

PRESENT:

HON. MARILYN SHAFER
Justice

PART 36

ELIZABETH COMBIER

INDEX NO. 115354199

Plaintiff(s),

MOTION DATE _____

-against-

MOTION SEQ. NO. 008-009

FRED ANDERSON

Defendant(s).

The following papers, numbered 1 to _____ were read on this motion to/for

PAPER# NUMBERED

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits _____

Answering Affidavits - Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided
pursuant to attached Decision/Order.

SCANNED
JAN 06 2007

Dated: 12/27/07

MARILYN SHAFER
J.S.C.
J.S.C.

Check one: [] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Motion sequence nos. 008 and 009 are consolidated for disposition. In motion sequence no. 008, defendants move, pursuant to CPLR 3212 (a), for summary judgment dismissing the complaint. In motion sequence no. 009, plaintiff moves, pursuant to CPLR 3124, to compel third-party witness Kenneth T. Wasserman, Esq. to answer certain questions which he refused to answer at his deposition, on the ground that they called for disclosure of attorney work-product.

The pro se complaint alleges that defendants Amstein and Anderson, in particular, engaged in a series of actions intended to inflict emotional distress upon plaintiff, without interference from, and at times, with the support of the other defendants. Amstein was, at all relevant times, associate pastor of Madison Avenue Presbyterian Church (the Church); Anderson was, and remains, the pastor. Plaintiff contends that Amstein and Anderson took those actions in order to retaliate against plaintiff for her years of outspoken advocacy within the Church, in order to coerce her to take certain actions with regard to her twin sister, and in order to coerce her into allowing her late mother's second will to be invalidated in favor of a prior will. The second will named plaintiff as personal representative and executor, and bequeathed to plaintiff, alone, her mother's estate. The earlier will named the Director of Music at the Church as executor. Plaintiff's sister is challenging the second will in New York County Surrogate's Court. The actions of defendants, upon which plaintiff

bases her claim, are the transfer of plaintiff from the active to the inactive roll of the Church, shortly after plaintiff's mother, who had been active in the Church for decades, had died; the libelling of plaintiff; the withholding of plaintiff's mother's ashes from plaintiff, for approximately one week; and the refusal to allow one of plaintiff's children to re-enroll in a private school affiliated with the Church.¹

Defendants' Motion

It is undisputed that plaintiff's mother died on March 16, 1998; that plaintiff arranged to have her mother's body cremated; that, approximately a week later, the ashes were delivered, in an urn inside a box, to the doorman of plaintiff's building; that, on that day, at plaintiff's request, Amstein took possession of the urn, because plaintiff was too distraught to have the ashes in her apartment; that a few months later, plaintiff requested Amstein to return the ashes, because she was planning to inter them in a casket in a cemetery; and that, on his own initiative, Amstein delayed returning the urn for approximately one week, while he ascertained, through the attorney who was representing plaintiff's sister in the will contest, that plaintiff's sister did not object to plaintiff's plan for the interment and planned to be present therefor.

The proponent of a motion for summary judgment has the burden of proving his or her entitlement to judgment as a matter of law.

¹ As to the last of these actions, discovery has not been completed.

Ferrante v American Luns Assn., 90 NY2d 623 (1997); Winesrad v New York Univ. Med. Center, 64 NY2d 851 (1985). Absent such proof, in admissible form, the motion must be denied, regardless of the sufficiency of the opposing papers. Id.; Finkelstein v Cornell Univ. Med. College, 269 AD2d 114 (1st Dept 2000).

Defendants contend that the complaint must be dismissed, because plaintiff can show neither that the actions of which she complains were sufficiently outrageous to support the cause of action which she alleges, nor that defendants undertook those actions for malicious reasons. In addition, defendants argue that this court lacks jurisdiction over the complaint, inasmuch as plaintiff's allegations of misconduct pertain to Church matters, or involve Church doctrine; and that the court may not consider any instances of misconduct that plaintiff alleges to have occurred more than one year prior to the date that she commenced this action (see CPLR 215 [3]).

