

Guerrero v Carva

2002 NY Slip Op 30097(U)

April 5, 2002

Supreme Court, New York County

Docket Number: 104893/01

Judge: Barbara R. Kapnick

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. **BARBARA R. KAPNICK** PART 12
Justice

William Guerrero

INDEX NO. 104893/01

- v -

MOTION DATE _____

MOTION SEQ. NO. 004

George Carva and Fernando Torres

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

SCANNED
APR 17 2002

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

MOTION/ORDER IS RESPECTFULLY REFERRED TO
JUSTICE _____
DATED: _____ J. C.

Dated: 4/5/02

[Signature]
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

BARBARA R. KAPNICK
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IA PART 12 .

-----X
WILLIAM GUERRERO, CITY PROPERTY MANAGEMENT
& DEVELOPMENT, INC. and CDC 111TH STREET
REALTY, LP,

DECISION/ORDER
Index No. 104893/01
Motion Seq. Nos.
004 and 005

Plaintiffs,

- against -

GEORGE CARVA and FERNANDO TORRES,

Defendants.

-----X

BARBARA R. MPNICK, J.:

Motions sequence numbers 004 and 005 are consolidated for disposition.

Plaintiffs William Guerrero, City Property Management & Development, Inc. and CDC 111th Street Realty, LP commenced this action against defendants George Carva and Fernando Torres seeking to recover damages for defamation (first, second and third causes of action), breach of privacy in violation of Civil Rights Law § 50 (fourth cause of action) slander (fifth cause of action), and trespass and property damage (sixth cause of action).

In addition, plaintiffs seek a permanent injunction enjoining defendants from conduct calculated to interfere with plaintiffs' business relationship with the City of New York, tenants and prospective tenants, employees, vendors and others, and prohibiting defendants from publishing or circulating any additional copies of allegedly libelous materials and from otherwise interfering with

the relationships between plaintiffs and third parties (seventh cause of action) and enjoining defendants from interfering with and invading plaintiffs' property rights, including enjoining defendants from publishing libel against plaintiffs and from trespassing upon or vandalizing their properties (eighth cause of action).

Plaintiffs now move for an order granting summary judgment and directing an inquest and assessment of damages against defendants (motion sequence no. 004).

Defendants pro se oppose the plaintiffs' motion and move for an order requiring plaintiffs to answer and comply fully with defendants' demands for the production of documents and a bill of particulars (motion sequence no. 005).

Based on the papers submitted and the oral argument held on the record on January 23, 2002, that portion of the motion seeking summary judgment on the first, second and third causes of action for defamation and fifth cause of action for slander on the ground that fliers which were undisputably distributed and posted by defendants, including a flier entitled "Warning!" and one entitled "Danger!", contained false and defamatory statements, is denied.

It is settled "beyond dispute that expressions of opinion are cloaked with the absolute privilege of speech protected by the

First Amendment (citation omitted), and 'false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions' (citations omitted)." Jaszai v. Christie's, 279 A.D.2d 186, 188 (1st Dep't 2001). See also, Steinhilber v. Alphonse, 68 N.Y.2d 283 (1986).

While many of the references to plaintiffs which are contained in the fliers are in the nature of sarcastic and/or offensive hyperbole (including "House Latino" and "Abusive Gun Carrying, Jerseyite Anti-Union Republican"), "the inescapable conclusion from the verbal context of the entire message and all of the circumstances under which it was delivered is that the statement would be understood by the ordinary listener for what it is: a tasteless effort to lampoon plaintiff[s]" for the manner in which they managed certain buildings in the defendants' community. See, Steinhilber v. Alphonse, supra at 294-295; Cook v. Relin, 280 A.D.2d 897 (4th Dep't 2001).

Therefore, this Court finds that plaintiffs' first, second, third and fifth causes of action must be dismissed.

That portion of the motion seeking summary judgment on the fourth cause of action for breach of privacy in violation of Civil Rights Law § 50 is granted since there is no dispute that defendants used plaintiff William Guerrero's photograph without his consent in publications soliciting membership for defendants'

organization, City Property Tenants Association.

Defendants' claim that their use of plaintiff Guerrero's photograph is protected by Civil Rights Law § 76-a is without merit since this is not an "action involving public petition and participation" as defined by § 76-a 1(a).

That portion of the motion seeking summary judgment on the sixth cause of action for trespass and property damage is also granted, as defendants' papers fail to contradict plaintiffs' claims that they vandalized property belonging to plaintiffs.

The motion is denied to the extent that it seeks an order directing an assessment of damages for intentional infliction of emotional distress since said cause of action is not set forth in the complaint. Moreover, "plaintiffs' allegations do not show atrocious conduct beyond all possible bounds of decency (citation omitted)." J.C. Klein, Inc. v. Forzley, 289 A.D.2d 79 (1st Dep't 2001).

That portion of the plaintiffs' motion seeking summary judgment on the seventh and eighth causes of action is granted only to the extent of permanently enjoining defendants from harassing the plaintiffs, interfering with plaintiffs' property rights, interfering with plaintiffs' contractual relationship with the City of New York, interfering with the plaintiffs' contractual

relationship with tenants, employees and vendors, trespassing upon plaintiffs' property and committing any acts of vandalism to plaintiffs' property.

The motion by defendants to compel discovery is denied, based on the responses to defendants' demands which have been incorporated into plaintiffs' affirmation in opposition.

Accordingly, the Clerk may enter judgment dismissing the first, second, third and fifth causes of action only with prejudice and without costs and disbursements.

The fourth and sixth causes of action are severed and continued. Upon service of a copy of this order with notice of entry, and the filing of a certificate of readiness for trial and payment of the appropriate fees, if any, the Clerk of the Trial Support Office shall place this action on the Part 12 trial calendar for an inquest and assessment of damages on the fourth and sixth causes of action.

This constitutes the decision and order of this Court.

Dated: April 5, 2002



BARBARA R. KAPNICK
J. S. C.

BARBARA R. KAPNICK
J. S. C.