UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK, COUNTY OF NEW YORK

CANDICE LUE, an individual, **Plaintiff,** **V.** **JPMORGAN CHASE & CO., a Delaware Corporation; ALEX KHAVIN, an individual; FIDELIA SHILLINGFORD, an individual; KIMBERLY DAUBER, an individual; BARUCH HOROWITZ, an individual; CHRIS LIASIS, an individual; and MICHELLE SULLIVAN, an individual; inclusive,** **Defendants.**	**CIVIL ACTION NO.: 19 CV 9784 (KPF) (SDA)** **RESPONSE TO:** **DEFENDANTS' ATTORNEY ANSHEL KAPLAN'S LETTER TO JUDGE KATHERINE POLK FAILLA (DOCKET # 33)**

I. ARGUMENT

The clear difference in the lawsuits Lue v. JPMorgan Chase & Co., et al and Gill v. Dougherty is that the statements made in the former by Defendants, JPMorgan Chase & Co., et al were blatant LIES made **under penalty of perjury** which were affirmed by the District Court and reaffirmed by the Appeals Court **as facts**[1] and the statements made in the latter, Gill v. Dougherty, No. 2019-05940, 2020 WL 6750782 (2d Dept. Nov. 18, 2020) were statements made based on the Defendant's **opinion**, "*and not facts*". See pages 1 – 2 of JPMorgan Chase & Co., et al's "Exhibit A" (Docket # 34) which states: *"Further, the context of the complained-of statement in a campus publication was such that a reasonable reader would have concluded that he or she was reading an opinion, and not facts, about the plaintiff (see Rosner v Amazon.com, 132 AD3d 835, 837;*

[1] See pages 7, 15, 17 and 18 of "*Plaintiff's Memorandum of Law In Opposition To Defendants' Motion to Dismiss*" (Docket # 30).

Silverman v Daily News, L.P., 129 AD3d 1054, 1055; Hollander v Cayton, 145 AD2d 605, 605-606)."

Also, as articulated and evidenced in "IV – 2" on pages 10 and 11 of "*Plaintiff's Memorandum of Law In Opposition To Defendants' Motion to Dismiss*" (Docket # 30), JPMorgan Chase & Co., et al's conspiratorial, false and fraudulent acts and conduct were pre-meditated to intentionally injure me, plaintiff, Candice Lue (Amended Complaint - Third Cause of Action). Whereby, the ruling on page 2 of JPMorgan Chase & Co., et al's "Exhibit A" (Docket # 34) states: "*The plaintiff failed to allege sufficient facts to establish that Dougherty intended to deceive through his actions in the prior hybrid action/proceeding (see Klein v Rieff, 135 AD3d 910, 912; Seldon v Lewis Brisbois Bisgaard & Smith LLP, 116 AD3d 490, 491; see also Doscher v Meyer, 177 AD3d 697, 699).*"

In addition, as articulated and evidenced in my Amended Complaint and my "*Plaintiff's Memorandum of Law In Opposition To Defendants' Motion to Dismiss*" (Docket # 30), anyone of reasonable mind can see that JPMorgan Chase & Co., et al's blatant LIES made **under penalty of perjury** and their conspiratorial, false and fraudulent acts and conduct perpetrated against me were for the sole purposes of intentionally injuring me, Plaintiff, Candice Lue, defaming my character and reputation and influencing the outcome of my Employment Racial Discrimination and Retaliation lawsuit. Because of JPMorgan Chase & Co., et al's intentional, criminal, overt, conspiratorial, false and fraudulent acts and conduct, I have suffered and continue to suffer severe harm and loss mentally, physically, emotionally and financially (see "IV – 4" on pages 16 – 20 of "*Plaintiff's Memorandum of Law In Opposition To Defendants' Motion to Dismiss*" (Docket # 30). Whereby, the ruling on page 2 of JPMorgan Chase & Co., et al's "Exhibit A" (Docket # 34) states: "*....the plaintiff did not sufficiently plead "malicious intent or disinterested malevolence as the sole motive for the challenged conduct" of the Iona defendants, and failed to sufficiently plead special*

damages (Ahmed Elkoulily, M.D., P.C. v New York State Catholic Healthplan, Inc., 153 AD3d 768, 772; see Nachbar v Cornwall Yacht Club, 160 AD3d 972, 973-974)."

