

NEWS & DEVELOPMENTS

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Qualified Privilege Applies to Pre-Litigation Communication

New York's highest court for the first time has addressed whether statements made by an attorney to a potential defendant prior to the commencement of litigation are privileged in the context of a later defamation claim. In *Front, Inc. v. Khalil*, No. 19, 2015 N.Y. LEXIS 299 (N.Y. Feb. 24, 2015), the New York Court of Appeals unanimously held that an attorney's pre-litigation statements were protected by a qualified privilege that attaches to statements pertinent to a good-faith anticipated litigation. *Id.* at *1. As a result, the defendant could not sustain a libel claim against plaintiff's attorney for statements made in demand letters sent prior to a litigation's commencement. *Id.* at *10–11.

The defendant/third-party plaintiff, Philip Khalil, was a Director of Engineering for several years at the plaintiff, Front, Inc., an architectural and engineering firm. In March 2011, Khalil resigned from Front to take a position with one of Front's competitors, Eckersley O'Callahan Structural Design (EOC). Prior to his departure, Front discovered that Khalil had downloaded Front's entire network drive directory and intended to take that download with him. The downloaded information included all prospects Front worked on, client contacts, and other proprietary information. Front also learned that Khalil, while a Front employee, had worked on 40 side projects of its competitors, including EOC, and had diverted work away from Front to EOC. *Id.* at *1–3.

Front's attorney then sent a letter to Khalil that listed his various wrongful acts and demanded, among other things, that he cease and desist from further wrongful conduct and return proprietary information he had taken. A letter (with a copy of the Khalil letter) was also sent to EOC and its principal stating they conspired with Khalil to injure Front and making "nearly identical" demands to those made in the letter to Khalil. Khalil and EOC failed to comply with Front's demands. *Id.* at *2–4.

Front thereafter commenced litigation against Khalil, EOC, and its principals asserting various claims, including those of misappropriation of trade secrets, and common-law unfair competition. Khalil, in response, commenced a third-party action against Front's attorney for libel *per se* based upon the statements made in the demand letter to Khalil. *Id.* at *4–5. The trial court granted the motion by Front's attorney to dismiss the libel claim and that dismissal was affirmed on appeal to the Appellate Division on the basis that the attorney's letters were "absolutely privileged". *Front, Inc. v. Khalil*, 103 A.D.3d 481 (1st Dep't 2013). The New York Court of Appeals granted leave to appeal, and affirmed that dismissal, but held the privilege was "qualified" rather than "absolute". 2015 N.Y. LEXIS 299, *5–6, 10–11.

The court noted that "although it is well-settled that statements made in the course of litigation are entitled to absolute privilege, this Court has not addressed whether statements made by an attorney on behalf of his or her client in connection with prospective litigation are privileged." *Id.* at *7. It found the same considerations that supported the application of

privileged status to attorney communications during the course of litigation were relevant to pre-litigation communications. Communications in anticipation of litigation encourage negotiation between the parties to avoid costly and time-consuming litigation, and should be encouraged undeterred by the possibility of a later defamation claim. *Id.* at *8–9.

The court recognized, however, that providing privileged status to pre-litigation communications could potentially lead to abuses. As a result, the court held that the privilege should be “qualified” and “should only be applied to statements pertinent to a good-faith anticipated litigation”. *Id.* at *9. Limiting the privilege in that manner will properly exclude those attorneys who seek to “bully, harass, or intimidate their client’s adversaries by threatening baseless litigation or by asserting wholly unmeritorious claims, unsupported in law and fact, and in violation of counsel’s ethical standards.” *Id.* at *9–10. The court in a footnote added that “attorneys should exercise caution when corresponding with unrepresented potential parties who may be particularly susceptible to harassment and unequipped to respond properly even to appropriate communications from an attorney”. *Id.* at *10 n.2. No further guidance was offered as to the “caution” to be exercised in those circumstances.

Turning to the letters sent by Front’s counsel, the court found both that a good-faith basis existed to anticipate litigation, and the statements contained in the letters were pertinent to that anticipated litigation. Those statements, therefore, fell within and were protected by a qualified privilege. *Id.* at *10–11.

Prior to sending a demand letter, attorneys in New York need satisfy themselves that both a good-faith basis exists for anticipated litigation and that they have avoided inflammatory or unnecessary verbiage. They should also consider the “caution” expected of them by *Front* even where the demand is “appropriate.”

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