

Bisogno v Libertella
2019 NY Slip Op 31167(U)
March 27, 2019
Supreme Court, Richmond County
Docket Number: 150281/2013
Judge: Wayne M. Ozzi
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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PATRICK F. BISOGNO,

Plaintiff,

- against -

PART 23

Present:

Hon. Wayne M. Ozzi

DECISION and ORDER

JOHN LIBERTELLA and GIOVANNI LIBERTELLA,

Defendants.

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Index No. 150281/2013

Motion Seq. No. - 010

- 011

The following papers numbered 1 to 7 were fully submitted on the 17th day of January, 2019.

Papers Numbered

Notice of Motion by defendant John Libertella for Summary Judgment pursuant to CPLR §3212, and to Impose Sanctions, with Supporting Papers and Memorandum of Law (dated June 13, 2018)..... 1

Plaintiff’s Affirmation in Opposition to Motion by Defendant John Libertella (dated October 18, 2018)..... 2

Notice of Motion by Defendant Giovanni Libertella to Dismiss the Complaint pursuant to CPLR §3211(a)(7) and CPLR §3212, with Supporting Papers (dated August 1, 2018)..... 3

Plaintiff’s Affirmation in Opposition to Motion by Giovanni Libertella (dated October 17, 2018)..... 4

Plaintiff’s Affirmation in Opposition to Motion by John Libertella (dated October 18, 2018)..... 5

Reply by Giovanni Libertella (dated October 24, 2018)..... 6

Reply by John Libertella (dated November 8, 2018)..... 7

Upon the foregoing papers, the separate motions (Seq. Nos. 010 and 011) of defendants John Libertella and Giovanni Libertella for, *inter alia*, summary judgment and dismissal of the complaint pursuant to CPLR §3211(a)(7), CPLR §3211(a)(8) and CPLR §3212 are denied in accordance herewith.

BACKGROUND

This action arises out of an incident between plaintiff Patrick F. Bisogno (hereinafter, "plaintiff") and co-defendants John Libertella (hereinafter, "John") and his father, Giovanni Libertella (hereinafter, "Giovanni"). On May 9, 2013 in the Richmond County Family Court, plaintiff (an attorney duly licensed to practice law in the State of New York) appeared on behalf of his client, the petitioner in a Family Court proceeding, seeking the enforcement of a judgment against her ex-husband, John Libertella, for child support arrears.

The following is a narrative of the events, *as alleged* in the Complaint, that gave rise to the incident at issue.

Upon the conclusion of the Family Court matter, plaintiff and co-defendants proceeded to the vicinity of the elevator whereupon Giovanni "circled around plaintiff" and engaged in a pattern of verbal abuse, attempting to antagonize [plaintiff]" while John used his iPhone to video the occurrence. Defendants engaged in a "staged and planned attack", *i.e.*, by verbally assaulting, ridiculing, mocking plaintiff and his family, and making false accusations concerning plaintiff's role in John's divorce action. The foregoing was intended to provoke plaintiff to engage in a physical altercation which defendants planned to capture on video. They entered the elevator with plaintiff and proceeded to harass and abuse him by placing the camera at or near his face while simultaneously shouting false accusations, *i.e.*, that plaintiff pushed Giovanni violently and

punched John with a closed fist to the nose. In concert, defendants yelled for help. As a crowd gathered outside the elevator, defendants continued shouting that they had been assaulted. The court officers “bared down” onto plaintiff and “forcibly removed” him from the area while many individuals including his peers and fellow attorneys gathered to observe the scene. He was placed in handcuffs, arrested and charged with assault and related offenses. Plaintiff was detained and imprisoned in a holding cell for five days. He was arraigned in Criminal Court. On the eve of trial, the District Attorney dropped all charges against plaintiff as he purportedly found the allegations to be false and unfounded.

CAUSES OF ACTION ALLEGED IN THE COMPLAINT

The first cause of action for slander and defamation of character is based on, *inter alia*, the following allegations: (1) defendants maliciously spoke false and defamatory words in the presence of several persons, including fellow attorneys, Richmond County Court Officers and New York City Police Officers, intending to have plaintiff charged and falsely arrested for assault and related offenses; (2) plaintiff’s character and reputation as an attorney have been held up to ridicule by acquaintances, professional associates, judges and the public at large; (3) the defamatory statements involved accusations of the commission of a crime, and were published on the front pages of the New York Law Journal, The Staten Island Advance and The Brooklyn Eagle.

