Supreme Court of the State of New York
Appellate Division – Second Department

JINKU CHANG, **PLAINTIFF-RESPONDENT-APPELLANT,** **- AGAINST –** **SONIA ARROYAVE,** **DEFENDANT-APPELLANT-RESPONDENT**	**NOTICE OF MOTION** Appellate Division Docket No.: 2020-06799

Please take notice that upon the annexed affidavit of Julie Salwen on behalf of amicus curiae National Employment Lawyers Association/New York, dated September 28, 2022, and the papers annexed thereto, the undersigned will move this court, at the courthouse thereof, located at 45 Monroe Place, Brooklyn, New York, 11201, on the 11th day of October, 2022, at 10:00 o'clock in the forenoon of that date, or as soon thereafter as counsel may be heard, for an order granting leave for amicus curiae National Employment Lawyers Association/New York to file an amicus brief in the above captioned case and such other and further relief as to the court may seem just and equitable.

Dated: September 28, 2022, New York

Respectfully submitted,
/s/ Julie Salwen
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Supreme Court of the State of New York
Appellate Division – Second Department

JINKU CHANG,

Plaintiff-Respondent-Appellant,

- against -

SONIA ARROYAVE,

Defendant-Appellant-Respondent,

Affirmation of Julie Salwen In Support of Motion for Leave to File Amicus Brief of the New York Chapter of The National Employment Lawyers Association (NELA/NY) in Support of Defendant-Appellant-Respondent

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Attorneys for Amicus Curiae

Westchester County Index No. 55459/2020
Appellate Division Docket No. 2022-03871

STATE OF)
ss.:
COUNTY OF)

Julie Salwen, an attorney duly licensed to practice before the Courts of the State of New York, hereby affirms pursuant to CPLR §2106 and under the penalty of perjury as follows:

1. I am a member of the Amicus Committee of the National Employment Lawyers Association/New York ("NELA/NY"), the New York affiliate of the National Employment Lawyers Association ("NELA"). I am a member of the NELA/NY and a New York practitioner with close to fifteen years of experience representing employees in employment matters. I respectfully make this affirmation in support of the request to submit a brief in support of the Defendant-Appellant-Respondent in the above-captioned matter on behalf of NELA/NY.

2. The brief submitted conditionally herewith addresses the need and expectation for employees to be candid and fulsome when attempting to engage in (confidential and non-publicized; often mandatory) pre-filing settlements of potential discrimination or other employment law claims with their employers, without fear of reprisal. It also addresses policy concerns and inefficiencies for employees, as well as employers and the courts, where there are parallel—or the specter of parallel—discrimination and defamation proceedings. On the one hand,

the victim of discrimination or harassment is seeking to vindicate his or her claims (and the important state interests underlying them) and, on the other, that same employee is concurrently defending him or herself against claims of defamation.

3. The Proposed Amicus Brief is annexed hereto as Exhibit A, and the Order and Notice of Appeal are annexed as Exhibits B and C respectively.

4. NELA/NY is the New York chapter of a national bar association dedicated to the vindication of individual employees' rights. The National Employment Lawyers Association (NELA) is the nation's only professional organization comprised exclusively of lawyers who represent individual employees. NELA has over 3000 member attorneys and approximately 67 state and local affiliates who focus their expertise on employment discrimination, employee benefits and other issues arising out of the employment relationship. NELA/NY, incorporated as a bar association under the laws of New York State, has over 350 members. Through its various committees, NELA/NY also seeks to promote more effective legal protections for employees.

5. NELA/NY respectfully requests permission to file an amicus brief in this matter for the reasons described in paragraph 2 above.

6. No party's counsel contributed content to the brief or participated in the preparation of the brief. No party or a party's counsel contributed money intended to fund preparation or submission of the brief. No person or entity, other

than movants or movants' counsel, contributed money that was intended to fund preparation or submission of the brief.

7. The chair of the Amicus Committee of NELA/NY, Rachel Geman, conferred with counsel for the opposing party, Mr. Joshua E. Kimerling, and his client, Mr. Chang, does not consent to the filing of this brief.

Dated: New York, New York
September 28, 2022

/s/ Julie Salwen
JULIE SALWEN, Esq.

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on behalf of amicus curiae:

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EXHIBIT A

Supreme Court of the State of New York
Appellate Division – Second Department

JINKU CHANG,

Plaintiff-Respondent-Appellant,

- against -

SONIA ARROYAVE,

Defendant-Appellant-Respondent,

Amicus Brief of the New York Chapter of The National Employment Lawyers Association (NELA/NY) in Support of Defendant-Appellant-Respondent

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Westchester County Index No. 55459/2020
Appellate Division Docket No. 2022-03871

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STATEMENT OF INTEREST

NELA/NY is the New York affiliate of the National Employment Lawyers Association ("NELA"), a national bar association dedicated to the vindication of the rights of individual employees. NELA is the nation's only professional organization comprised exclusively of lawyers who represent individual employees. NELA has over 4000 member attorneys and 69 state and local affiliates who focus their expertise on employment discrimination, employee compensation and benefits, and other issues arising out of the employment relationship. NELA/NY has approximately 350 members and is one of NELA's largest affiliates.

