

Bacon v Nygard

2015 NY Slip Op 31417(U)

July 28, 2015

Supreme Court, New York County

Docket Number: 150400/2015

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN, Justice

PART

Index Number : 150400/2015
BACON, LOUIS
vs.
NYGARD, PETER
SEQUENCE NUMBER : 002
DISMISS

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).

Answering Affidavits — Exhibits No(s).

Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/28/15

CYNTHIA S. KERN, J.S.C.

- 1. CHECK ONE: CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

CYNTHIA S. KERN
NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
LOUIS BACON,

Plaintiff,

Index No. 154399/2015

-against-

DECISION/ORDER

PETER NYGARD, NYGARD INTERNATIONAL
PARTNERSHIP, NYGARD INC., AND DOES 1-20.

Defendants.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff Louis Bacon (“Bacon”) has commenced this action against defendants based on his allegations that the defendants have been involved in a harassment campaign against him. He has brought the present action asserting claims for defamation, prima facie tort and intentional infliction of emotional distress. Defendants Peter Nygard (“Nygard”), Nygard International, and Nygard Inc. (the “Nygard Company”) have brought the present motion pursuant to CPLR 3211(a)(1), (a)(5), and (a)(7), to partially dismiss the amended complaint. Defendants seek to dismiss portions of the amended complaint on the grounds of documentary evidence, that these claims are time-barred and that they fail to state a cause of action. They argue that out of the 135 statements attributed to Nygard and referred to as the harassment campaign, 105 of these

statements were uttered or published prior to January 14, 2014, which would make them time-barred.

Plaintiff Bacon filed the initial complaint in this action on January 14, 2015 and filed an amended complaint on March 3, 2015. The amended complaint asserts six causes of action related to the harassment campaign for intentional infliction of emotional distress, defamation, defamation per se, prima facie tort, aiding and abetting and civil conspiracy. Plaintiff has attached as exhibit A to the amended complaint a chart detailing 135 allegedly defamatory statements and the dates on which they occurred. Out of the 135 statements listed in appendix A, 30 of the statements were published within the year preceding the filing of the initial complaint. The remaining 105 statements all preceded January 14, 2014, one year prior to the commencement of the action.

Bacon does not dispute that 105 of the 135 defamatory statements in the amended complaint were made more than one year prior to the filing of the instant lawsuit. He argues, however, that defendants are equitably estopped from invoking the statute of limitations because they fraudulently concealed and actively misrepresented their role in the harassment campaign for many years, including by (i) paying proxies to spread lies about Mr. Bacon and organizing fake hate rallies; (ii) using anonymous blogs, email addresses, Twitter handles, and YouTube accounts to hide their identity; (iii) manufacturing false invoices to obscure the true purpose of the Nygard Companies' payments to videographers; and (iv) masking the IP addresses of the computers from which defendants' proxies uploaded defamatory videos. Bacon claims that although he diligently attempted to discover the ultimate source of the harassment campaign, including by filing nine discovery actions and lawsuits in the Bahamas and the United Kingdom, defendants and their proxies thwarted Bacon's efforts to timely uncover the truth. He claims that he was not able to obtain enough information to commence a lawsuit against defendants until August 2014, at which

time a videographer named Stephen Feralio, who allegedly created defamatory videos about plaintiff at defendants' direction allegedly came forward as a whistleblower and confirmed that it was Nygard who had planned these attack videos. Bacon claims that he then moved promptly to obtain Feralio's evidence of defendants' involvement in the harassment campaign by filing in New York a federal court petition for discovery. He argues that he could not commence this action prior to the time he obtained information from the alleged whistleblower because he could not commence an action based solely on mere suspicion as a result of which he had to have more evidence before he could commence the present action.

On April 19, 2013 and August 9, 2013, Bacon published two letters in local Bahamian newspapers and on a website in which he claims that Nygard was the mastermind of the purported harassment campaign. In the first letter, Bacon asserts that Nygard "commenced a series of attacks against me" and talks about the "financial ramifications of Nygard's smear-campaign." The second letter, which was published in August 2013, is titled "Louis Bacon Responds to Peter Nygard's Smear-Campaign." The August 2013 letter states, inter alia:

For several years Peter Nygard and his minions have been running a smear-campaign against me. You may have seen some of the preposterous slurs which have been published via anonymous websites, vicious and disgusting videos on YouTube, flyers inserted into newspapers and so on.

Nygard has orchestrated a smear campaign against me which entailed his lawyer, Keod Smith, acting as a conduit to pay off Sherman Brown and Earlin Williams to write ludicrous articles claiming that I conduct an international drug smuggling operation, have been involved with a number of mysterious deaths, payoffs, etc.

