

Nesenoff v Dinerstein & Lesser, PC

2002 NY Slip Op 30037(U)

December 11, 2002

Supreme Court, Suffolk County

Docket Number: 0005717/5717

Judge: Robert W. Doyle

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**SUPREME COURT - STATE OF NEW YORK
DCM PART - SUFFOLK COUNTY**

P R E S E N T :

Hon. ROBERT W. DOYLE

Motion (001)
FUD: October 25,2002
Adj.D.: November22,2002
MotD

Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X
Rabbi David F. Nesenoff,
Plaintiff(s),

Decision and Order

- against -

Dinerstein & Lesser, PC and Robert Dinerstein,
Defendant(s).
-----X-

Attorney for Plaintiff
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Upon the following papers on these motions: Notice of Motion/Order to Show Cause (001) and supporting papers-pages 1-7 and Exhibits A-E, Memorandum of Law; Notice of Motion/Order to Show Cause and supporting papers ___; Notice of Cross Motion and supporting papers --> Answering Affidavits and supporting papers 1-3, Exhibits A-C, Memorandum of Law ___; Replying Affidavits and supporting papers --> Notice of Cross Motion and supporting papers ___ ; Other- ; **It is**

ORDERED that application (001) by defendants Dinerstein & Lesser and Robert Dinerstein pursuant to CPLR 5321 1(a)(7) to dismiss the complaint and pursuant to CPLR §3212 for an Order granting Summary Judgment against plaintiff Rabbi David F. Nesenoff, opposed by plaintiff, is decided as follows:

This action was commenced by the filing of a summons and complaint on March 01,2002. Issue was joined by the moving defendant by verified answer dated April 29,2002. Because issue has been joined and because plaintiff has been noticed both pursuant to CPLR §321 1(a)(7) and §3212, and there being an absence of prejudice to the parties, defendant having responded to the application for summary judgment, and in that this matter may be determined as a matter of law alone, this application is hereby treated **as** one pursuant **to** CPLR §3212 without notice to the parties, **Rich v. Lefkovits**, 452 N.Y.S.2d 1, 56 N.Y.2d 276.

Plaintiff became involved in a dispute with the Oyster Bay Jewish Center where he had been under

contract as a Rabbi. Plaintiff left their employ in July 1998 and entered into a written contract with the East Northport Jewish Center to act as its Rabbi in July 1998, which contract was to continue until July 31, 2001. In October 1998, plaintiff retained the within defendants to represent him in an action in Supreme Court, County of Suffolk under Index No. 99-16857 with causes of action sounding in breach of contract, interference with contract, defamation, intentional infliction of emotional distress, wrongful eviction, trespass, interference with prospective advantage, violation of the Religious Corporation Law, and civil conspiracy. Plaintiff had also commenced an action in Supreme Court, County of Suffolk, Index No. 02-06867 with causes of action sounding in defamation, slander and intentional infliction of emotional distress against various individuals associated with the East Northport Jewish Center relative to its decision not to engage in negotiations with plaintiff for a successor contract of employment as Rabbi of the East Northport Jewish Center.

In the instant action, plaintiff asserts that defendants represented him in the New York Supreme Court action under Index no. 99-16857 wherein he shared certain privileged conversations and provided documents to defendants within the scope of an attorney-client relationship to assist defendants in their representation of him against Oyster Bay Jewish Center. That action was resolved on or about March 2000. At that time, plaintiff was employed pursuant to contract at the East Northport Jewish Center, and believed that his contract with them would be renewed pursuant to a letter dated November 21, 2000 to him from the ENJC Ritual committee. However, on January 12, 2001, a congregant of ENJC and her infant were involved in an accident caused by ice build up on the parsonage private road and driveway where plaintiff resided with his family, causing plaintiff to be late by ten minutes to the Friday night service. The following week, plaintiff asserts he was sent a letter advising him to attend a meeting on January 24, 2001 at defendant's office to resolve any issues. At the time, plaintiff was represented by his then attorney John Canning. Defendant Dinerstein, plaintiff's former attorney in the action against Oyster Bay Jewish Center, was present on behalf of ENJC at this meeting. A disagreement ensued and plaintiff and his counsel left the meeting because ENJC and defendant wanted to record the meeting. Plaintiff asserts that the following day defendants met with ENJC Board members, discussed the prior litigation with OBJC, and failed to recuse themselves from the conversations. Plaintiff does not assert he was present, but claims the following day he received a letter advising him he was suspended with pay and was to appear at defendants' office on January 31, 2001 wherein, he claims he was deposed by his former attorney for more than one hour and that defendants produced a document with OBJC letterhead used as an exhibit in plaintiff's action against OBJC, and that he did not authorize disclosure of the document. Plaintiff demanded his file from defendants and demanded they withdraw as attorneys for ENJC as they never received permission from him to represent ENJC. Thereafter, plaintiff asserts, defendants spoke against him at a congregational meeting which he was not permitted to attend, and that various congregants stated they received two letters relative to plaintiff's litigation with OBJC, which letters plaintiff asserts were supplied by defendants. In May,

2001, the ENJC Board of Directors voted to suspend plaintiff without pay, and that he has since been unable to find employment as a Congregational Rabbi or related Rabbinical positions as a result of defendants' actions with ENJC. Consequently, plaintiff has set forth in the complaint of this action, causes of action sounding in breach of fiduciary duty, breach of contract, intentional infliction of emotional distress, and interference with prospective advantage.