NELA/NY is dedicated to advancing the rights of individual employees to work in an environment that is free of discrimination, harassment, and retaliation. Our members advance these goals through representation of employees who have been victims of discrimination and retaliation. NELA/NY has filed numerous amicus briefs in the courts of New York State and in the Second Circuit in cases that raise important questions of anti-discrimination law. The aim of this participation has been to highlight the practical effects of legal decisions on the lives of working people.

This case is important to our members and to the employees for whom they advocate because settlement prior to litigation enables the victims of

discrimination to obtain compensation for the illegal conduct through which they suffered and move forward with their lives without being forced to undergo the lengthy and often stressful and emotionally damaging process of litigation. *See* Michaela Keet, Heather Heavin & Shawna Sparrow, Anticipating and Managing the Psychological Cost of Civil Litigation, 34 Windsor Y.B. Access Just. 73 (2017) (examining the psychological consequences of litigation); *see also* Larry J. Cohen & Joyce H. Vesper, Forensic Stress Disorder, 25 LAW & Psychol. REV. 1 (2001) (examining the sources of psychological stress induced by litigation and arguing for a separate diagnostic category for "forensic stress disorder").

Moreover, discrimination victims who successfully defend against these defamation lawsuits will be forced to pay their attorneys for their defense, because, unlike antidiscrimination laws, which are fee shifting statutes, the parties to a defamation lawsuit are each responsible for their own attorneys' fees.

If the lower court decision is allowed to stand, in order to protect the employees that NELA/NY members represent from protracted and expensive defense of defamation claims, attorneys may be forced to forego sending efficacious (i.e., specific and detailed) demand letters and attempting to settle claims prior to litigation.

INTRODUCTION

Prior to litigation, in an attempt to resolve her claims of employment discrimination, retaliation, and harassment by her supervisor Jinku Chang (the Plaintiff-Respondent here), Sonia Arroyave (the Defendant-Appellant here) sent a short letter and a draft federal Complaint to the CEO of her employer, Universal Remote Control, Inc. ("URC"). Her claims arose under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., (as amended) ("Title VII") and the New York State Human Rights Law, New York State Executive Law, §§ 296, et seq. ("NYSHRL").

Both the letter and the draft Complaint were labeled "Personal and Confidential (For Settlement Purposes Only). (A. 8-22.) Ms. Arroyave did not publish her claims to anyone other than URC's CEO. In response, Mr. Chang brought the instant action for defamation against Ms. Arroyave in Westchester County Supreme Court. (A. 24-31.) Had Ms. Arroyave send her letter attaching the filed complaint, versus a draft complaint, within minutes of filing, she would be entitled to absolute immunity. Instead, the same letter, send in anticipation of litigation (and as part of litigation), is subject to a different standard.

Yet, under most circumstances, employees are actually or functionally required to lay out their claims in advance of litigation – for example, to their employers' human resources departments and/or the EEOC – in order to be able to

access the courts (or even to access an arbitral forum). Chilling the ability of employees to undergo pre-filing steps necessarily chills efforts to eliminate discrimination in the workplace, in derogation of strong public policy.

Moreover, public policy strongly favors conciliation and settlement as the means of resolving employment discrimination claims. For example, Supreme Court recognized that "[i]n enacting Title VII"—one of Ms. Arroyave's claims here—"Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims." *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981) (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (holding that "Congress enacted Title VII ... to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin.... [c]ooperation and voluntary compliance were selected as the preferred means for achieving this goal"). Indeed, Title VII requires the EEOC to attempt to settle meritorious claims via the process of conciliation prior to any filing in court. However, this policy would be thwarted if the victims of employment discrimination cannot reach out to their employers with their claims—prior to filing in court—without risking defamation lawsuits against them. For example, Ms. Arroyave would not now be defending against this defamation lawsuit if she had filed her complaint in court without making a prior attempt to settle her claims.

In the context of employment discrimination, an overly restrictive interpretation of qualified immunity from defamation actions with regard to pre-filing attempts to resolve claims is unfair to employees and chills their efforts to resolve their claims without litigation. Even if Ms. Arroyave should prevail at trial against the defamation claims brought by Mr. Chang, she will still have had to endure the stress, attorneys' fees, and costs of years of litigation. Moreover, the chilling effects of allowing defamation lawsuits to proceed against employees who attempt to resolve their claims prior to filing is problematic for employers who are interested in settlement and the courts which will be forced to deal with a multitude of cases, which could potentially have been resolved prior to litigation.

Furthermore, inefficient collateral litigation in the form of a defamation claim filed in response to an affirmative anti-discrimination claim raises a host of concerns, including inconsistent judgments and the waste of judicial resources.

Amicus curiae NELA/NY respectfully requests that this Court clarify the standard for qualified immunity from claims of defamation in the context of attempts to settle discrimination claims prior to litigation and vacate the lower court's order denying Ms. Arroyave's motion for summary judgment.