In the present motion, defendants argue that portions of the amended complaint should be dismissed pursuant to CPLR 3211(a) on the grounds of documentary evidence, statute of limitations and failure to state a cause of action. On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference.

Morone v. Morone, 50 N.Y.2d 481 (1980). Moreover, “a complaint should not be dismissed on a pleading motion so long as, when plaintiff’s allegations are given the benefit of every possible inference, a cause of action exists.” *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept. 1990). “Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to ‘whether it states in some recognizable form any cause of action known to our law.’” *Foley v. D’Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977) (quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)). “Although on a motion to dismiss plaintiffs’ allegations are presumed to be true and accorded every favorable inference, conclusory allegations-claims consisting of bare legal conclusions with no factual specificity-are insufficient to survive a motion to dismiss.” *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009).

Additionally, in order to prevail on a defense founded on documentary evidence pursuant to CPLR § 3211(a)(1), the documents relied upon must definitively dispose of plaintiff’s claim. See *Bronxville Knolls, Inc. v. Webster Town Partnership*, 221 A.D.2d 248 (1st Dept 1995). Additionally, the documentary evidence must be such that it resolves all factual issues as a matter of law. *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002).

The court will first address the motion to dismiss the defamation claims. Defendants argue that Bacon’s defamation claims, as well as his other intentional tort claims, based on defamatory statements published prior to January 14, 2014, which was one year prior to the filing of the complaint, must be dismissed as untimely. Plaintiff argues that defendants should be equitably estopped from asserting the statute of limitations as a defense to the action because the amended complaint sufficiently alleges that defendants misrepresented and concealed for many years that they were behind the harassment campaign, that Bacon reasonably relied on those acts of

concealment to refrain from bringing the lawsuit and that defendants' numerous acts of concealment continuing well into 2014 trigger the doctrine of equitable estoppel.

Under New York law, claims for defamation and defamation *per se* are governed by a one-year statute of limitations. CPLR § 215(3). “[E]quitable estoppel will preclude a defendant from using the statute of limitations as a defense ‘where it is the defendant's affirmative wrongdoing ... which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding.’” *Putter v. North Shore University Hospital*, 7 N.Y.3d 548, 552 (2006). The court will apply the doctrine of equitable estoppel where the plaintiff is prevented from filing an action within the applicable statute of limitations due to his or her reasonable reliance on deception, fraud or misrepresentations by the defendant. *Id.* at 552-553.

“When plaintiffs claim that defendants should be equitably estopped from asserting a statute of limitations bar, they must show ‘due diligence’ in bringing the action. By due diligence, the court means that as soon as the plaintiff learns of the misrepresentation, plaintiff must seek to bring an action against defendant.” *Zumpano v. Quinn*, 6 N.Y.3d 666, 683 (2006). Moreover, it is “fundamental to the application of equitable estoppel for plaintiffs to establish that subsequent and specific actions by defendants somehow kept them from timely bringing suit.” *Id.* Thus, if they have sufficient knowledge to bring an intentional tort cause of action against the defendants during the period of the statute of limitations, they cannot rely on the equitable estoppel defense. *Id.* at 675.

The courts have also held that “equitable estoppel will not toll a limitations statute... where a plaintiff possesses ‘timely knowledge’ sufficient to place him or her under a duty to make inquiry and ascertain all of the relevant facts prior to the expiration of the applicable Statute of Limitations.” *Gleason v. Spota*, 194 A.D.2d 764, 765 (2d Dep’t 1993); *Rite Aid Corp. v. Grass*, 48

A.D.3d 363, 364-65 (1st Dept 2008) (the doctrine of equitable estoppel “will not toll a limitations statute where plaintiffs possessed timely knowledge sufficient to place them under a duty to make inquiry and ascertain all the relevant facts prior to the expiration of the applicable statute of limitations.”)

In the present case, the court finds that the defendants are not equitably estopped from asserting the statute of limitations as a defense as the documentary evidence consisting of plaintiff’s two letters establish as a matter of law that plaintiff did not exercise due diligence in bringing this action by seeking to bring the action against defendants as soon as he learned of the misrepresentations contained in the complaint. *See Zumpano v. Quinn*, 6 N.Y.3d 666, 683 (2006). Plaintiff Bacon had knowledge of the facts underlying his claim, including Nygard’s alleged leadership role in the harassment campaign, no later than August 2013 when he published the second letter. For purposes of this analysis, the court will accept as true the allegations in Bacon’s amended complaint that defendants intentionally misrepresented and concealed their involvement in the harassment campaign. However, even accepting these allegations as true, the court finds that plaintiff would have had a reasonable basis for bringing a lawsuit in August 2013 based on the letter titled “Louis Bacon Responds to Peter Nygard’s Smear-Campaign.” In that letter, Bacon specifically alleges that Nygard “and his minions have been running a smear campaign against me. You may have seen some of the preposterous slurs which have been published via anonymous websites, vicious and disgusting videos on YouTube, flyers inserted into newspapers and so on.” He further states that “Nygard has orchestrated a smear campaign against me which entailed his lawyer, Keod Smith, acting as a conduit to pay off Sherman Brown and Earlin Williams to write ludicrous articles claiming that I conduct an international drug smuggling operation, have been involved with a number of mysterious deaths,

