Meyers, Harrison & Pia, LLC v. Riella

Superior Court of Connecticut, Judicial District of New Haven At New Haven
November 7, 2013, Decided; November 7, 2013, Filed
CV136038357S

Reporter: 2013 Conn. Super. LEXIS 2583; 2013 WL 6439668

Meyers, Harrison & Pia, LLC v. Nancy Riella
Notice: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

Core Terms

privilege, claims, proceed, omitted, count, legal, entrepreneurial, prepared, statements, absolute privilege, internal quotation marks, motion to strike, published, business, false, aspects, witness, filed, party, law, course of judicial proceeding, accounting, litigants, judicial, retained, plead

Judges: **[*1]** Brian T. Fischer, J.
Opinion by: Brian T. Fischer

Opinion

MEMORANDUM OF DECISION IN RE MOTION TO STRIKE #103
FACTS

On May 15, 2013, the plaintiff, Meyers, Harrison, & Pia, LLC, filed a three-count amended complaint against the defendants, Nancy Riella and Riella & Lepak, P.C. In its amended complaint the plaintiff alleges the following facts. The plaintiff is an accounting and business valuation firm. The defendants are a tax and accounting firm and the president and majority shareholder of that firm. The parties were retained by opposing litigants in two separate divorce proceedings. The plaintiff was retained as an expert witness and prepared valuation reports in connection with both proceedings. The defendants were retained by the opposing party in each case to rebut the plaintiff's reports. In each case, the defendants prepared and published a rebuttal report stating that the plaintiff's report did not meet industry standards, did not follow valuation principles, was inherently flawed and was therefore not valid. In the second case, the defendants further stated that the plaintiff charged unreasonable fees for unnecessary work in preparing its report.

The plaintiff further alleges the following. After **[*2]** the conclusion of the second proceeding, the party who had retained the defendants in that case (identified in the complaint as Mr. Mills) brought a legal action against the plaintiff for breach of contract, fraud, CUTPA violations, theft, and conversion. The allegations in that case are based on the defendants' report, and the defendants were disclosed as expert witnesses in the matter. The defendants encouraged and aided Mills in bringing that action, and engaged in a practice of disparaging the services provided by the plaintiff by making and publishing false statements. The statements in the defendants' reports were made with either knowledge of their falsity or reckless disregard for the truth, and were made with the intent to harm the plaintiff. The plaintiff suffered specific harm from these actions and seeks actual damages, punitive damages, a temporary and permanent injunction, and attorneys fees and costs.

In count one of the complaint, the plaintiff alleges that the defendants' conduct violated the Connecticut Unfair Trade Practices Act (CUTPA), *General Statutes §42-110a et seq.* In counts two and three, the plaintiff alleges that the defendants' conduct was defamatory. On **[*3]** July 3, 2013 the defendants moved to strike all three counts of the complaint on the grounds that they are barred by an absolute privilege, and that the first count further fails to allege facts that fall within the entrepreneurial acts exception for accountant's liability under CUTPA. The defendant filed a memorandum of law in support of the motion. The plaintiff filed an objection and memorandum of law on July 31, 2013. The defendants filed a reply memorandum on August 23, 2013, and the plaintiff filed a surreply on August 30, 2013. Oral argument was held on September 9, 2013.
DISCUSSION

"A motion to strike challenges the legal sufficiency of a pleading . . . and, consequently, requires no factual findings by the trial court." (Internal quotation marks omitted.) *Santorso v. Bristol Hosp.*, 308 Conn. 338, 349, 63 A.3d 940 (2013). "[I]n determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted . . . The role of the trial court in ruling on a motion to strike is to examine the [complaint], construed in favor of

the [plaintiff], to determine whether **[*4]** the [pleading party has] stated a legally sufficient cause of action." (Citation omitted; Internal quotation marks omitted.) *Coe v. Board of Education*, 301 Conn. 112, 116-17, 19 A.3d 640 (2011). "Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied." (Internal quotation marks omitted.) *Santorso v. Bristol Hospital, supra*, 349.

Although "a motion to strike admits all facts well pleaded; it does not admit legal conclusions or the truth or accuracy of opinions stated in the pleadings." (Emphasis omitted; internal quotation marks omitted.) *Faulkner v. United Technologies Corp.*, 240 Conn. 576, 588, 693 A.2d 293 (1997). Accordingly, "[a] motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged." (Internal quotation marks omitted.) *Santorso v. Bristol Hospital, supra*, 308 Conn. 349.

The **[*5]** defendants move to strike all three counts of the complaint on the ground that they are legally insufficient because an absolute privilege for statements that are made during the course of judicial proceedings shields the defendants from liability for the claims alleged therein.[1] The defendants further argue that count one is legally insufficient because they are only subject to CUTPA liability for the entrepreneurial actions of their business, which do not include the actions that the plaintiff relies on. In its objection and surreply, the plaintiff argues that the absolute privilege does not apply to the statements that form the basis for its complaint because the defendants are not attorneys and policy considerations do not justify extending it to the defendants. The plaintiff also contends that some of the defendants' conduct occurred outside the context of a legal proceeding. The plaintiff further argues that the defendants are liable under CUTPA because some of their actions involve the entrepreneurial aspect of their profession.