ARGUMENT

A. Pre-Filing Activities Are An Integral Part of Anti-Discrimination Litigation.

Anti-discrimination employment litigation has a pre-filing component—often a mandatory one. For various reasons, an employee who is a victim of discrimination often cannot access the courts unless they lay out their specific experiences in advance, and justify why those experiences mean that the employee was harassed or treated inequitably. The tight nexus between pre-filing activities and the often-resulting legal complaint is a reason *in itself* for courts to apply caution before rejecting qualified immunity for those pre-filing activities.

First, employees experiencing workplace discrimination often face a Hobson's choice: complain internally (which their employers prefer and often set forth as a requirement in handbooks), risking potential retaliation, or wait to communicate through a lawyer and face censure allegedly for coming up with claims only after the fact.

Second, for certain harassment claims under federal law, employees are *required* to provide notice pursuant to *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

Third, employees are required to bring EEOC charges under federal law before bringing Title VII claims in court. The administrative charges may be

protected, but the point is that administrative exhaustion is yet another step for employees.

Fourth, there is no guaranteed severance in this country. Thus, if an employee is let go, almost certainly any minimal (albeit needed) severance is conditioned on a release of all claims. The employee must then grapple with the question of whether that consideration is adequate, and is required to explain why more might be fair and reasonable.

NELA/NY notes that pre-filing resolution can be efficient and helpful for litigants in workplace disputes and for the courts—*but only if employees are not dis-incentivized or chilled from doing so*. Clearly, the specter of a defamation lawsuit is such a disincentive. To encourage pre-filing resolution, the courts must interpret qualified immunity to protect employees such as Ms. Arroyave who seek to resolve their claims pre-filing, especially when they do not publish those claims to anyone other than their employers.

B. <u>Employees Must be Free to be Candid in Pre-Filing Activities.</u>

If employees cannot tell the truth, or their good faith version of the truth, in pre-filing letters and/or they cannot be provide the specific details of their claims, the long-standing and repeatedly endorsed public policies in favor of settlement will be eviscerated.

If employees are constrained to keep their claims in pre-filing letters vague—due to fear of facing a defamation lawsuit—employers' reaction is often that they do not have enough information to respond. Or employers may conclude that there are no specifics to be had, that the employee does not have the facts to build a case. This belief on the part of the employer will affect the employer's calculation of the price of litigation and therefore the appropriate consideration for any settlement and often defeat the possibility of settlement.

In those instances where the parties agree on the facts (in relevant part), there is a tremendous benefit to both parties to settling without the costs, risks, and delay of litigation—and without the unnecessary expenditure of judicial resources. In those instances where the parties disagree on facts but where the facts are delineated on both sides, this clarity also gives the parties a better understanding with which to assess claims (including the potential to educate an employee about the weakness of their case).

No one benefits from a situation where employees are chilled from providing specifics in pre-filing correspondence. If employees who provide specifics in pre-filing correspondence face the possibility of defamation lawsuits, they will be deterred from filing internal complaints and seeking pre-filing settlements.

C. An Overly Liberal Standard for Allowing Defamation Lawsuits to Proceed in Employment Discrimination Cases Creates Problems for Employers and the Courts as Well as For Employees.

The above section addresses the problems caused by a liberal standard for allowing defamation lawsuits to proceed, even in the absence of any filed defamation complaint. This section addresses the host of specific problems, including for employers and the courts when there is an actual claim.

An individual manager found to be harassing or discriminating against their direct reports or other employees may (and should) face consequences by the employer, including transfer, demotion, or even termination.[1] Allegedly discriminating managers have every incentive—ranging from pecuniary concerns, to (in some cases) psychological denial, to societal opprobrium—to deny they have done anything wrong.

Against this backdrop, an overly liberal standard for allowing that manager to bring defamation claims—effectively, to go on the offensive—does not serve the interests of employee plaintiffs, the courts, or even employer defendants. If the manager's defamation claim is orchestrated or supported by the employer, this raises the inference that the claim is tactical, at best, and retaliatory, at worst.

[1] There is no suggestion here that any manager who denies allegations of discrimination against them must be obscuring the truth, obviously. Indeed, an employment plaintiff must (and should) plead and prove their allegations.

In other words: is a manager really concerned with their reputation with their employer (*the only recipient of the allegedly defamatory statements in the context of a confidential pre-filing letter*), if the employer is footing a claim to say that the manager is concerned about that reputation?

Conversely, if the claim is actuated by the manager without the knowledge or imprimatur of the employer, this complicates the underlying discrimination action (including the possibility of a fair and prompt resolution) in various ways. Both the employee plaintiff and the company employer will need to spend more resources with the collateral litigation; at minimum, the employer may need to monitor it, or spend resources in discovery.

This matters to NELA/NY and its clients because the resources spent monitoring even a bogus defamation lawsuit foreseeably and functionally would diminish what could be available to plaintiffs even when their claims are meritorious and their damages significant (perhaps especially so when the employer is small) The collateral litigation may be a roadblock to any settlement, let alone a fair one.

