SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa, Justice

FRANK MORA,

Plaintiff,

-against-

STACEY KOCH,

Defendant,

NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT,

Intervenor-Defendant.

DECISION AND ORDER

Index No. 2022-54141

Motion Sequences: 1, 2

The following papers were read and considered on the motion of Defendant seeking dismissal of the complaint and for an award of attorney's fees and costs (Seq. #1); and the motion of Intervenor-Defendant New York State Commission on Judicial Conduct (the "Commission") seeking dismissal of the complaint. (Seq. #2):

Document:	NYSCEF Doc. No(s).:
SUMMONS & VERIFIED COMPLAINT and EXHIBIT 1	1
NOTICE OF MOTION – Seq. #1	5
MEMORANDUM OF LAW	6
AFFIRMATION IN SUPPORT and EXHIBITS A–B	7–9
MEMORANDUM OF LAW IN OPPOSITION	26[1]
REPLY MEMORANDUM OF LAW	31
NOTICE OF MOTION – Seq. #2	15

[1] Plaintiff filed a single memorandum of law in opposition, addressing arguments made in both pending motions.

BACKGROUND

This is an action for defamation. The following facts are taken from the complaint and presumed to be true for purposes of deciding both motions.

The events giving rise to this action commenced on December 28, 2021. That day, Plaintiff, a Judge of the Poughkeepsie City Court, brought his son to an ophthalmology office where a dispute arose between Plaintiff and the office manager, Defendant, regarding Plaintiff's unwillingness to wear a face mask while in the office. The following day, December 29, 2021, Defendant wrote certain "statements concerning [Plaintiff] . . . to the New York State Commission on Judicial Conduct" (Complaint at "Preliminary Statement"). The written statements were submitted via a complaint form provided by the New York State Office [sic] of Judicial Conduct" (*id.* at ¶24).[2]

Plaintiff alleges that Defendant's statements were false, libelous, professionally damaging to him as a jurist and calculated to subject him to personal ridicule and shame (*id.* at ¶¶ 23–24). Plaintiff further alleges that Defendant's statements caused him "emotional distress, humiliation, shame and embarrassment and required him to answer [Defendant's] false claims before a state commission designed and empowered to investigate judicial misconduct" (*id.* at ¶27). As a result of these events, Plaintiff seeks compensatory and punitive damages of $425,000.00 on a single cause of action for defamation *per se*.

Oral argument on these motions was held March 27, 2023, at which time all parties were heard. The first branch of the Commission's motion seeking leave to intervene in this matter was granted on the record as unopposed, and the caption has been amended accordingly. Defendant moves to dismiss the complaint pursuant to the defense of absolute privilege and pursuant to New York's "anti-SLAPP" statutes. The Commission moves for dismissal based on absolute privilege.

DISCUSSION

In order to decide the pending motions, the Court must make an initial determination of whether this is "an action involving public petition and participation." As recently discussed by the Second Department:

> In 1992, legislation was enacted to address "a rising concern about the use of civil litigation, primarily defamation suits,

[2] For reasons discussed below, the substance of Defendant's statements is not relevant to the determination of the issues raised herein, and the Court will not republish them as part of this opinion.

> to intimidate or silence those who speak out at public meetings against proposed land use development and other activities requiring approval of public boards. Termed SLAPP suits—strategic lawsuits against public participation—such actions are characterized as having little legal merit but are filed nonetheless to burden opponents with legal defense costs and the threat of liability and to discourage those who might wish to speak out in the future." The legislation was specifically aimed at broadening the protection of citizens facing litigation arising from their public petition and participation.
>
> [In 2020,] the Legislature amended the relevant statutes to broaden the scope of the law and afford greater protections to citizens facing litigation arising from their public petition and participation (see L 2020, ch 250).

(*Mable Assets, LLC v Rachmanov*, 192 AD3d 998, 998 [2d Dept 2021] (quoting *600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d 130 [1992]).

New York's "anti-SLAPP" statutes are codified at Civil Rights Law §§ 70-a and 76-a. As part of the 2020 amendments to these statutes, the Legislature enacted heightened pleading standards when a defendant moves to dismiss for failure to state a cause of action (CPLR 3211[a][7]), where the "[defendant] has demonstrated that the action . . . subject to the motion is an action involving public petition and participation as defined in [Civil Rights Law §76-a(1)(a)]" (CPLR 3211[g][1]).

An "action involving public petition and participation" is defined as lawsuit based upon: (1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or (2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition" (Civil Rights Law §76-a[1][a]). The court is to construe the term "public interest" broadly to include any subject other than a purely private matter (Civil Rights Law §76-a[1][d]).

A court is required to grant a preference to hearing a motion to dismiss a SLAPP action, and the motion "shall be granted unless the [plaintiff] demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law" (CPLR §3211[g][1]). In adjudicating a motion to dismiss a SLAPP action, the court must consider the pleadings and supporting and opposing affidavits (CPLR §3211[g][2]).

