

1947 Communication, Inc. v Cinemaya Media, Inc.

2006 NY Slip Op 30775(U)

April 4, 2006

Supreme Court, New York County

Docket Number: 109305/05

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
1947 COMMUNICATION, INC.,

Plaintiff,

-against-

CINEMAYA MEDIA, INC., CINEMAYA LLC,
CINEMAYA HOLDINGS LLC, and SUNIL K.
HALI,

Defendants.
-----X

DECISION/ORDER

Index No.: 109305/05
Seq. No. : 001

Present:
Hon. Judith J. Gische
J.S.C.

FILED

APR 10 2008

NEW YORK
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Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

	Numbered
Defs motion [dismiss] w/SKH affid in support, exhs	1
Pltf's opposition	2
Defs affirm in reply (AP) w/exh	3

Upon the foregoing papers, the decision and order of the court is as follows:

Defendants Cinemaya Media Inc. ("Media"), Cinemaya, LLC ("LLC"), Cinemaya Holdings, LLC ("Holdings") (collectively "Cinemaya") and Sunil K. Hali ("Hali") bring this pre-answer motion to dismiss, which is opposed by plaintiff. Defendants also seek sanctions for frivolous litigation pursuant to 22 NYCRR part 130. Plaintiff opposes the motion.

The complaint purports to set forth five causes of action as follows: [1] libel and slander per se against defendant Hali; [2] libel and slander per se against defendants Media, LLC and Holdings; [3] tortious interference with plaintiff's contract with

DIRECTTV; [4] tortious interference with plaintiff's business relations with DIRECTTV; and [5] tortious interference with plaintiff's business relations with various media vendors.

Looking at the complaint in a light most favorable to plaintiff, the allegations are as follows: Both plaintiff and defendants operate advertising agencies that specialize in the Asian Indian markets. In September 2004 DIRECTTV contracted with both plaintiff and defendants in connection with services needed to launch a satellite television package specifically catering to the Asian Indian market. Plaintiff was hired to be DIRECTTV's advertising agency and Cinemaya was hired to oversee promotional events.

Plaintiff alleges that defendants, thereafter, embarked on a campaign to defame plaintiff and destroy its business reputation in order to get DIRECTTV's business for themselves. In particular, plaintiff alleges that Hali, acting on behalf of Cinemaya, sent a e-mail to Anu Babber of DIRECTTV, and to others, including DIRECTTV employees and media vendors, which stated as follows:

"November 17, 2004

Metlife auditors and authorities widen the investigation into its former AOR 1947 Communications' handling of its advertising account according to some sources familiar with the matter. Some sources have hinted at charges of misappropriation of funds, over-charging, and fraud.

Investigators have called various South Asian media regarding the relationship between 1947 Communications and former Metlife Marketing VP Tariq Khan."

Plaintiff alleges that the claims and content of the e-mail are completely false.

Plaintiff alleges that as a result of the defamatory remarks, in February 2005 DIRECTTV terminated its business relationship with plaintiff and instead hired a new company created by defendants.

Plaintiff alleges that Hali thereafter, acting on behalf of Cinemaya, made further disparaging remarks about plaintiff in the relevant community of media vendors. In particular, plaintiff claims that in April, 2005 Hali told Prashant Shah of the India Tribune that "a lot of people are coming after her and they are not paying any money." Plaintiff also claims that Hali told Kewal Kapal, another publisher of an Indian newspaper at a luncheon on May 18, 2005 that plaintiff "was closing its operations and moving to Bangalore, India." Plaintiff claims that the statements made were false.

In determining whether a complaint is sufficient as to withstand a motion to dismiss pursuant to CPLR § 3211 "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." Guggenheimer v. Ginzburg, 43 NY2d 268 (1977). The facts as alleged must be accepted by the court as true for purposes of such a motion, and are to be accorded every favorable inference. Morone v. Morone, 50 NY2d 481 (1980); Beattie v. Brown & Wood, 243 AD2d 395 (1st dept. 1997).

At bar, defendants have offered numerous affidavits that refute the factual recitations contained in the complaint. The affidavits refute that the allegedly defamatory statements were ever made and they further dispute that anybody heard or read such statements. In general, however, affidavits are not considered documentary evidence that conclusively refutes a stated cause of action. See: American Industrial

Contracting Co. Inc. v. Travelers Indemnity Company, 42 NY2d 1041 (1977);

Wallach v. Hinkley, 12 AD3d 893 (3rd dept. 2004).

Plaintiff, in opposition to the motion, can choose to stand on the pleading alone. On a pre-answer motion to dismiss, the court cannot penalize a plaintiff for failing to make any evidentiary showing in support of the claim. The court's inquiry is limited to figuring the sufficiency of the pleading, even though the dispute may be "finally resolved in the more embracive and exploratory motion for summary judgment." Rovello v. Orofino Realty Co., Inc., 40 NY2d 633 (1976); Hornstein v. Wolf, 109 AD2d 129 (2nd dept. 1985).¹ Thus, at this time, the court will consider defendants' arguments only in the context of whether the complaint states sufficient facts to support the asserted causes of action.