Finally, parallel proceedings—discrimination in one court, defamation in another—raise the specter of inconsistent judgments. Here, for example, the federal court has found that Ms. Arroyave (the plaintiff in the federal discrimination proceeding, and the defendant in the defamation case) plausibly

alleged her claims involving Mr. Chang. *Arroyave v. Universal Remote Control, Inc.*, 7:20-cv-08040 (VB), ECF No. 39 (S.D.N.Y. Aug. 9, 2021) (denying the defendants' motion for partial dismissal of Ms. Arroyave's Complaint). Yet the NYS Supreme Court has determined that whether Ms. Arroyave defamed Mr. Chang is a question for the finder of fact. *Chang v. Arroyave,* Index No. 55459/2020, 74 Misc.3d 1229(A), 164 N.Y.S.3d 806, 2022 N.Y. Slip Op. 50248(U) (N.Y. Sup. Apr. 7, 2022).

Broadening the lens, if an employee succeeds in proving discrimination in one court, but in another must still litigate the question of whether her allegations of discrimination (sent privately and confidentially) were defamatory, this raises many problematic possibilities. Would the employer seek to re-litigate the underlying discrimination claim? Would issues of estoppel regularly be introduced into cases with already-complicated standards? Would employers seek to stay, slow, or stage litigation, purportedly to focus on the plaintiffs' mindset rather than the conduct of their own employees? Overall, the standard as used by the Supreme Court here, if applied broadly, invites mischief, inefficiency, and inequity.

CONCLUSION

Amicus NELA/NY maintains that the defamation claim against Defendant Arroyave should be dismissed. If this Court is inclined to develop a standard for analyzing good faith and qualified immunity in the context of pre-filing settlement

letters of employment discrimination claims, NELA/NY respectfully requests that the Court bear in mind the backdrop set forth above.

Dated: September 28, 2022

Respectfully submitted,

By: /s/ Julie Salwen
Julie Salwen, Esq.

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Counsel for Amicus National Employment Lawyers Association/New York (NELA/NY)

PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

A proportionally spaced typeface was used, namely, Times New Roman 14-Point.

This brief is double-spaced.

The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, and this Statement is 2,341.

EXHIBIT B

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

_____x

JINKYU CHANG,

Plaintiff,

Index No. 55459/2020

– against –

DECISION & ORDER

SONIA ARROYAVE,

Defendant.

_____x

In an action to recover damages for defamation, the defendant moves to dismiss the complaint pursuant to CPLR 3211(a)(1) & (7):

Papers Considered **NYSCEF Doc. No. 5-8; 12-17**

1. Notice of Motion/Affirmation of Joseph Myers, Esq./Exhibits A-B;
2. Affidavit of Jinkyu Chang;
3. Reply Affirmation of Joseph Myers, Esq./Exhibits C-D.

Factual and Procedural Background

On or about April 2, 2020, attorneys for Sonia Arroyava issued a letter for settlement purposes only to Chang K. Park, the CEO of Universal Remote Control, Inc. The letter, for settlement purposes only, enclosed a draft complaint to the United States District Court for the Southern District of New York, entitled *Arroyave v. Universal Remote Control, Inc., Jin Chang, et al.* The draft complaint asserts allegations regarding gender discrimination, race discrimination, hostile work environment, national origin, retaliation, and violations of Title VII of the Civil Rights Act of 1964 and the New York State Human Rights Law. The draft complaint asserted that Arroyava, a female, was an employee of Universal Remote, and Chang, an Asian male, was a vice president of finance for Universal Remote. The letter states it was being sent in a good faith attempt to resolve the matter prior to litigation.

On May 27, 2020, plaintiff Jinkyu Chang commenced this action against Arroyave seeking damages for defamation. The complaint in this action alleges that Arroyave had been employed by Universal Remote since 2001 and was currently a supervisor for accounts payable. The complaint asserts that by letter dated April 2, 2020, Arroyave's agent, at her request, disseminated false claims to the CEO of Universal Remote including the following statements: Arroyava was "subject to an abusive and hostile work

environment by [Chang] because of her gender, race and national origin"; Chang engaged in "unlawful conduct, which permeates [Arroyava's] working environment with discrimination and hostility"; Change "'appeared to imply that [Arroyava's] relationship' with another employee is inappropriately 'special' and 'was sexual in nature'"; Arroyava "continued to endure discriminatory treatment at the hands of [Chang]; and Chang committed "an assault on [Arroyava]". Chang disputes each allegation made within the challenged statements.

The complaint asserts that the publishing of the statements constituted negligence and undermined and damaged Chang's personal and professional reputation. The statements exposed Chang to contempt, ridicule, aversion, and disgrace, and injured his business, trade, and profession. The complaint asserts that Arroyava made the defamatory statements to Chang's employer knowing they were false in order to extract a monetary payment for her claims and that the statements are defamatory per se.