Here, the Court readily finds that Defendant's conduct, as alleged in the complaint and discussed in Defendant's motion papers, falls within the broad definition of "public petition and participation." Her statements about Plaintiff concerned his status as a public official and his fitness for that role and were made to a governmental body charged with overseeing his conduct,

i.e., the Commission. Moreover, the statements were admittedly furnished through an online form provided by the Commission, the purpose of which is to invite members of the public to submit complaints about specific judges. Defendant's complaint about Plaintiff to the Commission may therefore be viewed as a public petition[3] and participation in furtherance of the right of free speech in connection with an issue of public interest, particularly in the broad sense the Court is required to apply.

As a result, the stricter pleading standards of CPLR 3211(g) apply, and to avoid dismissal Plaintiff is required to show that the single cause of action for defamation *per se* in the complaint "has a substantial basis in law or is supported by a substantial argument for an extension, modification or a reversal of existing law." That is not the case here.

A cause of action for defamation *per se* is based upon a false statement, published *without privilege* or authorization to a third party, and so offensive that malice is presumed, *i.e.* claiming that a person committed a crime of moral turpitude or suffers from a loathsome disease; To recover damages for defamation, a plaintiff must prove the defendant's publication to a third party of a false statement about the plaintiff, without privilege or authorization (*Knutt v. Metro Intern S.A.,* 91 A.D. 3d 915 [2nd Dept. 2012] citing *Epifani v. Johnson,* 65 A.D.3d 224, 233). A defamatory statement is one which " 'tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him *in the minds of a substantial number of the community*'" (*Golub v. Enquirer/Star Group,* 89 N.Y.2d 1074, 1076, quoting *Mencher v. Chesley,* 297 N.Y. 94, 100, emphasis added). Imputing a serious crime to the plaintiff constitutes defamation *per se* (*see Geraci v. Probst,* 15 N.Y.3d 336, 344; *Liberman v. Gelstein,* 80 N.Y.2d 429, 435). In the context of a defamation action, "[a] privileged communication is one which, but for the occasion on which it is uttered, would be defamatory and actionable." *Park Knoll Assoc. v Schmidt*, 59 NY2d 205, 208 [1983].

The only defamatory conduct alleged in the complaint is Defendant's submission of her statements concerning Plaintiff to the Commission. It was further admitted during oral argument on this matter, and as supported by the affirmation of counsel for the Commission, that Defendant did not publish the statements to anyone else; and until Plaintiff filed this lawsuit, Defendant's statements and the Commission's proceedings with respect thereto were confidential and non-public.

Accordingly, this matter is subject to the controlling precedent of *Wiener v Weintraub* (22 NY2d 330 [1968]), wherein the Court of Appeals held that a written complaint about an attorney submitted to the local Grievance Committee and pertaining to potential misconduct by the attorney is "absolutely privileged," based upon overriding public interests:

> If a complainant were to be subject to a libel action by the accused attorney, the effect in many instances might well be to deter the filing of legitimate charges. We may assume that on occasion false and malicious complaints will be made. But, whatever the hardship on a particular attorney, the

[3] See Merriam-Webster.com Dictionary (https://www.merriam-webster.com/), *Petition:* "a formal written request made to an authority or organized body (such as a court)."

> necessity of maintaining the high standards of our bar—indeed, the proper administration of justice—requires that there be a forum in which clients or other persons, unlearned in the law, may state their complaints, have them examined and, if necessary, judicially determined.

(*Wiener v Weintraub*, 22 NY2d 330, 331–332 [1968]; *see also Bisogno v Borsa*, 31 Misc 3d 1203(A) [Sup Ct, Richmond County 2011], *affd*, 101 AD3d 780 [2d Dept 2012]).

The process followed with respect to judicial conduct complaints is very similar to the process followed with respect to complaints against attorneys, including the quasi-judicial and confidential nature of the proceedings (*see* Affirmation of Robert H. Tembeckjian, Esq., dated February 6, 2023 (NYSCEF Doc. No. 16) at ¶¶ 14–19, 24–29; Judiciary Law §§ 44, 45). Moreover, the same public concerns regarding the "necessity of maintaining high standards [and] the proper administration of justice" obviously apply to sitting judges at least as forcefully as to practicing attorneys. Thus, the defense of absolute privilege applies in this matter; and if Defendant's complaint is deemed to be absolutely privileged, this Court is required to dismiss the complaint at the pre-answer stage (*Wiener*, 22 NY2d at 332–333; CPLR 3211[g][1]), and the substance of the complaint to the commission is not relevant to this determination.

Plaintiff opposes the absolute privilege argument, raised by both Defendant and the Commission, on the basis that it does not apply where the underlying complaint is a "sham." For this argument, Plaintiff relies on a line of cases in the First Department, which in turn rely upon the Court of Appeals case of *Youmans v. Smith*:

> . . . If counsel, through an excess of zeal to serve their clients, or in order to gratify their own vindictive feelings, go beyond the bounds of reason, and by main force bring into a lawsuit matters so obviously impertinent as not to admit of discussion, and so needlessly defamatory as to warrant the inference of express malice, they lose their privilege, and must take the consequences. In other words, if the privilege is abused, protection is withdrawn.