Furthermore, as articulated and evidenced in "IV – 1C" on page 8 of "*Plaintiff's Memorandum of Law In Opposition To Defendants' Motion to Dismiss*" (Docket # 30), "*the challenged statements are not subjected to "absolute privilege" because the Defendants have no evidence of pertinency.*"

In contrast, I, Plaintiff, Candice Lue, am able to provide and have provided (docket # 24) solid and material evidence of pertinency that show that the Defendants' false, misleading, libelous, perjurious, malicious, mendacious and disparaging statements and acts are criminal, fraudulent and defamatory. JPMorgan Chase & Co., et al knowingly, purposefully and intentionally misrepresented important material facts in statements they made in their Declarations for which they cannot produce one scintilla of evidence to support (*Gugliotta v. Wilson*, 168 A.D.3d 817, 819 (2d Dept. 2019)). Also, there is a clear difference between "material" and "misrepresented material" - "*to qualify for the privilege, a statement must be 'material and pertinent to the questions involved'*" - *Brown v. Maxwell*, 929 F.3d 41, 53 (2d Cir. 2019).

II. CONCLUSION

In light of the foregoing, I have stated valid Claims for this lawsuit to be allowed to proceed to trial as the Defendants' "absolute privilege" defense is without merit and I have provided (docket # 24)/will be able to provide solid proofs on my own or via Discovery to show that a recovery is warranted - *Pratt v. Payne (2003)*, 153 Ohio App. 3d 450 (¶ 29).

DATED: December 9, 2020

Respectfully Submitted,

_____

CANDICE LUE
Pro Se Plaintiff
[redacted]

Seyfarth

Seyfarth Shaw LLP
620 Eighth Avenue
New York, New York 10018
T (212) 218-5500
F (212) 218-5526

akaplan@seyfarth.com
T (212) 218-5271

www.seyfarth.com

December 2, 2020

VIA ECF

Honorable Katherine Polk Failla
United States District Court
Southern District of New York
40 Foley Square
New York, NY 10007

Re: *Lue v. JPMorgan Chase & Co., et al.*, No. 19-cv-9784 (S.D.N.Y.)

Dear Judge Failla:

We represent the Defendants in the above-referenced action. We write to notify the Court of the recent decision in *Gill v. Dougherty*, No. 2019-05940, 2020 WL 6750782 (2d Dept. Nov. 18, 2020), a copy of which is annexed hereto as Ex. A. This decision provides further support for the arguments made in Defendants' pending motion to dismiss (Dkt. No. 29).

In *Gill*, Iona College ("Iona") commenced an Article 78 proceeding against the City of New Rochelle (the "City"), alleging *inter alia* that Kathleen Gill, an attorney for the City, had engaged in unethical behavior. During the pendency of the proceeding, Anthony Dougherty, counsel for Iona, sent a letter to counsel for the City stating that Gill had acted unethically and had misused Iona's privileged and confidential information. The letter was also sent to the Mayor of New Rochelle.

Following dismissal of the Article 78 proceeding, Gill sued Iona and Dougherty (among other defendants), alleging in part that the Article 78 petition and letter were defamatory.

On appeal, the Second Department ordered dismissal of Gill's claims because the statements -- in both the Article 78 petition and Dougherty's letter -- were protected by the absolute privilege relating to statements pertinent to litigation. In pertinent part, the court held that, as a matter of New York law, "[t]he statements made with respect to the plaintiff in the prior hybrid action/proceeding were pertinent to that action/proceeding, and were therefore protected by absolute privilege," and that "[t]he cause of action alleging defamation failed because the challenged statements were absolutely privileged as a matter of law and cannot be the basis for a defamation action." 2020 WL 6750782, at *1-2.[1]

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[1] The lower court declined to dismiss the defamation claim on grounds that the underlying litigation may have been "a sham action brought solely to defame the defendant." *Gill v. Dougherty*, No. 70666/2017, slip op. at 5 (N.Y. Sup. Ct. May 13, 2019).

Seyfarth

The Second Department's decision in *Gill* directly supports the arguments made in Defendants' motion to dismiss, specifically, the discussion in Dkt. No. 29 at 3-5, and Dkt. No. 32 at 1-3.