Defendant moves, pre answer, pursuant to CPLR 3211(a)(1) & (7), to dismiss the complaint based upon the documentary evidence and for failure to state a cause of action.

In opposition, Chang submits an affidavit attesting that despite knowing her claims were false, Arroyava motivated by bad faith to extort money from Universal Remote, maliciously accused him of creating a hostile work environment.

Discussion

On a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, "the court must liberally construe the complaint, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Minovici v Belkin BV*, 109 AD3d 520 [2d Dept 2013]; *see Leon v Martinez*, 84 NY2d 83, 87–88 [1994]; *Treeline 990 Stewart Partners, LLC v RAIT Atria*, LLC, 107 AD3d 788, 791 [2d Dept 2013]).

The defendant argues that pursuant to *Front v. Khalil*, 24 NY3d 713 (2015), the complaint fails to state a cause of action and must be dismissed. Defendant argues that the alleged defamatory statements were made in a letter by counsel, prior to litigation, describing the basis of the anticipated complaint and seeking a possible resolution of the matter prior to litigation.

In opposition, plaintiff argues that a qualified privilege defense, even if applicable, is not absolute and only applies to communications made in advance of "good faith" litigation. Plaintiff argues that the defense does not apply because no litigation had been commenced by Arroyava in the three months since the defamatory statements were made and therefore the communication cannot be deemed a "pre litigation" communication. Moreover, even if considered a pre litigation communication, the privilege is not conferred where a threatened lawsuit is predicated on false claims, would be filed in bad faith, and is being misused for ulterior purposes to extract financial gain.

The law provides absolute immunity from liability for defamation based on oral or written statements made by attorneys in connection with a proceeding before a court "when such words and writings are material and pertinent to the questions involved"

(*Strujan v Kaufman & Kahn, LLP*, 168 AD3d 1114, 1116 [2d Dept 2019] *quoting Front, Inc. v Khalil*, 24 NY3d 713, 718 [2015] [internal citations omitted]).

However, extending privileged status to communication made prior to anticipated litigation has the potential to be abused (*Front, Inc. v Khalil*, 24 NY3d at 719). Applying an absolute privilege to statements made during a phase prior to litigation would be problematic and unnecessary to advance the goals of encouraging communication prior to the commencement of litigation (*Front, Inc. v Khalil*, 24 NY3d at 719). Thus, statements made by attorneys prior to the commencement of litigation are protected by a qualified privilege (*Front, Inc. v Khalil*, 24 NY3d at 719).

> [T]the privilege should only be applied to statements pertinent to a good faith anticipated litigation. This requirement ensures that privilege does not protect attorneys who are seeking to bully, harass, or intimidate their client's adversaries by threatening baseless litigation or by asserting wholly unmeritorious claims, unsupported in law and fact, in violation of counsel's ethical obligations. Therefore, we hold that statements made prior to the commencement of an anticipated litigation are privileged, and that the privilege is lost where a defendant proves that the statements were not pertinent to a good faith anticipated litigation (*Front, Inc. v Khalil*, 24 NY3d at 719-720).

Here, the challenged statements were made in a proposed draft complaint that was sent to Chang's employer in anticipation of resolving the matter without resorting to litigation. While these statements may be subject to a qualified privilege, the complaint states a cause of action for defamation. According the plaintiff the benefit of every favorable inference, the allegations in the complaint sufficiently infer that the challenged statements were not pertinent to a good faith anticipated litigation and therefore, the qualified privilege has been lost. "Whether the complaint will withstand a subsequent motion for summary judgment, or whether the plaintiff will be able to prove his claim, is irrelevant to the determination of a pre-disclosure CPLR 3211 motion to dismiss (*see Nasca v Sgro*, 101 AD3d 963, 964 [2d Dept 2012]).

Moreover, the defendant failed to demonstrate entitlement to dismissal of the complaint based upon the documentary evidence. A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) may be granted only where the documentary evidence utterly refutes the complaint's factual allegations, conclusively establishing a defense as a matter of law (*Gorbatov v Tsirelman*, 155 AD3d 836 [2d Dept 2017] *citing Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Cavaliere v 1515 Broadway Fee Owner, LLC*, 150 AD3d 1190, 1191 [2d Dept 2017]). The defendant submits the proposed draft complaint and correspondence that was sent to Universal Remote as documentary evidence. Defendant has not conclusively established through these documents that the challenged statements were pertinent to a good faith anticipated litigation.

Accordingly, it is

ORDERED that the defendant's motion to dismiss the complaint is DENIED; and it is further

ORDERED that the plaintiff shall serve a copy of this order with notice of entry within twenty days from the date hereof; and it is further

ORDERED that the defendant shall serve its answer within ten days of service of this order with notice of entry (*see* CPLR 3211[f]).

The parties are directed to appear in the **Preliminary Conference Part, room 800**, for further proceedings, at a date and time to be provided.

Dated: White Plains, New York
August 12, 2020

HON. WILLIAM J. GIACOMO, J.S.C.

