THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA COUNTY
IN THE COURT OF COMMON PLEAS

KENNETH RICHMOND, Esq.	:	**TRIAL DIVISION – CIVIL**
Appellant/Plaintiff	:	
	:	**NOVEMBER TERM, 2010**
V.	:	**NO. 2202**
JOSEPH J. MCHALE, Esq.	:	**Superior Court Docket # 627 EDA 2011**
Appellee/Defendant	:	

OPINION

PROCEDURAL HISTORY

Plaintiff, Kenneth Richmond, appeals from the January 20, 2011 Order granting Defendant Joseph McHale's Preliminary Objections and dismissal of Plaintiff's Complaint.

FACTUAL BACKGROUND

Kenneth Richmond was a lead attorney of record for Plaintiffs in a civil matter captioned *John and Jane Doe v. Schneider, et al* in the Federal District Court for the Eastern District of Pennsylvania docketed there at number 2:08-cv-03805 which is the underlying civil case. (Complaint ¶ 3). This underlying civil case alleges sexual abuse of a minor and a breach of fiduciary responsibility by certain defendants named therein who were legal guardians of the abused plaintiff while he was a minor. (Complaint ¶ 4). Following denial of Defendants' Motion to Dismiss in the underlying civil case, on or

about December 10, 2009 Joseph J. McHale and other attorneys from the firm Stradley Ronon , substituted their appearance as defense counsel. (Complaint ¶ 5). In conjunction with that substitution of appearance for the defendant in the underlying civil action McHale telephoned to introduce himself and to request a face to face meeting with Richmond to be "brought up to speed." (Complaint ¶ 6).

On December 23, 2009 McHale, along with three other attorneys involved in the underlying civil action, met at Richmond's office. According to Richmond, the meeting was a discussion between him, McHale, and three other attorneys involved in the underlying Federal action which was for the purpose of resolving a potential discovery issue. (Complaint ¶ 7). Plaintiff requested a physical examination of Defendant in the underlying civil action. (No formal Motion had been presented to the Court). (Complaint ¶ 7). Responding to this request for the physical examination, McHale stated that he would not agree to it on his client's behalf. (Complaint ¶ 8). McHale then accused Richmond of using this proposed examination to extort money from his clients. (Complaint ¶ 8). Richmond asked McHale to repeat his comment. (Complaint ¶ 9). McHale then repeated the statement, saying, "You are extorting this family and I am not allowing you to get away with it." (Complaint ¶ 9). Richmond then asked McHale to leave his office. (Complaint ¶ 10).

A Complaint was filed November 12, 2010. The Complaint alleges that McHale made the comment maliciously in an attempt to induce fear of criminal prosecution against Richmond (hereinafter "Plaintiff"). (Complaint ¶¶ 14, 16). Plaintiff further alleges that McHale, in making the comments, adversely affected Plaintiff's ability to practice law and damaged his professional reputation. (Complaint ¶ 21).

On December 6, 2010, McHale filed his Preliminary Objections. McHale argued that the allegedly slanderous comments were made in the course of litigation and are absolutely privileged and therefore are precluded as a basis of a slander claim. (Preliminary Objections ¶ 5). Additionally the Complaint fails to state a claim because the comments made by McHale were not defamatory as a matter of law. (Preliminary Objections § B). McHale argues that given the context of the meeting, the individuals in attendance and the absence of any evidence of intent to harm Plaintiff's character, his comments cannot be construed as defamatory. (Preliminary Objections ¶ 61).

On December 16, 2010 Plaintiff responded to McHale's Preliminary Objections. First, Plaintiff claims that the December 2009 meeting between Plaintiff and McHale was not a judicial proceeding and thus should not be accorded privilege. (Plaintiff's Response pg. 5) Second, Plaintiff alleges the statements constituted slander because the comments impugned his integrity and blackened his business reputation. (Plaintiff's Response pg. 6).