It is established that, regardless of whether defendants acted with malice,

substantial damages may be recovered for the deprivation of the solace and comfort of burying the remains of a deceased relative and for any interference by third parties with the remains which may lacerate the plaintiff's feelings * * * .

Finley v Atlantic Transport Co., 90 Misc 480 (Sup Ct, NY County 1915), affd 172 App Div 907 (1st Dept 1916), affd 220 NY 249 (1917). Where the death, or the reported death, of a loved one is involved, "there exists an especial likelihood of genuine and serious mental distress, arising from the special circumstances,

which serves as a guarantee that the claim is not spurious." Johnson v State of New York, 37 NY2d 378, 382 (1975) (internal quotation marks and citation omitted); see also Darcy v Presbyterian Hosp. in City of New York, 202 NY 259 (1911); Masbaro v Charles J. O'Shea Funeral Home, Inc., 292 AD2d 349, 2d Dept 2002). A third party may not retain the remains of a loved one "upon any debt or demand whatsoever * * *" (Public Health Law § 4319), and even a very brief delay in returning such remains is actionable. Gratton v Baldwinsville Academy and Central School, 49 Misc 2d 329 (Sup Ct, Onondaga County 1966) (a delay of several minutes).

Defendants have failed to show that Amstein's retention of plaintiff's mother's ashes, in the face of plaintiff's demand that he return them to her, involved any matter pertaining to the organization or the operation of the Church, or to Church doctrine. Indeed, Amstein acknowledged at his deposition that he had withheld them on the "supposition" that plaintiff's mother would have wanted plaintiff's sister, who lives in France, but who, at that time, was temporarily in Florida, to attend the interment. Greenberg Affirm., Exh. J, at 277. Accordingly, this court has jurisdiction over this matter.

With regard to plaintiff's claim, as to her placement on the inactive list of the Church, plaintiff's own complaint, as supplemented by her bill of particulars, as well as her affidavit in opposition to defendants' motion for summary judgment, show that the gravamen of the claim is that such placement violated the Book

of Order, which, together with the Constitution of the Presbyterian Church (USA), governs the organization and operation of the Presbyterian Church (USA). Plaintiff litigated her claim that she had improperly been listed on the inactive roll before the Permanent Judicial Commission of the Presbytery of New York City (the PJC). The PJC found that plaintiff had "intentionally failed to participate in the work and worship of [the Church] for a period of at least one year" and that she had been "removed from the active role of [the Church] because of her intentional failure in the judgment of the Session of [the Church] to participate in the work and worship of the [Church]." However, the PJC also found that the Session of the Church had violated the requirement in the Book of Order that a Session make diligent efforts to restore a person in plaintiff's position to activity in the Church's work and worship. Accordingly, the PJC ordered the Session of the Church to restore plaintiff to the active member's roll. See Greenberg, Reply Affirm., Exh. B. Plainly, this court lacks jurisdiction with regard to the issue of plaintiff's standing within the Church. See Presbyterian Church in United States v Mary Elizabeth Blue Hill Mem. Presbyterian Church, 393 US 410, 419 (1969) (First Amendment bars civil court from exercising jurisdiction over disputes that implicate "controversies over religious doctrine and practice"). That plaintiff appealed the order of the PJC to the Permanent Judicial Commission of the Synod of the Northeast, and then to the Permanent Judicial Commission of the General Assembly of the Presbyterian Church (USA), seeking attorney's fees and damages, and

that those bodies ruled that, under the Constitution of the Presbyterian Church (USA), they lacked jurisdiction to grant plaintiff the relief that she had requested, does not vest such jurisdiction in this court.²

Plaintiff bases her claim, in part, on multiple allegations of defamation. One of these is that, on July 22, 1999, when she accompanied a former employee of the Church to an unemployment hearing, defendant Frey told the unemployment judge that plaintiff was a litigious person, who was in litigation against the Church. Plaintiff contends that Mr. Frey's statement was false, in that she had regained her active membership in the Church, and had not yet commenced this action. In the first place, plaintiff had filed an ecclesiastical proceeding against the Church on June 25, 1998. Secondly, plaintiff filed her first appeal of the decision of the PIC on July 12, 1999. See Combar Aff., Exh. 1, at 1. Accordingly, the statement that plaintiff was in litigation against the Church was not false, although Mr. Frey's words may have been imprecise, to the extent that they could have been understood to refer to a civil action.