payoffs, etc.” He further alleges in the letter that “For the most part, Nygard’s attacks are laundered through others”; “I wish to address the allegations he [Mr. Nygard] is propagating about me so they can be relegated to the large trash piles of lies that he [Mr. Nygard] continues pile up around himself”; “Incidentally I made clear in that open letter that Nygard is running a smear campaign against me. Although he is accustomed to suing for defamation, he has not challenged any claim I made against him”; “Some of the absurd allegations against me that have emanated from Nygard’s minions – drug smuggling, arson, and murder – are farcical and have not made it past the gutter journalists he has employed”; “Nygard and his sidekicks have alleged on a number of occasions that ancestors of mine living in the 19th and 18th centuries, whom I of course, never knew, were associated with racist groups or slaveholding”; “Peter Pinocchio, as he [Mr. Nygard] should be known, has offered up the above incendiary accusations . . .”; “Many of the outrageous articles have been authored by his PR officer Earlin Williams – who is currently attempting to defend himself in court on the bizarre basis that someone else with his name wrote them. The slurs have then appeared on Sherman Brown’s Bahamas National and a number of anonymous attack websites. The fact that the websites were created purely to harm my reputation has been confirmed as a result of court proceedings. Court documents also show Nygard orchestrated the smear campaign published in the Bahama Journal. The recent Tribune article, published July 23, exposes how deep Nygard’s duplicity actually went; he paid for his lawyer to entertain journalists and MPs in order to discredit me”; “[C]learly a huge amount of energy is going into his [Mr. Nygard’s] nefarious smear-campaign.”

Based on the statements in these letters, Bacon had enough information about defendants’ alleged smear campaign and alleged defamatory statements to commence an action against defendants in August 2013. These allegations in the letter are the identical allegations as some of

the time barred allegations in the amended complaint. Since he had sufficient knowledge to bring a defamation claim against defendants before the statute of limitations expired, he cannot rely on the equitable estoppel defense. Moreover even if he did not have enough information to bring the suit at that time, he possessed “timely knowledge sufficient to place him... under a duty to make inquiry and ascertain all of the relevant facts prior to the expiration of the applicable statute of limitations.” *Gleason v. Spota*, 194 A.D.2d at 765 (2d Dept 1993).

The argument by Bacon that he could not bring the present action against defendants until at least 2014 because he only had suspicions and did not have any hard proof is without basis. Even if the court accepts as true all of the allegations by Bacon that defendants and their co-conspirators thwarted Mr. Bacon’s efforts to uncover the truth through affirmative misrepresentations and lies, he had enough timely information about Nygard’s involvement in the harassment campaign to timely bring the claims within the statute of limitations despite any deception or wrongdoing on the part of defendants to cover-up their involvement in the harassment campaign. It is clear from reviewing Bacon’s August 2013 letter that he does not merely suspect Nygard of orchestrating the harassment campaign. To the contrary, he is very explicit in the letter that it is Nygard who is responsible for the smear campaign against him and that Nygard is orchestrating the smear campaign through other persons.

Moreover, the conclusory allegation by Bacon that he could not bring the present lawsuit against defendants until Stephen Feralio came forward with his smoking gun evidence of Nygard’s involvement in the harassment campaign and his use of the Nygard Company’s resources to support it is also insufficient to support invocation of the doctrine of equitable estoppel. Bacon fails to show how the information he obtained from Feralio was necessary for him to bring an action against Nygard or his companies for the intentional torts he has asserted, as opposed to

simply confirming facts of which he was already aware. He has failed to show what evidence Feralio provided that he could not already have alleged based on the statements he made in his letters.

Even assuming, *arguendo*, that Bacon did not have knowledge as of August 2013 with respect to the involvement of the Nygard Company as opposed to Nygard himself, Bacon has still failed to establish “that subsequent and specific actions by [the Nygard Company] somehow kept [him] from timely bringing suit.” *Zumpano v. Quinn*, 6 N.Y.3d at 683 (2006). He has failed to alleged subsequent and specific actions by the Nygard Company, separate from and subsequent to the acts forming the basis of the alleged complaint, which kept him from bringing the present action. All of the specific allegations in the amended complaint which allege misrepresentations and concealment are attributed to Nygard individually and there are only conclusory allegations about misrepresentations and concealment by the Nygard Company which prevented plaintiff from bringing the lawsuit.