McHale's December 20, 2010 reply stated that "judicial proceedings" are not to be construed narrowly to only include matters before a judge or in the court. (McHale's Reply pg. 1). Plaintiff then filed his sur-reply two days later, on December 22, 2010. Plaintiff again argues that the meeting was not a "judicial proceeding" related to discovery because Federal Rules of Civil Procedure unambiguously define Discovery Conferences in Rule 26 and Plaintiff alleges this meeting did not fit under the Rule's definition.

By Order dated January 20th, 2011, this Court granted McHale's Preliminary Objections and dismissed Plaintiff's Complaint. Plaintiff appealed the Order on January 31, 2011 and filed Statement of Matters Complained of on Appeal accordingly.

The issue on Appeal is whether this Court erred in granting McHale's Preliminary Objections to Plaintiff's cause of action for defamation when an attorney's comments to opposing counsel were made during the course of judicial proceedings where and Plaintiff has failed to sufficiently plead the elements of slander under Pennsylvania law.

LEGAL ANALYSIS

Preliminary Objections in the nature of a demurrer may be sustained only when cases are clear and free from doubt that the facts alleged in the Complaint are legally insufficient to permit recovery. *DeSantis v. Swigart*, 296 Pa. Super. 283,286, 442 A.2d 770, 771 (1982).

In Pennsylvania, defamation claims require the plaintiff to prove the following:

> 1) defamatory character of the communication; 2) its publication by the defendant, its application to the plaintiff; 3) the understanding by the recipient of its defamatory meaning; 4) the understanding by the recipient of it as intended to be applied to the plaintiff and; 5) special harm resulting to the plaintiff from its publication, or abuse of a conditionally privileged occasion.

Pa. C.S.A § 8343 (a)(1)-(5).

In this case, Plaintiff must also prove that McHale's comments were not protected by an attorney's absolute privilege regarding a matter concerning on-going litigation, and the comments made were defamatory in nature. It is well settled in Pennsylvania that statements made by an attorney in representation of the client are provided absolute privilege and cannot be abused. *Mansman v. Turman*, 970 F. Supp. 389 (E.D. Pa. 1997).

In Pennsylvania, communications at any stage of the judicial process are accorded absolute privilege. *Pelagatti v. Cohen*, 370 Pa.Super. 422, 536 A.2d 1337, 1344 (1987) stated:

> Communications pertinent to any stage of judicial proceedings are accorded an absolute privilege, which cannot be destroyed by abuse; therefore, statements made by a party, a witness, counsel, or a judge, cannot be the basis of a defamation action when made in pleadings, open court, or even in less formal circumstances, such as preliminary conferences, negotiations, and routine correspondence exchanges between counsel in furtherance of their clients' interests.

In *Pelagatti*, an attorney brought an action against another attorney alleging libel and slander after the defendant made various allegations of wrongdoing on the part of the plaintiff. The Court affirmed the trial court decision extending privilege in this instance, saying, "Counsel must be enabled to best represent their clients' interests, without fear of reprisal through defamation actions. The courts have the appropriate internal sanctions to deal with defamatory statements given in judicial proceedings…thereby obviating the need for the threat of civil damages liability." *Id*. Here, Plaintiff brought an action against McHale for comments made during a discovery conference between the lawyers involved in an underlying federal civil action. Plaintiff cannot use McHale's comments as a base for a defamation claim because *Pelagatti* extended privilege to attorneys meeting under the circumstances herein described. Because Plaintiff and McHale met to discuss discovery in the underlying civil action, *Pelagatti* requires that privilege be accorded to McHale's comments.

