

Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

-----X
LIBERTY MUTUAL INSURANCE COMPANY,

Plaintiff,

-against-

MIRAGE LIMOUSINE SERVICES, INC.,

Defendants.
-----X

Index No: 23043/07
Motion Date: 12/12/07
Motion Cal. No: 21
Motion Seq. No: 1

The following papers numbered 1 to 13 read on this motion for an order, pursuant to CPLR 3211(a)(6) & (7), dismissing the counterclaims asserted within the verified answer of Mirage Limousine Services, Inc.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Memorandum of Law in Support-Exhibits.....	5 - 7
Affirmation in Opposition-Exhibits.....	8 - 10
Reply Affidavit.....	11 - 13

Upon the foregoing papers, it is hereby ordered that the motion is decided as follows:

This is an action commenced on March 7, 2007, in the Supreme Court, Kings County, by plaintiff Liberty Mutual Insurance Company (“Liberty Mutual”), to recovery earned, unpaid insurance premiums outstanding on a policy of insurance issued by Liberty Mutual to defendant Mirage Limousine Services, Inc. (“Mirage”). Mirage interposed a Verified Answer on June 29, 2007, interposing three counterclaims. By Order of the Supreme Court, Kings County, dated September 5, 2007 (Schmidt, J.), Liberty Mutual’s motion to dismiss the counterclaims was “withdrawn without prejudice, with leave to re-file this motion within 60 days after transfer of matter to Queens County.” This motion to dismiss the counterclaims was made within 60 days of the September 10, 2007 transfer of the action to the Supreme Court, Queens County.

“It is well-settled that on a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the

complaint to be true and according the plaintiff the benefit of every possible favorable inference...” Jacobs v Macy’s East, Inc., 262 A.D.2d 607, 608 (2nd Dept. 1999). See, Nonnon v. City of New York, 9 N.Y.3d 825 (2007); Zumpano v. Quinn, 6 N.Y.3d 666 (2006); Arnav Indus., Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder &Steiner, 96 N.Y.2d 300, 303, (2001); Leon v Martinez, 84 N.Y.2d 83 (1994); Grazioli v. Encompass Ins. Co., 40 A.D.3d 696 (2nd Dept. 2007); Kempf v. Magida, 37 A.D.3d 763 (2nd Dept. 2007); Gallagher. Kucker & Bruh, 34A.D.3d 419, 419 (2nd Dept 2006). In assessing such a motion, a court properly may freely consider affidavits submitted by the plaintiff for the limited purpose of ascertaining whether they may remedy defects in the complaint or they establish conclusively that plaintiff has no cause of action. See, Rovello v. Orofino Realty Co., Inc., 40 N.Y.2d 633 (1976). Such “affidavits may be used freely to preserve inartfully pleaded, but potentially meritorious, claims.” Id., 40 N.Y.2d at 636; see, Cron v. Hargro Fabrics, Inc., 91 N.Y.2d 362 (1998). “When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.” Gershon v. Goldberg, 30 A.D.3d 372 (2nd Dept. 2006); see, Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977); Gaidon v. Guardian Life Ins. Co. of America, 94 N.Y.2d 330 (1999); Operative Cake Corp. v. Nassour, 21 A.D.3d 1020 (2nd Dept. 2005). Where evidentiary material is submitted in support of a motion to dismiss for failure to state a cause of action, dismissal is warranted only where the evidence conclusively establishes that a material fact alleged by plaintiff is not a fact at all and that plaintiff has no cause of action. See, Guggenheimer v Ginzburg, *supra*; Rovello v Orofino Realty Co., 40 N.Y.2d 633 (1976); Allstate Ins. Co. v Raguzin, 12A.D.3d 468 (2nd Dept. 2004).

Although “any deficiencies in the complaint may be amplified by supplemental pleadings and other evidence” [(AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co., 5 N.Y.3d 582, 591 (2005)], bare legal conclusions as well as factual claims that are flatly contradicted by the record are not presumed to be true on a motion to dismiss for failure to state a cause of action, and are not entitled to any such consideration.” Mayer v. Sanders, 264 A.D.2d 827, 828 (2nd Dept. 1999); see, Morone v. Morone, 50 N.Y.2d 481 (1980). Moreover, where, the plaintiff’s submissions conclusively establish that there is no cause of action, the cause of action should be dismissed.” Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 636 (1976). Thus, allegations that are impermissibly vague and conclusory fail to state a cause of action. See, Island Surgical Supply Co. v. Allstate Ins. Co., 32 A.D.3d 824 (2nd Dept.2006); Levin v. Isayeu, 27 A.D.3d 425 (2nd Dept. 2006); Lester v. Braue, 25 A.D.3d 769 (2nd Dept. 2006); Hart v. Scott, 8 A.D.3d 532 (2nd Dept. 2004); Becker v. University Physicians of Brooklyn, Inc., 307 A.D.2d 243, 245 (2nd Dept. 2003); Stoianoff v. Gahona, 248 A.D.2d 525 (2nd Dept. 1998), appeal dismissed 92 N.Y.2d 844 (1998), cert. denied 525 U.S. 953, 670 N.Y.S.2d 204 (1998).

Here, Liberty Mutual seeks dismissal of the three counterclaims asserted by Mirage. The first counterclaim seeks recovery of “attorney’s fees, cost, and court fees, along with any and all other fees associating [sic] with defending this action.” The second counterclaim seeks punitive damages in the amount of \$100,000.00 “for being forced to defend said frivolous law suit.” The third counterclaim seeks compensatory damages in the amount of \$100,000.00 “for bringing this frivolous law suit and being forced to defend the same.” Each of the counterclaims is based upon Mirage’s characterization of the law suit as “frivolous.” This Court finds that neither counterclaim states a

cause of action, and must therefore be dismissed.