Respectfully submitted,

SEYFARTH SHAW LLP

/s/ Anshel Joel Kaplan

Anshel Joel Kaplan

cc: Candice Lue (via First Class Mail)
4122 Bel Vista Court
Lodi, NJ 07644

2020 WL 6750782
Supreme Court, Appellate Division, Second Department, New York.

Kathleen GILL, respondent,
v.
Anthony D. DOUGHERTY, et al., appellants.

2019–05940
|
(Index 70666/17)
|
Argued—June 29, 2020
|
November 18, 2020

Attorneys and Law Firms

Akerman LLP, New York, N.Y. (Philip Touitou, Joseph G. Silver, and Sara L. Mandelbaum of counsel), for appellants Anthony D. Dougherty and Tarter Krinsky & Drogin, LLP.

Davis Wright Tremaine LLP, New York, N.Y. (Kathleen Bolger, Laura R. Handman, and Jeremy A. Chase of counsel), for appellants Iona College and Kathleen McElroy.

Harfenist Kraut & Perlstein, LLP, Purchase, N.Y. (Jonathan D. Kraut, Neil Torczyner, and Meredith B. Castelli of counsel), for respondent.

REINALDO E. RIVERA, J.P., JOHN M. LEVENTHAL, SYLVIA O. HINDS–RADIX, LINDA CHRISTOPHER, JJ.

DECISION & ORDER

***1** In an action, inter alia, to recover damages for violation of Judiciary Law § 487 and defamation, the defendants Iona College and Kathleen McElroy appeal, and the defendants Anthony D. Dougherty and Tarter Krinsky & Drogin, LLP, separately appeal, from an order of the Supreme Court, Westchester County (Gerald E. Loehr, J.), entered May 13, 2019. The order denied the separate motions of the defendants Iona College and Kathleen McElroy and the defendants Anthony D. Dougherty and Tarter Krinsky & Drogin, LLP, pursuant to CPLR 3211(a) to dismiss the amended complaint insofar as asserted against each of them.

ORDERED that the order is reversed, on the law, with one bill of costs, and the motion of the defendants Iona College and Kathleen McElroy and the defendants Anthony D. Dougherty and Tarter Krinsky & Drogin, LLP, pursuant to CPLR 3211(a) to dismiss the amended complaint insofar as asserted against each of them is granted.

The plaintiff commenced this action, inter alia, to recover damages for violation of Judiciary Law § 487 and defamation against Anthony D. Dougherty, Tarter Krinsky & Drogin, LLP, Iona College (hereinafter Iona), and Kathleen McElroy. The plaintiff worked for the City of New Rochelle and previously worked as General Counsel for Iona. Dougherty worked for the law firm Tarter Krinsky & Drogin, LLP (hereinafter together the TKD defendants). McElroy worked as General Counsel for Iona (hereinafter together the Iona defendants).

The plaintiff alleged, among other things, that defamatory statements were made about her in a prior hybrid action for a declaratory judgment and proceeding pursuant to CPLR article 78. That prior hybrid action/proceeding was commenced against the City by Iona, which was represented in that hybrid action/proceeding by the TKD defendants, following a land use and zoning dispute.

The Iona defendants moved, and the TKD defendants separately moved, pursuant to CPLR 3211(a) to dismiss the amended complaint insofar as asserted against each of them. In an order entered May 13, 2019, the Supreme Court denied the motions. The Iona defendants appeal and the TKD defendants appeal separately.

We disagree with the Supreme Court's determination to deny the Iona defendants' motion pursuant to CPLR 3211(a) to dismiss the amended complaint insofar as asserted against them. The statements made with respect to the plaintiff in the prior hybrid action/proceeding were pertinent to that action/proceeding, and were therefore protected by absolute privilege (*see Ifantides v. Wisniewski*, 181 A.D.3d 575, 576, 117 N.Y.S.3d 591; *Weinstock v. Sanders*, 144 A.D.3d 1019, 1021, 42 N.Y.S.3d 205; *Brady v. Gaudelli*, 137 A.D.3d 951, 952, 27 N.Y.S.3d 205; *Rabiea v. Stein*, 69 A.D.3d 700, 701, 893 N.Y.S.2d 224). Further, the context of the