H: ALPHABETICAL MASTER LIST – WESTCHESTER/Chang v. Arroyave

EXHIBIT C

Supreme Court of the State of New York

County of Westchester

Jinkyu Chang

NOTICE OF APPEAL

vs.

Index No.:

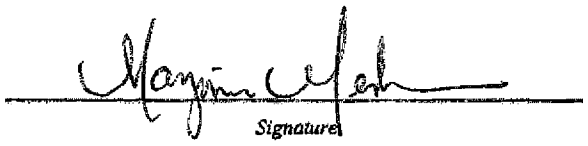
Sonia Arroyave

55459/2020

PLEASE TAKE NOTICE that *(insert your name)* Sonia Arroyave hereby appeals to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, from a *(insert judgment, order, decree, etc.)* Decision & Order of the Supreme Court, Westchester County, dated August 12, 2020.

Dated: New York, New York
August 24, 2020

Yours, etc.,



Signature

(Print Name) *Marjorie Mesidor. Phillips & Associates*

(Address) *45 Broadway, Suite 620, New York106*

(Telephone Number) *212-248-7431*

To: *(Insert below the name and address of the clerk of the trial court and the names and addresses of all opponents)*

Clerk of Court
County of Westchester
Richard J. Daronco Courthouse
111 Dr. Martin Luther King Courthouse
White Plains, NY 10601

Joshua E. Kimerling
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Supreme Court of the State of New York
Appellate Division: Second Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.

Jinkyu Chang

- against -

Sonia Arroyave

For Court of Original Instance

Date Notice of Appeal Filed

For Appellate Division

Case Type

- ☒ Civil Action
- ☐ CPLR article 75 Arbitration
- ☐ CPLR article 78 Proceeding
- ☐ Special Proceeding Other
- ☐ Habeas Corpus Proceeding

Filing Type

- ☒ Appeal
- ☐ Original Proceedings
  - ☐ CPLR Article 78
  - ☐ Eminent Domain
  - ☐ Labor Law 220 or 220-b
  - ☐ Public Officers Law § 36
  - ☐ Real Property Tax Law § 1278
- ☐ Transferred Proceeding
  - ☐ CPLR Article 78
  - ☐ Executive Law § 298
- ☐ CPLR 5704 Review

Nature of Suit: Check up to three of the following categories which best reflect the nature of the case.

☐ Administrative Review	☐ Business Relationships	☐ Commercial	☐ Contracts
☐ Declaratory Judgment	☐ Domestic Relations	☐ Election Law	☐ Estate Matters
☐ Family Court	☐ Mortgage Foreclosure	☐ Miscellaneous	☐ Prisoner Discipline & Parole
☐ Real Property (other than foreclosure)	☐ Statutory	☐ Taxation	☒ Torts

Appeal

Paper Appealed From (Check one only):	If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.

☐ Amended Decree	☐ Determination	☐ Order	☐ Resettled Order
☐ Amended Judgement	☐ Finding	■ Order & Judgment	☐ Ruling
☐ Amended Order	☐ Interlocutory Decree	☐ Partial Decree	☐ Other (specify):
☐ Decision	☐ Interlocutory Judgment	☐ Resettled Decree	
☐ Decree	☐ Judgment	☐ Resettled Judgment	

Court: Supreme Court	County: Choose County
Dated: 08/12/2020	Entered: August 13, 2020
Judge (name in full): William J. Giacomo, JSC	Index No.: 55459/2020
Stage: ■ Interlocutory ☐ Final ☐ Post-Final	Trial: ☐ Yes ■ No If Yes: ☐ Jury ☐ Non-Jury

Prior Unperfected Appeal and Related Case Information

Are any appeals arising in the same action or proceeding currently pending in the court? ☐ Yes ■ No
If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.

Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:

Original Proceeding

Commenced by: ☐ Order to Show Cause ☐ Notice of Petition ☐ Writ of Habeas Corpus	Date Filed:
Statute authorizing commencement of proceeding in the Appellate Division:	

Proceeding Transferred Pursuant to CPLR 7804(g)

Court: Choose Court	County: Choose County
Judge (name in full):	Order of Transfer Date:

CPLR 5704 Review of Ex Parte Order:

Court: Choose Court	County: Choose County
Judge (name in full):	Dated:

Description of Appeal, Proceeding or Application and Statement of Issues

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.

Defendant appeals from the Decision and Order denying Defendant's motion to dismiss the Complaint for failure to state a claim.

Informational Statement - Civil

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

Whether Supreme Court properly denied Defendant's motion to dismiss the Complaint for failure to state a claim, where Plaintiff claims that Defendant's pre-litigation draft settlement letter was defamatory and sent to Plaintiff in bad faith, and Defendant argued in support of her motion to dismss that the letter is privileged.