Defendants next argue that some of Bacon’s claims for intentional infliction of emotional distress and prima facie tort must be dismissed as duplicative and the remaining claims for intentional infliction of emotional distress and prima facie tort that are not duplicative must be dismissed as time-barred. The law is clear that a claim for intentional infliction of emotional distress and prima facie tort will be dismissed as duplicative when the “underlying allegations fall within the ambit of other traditional tort liability, namely, plaintiff’s causes of action sounding in defamation.” *Fleischer v. NYP Holdings, Inc.*, 104 A.D.3d 536, 539 (1st Dept 2013). *See also Hirschfeld v. Daily News*, 269 A.D.2d 248, 249 (1st Dept 2000); *Herlihy v. Metro. Museum of Art*, 214 A.D.2d 250, 263 (1st Dep’t 1995); *Akpinar v. Moran*, 83 A.D.3d 458, 459 (1st Dep’t 2011).

Bacon enumerates eight sets of allegations upon which his claims for intentional infliction of emotional distress are based. Defendants argue that four of the eight sets of allegations relied upon are duplicative of Bacon's defamation claims. These allegations include that Nygard organized rallies, marches and protests where Bacon was defamed, created and distributed defamatory T-shirts and signs, published defamatory accusations about Bacon and used websites and twitter accounts that included Bacon's name and defamed him. Defendants argue that these are the same allegations that are the basis for Bacon's defamation claims.

Plaintiff argues that the claims for intentional infliction of emotional distress and prima facie tort are not duplicative of the defamation claims because the amended complaint details additional wrongdoing by defendants that does not constitute defamation but was instrumental in inflicting sustained emotional distress and harm on Bacon. He argues that these allegations include that defendants instigated an unjustified and jumped up police raid on Bacon's residence in the Bahamas, engaged in repeated acts of destruction of property and vandalism at Point House and threatened and engaged in violence against Bacon and those close to him, including a mob attack on Bacon's associate Fred Smith. According to Bacon, these allegations do not describe acts of defamation and provide a basis for Bacon's independent claims for intentional infliction of emotional distress and prima facie tort.

Even if the foregoing allegations contained in his claim for intentional infliction of emotional distress and prima facie tort are not duplicative of his defamation claims, the court finds that all of the alleged nonduplicative claims are time-barred as they occurred more than one year prior to the commencement of this action. A claim for intentional infliction of emotional distress accrues at the time the claimant suffered emotional distress. *See Long v. Sowande*, 27 A.D.3d 247, 249 (1st Dep't 2006). The allegations which Bacon claims are not duplicative of his claims for

defamation are the police raid which is alleged to have occurred on July 26, 2010, the alleged destruction of property or vandalism which is alleged to have occurred in 2010 and 2011 and violence against him and his colleagues which is alleged to have occurred in 2013.

The court also finds that the continuing tort doctrine does not prevent Bacon's nonduplicative claims for intentional infliction of emotional distress from being time-barred. Pursuant to the continuing tort doctrine, a plaintiff may rely on wrongful conduct which occurs more than one year prior to the commencement of the action "so long as the final actionable event occurred within one year of the suit." *Shannon v. MTA Metro -N.R.R.*, 269 A.D.2d 218, 219 (1st Dept 2000). In the present case, even if the continuous tort doctrine were to apply, Bacon has failed to establish that the final actionable event occurred within one year of the suit. Since all of Bacon's allegations concerning acts which have occurred in the last year are duplicative of Bacon's defamation claim, these acts fail to state an actionable claim for intentional infliction of emotional distress.

The argument by Bacon that his allegations that defendants were responsible for staging hate rallies against him in the last year constitutes an allegation in support of his intentional infliction of emotional distress claim which is not duplicative of his defamation claim is without basis. The court finds that the allegations with respect to the staging of hate rallies are duplicative of Bacon's defamation claims as the essence of these claims is that Bacon has been defamed during these hate rallies.

For the same reasons that plaintiff's claims for intentional infliction of emotional distress and prima facie tort are dismissed, on the ground either that they are duplicative of the defamation claim or are time-barred, the claims for conspiracy and aiding and abetting the intentional infliction of emotional distress and prima facie tort are also dismissed. Similarly, to the extent that any

defamation claims are time-barred, any claims for aiding and abetting a conspiracy in connection with those time-barred defamation claims are also dismissed.

Based on the foregoing, 105 of the 135 defamatory statements are dismissed as time-barred and the claims for intentional infliction of emotional distress and prima facie tort are dismissed either on the ground that they are duplicative of the defamation claim or are time-barred. The foregoing constitutes the decision and order of the court.

Dated: 7/28/15

Enter: CK

CYNTHIA S. KERN
J.S.C.