First, as a general proposition, Liberty Mutual is correct when it argues that there is no cause of action for a frivolous lawsuit. This, indeed, has been the holding of many trial courts, and at least one appellate court. See, Couch v. Schmidt, 204 A.D.2d 951 (2nd Dept 1994) [holding that “while CPLR 8303-a provides for assessment of sanctions in the nature of costs and counsel fees in a proper case, it does not create an independent cause of action”]; Murphy v. Smith, 4 Misc.3d 1029(A) (Supreme Court, New York County 2004)[holding that a counterclaim based upon an accusation that plaintiff brought a frivolous law suit “is not a recognized cause of action”]; Yankee Trails, Inc. v. Jardine Ins. Brokers, Inc., 145 Misc.2d 282, 283 (Supreme Court, Rensselaer County 1989)[holding that a counterclaim for attorney's fees and sanctions based upon the assertion that the action is frivolous is improper]. And, as correctly recognized in Murphy v. Smith, *supra*, “[a]n assertion that plaintiff's entire pleading is frivolous may be tested upon a summary judgment motion to dismiss the complaint.”

Moreover, with respect to the counterclaim specifically seeking attorneys fees and costs, it likewise is recognized that no such separate cause of action is permitted and there is no right to damages based upon such a claim. Absent a specific statute or contractual agreement to the contrary, a successful litigant may not recover legal fees. Feeney v. Licari, 131 A.D.2d 539 (2nd Dept. 1987). Certainly, a defendant has no right to such damages based upon its characterization of the complaint as frivolous. Attorney's fees and sanctions are permitted by Rule 130.1(d) and CPLR 8303-a to penalize specific frivolous conduct and the court, in its discretion may award attorney's fees and sanctions, under circumstances addressed by the rule and statutory provision. In short, a party is not entitled to such relief as a matter of right, and it may not be pleaded as a distinct cause of action. Instead, the request for such appropriately may be made by motion upon the happening of specific conduct, and an assertion that plaintiff's entire pleading is frivolous may be tested upon a summary judgment motion to dismiss the complaint.

In sum, a counterclaim for attorney's fees and sanctions based upon the assertion that the action is frivolous is improper. Yankee Trails, Inc. v. Jardine Ins. Brokers, Inc., 145 Misc.2d 282 (Sup Court, Rensselaer County,1989). As was stated in Richardson v. Pascarella, 15 Misc.3d 1143(A)(Supreme Court, Onondaga County 2007):

The plaintiff also moves to dismiss the defendants' second counterclaim seeking sanctions and attorney's fees based upon the assertion that the action is frivolous. Attorneys fees and sanctions are permitted by Rule 130.1(d) and CPLR § 8303-a to penalize specific frivolous conduct. See, 22 NYCRR 130.1(d); see also, CPLR § 8303-a. The court, in its discretion may award attorney's fees and sanctions. However, a party is not entitled to such relief as a matter of right and it may not be pleaded as a distinct cause of action; a party may apply for such relief by motion upon the happening of specific conduct. See, Yankee Trails, Inc. v. Jardine Insurance Brokers, Inc.,

145 Misc.2d 282 (1989). A counterclaim for attorney's fees and sanctions based upon the assertion the action is frivolous is improper.

See, also, Aurora Loan Services, LLC v. Cambridge Home Capital, LLC, 12 Misc.3d 1152(A)(Supreme Court, Nassau County 2006).

The second counterclaim, for punitive damages, and the third counterclaim, for compensatory damages, suffer the same defeat. It is well settled that a cause of action for punitive may not stand alone as a separate cause of action. Randi A.J. v. Long Island Surgi-Center, 46 A.D.3d 74, 80-81 (2nd Dept. 2007)[“New York does not recognize an independent cause of action for punitive damages”]; Grazioli v. Encompass Ins. Co., 40 A.D.3d 696 (2nd Dept. 2007)[“a demand for punitive damages may not constitute a separate cause of action for pleading purposes’ (citations omitted)”]; Benjamin Park v. YMCA of Greater New York Flushing, 17 A.D.3d 333 (2nd Dept. 2005)[“Supreme Court correctly dismissed the third cause of action to recover for punitive damages, because a demand for punitive damages does not amount to a separate cause of action for pleading purposes”]. This is because a “demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action” (Rocanova v. Equitable Life Assur. Socy. of U.S., 83 N.Y.2d 603, 616, 612 N.Y.S.2d 339, 634 N.E.2d 940).” Yong Wen Mo v. Gee Ming Chan, 17 A.D.3d 356 (2nd Dept. 2005). Moreover, “[c]ompensatory damages are intended to have the wrongdoer make the victim whole to assure that the victim receive fair and just compensation commensurate with the injury sustained [(Ross v. Louise Wise Services, Inc., 8 N.Y.3d 478, 515-516 (2007), citing Walker v. Sheldon, 10 N.Y.2d 401, 404(1961)], not to reimburse for the costs of litigation.

Based upon the foregoing, Liberty Mutual’s motion to dismiss the counterclaims is granted, upon the basis that as a matter of law, none of the counterclaims state a cause of action. Inasmuch as Mirage’s opposition to the motion, on the ground of lack of timeliness or prematurity, is completely lacking in merit, the motion is granted and, and the counterclaims hereby are dismissed.

Dated: January 25, 2008

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J.S.C.