To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v. Twentieth Century-Fox Film Corporation*, 3 N.Y.2d 395, 165 N.Y.S.2d 498). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v. N.Y.U. Medical Center*, 64 NY2d 851, 487 N.Y.S.2d 316). Once such proof has been offered, in order to defend the summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact." (CPLR 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557, 427 N.Y.S.2d 595). Further, in order to defeat a motion for summary judgment, the opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v. Aeroxon Prods.*, 148 A.D.2d 499, 538 N.Y.S.2d 843). Mere conclusions and unsubstantiated allegations and assertions by the moving party, unsupported by admissible evidence, are insufficient as a matter of law to entitle defendant to an Order granting summary judgment, (*Zuckerman v. City of New York*, supra). On a motion for summary judgment, the court is not to determine credibility, but is to determine whether there exists a factual issue, or if arguably there is a genuine issue of fact (CPLR §3212(b)) (*S.J. Capelin Associates, Inc. v. Globe Manufacturing Corporation*, 357 N.Y.S.2d 478, 34 N.Y.2d 338).

In support of the application for summary judgment, the moving defendants have provided copies of the pleadings; a copy of the amended verified complaint with annexed exhibits from Supreme Court, County of Suffolk action, Index No. 02-06867; affirmation of Robert Jay Dinerstein submitted under Index No. 02-05717 dated October 1, 2002 with nine additional annexed pages; and the affirmation of Dr. Robert I. Spitz dated April 17, 2001. The documents submitted by defendant in support of the application for summary judgment, are not certified in admissible form, but the documents are not objected to by plaintiff.

The affidavit of Dr. Spitz, President of the East Northport Jewish Center, sets forth that certain communications, including a letter of January 28, 2001, mailed to members of the East Northport Jewish Center congregation, were obtained by or through congregants who were concerned over the turmoil within the congregation, and that information, documents or details surrounding or involving Rabbi Nesenoffs departure from the Oyster Bay Jewish Center were not made to him or anyone else in his presence by Robert Jay Dinerstein or anyone affiliated with Dinerstein & Lesser, P.C. In that those communications have not been specifically identified by Dr. Spitz, there are factual issues as to whether those communications are the same as those referred to by plaintiff in his complaint at paragraph 31. Plaintiff does not specifically identify the communications in the

complaint as well. As set forth above, these assertions by Dr. Spitz are insufficient as a matter of law to entitle defendant to an Order granting summary judgment, (*Zuckerman v. City of New York*, supra) as the court is not to determine credibility, but is to determine whether there exists a factual issue, or if arguably there is a genuine issue of fact (CPLR §3212(b) (*S.J. Capelin Associates, Inc. v. Globe Manufacturing Corporation*, 357 N.Y.S.2d 478, 34 N.Y.2d 338). Because there are factual issues to be determined, defendants' application for summary judgment must be denied.

There are factual issues as well concerning whether defendant Dinerstein distributed or caused to be distributed certain communications or publically spoke against plaintiff or openly discussed the issue of plaintiffs employment at the Oyster Bay Jewish Center at the congregational meeting of February 12, 200. Plaintiff was not present at the meeting and does not assert in the complaint specifically what defendant is alleged to have said or disclosed, and this Court does not have the benefit of a Bill of Particulars to review as none has been served in this action and discovery has not been completed. There are factual issues as to whether defendant Dinerstein did distribute certain communications and if these are the same documents or papers alleged to have been published and circulated by different defendants in the action under Index No. 02-06867. There are further factual issues concerning proximate cause of the alleged emotional distress suffered by plaintiff as well as distinguishing the emotional distress claimed in that action from the emotional distress claimed in this action during overlapping time periods. These factual issues preclude an Order granting summary judgment on the third and fourth causes of action for intentional infliction of emotional distress and interference with a prospective advantage (*Sillman v. Twentieth Century-Fox Film Corporation*, supra; (*Winegrad v. N.Y.U. Medical Center*; supra). Additionally, in that no depositions have been conducted and discovery is incomplete, it is determined that summary judgment is premature at this time (*Ferrara v. Maio*, 634 N.Y.S.2d 170).

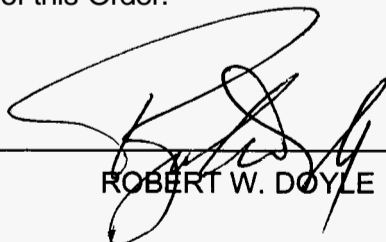
Accordingly, it is

ORDERED that defendants' application pursuant to CPLR §3212 for an Order granting summary judgment and dismissing the complaint is denied. It is further

ORDERED, that all parties are directed to appear for a Preliminary Conference on December 20, 2002, Supreme Court Annex, DCM-J Part, Room 200 at Griffing Avenue, Riverhead, New York at 10:00 a.m. It is further

ORDERED that attorney for the moving defendant shall serve a copy of this Order with notice of entry on all parties within thirty days from the date of this Order.

Dated: December 11, 2002


ROBERT W. DOYLE J.S.C.