I

Absolute Privilege for Judicial Proceedings[2]

As to count one, although our appellate courts have not specifically decided that the absolute privilege applies to CUTPA claims, the Supreme Court recently noted that "[a]lthough few courts have considered the litigation privilege in the context of CUTPA claims, those that have had occasion to do so have upheld the application of absolute immunity. *Walsh v. Law Offices of Howard Lee Schiff*, [United States District Court, Docket No. 3:11-cv-1111 (SRU), 2012 U.S. Dist. LEXIS 136408 (D.Conn. September 24, 2012)] . . . This recent precedent, like other well established federal precedent, weighs in favor of applying the privilege to state law claims alleging fraud." (Citations omitted, internal quotation **[*7]** marks omitted.) *Simms v. Seaman*, 308 Conn. 523, 562, 69 A.3d 880 (2013). See also *Krol v. Halloran & Sage, LLP*, Superior Court, judicial district of Fairfield, Docket No. CV-11-6018792-S, 2013 Conn. Super. LEXIS 204 (January 24, 2013, Gilardi, J.T.R.), and trial court decisions discussed therein. Regarding counts two and three, "[t]o find that the defendants were liable for defamation . . . the jury was required to find that the defendants published false statements that harmed the [plaintiff], *and that the defendants were not privileged to do so*." (Emphasis added.) *Kelley v. Bonney*, 221 Conn. 549, 563, 606 A.2d 693 (1992). "The effect of an absolute privilege in a defamation action is that damages cannot be recovered for a defamatory statement even if it is published falsely and maliciously." *Id*. Therefore, the privilege may apply to all three counts, and the next issue is whether it applies in the present circumstances.

"It is well settled that communications uttered or published in the course of judicial proceedings are absolutely privileged [as] long as they are in some way pertinent to the subject of the controversy." (Internal quotation marks omitted.) *Gallo v. Barile*, 284 Conn. 459, 465-66, 935 A.2d 103 (2007). **[*8]** "That absolute privilege applies regardless of whether the representations at issue could be characterized as false, extreme or outrageous." *Alexandru v. Strong*, 81 Conn.App. 68, 83, 837 A.2d 875, cert. denied, *268 Conn. 906, 845 A.2d 406 (2004)*. "The policy underlying the privilege is that in certain situations the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements . . . Participants in a judicial process must be able to testify or otherwise take part without being hampered by fear of [actions seeking damages for statements made by such participants in the course of the judicial proceeding]." (Internal quotation marks omitted.) *Gallo v. Barile, supra*, 466. "The privilege applies also to statements made in pleadings or other documents prepared in connection with a court

---

[1] The defendants refer to the privilege that applies to the CUTPA claim as "the Litigation Privilege." Their arguments and the case law they cite, however, **[*6]** establish this privilege as functionally identical to the claim of absolute privilege that they raise as to counts two and three.

[2] "[T]he issue of immunity typically is raised by way of a special defense and determined either at trial or on summary judgment." *Mercer v. Blanchette*, 133 Conn.App. 84, 88 n.1, 33 A.3d 889 (2012). It is noted, however, that the plaintiff did not object to the court's consideration of the issue in this context. The court may address this issue.

proceeding." (Internal quotation marks omitted.) *Alexandru v. Strong, supra*, 83.

In the present case, the plaintiff alleges that the defendants were retained by litigants in two separate proceedings as expert witnesses to read, comment on, and rebut work that was prepared by the plaintiff, which the defendants **[*9]** did by means of writing their own reports on the plaintiff's work product. The complaint contains no factual allegations of any specific actions by the defendants other than their creation of the reports in each case. The reports complained of by the plaintiff were prepared by the defendants in their role as experts in pending judicial proceedings. The courts have noted that absolute privilege extends to documents prepared in connection with a court proceeding, such as the reports that the plaintiff refers to in the complaint. *Alexandru v. Strong, supra*, 81 Conn.App. 83.

Although the plaintiff alleges that the reports were false and known to be false by the defendants, the accuracy of the reports in question is irrelevant to the application of the privilege. False, extreme or outrageous representations are nevertheless privileged if they are uttered or published in the course of judicial proceedings. *Id*. Moreover, the plaintiff cannot reasonably claim that the reports are not pertinent to the subject of the proceedings. In both cases, the plaintiff alleges it had prepared a forensic valuation report for the divorce proceedings. The validity of the plaintiff's methodology and conclusions **[*10]** was thereby a pertinent topic before the court in those proceedings.