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	Jinkyu Chang	Plaintiff	Respondent
2	Sonia Arroyave	Defendant	Appellant
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Attorney Information

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name: Marjorie Mesidor, Esq., Phillips & Associates			
Address: 45 Broadway Suite 620			
City: New York	State: NY	Zip: 10006	Telephone No: (212) 248-7431
E-mail Address: mmesidor@tpglaws.com			
Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			
Attorney/Firm Name: Joshua E. Kimerling, Esq., Cuddy & Feder, LLP			
Address: 445 Hamilton Avenue - 14th Floor			
City: White Plains	State: NY	Zip: 10601	Telephone No: (914) 761-1300
E-mail Address: jkimerling@cuddyfeder.com			
Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

JINKYU CHANG,

Plaintiff,

Index No.: 55459/2020

-against-

NOTICE OF ENTRY

SONIA ARROYAVE,

Defendant.

----------X

PLEASE TAKE NOTICE, that the within is a true and accurate copy of the Decision & Order of the Supreme Court of the State of New York, County of Westchester (Hon. William J. Giacomo, J.S.C.), dated, filed and entered in the Westchester County Clerk's Office on August 12, 2020.

Dated: White Plains, New York
August 13, 2020

CUDDY & FEDER LLP
Attorneys for Plaintiff

By: */s/ Joshua E. Kimerling*
Joshua E. Kimerling
445 Hamilton Avenue - 14th Floor
White Plains, New York 10601
(914) 761-1300

To: Marjorie Mesidor, Esq. (VIA NYSCEF)

4545821.vl

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

JINKYU CHANG,

Plaintiff,

– against –

SONIA ARROYAVE,

Defendant.

Index No. 55459/2020

DECISION & ORDER

In an action to recover damages for defamation, the defendant moves to dismiss the complaint pursuant to CPLR 3211(a)(1) & (7):

Papers Considered **NYSCEF Doc. No. 5-8; 12-17**

1. Notice of Motion/Affirmation of Joseph Myers, Esq./Exhibits A-B;
2. Affidavit of Jinkyu Chang;
3. Reply Affirmation of Joseph Myers, Esq./Exhibits C-D.

Factual and Procedural Background

On or about April 2, 2020, attorneys for Sonia Arroyava issued a letter for settlement purposes only to Chang K. Park, the CEO of Universal Remote Control, Inc. The letter, for settlement purposes only, enclosed a draft complaint to the United States District Court for the Southern District of New York, entitled *Arroyave v. Universal Remote Control, Inc., Jin Chang, et al.* The draft complaint asserts allegations regarding gender discrimination, race discrimination, hostile work environment, national origin, retaliation, and violations of Title VII of the Civil Rights Act of 1964 and the New York State Human Rights Law. The draft complaint asserted that Arroyava, a female, was an employee of Universal Remote, and Chang, an Asian male, was a vice president of finance for Universal Remote. The letter states it was being sent in a good faith attempt to resolve the matter prior to litigation.

On May 27, 2020, plaintiff Jinkyu Chang commenced this action against Arroyave seeking damages for defamation. The complaint in this action alleges that Arroyave had been employed by Universal Remote since 2001 and was currently a supervisor for accounts payable. The complaint asserts that by letter dated April 2, 2020, Arroyave's agent, at her request, disseminated false claims to the CEO of Universal Remote including the following statements: Arroyava was "subject to an abusive and hostile work

environment by [Chang] because of her gender, race and national origin"; Chang engaged in "unlawful conduct, which permeates [Arroyava's] working environment with discrimination and hostility"; Change "'appeared to imply that [Arroyava's] relationship' with another employee is inappropriately 'special' and 'was sexual in nature'"; Arroyava "continued to endure discriminatory treatment at the hands of [Chang]; and Chang committed "an assault on [Arroyava]". Chang disputes each allegation made within the challenged statements.

The complaint asserts that the publishing of the statements constituted negligence and undermined and damaged Chang's personal and professional reputation. The statements exposed Chang to contempt, ridicule, aversion, and disgrace, and injured his business, trade, and profession. The complaint asserts that Arroyava made the defamatory statements to Chang's employer knowing they were false in order to extract a monetary payment for her claims and that the statements are defamatory per se.

Defendant moves, pre answer, pursuant to CPLR 3211(a)(1) & (7), to dismiss the complaint based upon the documentary evidence and for failure to state a cause of action.

In opposition, Chang submits an affidavit attesting that despite knowing her claims were false, Arroyava motivated by bad faith to extort money from Universal Remote, maliciously accused him of creating a hostile work environment.

Discussion

On a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, "the court must liberally construe the complaint, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Minovici v Belkin BV*, 109 AD3d 520 [2d Dept 2013]; *see Leon v Martinez*, 84 NY2d 83, 87–88 [1994]; *Treeline 990 Stewart Partners, LLC v RAIT Atria*, LLC, 107 AD3d 788, 791 [2d Dept 2013]).

The defendant argues that pursuant to *Front v. Khalil*, 24 NY3d 713 (2015), the complaint fails to state a cause of action and must be dismissed. Defendant argues that the alleged defamatory statements were made in a letter by counsel, prior to litigation, describing the basis of the anticipated complaint and seeking a possible resolution of the matter prior to litigation.

