

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

BARBARA L. REESE,		: CV- 15-00,706
	Plaintiff,	:
vs.		: CIVIL ACTION
		:
MICHAEL P. NESTARICK, an individual	:	
MANAGEMENT, INC. and LEXON INSURANCE	:	
COMPANY and WASTE MANAGEMENT OF	:	
PENNSYLVANIA, INC.	:	
	Defendants.	: PRELIMINARY OBJECTIONS

ORDER

Before the Court are preliminary objections filed by Defendants to Plaintiff’s complaint. Defendants demur on the grounds of absolute privilege for the conduct underlying the causes of actions set forth in the complaint.¹ Upon consideration of the argument and briefs submitted by Counsel, the Court sustains the demurrer. The following discussion is provided in support of the Court’s ruling.

Factual Background

Accepting the allegations of the complaint as true, the factual background of this matter is as follows. The parties hold certifications for appraising residential property in Pennsylvania. In investigating and prosecuting Reese regarding an appraisal done in 2005, a prosecuting attorney for the Department of State, Board of Certified Real Estate Appraisers, hired Nestarick to evaluate her appraisal done in 2005. Nestarick violated the Uniform Standard of Professional Appraisal Practice (USPAP) in accepting the assignment because of his past conflict and adversarial dealings with Reese. Reese hired her own expert who prepared a report evaluating Nestarick’s expert report evaluating Reese’s appraisal. Reese’s expert reported that Nestarick

¹ Defendants also object to the complaint for failure to attach writings that form the basis of the complaint as required under Pa. R.C.P. 1019(i), specifically Nestarick’s report, an order to show cause sent by prosecutor, Plaintiff’s expert’s report, and date the notice of withdrawal was filed. In light of the Court’s ruling, these objections are moot.

violated USPAP in his review of Reese. Upon receiving Reese's expert report, the Department of State withdrew its order to show cause and prosecution of Reese. Reese suffered out-of-pocket damages, damage to her business and personal reputation, lost business, and emotional distress. Reese sued Nestarick at Lycoming County Docket No. 10-02343 for interference with business relations. The claims were dismissed by Order dated February 28, 2011 on the grounds that the Nestarick was absolutely privileged in preparing his expert report. Based upon the violations of USPAP with respect to Reese, on September 11, 2014, Nestarick was order to pay a civil penalty of \$5,000 and costs of \$5,000. Nestarick was placed on probation for one year and was required to successfully complete at least 59 hours of remedial education. On June 10, 2015, Reese filed a complaint in the instant matter against Nestarick for Malicious Prosecution, Wrongful Use of Civil Proceedings and Interference with Business Relations.

Discussion

A party may file preliminary objections based on the legal sufficiency or insufficiency of a pleading (demurrer) pursuant to Pa. R.C.P. 1028(a)(4). A demurrer tests the legal sufficiency of the complaint. Sullivan v. Chartwell Inv. Partners, LP, 873 A.2d 710, 714 (Pa.Super. 2005). When reviewing preliminary objections in the nature of a demurrer, the court must "accept as true all well-pleaded material facts set forth in the complaint and all inferences fairly deducible from those facts." Thierfelder v. Wolfert, 52 A.3d 1251, 1253 (Pa. 2012), *citing*, Stilp v. Commonwealth, 940 A.2d 1227, 1232 n.9 (Pa. 2007). In deciding a demurrer "it is essential that the face of the complaint indicate that its claims may not be sustained and that the law will not permit a recovery. If there is any doubt, it should be resolved by the overruling of the demurrer." Melon Bank, N.A. v. Fabinyi, 650 A.2d 895, 899 (Pa. Super. 1994) (citations omitted). "Preliminary objections, the end result of which would be dismissal of a cause of action, should

be sustained only in cases that are **clear and free from doubt.**” Bower v. Bower, 611 A.2d 181, 182 (Pa. 1992)(emphasis added).

As this Court ruled on February 28, 2011, this Court again rules that Reese has no cause of action based upon the expert report prepared by Nestarick which was as part of legal proceedings and was pertinent and material to those proceedings.

“Pennsylvania, like many other jurisdictions, recognizes a judicial privilege providing immunity for communications which are made in the regular course of judicial proceedings and are material to the relief sought.” Schanne v. Addis, 121 A.3d 942, 947-948 (Pa. 2015), *citing*, Bochetto v. Gibson, 580 Pa. 245, 251, 860 A.2d 67, 71 (2004).n2; *See, Also*, RESTATEMENT OF TORTS (SECOND) § 588 (1977); Clodgo v. Bowman, 601 A.2d 342 (Pa. Super. 1992); Post v. Mendel, 510 Pa. 213, 217, 507 A.2d 351, 353 (Pa. 1986), *citing*, Kemper v. Fort, 219 Pa. 85, 93, 67 A. 991 (1907). The privilege covers a witness. Schanne, supra, 121 A.3d at 947-948 (citation omitted). “Furthermore, the privilege is absolute, meaning that, where it attaches, the declarant's intent is immaterial even if the statement is false and made with malice.” Id. (citation omitted). See Bochetto, 580 Pa. at 251 n.12, 860 A.2d at 71 n.12.” Schanne, supra, 121 A.3d at 947-948. Absolute privilege protects the declarant against a charge of malice and cannot be lost through an abuse of privilege. Id. n.3.

In the present case, Reese contends that the sanction imposed upon Nestarick for violations of USPAP in the expert report at issue in this case removes Nestarick’s privilege as to the expert report. As noted above, however, absolute privilege cannot be lost by malice or an abuse of privilege. Schanne, supra, n. 3. ²

² The February 28, 2011 ruling was not appealed and would preclude the issue of absolute privilege for the expert report from being re-litigated. Reese contends that the sanction against Nestarick on September 11, 2014 is a later fact that removes the privilege. However, the Court ruled that the expert reported was protected by judicial privilege. That privilege is absolute.

Accordingly, the Court enters the following Order.

ORDER

AND NOW, this 31st day of **December, 2015**, it is ORDERED and DIRECTED that Defendants' demurrer is SUSTAINED.

BY THE COURT,

December 31, 2015
Date

Richard A. Gray, J.

cc: Benjamin E. Landon, Esq.
James J. Wilson, Esq.
MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN
PO Box 3118
Scranton, PA 18505-3118