In the second, third and fourth causes of action for abuse of process, malicious prosecution and civil conspiracy, respectively, plaintiff claims that defendants planned and conspired to destroy his reputation; they maliciously and without probable cause gave false statements to law enforcement and the District Attorney for the purposes of procuring plaintiff’s arrest and prosecution.

In plaintiff's fifth cause of action for intentional infliction of emotional distress it is alleged that at the time of the arrest, defendants had in their possession the iPhone video recording which would have exonerated plaintiff. Defendants allegedly refused to allow the responding police officer access to view the video. As a result, plaintiff was detained in handcuffs in front of his peers and court personnel, causing him to endure humiliation, embarrassment and disgrace. Defendants refused to drop the unfounded charges, causing plaintiff to suffer continued humiliation, embarrassment and despair for seven months during the pendency of the Criminal Court proceedings. Plaintiff claims he was "lambasted, mocked and ridiculed" when the newspaper articles appeared on the internet worldwide, causing him to be disgraced in his profession. The emotional distress he allegedly suffered as a result thereof prevented him from attending court conferences, court functions and dinners.

In the sixth cause of action, plaintiff asserts that defendants are vicariously liable for the wrongful acts as set forth in the Complaint.

The seventh cause of action as against John Libertella for libel and slander *per se* concerns the publishing of malicious and fabricated statements against plaintiff on social media, including youtube, gofundme and facebook. The defamatory matters at issue were published numerous times on various dates in January 2015.

DISCUSSION

Presently before the Court are the separate motions of defendants John Libertella and Giovanni Libertella for summary judgment dismissing the Complaint pursuant to CPLR §3211 (a)(7), CPLR §3211(a)(8), and CPLR §3212.

In support of the motion by John Libertella for, *inter alia*, summary judgment, he maintains that the purported defamatory statements are absolutely privileged since they are true and were made in the context of a judicial proceeding. He further alleges there is evidence that plaintiff previously committed battery against his former client and sexually harassed a former female employee. Thus, John contends that the purported damages to plaintiff's reputation were sustained *prior* to the incident at issue in this case and were due solely to his own misconduct. He also argues that the remaining causes of action are duplicative of the defamation claim, and are in other respects legally insufficient. In this regard, it is alleged that each cause of action consists solely of bare legal conclusions, which are contradicted by plaintiff's deposition testimony and by the iPhone video recording. Moreover, John maintains that the essential elements of each cause of action are either defectively plead or lack a factual basis.

As for the motion brought by Giovanni Libertella, he maintains that the incident on May 9, 2013 arose from a deep-rooted acrimony between plaintiff and John concerning John's divorce action, wherein plaintiff represented John's ex-wife. According to Giovanni, this case is "just another front in the war, and [he] is just collateral damage." He alleges that plaintiff's purported damages, if any, were the result of his arrest and the ensuing publication of the details, rather than the alleged defamatory and slanderous statements. Giovanni also points out that he did not file the criminal complaint, nor did he provide sworn statements to the District Attorney. According to defendant, the deposition testimony of the parties and of non-party witness Sgt. Lee Helton establishes *prima facie* that plaintiff's claims against him are devoid of merit.

Turning first, to the branch of Giovanni's motion which to dismiss the Complaint as against him pursuant to CPLR §3211(a)(7) for failure to state a cause of action, in considering such a motion, the complaint is to be afforded a liberal construction, the allegations are to be accepted as

true, and the pleadings viewed in the light most favorable to plaintiff (*see* CPLR §3026; *Leon v Martinez*, 84 NY2d 83 [1994]; *Doria v Masucci*, 230 AD2d 764, 765 [2d Dept 1996], *lv denied* 89 NY2d 811). In any such inquiry, the sole criterion is whether “from [the complaint’s] four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005]); *Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 303 [2001]). Moreover, the Court may freely consider affidavits submitted by plaintiff to remedy defects in the complaint, at which point the criterion becomes whether the pleader has a cause of action, not whether one has been stated (*Leon v Martinez*, 84 NY2d at 88; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]).

Applying these principles here, in view of the voluminous records before the Court, defendant Giovanni is unable to meet his burden of demonstrating that “a material fact as claimed by [plaintiff] to be one is not a fact at all,” and that “no significant dispute exists regarding it” (*Guggenheimer v Ginzburg*, 43 NY2d at 275). As such, he is not entitled to dismissal of the causes of action asserted against him. The branch of his motion pursuant to CPLR §3211(7) must be denied.

