzi*, 63 NY2d 113, 116).

Accordingly, the defendants' motion for an order granting them summary judgment and dismissing the complaint is granted, and the plaintiff's cross-motion for summary judgment is denied. Based on the foregoing decisions all other issues presented in the motion papers are deemed moot.

This Court declines to award costs or impose sanctions under the facts presented (*see, Thoubboron v Smith*, 8 AD3d 260). Further, there is no retainer agreement, nor any documentation as to the time M&G spent on the matrimonial case in which Goff was involved, and the Court is, therefore, unable to determine whether Goff is entitled to a recovery.

So Ordered.

Dated: February 1, 2008

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Robert J. McDonald, J.S.C.