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Trials&TRIBULATIONS

Pre-action communications not cloaked with absolute immunity

On Feb. 24, the New York Court of Appeals unanimously pronounced new law in the case of *Front, Inc. v. Philip Khalil, et al.*, which dealt with the extent to which attorneys will be protected from defamation claims based on any pre-action communications. All attorneys should be mindful of this case and its implications for pre-litigation strategy.

In essence, the Court of Appeals held that statements made by attorneys prior to the commencement of litigation are protected by only a qualified privilege, not an absolute privilege. Therefore, the statements are protected only if there is a good faith belief that litigation will take place and they are made without malice.

Although there had been a number of Appellate Division decisions dealing with this subject, prior to this decision, the Court of Appeals had not previously addressed this specific issue.

By MICHAEL R. WOLFORD
Daily Record Columnist

In Front, defendant Philip Khalil had been employed as director of engineering for plaintiff Front Inc., an American architectural and engineering firm, for approximately eight years, until 2011. During his employment, Khalil, who was a British citizen, applied for and obtained resident alien status in the United States, which plaintiff sponsored. In March 2011, Khalil resigned from his employment and informed Front that he intended to take a new position with defendant Eckersley O'Callaghan Structural Design (EOC), a United Kingdom firm and one of Front's competitors.

Front alleges that after Khalil resigned, but while still employed, it discovered that Khalil had downloaded the firm's entire network drive directory, which included all of the projects the company had worked on, client contact information and other proprietary material. When confronted, Khalil apparently admitted he intended to save his employer's files to his hard drive.

Khalil was immediately terminated based on this conduct. Upon further investigation, it was also discovered that Khalil had worked on approximately 40 side projects for some of his employer's competitors – a clear violation of his employment contract. With the assistance of defendant James O'Callaghan, he also diverted work to his new employer.

After these discoveries, Front retained a law firm, and, in April 2011, an attorney with that firm sent a letter to Khalil in which it was alleged that he had attempted to steal Front's confidential and proprietary information, had conducted an illegal competing business, had unlawfully diverted business opportunities away from Front, and had violated ethical and professional codes of conduct.

The letter also stated that he could be subject to punishment under the Economic Espionage Act of 1996, as he had violated the terms of his immigration status. The letter demanded that he cease and desist from using Front's confidential and proprietary information, and that he promptly return it.

The attorney for Front also sent a letter to Khalil's new employer enclosing the letter to Khalil and stating that Khalil had conspired with EOC to breach his fiduciary duty to Front. The letter to EOC made the same demands that had been made directly to Khalil.

After the letters were sent and Khalil failed to comply with the demands, Front commenced an action against Khalil, O'Callaghan and EOC seeking damages for numerous claims, including misappropriation of trade secrets and unfair competition.

In response, Khalil commenced a third-party action against the law firm, asserting a cause of action for libel per se based upon the statements that it had made in the letters to him and

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EOC.

In response to motions to dismiss directed to the main and third-party actions, New York State Supreme Court, New York County concluded that the letter to Khalil was absolutely privileged. The court relied upon the First Department case of *Sexter & Warmflash v. Margrabe*, 38 AD3d 163, 174 (1st Dept. 2007), in which the court concluded that even though the litigation was not initiated until approximately six months after demand letters were sent, the pre-litigation letters among the parties and counsel of prospective litigation were absolutely privileged.

On appeal, the First Department affirmed the dismissal of the third-party action against the law firm and concluded that an absolute privilege attached to the statements made by counsel in the April 21, 2011 letters, because they were issued in the context of "prospective litigation," *Front, Inc. v. Khalil*, 103 AD3d 481, 483-484 (1st Dept. 2013).

The Court of Appeals decision, written by Judge Sheila Abdus-Salaam, traces the history of the court's handling of statements by attorneys in court proceedings and the extent to which absolute immunity has been provided.

It points to the court's 1897 decision in *Youmans v. Smith*, 153 NY 214 (1897), in which it held that absolute immunity from liability is to be provided to any attorney for any oral or written statements made by the attorney in connection with a court proceeding, as long as "such words or writings are material and pertinent to the questions involved," *id*. at 219.

Thereafter, in the case of *Wiener v. Weintraub*, 22 NY2d 330 (1968), the Court of Appeals extended the absolute immunity protection to any statements made to the Grievance Committee of the Bar Association in connection with the investigation of alleged misconduct by the attorney.

More recently, in the case of *Park Knoll Associates v. Schmidt*, 59 NY2d 205 (1983), the court reiterated the application of an absolute privilege to judicial proceedings and it also suggested that the privilege "confers immunity from liability regardless of motive," *id.* at 209.

The court then proceeded to point out the differences among three Appellate Division departments, which have addressed the issue involving communications made by an attorney on behalf of his client for any pre-action matter.

As discussed, the First Department case of *Sexter & Warmflash*, 38 AD3d 163 (1st Dept 2007), had held that the communications made by an attorney in connection with prospective litigation are absolutely privileged. Whereas the Second Department, in the case of *Kenny v. Cleary*, 47 AD2d 531 (2nd Dept 1975), held that an absolute privilege did not apply to statements made prior to litigation. More recently however, the Second Department held in the case of *Sklover v. Sack*, 102 AD3d (2nd Dept 2013), that statements made in connection with the settlement of a prospective malpractice litigation were afforded an absolute privilege.

The Third Department holds the minority view. In the case of *Uni-Serv. Risk Mgt. v. New York State Assn. of School Bus. Officials*, 62 AD2d 1093 (3rd Dept. 1978), it ruled that statements made by the defendant that plaintiff had "misappropriated our funds" was not covered by an absolute privilege since the statement was made before the commencement of the action. Therefore, a question of fact existed as to whether there was a qualified privilege that would be applicable to the statement, *id.*

The Court of Appeals, in Front, ultimately reversed the First Department to the extent that the court had held that all communications made in the context of prospective litigation are absolutely privileged. Rather, while recognizing the importance of applying some type of privilege to pre-litigation attorney communications, the Court of Appeals determined that the extent of that privilege should be limited to a qualified privilege, which is ultimately lost if it is made with malice.

Based upon this recent Court of Appeals decision, it is evident that a pre-action letter from an attorney, which threatens litigation, does not carry with it an absolute privilege from liability. If the plaintiff can demonstrate that there was not a good faith belief that litigation would take place, or that the attorney and her client is guilty of malice – that is ill will toward the recipient of the letter – no privilege will be applicable and therefore, the attorney writing the letter may be forced to litigate the defamation claim.

In essence, any attorney who authors a pre-action letter needs to be very circumspect with reference to the allegations that are contained in the letter and, in particular, she should be convinced of the validity of her client's allegations before she signs it.

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