As for the summary judgment motions presently before the Court, it is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the “cause of action...has no merit” (CPLR § 3212[b]) sufficient to warrant the court as a matter of law to direct judgment in the movant’s favor (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient

evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Moreover, in determining a motion for summary judgment, the evidence and all reasonable inferences must be viewed in the light most favorable to the nonmoving party (*see Derise v Jaak 773, Inc.*, 127 AD3d 1011, 1011 [2d Dept 2015]; *Green v Quincy Amusements, Inc.*, 108 AD3d 591, 592 [2d Dept 2013]).

Pertinently “[o]n a motion for summary judgment, the court is not to determine [matters of] credibility, but is to determine whether there exists a factual issue, or if arguably there is a genuine issue of fact” (*S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *see DeSario v SL Green Management LLC*, 105 AD3d 421 [1st Dept 2013]) [holding, given the conflicting deposition testimony as to what was said and to whom, issues of credibility should be resolved at trial]). Where credibility determinations are required, summary judgment is not appropriate and must be denied (*see St. Marks Assets, Inc. v Sohayegh*, 167 AD3d 458, 459 [1st Dept 2018]) “This is so because the granting of such a motion is the equivalent of a trial” (*S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d at 341). Thus, “[c]redibility, in short, if it is a key factor in the motion papers, will require a denial of the motion.” (Siegel, Practice Commentaries, Cons Laws of NY, Book 7B; C3212:6, p 14, entitled “Credibility as Factor”).

Applying the foregoing principles to the matter at bar, the Court finds that, as the proponents of summary judgment, the moving defendants have failed to sustain their initial burden.

Here, the evidence tendered by defendants in support of summary judgment motions presents clear credibility issues (*see Dombia v Moonlight Towing, Inc.*, 160 AD3d 554, 554 [1st Dept 2018]). In particular, the voluminous transcripts of deposition testimony reveal conflicting versions of the events that occurred on May 9, 2015. The same can be said with regard

to the photo of plaintiff in the elevator, as depicted in the video recording of the incident. Under these circumstances, any determination by the Court would be based upon the credibility of the parties, which is to be resolved at trial, not on a motion for summary judgment (*see S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d at 341; *St. Marks Assets, Inc. v Sohayegh*, 167 AD3d at 459; *Doumbia v Moonlight Towing, Inc.*, 160 AD3d at 554; *Disario v SL Green Mgt. LLC*, 105 AD3d at 421-422). Accordingly, since defendants have failed to meet their burden as the movants, the Court need not review the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853).

Defendant John Libertella also maintains that the Complaint should be dismissed pursuant to CPLR §3211(a)(8) since the Court lacks personal jurisdiction over him. Although defendant preserved the defense in his Verified Answer, his bare and unsubstantiated denial of personal service of process is legally insufficient to warrant dismissal of the Complaint (*Deutsche Bank Natl. Trust Co. v Saketos*, 158 AD3d 610, 612 [2d Dept 2018], quoting *Deutsche Bank Natl. Trust Co. v DaCosta*, 97 AD3d 630, 631 [2d Dept 2012]; *Federal National Mortgage Assn. v Alverado*, 167 AD3d 987, 988 [2d Dept 2018]). In any event, the time to move for dismissal based on improper service has expired, pursuant to CPLR §3211(e), which provides, in pertinent part: “an objection that the summons and complaint... was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading unless the court extends the time upon the ground of undue hardship” (CPLR §3211[e]).

Finally, John seeks the imposition of sanctions upon plaintiff pursuant to 22 NYCRR §130-1.1, alleging that plaintiff has engaged in frivolous conduct undertaken to delay or prolong the resolution of this litigation and to harass and maliciously injure defendants. This alleged “pattern

of frivolous litigation” includes making willful misrepresentations, refusing to provide all legally required discovery, delaying the deposition of the primary witness in this case, and using the legal system as a weapon to cause defendant financial harm. Although this branch of defendant’s motion is unopposed, in the interest of justice, the Court will reserve the issue of sanctions to the time of trial, whereupon plaintiff may be heard on this issue.

Accordingly, it is

ORDERED, that the motion of defendant Giovanni Libertella (Seq. No. 010) for dismissal of the complaint pursuant to CPLR § 3211(a)(7) and for summary judgment pursuant to CPLR §3212 is denied; and it is further

ORDERED, that the motion of defendant John Libertella (Seq. No 011) for dismissal of the Complaint pursuant to CPLR §3211(a)(8) and for summary judgment pursuant to CPLR §3212 is denied, except the branch of the motion which is for the imposition of sanctions as against plaintiff pursuant to 22 NYCRR §130-1.1 shall be heard at the time of trial; and it is further

ORDERED, that the Clerk shall mark his records accordingly.

E N T E R,



J.S.C.

HON. WAYNE M. OZZI
J.S.C.

Dated: 3/27/19