In opposition, plaintiff argues that a qualified privilege defense, even if applicable, is not absolute and only applies to communications made in advance of "good faith" litigation. Plaintiff argues that the defense does not apply because no litigation had been commenced by Arroyava in the three months since the defamatory statements were made and therefore the communication cannot be deemed a "pre litigation" communication. Moreover, even if considered a pre litigation communication, the privilege is not conferred where a threatened lawsuit is predicated on false claims, would be filed in bad faith, and is being misused for ulterior purposes to extract financial gain.

The law provides absolute immunity from liability for defamation based on oral or written statements made by attorneys in connection with a proceeding before a court "when such words and writings are material and pertinent to the questions involved"

(*Strujan v Kaufman & Kahn, LLP*, 168 AD3d 1114, 1116 [2d Dept 2019] *quoting Front, Inc. v Khalil*, 24 NY3d 713, 718 [2015] [internal citations omitted]).

However, extending privileged status to communication made prior to anticipated litigation has the potential to be abused (*Front, Inc. v Khalil*, 24 NY3d at 719). Applying an absolute privilege to statements made during a phase prior to litigation would be problematic and unnecessary to advance the goals of encouraging communication prior to the commencement of litigation (*Front, Inc. v Khalil*, 24 NY3d at 719). Thus, statements made by attorneys prior to the commencement of litigation are protected by a qualified privilege (*Front, Inc. v Khalil*, 24 NY3d at 719).

> [T]the privilege should only be applied to statements pertinent to a good faith anticipated litigation. This requirement ensures that privilege does not protect attorneys who are seeking to bully, harass, or intimidate their client's adversaries by threatening baseless litigation or by asserting wholly unmeritorious claims, unsupported in law and fact, in violation of counsel's ethical obligations. Therefore, we hold that statements made prior to the commencement of an anticipated litigation are privileged, and that the privilege is lost where a defendant proves that the statements were not pertinent to a good faith anticipated litigation (*Front, Inc. v Khalil*, 24 NY3d at 719-720).

Here, the challenged statements were made in a proposed draft complaint that was sent to Chang's employer in anticipation of resolving the matter without resorting to litigation. While these statements may be subject to a qualified privilege, the complaint states a cause of action for defamation. According the plaintiff the benefit of every favorable inference, the allegations in the complaint sufficiently infer that the challenged statements were not pertinent to a good faith anticipated litigation and therefore, the qualified privilege has been lost. "Whether the complaint will withstand a subsequent motion for summary judgment, or whether the plaintiff will be able to prove his claim, is irrelevant to the determination of a pre-disclosure CPLR 3211 motion to dismiss (*see Nasca v Sgro*, 101 AD3d 963, 964 [2d Dept 2012]).

Moreover, the defendant failed to demonstrate entitlement to dismissal of the complaint based upon the documentary evidence. A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) may be granted only where the documentary evidence utterly refutes the complaint's factual allegations, conclusively establishing a defense as a matter of law (*Gorbatov v Tsirelman*, 155 AD3d 836 [2d Dept 2017] *citing Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Cavaliere v 1515 Broadway Fee Owner, LLC*, 150 AD3d 1190, 1191 [2d Dept 2017]). The defendant submits the proposed draft complaint and correspondence that was sent to Universal Remote as documentary evidence. Defendant has not conclusively established through these documents that the challenged statements were pertinent to a good faith anticipated litigation.

Accordingly, it is

ORDERED that the defendant's motion to dismiss the complaint is DENIED; and it is further

ORDERED that the plaintiff shall serve a copy of this order with notice of entry within twenty days from the date hereof; and it is further

ORDERED that the defendant shall serve its answer within ten days of service of this order with notice of entry (*see* CPLR 3211[f]).

The parties are directed to appear in the **Preliminary Conference Part, room 800**, for further proceedings, at a date and time to be provided.

Dated: White Plains, New York
August 12, 2020

HON. WILLIAM J. GIACOMO, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK Index No.: 55459/2020
COUNTY OF WESTCHESTER

----------X

JINKYU CHANG,

AFFIDAVIT OF SERVICE

Plaintiff,

-against-

SONIA ARROYAVE,

Defendant.

----------X

STATE OF NEW YORK }
} ss.
COUNTY OF NEW YORK }

I, Ingrid M. Fernandez, being sworn, deposes and says;

I am not a party to the action, am over eighteen (18) years of age and reside in Bronx, New York.

On August 24, 2020, I served a copy of Defendant's Notice of Appeal, Informational Statement, and Copy of Order, via NYSCEF and regular mail upon:

Joshua E. Kimerling, Esq.
Cuddy & Feder LLP
445 Hamilton Avenue, 14th Floor
White Plains, New York 10601
Attorney for Plaintiff

Ingrid Fernandez
Ingrid M. Fernandez

Sworn to before me on this
24th day of August, 2020

Notary Public/State of New York

CANDY NICOLE HERNANDEZ
Notary Public, State of New York
No. 01HE6353674
Qualified in Queens County
Commission Expires January 30, 2021