complained-of statement in a campus publication was such that a reasonable reader would have concluded that he or she was reading an opinion, and not facts, about the plaintiff (*see Rosner v. Amazon.com*, 132 A.D.3d 835, 837, 18 N.Y.S.3d 155; *Silverman v. Daily News, L.P.*, 129 A.D.3d 1054, 1055, 11 N.Y.S.3d 674; *Hollander v. Cayton*, 145 A.D.2d 605, 605–606, 536 N.Y.S.2d 790). Likewise, the cause of action alleging prima facie tort failed because the plaintiff did not sufficiently plead "malicious intent or disinterested malevolence as the sole motive for the challenged conduct" of the Iona defendants, and failed to sufficiently plead special damages (*Ahmed Elkoulily, M.D., P.C. v. New York State Catholic Healthplan, Inc.*, 153 A.D.3d 768, 772, 61 N.Y.S.3d 83; *see Nachbar v. Cornwall Yacht Club*, 160 A.D.3d 972, 973–974, 75 N.Y.S.3d 494).

***2** Additionally, we disagree with the Supreme Court's determination to deny the TKD defendants' motion pursuant to CPLR 3211(a) to dismiss the amended complaint insofar as asserted against them. The plaintiff failed to allege sufficient facts to establish that Dougherty intended to deceive through his actions in the prior hybrid action/proceeding (*see Klein v. Rieff*, 135 A.D.3d 910, 912, 24 N.Y.S.3d 364; *Seldon v. Lewis Brisbois Bisgaard & Smith LLP*, 116 A.D.3d 490, 491, 984 N.Y.S.2d 23; *see also Doscher v. Meyer*, 177 A.D.3d 697, 699, 112 N.Y.S.3d 237). Notably, " '[a]ssertion of unfounded allegations in a pleading, even if made for improper purposes, does not provide a basis for liability under [Judiciary Law § 487]' " (*Ticketmaster Corp. v. Lidsky*, 245 A.D.2d 142, 143, 665 N.Y.S.2d 666, quoting *Thomas v. Chamberlain, D'Amanda, Oppenheimer & Greenfield*, 115 A.D.2d 999, 999–1000, 497 N.Y.S.2d 561). Moreover, the cause of action alleging a violation of Judiciary Law § 487 failed to sufficiently allege that the plaintiff suffered an injury proximately caused by any claimed deceit or collusion on the part of Dougherty, and no such injury can reasonably be inferred from the amended complaint (*see Gumarova v. Law Offs. of Paul A. Boronow, P.C.*, 129 A.D.3d 911, 911, 12 N.Y.S.3d 187). The cause of action alleging defamation failed because the challenged statements were absolutely privileged as a matter of law and cannot be the basis for a defamation action (*see Ifantides v. Wisniewski*, 181 A.D.3d at 576, 117 N.Y.S.3d 591; *Weinstock v. Sanders*, 144 A.D.3d at 1021, 42 N.Y.S.3d 205; *Brady v. Gaudelli*, 137 A.D.3d at 952, 27 N.Y.S.3d 205; *El Jamal v. Weil*, 116 A.D.3d 732, 734, 986 N.Y.S.2d 146; *Rabiea v. Stein*, 69 A.D.3d at 701, 893 N.Y.S.2d 224). Tarter Krinsky & Drogin, LLP, cannot be held vicariously liable for Dougherty's primary liability absent a cognizable theory of liability against Dougherty (*see Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 546, 435 N.Y.S.2d 556, 416 N.E.2d 557; *Pereira v. St. Joseph's Cemetery*, 54 A.D.3d 835, 837, 864 N.Y.S.2d 491; *Rojas v. Feliz*, 24 A.D.3d 652, 808 N.Y.S.2d 372).

The parties' remaining contentions either are without merit or need not be reached in light of our determination.

Accordingly, the Supreme Court should have granted the Iona defendants' motion and the TKD defendants' separate motion pursuant to CPLR 3211(a) to dismiss the amended complaint insofar as asserted against each of them.

RIVERA, J.P., LEVENTHAL, HINDS–RADIX and CHRISTOPHER, JJ., concur.

All Citations

--- N.Y.S.3d ----, 2020 WL 6750782, 2020 N.Y. Slip Op. 06758

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