The other allegations of defamation in the complaint concern intra-Church communications that are entitled to a qualified immunity. See Lieberman v. Gelstein, 80 NY2d 429 (1992). Such an

² The court notes that, although a motion for summary judgment must be supported by evidence in admissible form, defendants' motion is supported, in the main, by an affidavit from an attorney who lacks personal knowledge of the matters to which he attests, and by depositions of several of the defendants. Those depositions are not evidence in admissible form. See CPLR 3117.

immunity is defeated by a showing of malice (See Dobkin v New York University, 278 AD2d 24 (1st Dept 2000)), but plaintiff's own papers explicitly state that her vilification by a number of the defendants, like her transferral from the active to the inactive roll of the Church, and Amstein's withholding of plaintiff's mother's ashes, was undertaken in order to coerce her to take certain actions with regard to her sister, and in order to coerce her into allowing her mother's second will to be invalidated, acts which, according to plaintiff, the Church viewed as being in its own financial interest. See e.g. Complaint, at 13-14, 32. It thus appears, on plaintiff's account, that such distress as was inflicted upon plaintiff was not the product of malice, but a byproduct of actions that Church officials took, in aid of what they considered to be the Church's self-interest.

Plaintiff's Motion

Mr. Wasserman represents plaintiff's sister in the will contest. At Mr. Wasserman's deposition, plaintiff's then-counsel asked Mr. Wasserman what defendants Anderson and Amstein, or other Church officials, had said to him about plaintiff, in a number of conversations that he had had with them. Mr. Wasserman refused to answer those questions, except as to the issue of plaintiff's mother's ashes, on the ground that such statements constitute attorney work product, because Mr. Wasserman had entered into those conversations in the course of his representation of plaintiff's sister in the will contest, and in another proceeding that plaintiff's sister has commenced against plaintiff. An attorney's

work-product is absolutely exempt from disclosure. Spectrum Svs. Intl. Corp. v Chemical Bank, 78 NY2d 371 (1991). The exemption applies "to those materials that are prepared by an attorney as an attorney, * * * and which contain the attorney's analysis and trial strategy." Doe v. Roe, 244 AD2d 450 (2d Dept 1997), *affd* 92 NY2d 864 (1998). Accordingly, documents that an attorney prepares on the basis of interviews constitutes work-product. See, e.g. Fravlich by Fravlich v Maimonides Hosp., 251 AD2d 251 (1st Dept 1998). Analogously, while statements reflecting the independent observations or knowledge of witnesses are not immune from discovery as work-product (Salzer ex rel. Salzer v Farm Family Life Ins. Co., 280 AD2d 844 (3rd Dept 2001), statements made in the course of a conversation with an attorney may reflect questions posed by the attorney and, thus, the attorney's analysis. At the least, the eliciting of statements from witnesses constitutes material prepared for litigation, which plaintiff would be unable to obtain in the litigation between her and her sister. See e.g. Dworkin v Metropolitan Transp. Auth., 54 AD2d 922 (2d Dept 1976). It would be anomalous to compel such discovery here, where plaintiff learned of the conversations between Mr. Wasserman and various defendants in the course of her discovery of defendants, and where she has had ample opportunity to depose defendants about those conversations.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted in part, to the extent that plaintiff may not base her

cause of action for intentional infliction of emotional distress on any matter pertaining to her removal from the active roll of the Church, or on any claim of defamation; and it is further

ORDERED that plaintiff's motion is denied; and it is further

ORDERED that the rest of this action shall continue.

Dated: 12/23/03

ENTER:

[Handwritten signature]
JIS/J.S.C.