1. Failure to join a necessary party

Preliminarily the court rejects defendant's argument that the action should be dismissed for failure to join a necessary party. DIRECTTV is not a necessary party on any of the asserted causes of action, including those based upon interference with contract or prospective contract. SC Yu v. Forero, 184 AD2d 506, 508 (2nd dept. 1992).

2. Libel and defamation per se

Defendants argue that the first and second causes of action should be dismissed because they have failed to plead defamation with sufficient particularity. CPLR § 3016 (a) expressly requires that the particular words complained of be set forth in the complaint. Acota v. Fidelity New York, 227 AD2d 424 (2nd dept. 1996). The pleading

¹While the court has the discretion to convert this motion to one for summary judgment, the court declines to do so. Neither party asked for such a conversion.

must also allege the time, place and manner of false statement and specify to whom it was made. Dillon v. City of New York, 261 AD2d 34, 38 (1st dept. 1999).

Plaintiff has satisfied its burden. The precise language alleged as being part of an e-mail is stated in the complaint. Likewise there is quoted language attributed to Hali that was allegedly communicated to certain named publishers. The time and the circumstances of the communications are alleged in the complaint. The allegations satisfy the pleading requirements for particularity.

Defendants real contention seems to be that the allegations are untrue. As previously stated, however, the truth or falsity fo the factual allegations in the complaint will have to be determined at later point in this action. Solely from the perspective of the particularity of the pleading, the causes of action for defamation survive dismissal.

3. Tortious interference with contract

In order to establish a validly stated cause of action for tortious interference with contract a plaintiff must the allege the existence of a valid contract between plaintiff and a third party, the defendants's intentional and unjustified procurement of the third party's breach of contract and resulting damages. JM Ball Chrysler LLC v. Marong Chrysler-Plymouth, Inc., 19 AD3d 1094 (4th dept. 2005). A contract that is terminable at will cannot support a claim for tortious interference with an existing contract. Guard-Life Corporation v. S. Parker Hardware Manufacturing Corp., 50 NY2d 183 (1980); Miller v. Mt. Sinai Medical Center, 288 AD2d 72 (1st dept. 2001). The allegations cannot be conclusory, but must include facts sufficient to support the conclusions to be drawn. Mere conclusions that third parties cancelled contracts because of defendant's defamatory remarks will not withstand a motion to dismiss. MJ & K Co. Inc. v. Matthew

Bender and Company Inc., 220 AD2d 488 (2nd dept. 1995).

The cause of action plead for tortious interference with contract must fail, because plaintiff's allegations, even when given every favorable inference, do not allege the existence of any valid contract. Although DIRECTTV is alleged to have retained plaintiff to perform certain work, there is no claim that their agreement had any expected time within which it was to be performed. It was, therefore, an agreement that could be ended at will. There is no allegation that when DIRECTTV ceased doing business with plaintiff, that DIRECTTV had breached any existing contract or existing obligation it had to continue to do business with plaintiff.

4. Tortious interference with business relations

Tortious interference with business relations is a distinct and separate claim from tortious interference with contract. Carvel Corp. v. Noonan, 3 NY3d 359 (2004). It applies to those situations where a third party would have entered into, or extended a contractual relationship with, plaintiff but for the wrongful and intentional acts of the defendant.

While the existence of a contract is not a requirement for this tort, there is a more demanding pleading requirement which, in general, requires allegations that the defendant's actions were taken maliciously and solely done to injure plaintiff. Guard-Life Corporation v. S. Parker Hardware Manufacturing Corp., 50 NY2d 183 (1980). Shared Communications Services of ESR, Inc. v. Goldman Sachs & Co., 23 AD3d 162 (1st dept. 2005). Where, as here, the alleged interferer is a business competitor, then, unless wrongful means are employed, an interference that is intended to advance the competing interest of the interferer is not actionable. In Carvel Corp v. Noonan, *supra*,

the Court of Appeals held that in order to constitute “wrongful means” the conduct by the competitor must: [1] amount to a crime or [2] constitute an independent tort or [3] be for the sole purpose of inflicting intentional harm on plaintiffs. Slander and business defamation that, in themselves, state a claim for relief, can be the independent tort that supports a claim for tortious interference with a prospective business relation.

Stapelton Studios LLC v. City of New York, __ AD3d __, 810 NYS2d 657 (1st dept. 2006).

At bar, since the plaintiff has alleged valid causes of action for defamation, the causes of action for tortious interference with business likewise withstand dismissal at the pleading stage.

5. Sanctions

Defendants’ motion for sanctions is based upon its conclusion that the entire complaint should be dismissed. Since the motion to dismiss has been denied in part, there is likewise no basis for a conclusion at this time that the action is frivolous. The motion for sanctions is denied.

Conclusion

In accordance with the aforesaid decision of the court it is hereby:

ORDERED that the motion to dismiss the complaint is granted only to the extent that the third cause of action for tortious interference with contract is hereby severed and dismissed; the clerk is directed to enter a judgment dismissing such cause of action; and it is further

ORDERED that the motion to dismiss the complaint is otherwise denied and defendants are directed to serve and file an answer to the complaint within 20 days of the date of this order; and it is further

ORDERED that the motion for sanctions is denied; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on **May 11, 2006 at 9:30 a.m.** before this court at 80 Centre Street (room 122); and it is further

ORDERED that any requested relief not expressly granted herein is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
April 4, 2006

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

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