(*Youmans v Smith*, 153 NY 214, 219–220 [1897] [internal quotations omitted]). This "common law privilege afforded to words spoken and written in the course of judicial proceedings . . . is lost if abused, and is limited to statements which are pertinent to the subject matter of the lawsuit, made in good faith and without malice" (*Halperin v Salvan*, 117 AD2d 544, 548 [1st Dept 1986]).

The theory underlying the "sham action" exception or "sham litigation", *Flomenhaft v. Finkelstein*, 127 AD3d 634, 638 [1st Dept 2015], is inapplicable here as it is inconsistent with the policy and breadth of the absolute privilege expressed by the Court of Appeals in *Weiner*, which specifically applies even to "false and malicious complaints" (*Wiener*, 22 NY2d at 332). The critical distinction in the cases relied upon by Plaintiff is that "sham actions" are filed publicly before the attorney or judge has an opportunity to respond, while complaints made to governing

bodies overseeing attorneys and judges, and the quasi-judicial proceedings that follow, are "private and confidential" (*id.*).

In other words, there can be no abuse of the absolute privilege in the submission of a confidential complaint to the Commission, because the only persons to whom the complaint is published are public officials (Judiciary Law §41) charged with "receiv[ing], initiat[ing], investigat[ing] and hear[ing] complaints with respect to the conduct, qualifications, fitness to perform, or performance of official duties of any judge" (Judiciary Law §44), and who are bound by law to keep such complaints and related proceedings confidential (Judiciary Law §§ 45–46; *Wiener*, 22 NY2d at 332). Such circumstances are among the few, but well-recognized, reasons for application of an absolute privilege:

> Because the perceived social benefit in...he discharge of governmental responsibility sometimes outweighs the individual's underlying right to a good reputation, the individual's right may have to yield to a privilege granted the speaker barring recovery of damages for the defamatory statements...If the privilege is absolute, it confers immunity from liability regardless of motive.
>
> *...The public interest requires that such statements be absolutely privileged so that those discharging a public function may speak freely in doing so, insulated from harassment and fear of financial hazard...*

Park Knoll Assoc. v Schmidt, 59 NY2d 205, 208–209 [1983] [emphasis added; internal quotations and citations omitted].

By contrast, each of the cases on which Plaintiff relies for his argument that the "sham action" exception precludes dismissal of this case involved written statements used in a *public, civil action*, where the allegedly defamatory statements appeared in a civil pleading filed by an attorney. In each such case, the plaintiff was an attorney; and the allegedly defamatory statements were made to the public generally, before the plaintiff attorney had any opportunity to respond to the allegations confidentially in the context of a Grievance Committee investigation. Those cases present the opposite factual scenario of what has occurred here. Until Plaintiff commenced this action via a publicly-viewable compliant, to which he attached a full copy of Defendant's non-public statements to the Commission, the statements and the Commission's proceedings were confidential. Pursuant to *Wiener v. Weintraub*, Defendant's statements could not be deemed abusive of any privilege. Accordingly, the "sham action" exception to the absolute privilege does not apply here as a matter of law.

In fact, as the Commission's counsel asserted, there is a very real fear that others may be deterred from bringing legitimate and serious complaints before the Commission if retribution in the form of a lawsuit is a viable possibility. The purpose of keeping the Commission's proceedings confidential is to protect not only the Judge involved but to protect the public by providing a safe forum in which to have complaints addressed. As counsel for the Commission stated, the absolute

privilege and confidentiality of the proceedings before it are critical to the Commission's investigation and to maintaining public confidence in the integrity of the judiciary.

Given that the subject-matter of this lawsuit squarely falls within the precedent of *Wiener v. Weintraub* and its progeny, and that Plaintiff has not furnished any "*substantial* argument" or precedent which warrant consideration of "an extension, modification or reversal of existing law" (CPLR 3211[g][1]), Defendant's statements must be deemed absolutely privileged and the complaint must be dismissed. As a statutory consequence, Defendant is entitled to an award of "costs and attorney's fees" (Civil Rights Law §70-a(1)(a)), as such an award is mandatory.

Based on the foregoing, it is hereby

ORDERED that Defendant's motion to dismiss is GRANTED; and it is further

ORDERED that the motion to dismiss of Intervenor-Defendant Commission is GRANTED; and it is further

ORDERED that the complaint is DISMISSED with prejudice; and it is further

ORDERED that a hearing on the amount of attorney's fees and costs to be awarded to Defendant shall be held in person on April 27, 2023 at 10:00 a.m.

The foregoing constitutes the decision and order of the Court.

Dated: April 4, 2023
Poughkeepsie, New York

ENTER:

MARIA G. ROSA, J.S.C.

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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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