The complaint does contain allegations that the defendants aided, abetted, and encouraged Mr. Mills to file a lawsuit against the plaintiff, and that the defendants have engaged in a practice of formally disparaging the plaintiff. The plaintiff relies on these two paragraphs of the complaint in its objection to the present motion, arguing that this conduct is not privileged because it occurred outside the judicial process. Both paragraphs contain only legal conclusions and opinions, not factual allegations. The court does not admit the accuracy of such conclusions and opinions in deciding a motion to strike. *Faulkner v. United Technologies Corp., supra*, 240 Conn. 588. Moreover, the Appellate Court has explained that "[e]ven communications that are preliminary to a proposed judicial proceeding are absolutely privileged if they bear some relation to the proceeding." *Stone v. Pattis*, 144 Conn.App. 79, 97, 72 A.3d 1138 (2013). The defendants' preparation of the reports described in the complaint is conduct that is protected under the absolute privilege for communications uttered or published in the course of judicial proceedings. **[*11]** Absent the allegations regarding those two reports, all three counts of the plaintiff's complaint are legally insufficient to set forth the causes of action the plaintiff attempts to allege therein.

The plaintiff's contention that policy provisions do not favor extension of the privilege to cover the defendants' conduct as witnesses is contrary to the case law. As the Supreme Court has explained, "[i]n *Blakeslee*, the court explained that the privilege was 'founded upon the principle that in certain cases it is advantageous for the public interest that persons should not be in any way fettered in their statements, but should speak out the whole truth, freely and fearlessly.' . . . *Blakeslee & Sons v. Carroll*, [64 Conn. 223, 232, 29 A. 473 (1894)]. The court described the privilege as being rooted in the public policy that 'a judge in dealing with the matter before him, a party in preparing or resisting a legal proceeding, [or] *a witness* in giving evidence in a court of justice, shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for libel.' . . . *Id*. . . . '[T]he expense and distress of . . . harassing litigation' might cause a witness not **[*12]** to speak openly and freely. *[Id.], 233* . . ." (Citations omitted, emphasis added). *Simms v. Seaman, supra*, 308 Conn. 538-39.

II

Entrepreneurial Aspects of CUTPA

The Connecticut Appellate Court recently held that CUTPA is "inapplicable for accountants, except in cases relating to the commercial or entrepreneurial aspects of an accounting practice." *Stuart v. Freiberg*, 142 Conn.App. 684, 708, 69 A.3d 320 (2013). The term entrepreneurial "is not . . . broad. Our Supreme Court defined entrepreneurial as 'aspects of practice, such as the solicitation of business and billing practices, as opposed to claims directed at the competence of and strategy employed by the' defendant . . ." *Id*., 709. See also *Haynes v. Yale-New Haven Hospital*, 243 Conn. 17, 34, 699 A.2d 964 (1997) ("[P]rofessional negligence—that is, malpractice—does not fall under CUTPA. Although physicians and other health care providers are subject to CUTPA, only the entrepreneurial or commercial aspects of the profession are covered, just as only the entrepreneurial aspects of the practice of law are covered by CUTPA"). "Thus, to succeed [in a CUTPA claim], the plaintiffs had to demonstrate that some element of the defendant's business **[*13]** practices was deceptive or unfair." *Stuart v. Freiberg, supra*, 710.

In the present case the complaint does not contain any specific factual allegations pertaining to any deceptive or unfair practices by the defendants regarding their solicitation of business or billing practices. The complaint alleges only that the defendants were hired by third parties to provide reports, and then focuses on the contents

of the reports themselves. The plaintiff's allegation that the defendants stood to "enhance their business and their economic interests" and to "improve their competitive position in the marketplace" by preparing the reports do not render such actions entrepreneurial in nature. The Supreme Court has rejected a plaintiff's claim that its allegations that the defendant attorney engaged in misconduct by which it intended to profit were sufficient to bring its claim within the exception. As the court stated, "[u]sing an attorney's financial considerations as a screening mechanism for separating professional actions from entrepreneurial ones would dissolve the distinction between the two, subjecting attorneys to CUTPA claims for any decision in which profit conceivably could have been a **[*14]** factor. Accordingly, we reject such an interpretation." *Suffield Development Associates Ltd. Partnership v. National Loan Investors, L.P.*, 260 Conn. 766, 783, 802 A.2d 44 (2002). See also *Stuart v. Freiberg, supra*, 142 Conn.App. 710 ("The plaintiffs allege fraudulent billing practices in name only, as their claim is supported with evidence of alleged poor decision making and withholding of information underlying their other legal claims. In sum, the plaintiffs' claims in this regard are not pointed, in the main, at the defendant's billing or other business related practices, as they must be in order to establish a CUTPA claim . . . The plaintiffs do not, therefore, sufficiently allege a CUTPA violation").

The nature and manner of the reports compiled by the defendants, regardless of their contents, do not involve the entrepreneurial aspects of their practice. If in fact there is any flaw in the defendants' reports, as the plaintiff alleges, it would fall squarely within the category of claims directed at the competence of and strategy employed by the defendants. The CUTPA claim in count one, as alleged by the plaintiff, is therefore legally insufficient on this basis. All three counts **[*15]** of the plaintiff's complaint are stricken as they are barred by the litigation privilege.

CONCLUSION

For the foregoing reasons, the court grants the defendants' motion to strike.

Brian T. Fischer, J.