Additionally, Pennsylvania also broadly applies the privilege to "pertinent, relevant and material" to statements made during the judicial process. *Greenberg v.*

Aetna Ins. Co., 427 Pa. 511, 235 A.2d 576, 577 (1967). Courts have continually protected a variety of communications made at various proceedings as well as statements with only a minor relation to the underlying case. The Court ruled that statements made during judicial proceedings are privileged even if the statements are made "falsely or maliciously without reasonable and probable cause." *Id.* at 578. Here, it is clear that the comment was related to the underlying litigation. The comment was made in response to a request for a physical examination of McHale's client. McHale believed that the purpose of the request was to extort money from his client's family. Because the statements were made during a judicial proceeding that was limited to counsel for each side of the civil case and made in response to a discovery request, the allegedly defamatory statements have a bearing on the litigation and are absolutely protected. See also *Post v. Mendel*, 510 Pa. 213, 507 A.2d 351, 356 citing *The Restatement (Second) of Torts §587* ("The fact that the defamatory publication is an unwarranted reference from the alleged or existing facts is not enough to deprive the party of his privilege, if the inference itself has *some* bearing upon the litigation." (emphasis added)). Pennsylvania has established the low threshold that must be met for a comment to be relevant, pertinent or material. See *Pawlowski v. Smorto*, 588 A.2d 36, 41 (Pa. Super. 1991) ("Statements made by judges, attorneys, witnesses, and parties in the course of or pertinent to any stage of a judicial proceeding are absolutely privileged.").

Further, McHale's Preliminary Objections should be sustained because Plaintiff has not satisfied the defamation requirements established by 42 Pa. C.S.A § 8343. The Court must look at the context in which the statement was made to determine if it is "fairly calculated to produce" a defamatory effect in the mind of the person or persons to

whom it was intended. *Corabi v. Curtis Publ'g. Co.*, 441 Pa. 432, 442, 273 A.2d 899, 904 (1971). Viewing the statement in the appropriate context, the court then must determine whether the comment "tends to blacken a person's reputation or to expose him to public hatred, contempt, or ridicule, or to injure him in his business or profession." *Id.* at 441.

The Court must "view the statement in context with an eye toward the effect the [statement] is calculated to produce, the impression it would naturally engender, in the minds of the average person among whom it is intended to circulate." *Remick v. Manfredy*, 238 F.3d 248, 261 (3rd Cir. 2001), (quoting *Baker v. Lafayette College*, 516 Pa. 291, 532 A.2d 399,402 (1987)). Courts have agreed that at times, discussions between lawyers can be extremely hostile. *See Remick*, 238 F.3d at 261 ("Correspondence between jousting lawyers is not always drafted with finesse, tact, and niceties used by the 19th century novelist."). However, "the law does not protect a person from hurt feelings." *Rybas v. Wapner*, 311 Pa. Super 50, 457 A.2d 108, 110 (1983). In *Remick*, the plaintiff-attorney sent a letter accusing defendant-attorney of extortion. *Remick* at 249. The Court, ruling that the letter was not defamatory, stated, "In this instance, the use of the term 'extort' is non-defamatory rhetorical hyperbole, a vigorous epithet used by those who considered [plaintiff's] negotiating position extremely unreasonable. *Id.* at 262. (citing *Greenbelt Coop. Publ'g Ass'n. v. Bresler*, 398 U.S. 6, 14 (1970) (finding "blackmail" accusation non-defamatory because the audience receiving the statement could have thought the plaintiff was being charged with a criminal offense).

In the current case, only the attorneys involved in the federal action heard McHale's statements. While Plaintiff may have found the comments personally insulting

or hurtful, this standing out of context cannot support the claim that the statement was slanderous. Plaintiff fails to offer any evidence that the three other attorneys present at the time of the comments understood McHale's statements as defamatory towards Plaintiff. Given the context of the meeting and the individuals present, it is clear that McHale did not intend to blacken Plaintiff's business reputation. His comments were isolated to a group of attorneys involved in the underlying federal action; the comments were not openly broadcast to the public at large, being limited to the attorneys who were involved in the underlying litigation.

CONCLUSION

For the foregoing reasons, this Court respectfully requests that its decision to grant Defendant McHale's Preliminary Objections to Plaintiff's Complaint be **AFFIRMED.**

BY THE COURT:

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ALLAN L. TERESHKO, J.

_____

DATE

cc:

William E. Hevenor, Esq., for Appellant
Joseph J. McHale, Esq., for Appellee