New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 256—NO. 120
THURSDAY, DECEMBER 22, 2016

Southern District Civil Practice Roundup

Expert Analysis

Attorneys Beware—Limited Immunity From Defamation Suits

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When civil litigation turns ugly, it sometimes devolves into allegations of defamation not just between the parties, but against their lawyers as well. In light of the broad privilege cloaking statements made in the litigation process, the incidence of defamation allegations against lawyers is surprising. We discuss below the parameters of the litigation privilege, and the narrow exceptions that litigants have been able to exploit, as discussed in a pair of recent cases from the U.S. District Court for the Southern District of New York.

Absolute v. Qualified Privilege

In a decision filed in September in *Yukos Capital v. Feldman*, 2016 WL 4940200 (S.D.N.Y. Sept. 14, 2016), Judge Lewis A. Kaplan explained the contours of the litigation privilege, underscoring the slight, but meaningful difference between the near absolute privilege accorded parties and their counsel for statements made once litigation is commenced and the qualified privilege for similar statements if made prior to the commencement of contemplated litigation.

The Yukos litigation arose out of the breakup of the Yukos Group, formerly one of Russia's largest exporters of crude oil. The parties accused each other, both in and out of court, of various acts of self-dealing and impropriety. At issue on the motions to dismiss were defendant Feldman's counterclaims and third-party claims against the Yukos directors and their outside counsel for a series of statements made in the run-up to the litigation and after it was commenced.

> Although absolute in name, the absolute privilege accorded statements made in the context of a legal proceeding is not entirely absolute.

Quoting *Front, Inc. v. Khalil*, 24 N.Y. 3d 713 (2015), a recent decision from the New York Court of Appeals which in turn cited its 1897 decision in *Youmans v. Smith*, 153 N.Y. 214, Judge Kaplan explained that "for well over one hundred years" New York has provided "absolute immunity from liability for defamation…for 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.'" He noted that this broad immunity extends even to out-of-court statements in most contexts, and that it "'embraces anything that may possibly or plausibly be relevant or pertinent,'" to the subject matter of the litigation. Id. (quoting *Grasso v. Matthew*, 164 A.D.2d 476 (3d Dept. 1991)). Finally, Judge Kaplan observed that the New York Court of Appeals in *Front* had extended the litigation privilege to counsel's pre-litigation statements "pertinent to a good faith anticipated litigation," although the protection in that instance is a more limited qualified immunity.

Kaplan applied those standards to the allegedly defamatory statements made by counsel in *Yukos*. In his counterclaim, Feldman alleged that the outside lawyers told various Yukos employees and other individuals that Feldman had stolen from Yukos while acting as one of its directors, or that he was a thief. Judge Kaplan held that because those statements were made after the litigation was commenced, they were protected by absolute immunity. He found that a statement made by one of the Yukos lawyers to a principal of Yukos' litigation adversary was similarly privileged, and dismissed the defamation claims against the lawyers based on statements

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allegedly made after the litigation had commenced.

By contrast, Kaplan declined to dismiss the defamation claim against one of the outside attorneys based on a statement he made to a Yukos consultant the week before the litigation was commenced, to the effect that Feldman had used his position as an insider to secure a personal benefit. Judge Kaplan concluded that it is entirely proper for an attorney to gather information in anticipation of litigation, and that the statement was likely protected by a qualified privilege. He went on to find that that conclusion did not end the matter, because the qualified privilege can be overcome by a showing of malice.

Noting that qualified privilege is an affirmative defense, Judge Kaplan cited the general proposition that on a motion to dismiss, dismissal based on an affirmative defense is not appropriate. He recognized some division within New York courts on whether pre-answer dismissal of defamation claims on qualified privilege grounds can be proper, but concluded that the Second Circuit has weighed in against dismissal in such circumstances, citing *Boyd v. Nationwide Mut. Ins.*, 208 F.3d 406 (2d Cir. 2000) for the proposition that it is important to distinguish between disposing of a case on a 12(b)(6) motion and disposing of a case on summary judgment.

He adopted *Boyd's* observation that "'a plaintiff may allege facts suggestive enough to warrant discovery, even where those facts alone would not establish a cause of action for defamation.'" Judge Kaplan declined to dismiss the claim, concluding that Feldman "should have the opportunity to prove through discover[y] that 'malice was the one and only cause' for the statement even though doing so 'might be well-nigh impossible.'" 2016 WL 4940200, at *7 (quoting *Stukuls v. State of New York*, 42 N.Y.2d 272 (1977)).

Not Entirely Absolute

Although absolute in name, the absolute privilege accorded statements made in the context of a legal proceeding is not entirely absolute. As Judge John Koeltl explained in a decision filed earlier this year in *Frydman v. Verschleiser*, 172 F.Supp.3d 653 (S.D.N.Y. 2016), New York law recognizes a narrow exception to the rule of absolute immunity where the litigation itself is brought maliciously and solely for the purpose of defaming the plaintiff. Id. at 672 (citing, e.g., *Riel v. Morgan Stanley*, 2007 WL 541955 (S.D.N.Y. Feb. 16, 2007) (Griesa, J.).

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That decision arose in the context of a bitter dispute between former partners in a real estate investment trust in which, as Judge Koeltl put it, "each party has used judicial and extra-judicial scorched earth practices to torment the other party." Among the multiple claims asserted by plaintiff were claims for defamation based in part on the allegation that the defendant had previously filed three defamatory lawsuits against plaintiff that in turn led to defamatory newspaper accounts that resulted in the loss of plaintiff's business.

The plaintiff alleged that the allegations in the lawsuits were made maliciously and solely for the purpose of harming the plaintiff. One of the three lawsuits had already been dismissed, with the judge declining to impose sanctions. Judge Koeltl held that the court's decision not to impose sanctions was a sufficient basis to determine that the suit was not an "objective sham filed for the sole purpose of disseminating false information." He held however, that the allegation that the sole purpose of the other two lawsuits was malicious could not be resolved on a motion to dismiss, and permitted the claim to proceed on that basis.

Judge Koeltl did not discuss the plausibility standard articulated by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), but presumably he found the allegations sufficiently plausible to survive a motion to dismiss. See *Biro v. Conde Nast*, 807 F.3d 541 (2d Cir. 2015) (holding that *Twombly* would not permit an implausible defamation claim—in that case against a public figure—to proceed to discovery in order to rebut the assertion of qualified immunity).

Conclusion

The litigation privilege is intended to provide a zone of protection to permit attorneys to speak freely and zealously represent their clients without fear of reprisal. Litigants nevertheless persist in asserting defamation claims against counsel. Courts have permitted such claims to proceed, at least past the motion to dismiss stage, where the claim is based on a pre-litigation statement by an attorney, in which case it is covered only by a qualified immunity, or when the plaintiff plausibly alleges that the underlying litigation was motivated solely by malice.