

Mehmet v Scudieri

2006 NY Slip Op 30154(U)

June 6, 2006

Supreme Court, New York County

Docket Number: 0100017/2006

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE, J.S.C.
Justice

PART 10

Melrot + MBK

INDEX NO. 100017/06

Scudiero

MOTION DATE _____

MOTION SEQ. NO. 007

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

FILED
JUN 20 2007
COUNTY CLERK'S OFFICE
NEW YORK

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

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

Dated: 6/7/07

J. Gische
JUDITH J. GISCHE, J.S.C. J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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

-----X
B. DAVID MEHMET & AS ASSIGNEE OF
MBK COMPANY, INC.,,

Plaintiff,

-against-

MARY ANN SCUDIERI,

Defendant.
-----X

DECISION/ORDER

Index No.: 100017/06

Seq. No.: 007

Present:

Hon. Judith J. Gische

J.S.C.

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

Papers	Numbered
Pltf's mot [sj] w/BDM affirm in support, exhs	1
Def's affirm in opp (SL)	2
Pltf's affid in support (BDM), exhs	3

-----X

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

The underlying complaint was for defamation and was dismissed by the court's order dated April 4, 2007. Plaintiff now moves for summary judgment against defendant dismissing her counterclaims.

Since issue has been joined, and the note of issue has not yet been filed, summary judgment relief is available. CPLR 3212. Brill v. City of New York, 2 N.Y.3d 648 (2004). The court's decision follows.

Background

The history of this action has been detailed in the court's prior order dated April 4, 2007, and is herein incorporated by reference.

Defendant's counterclaims are: (1) two separate claims for defamation; (2) tortious interference with business relationships; (3) tortious interference with contract; and (4) harassment and/or intentional infliction of emotional distress. Plaintiff, *pro se*, moves for summary judgment on defendant's counterclaims based on the following assertions: (1) absolute privilege; (2) qualified privilege; (3) plaintiff has failed to plead the counterclaims for defamation with specificity; and (4) the affirmative defense of unclean hands.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR 3212; Winegrad v. NYU Medical Center, 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Only if it meets this burden, will it then shift to the party opposing summary judgment who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1977).

The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film, 3 N.Y.2d 395 (1957).

When issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 A.D.2d 459 (2nd dept. 2003).

Defamation is the injury to one's reputation, either by written expression (libel) or oral expression (slander). Morrison v. National Broadcasting Co., 19 N.Y.2d 453 (1967). The elements of libel are: (1) a false and defamatory statement of fact; (2) regarding the plaintiff; (3) which are published to a third party and which (4) result in injury to plaintiff. Idema v. Wager, 120 F.Supp.2d 361 (SDNY 2000); Ives v. Gujford Mills, 3 F.Supp.2d 191 (NDNY 1998). Certain statements are considered libelous *per se*. They are limited to four categories of statements that: (1) charge plaintiff with a serious crime; (2) tend to injure plaintiff in its business, trade or profession; (3) plaintiff has some loathsome disease; or (4) impute unchastity. Liberman v. Gelstein, 80 N.Y.2d 429 (1992); Harris v. Hirsh, 228 A.D.2d 206 (1st Dept. 1996). Where statements are libelous *per se*, the law presumes that damages will result and they need not be separately proved.

Here, defendant's claims for defamation (third and fifth counterclaims) must fail for lack of specificity. CPLR 3016[a]; Bell v. Alden Owners, Inc., 299 A.D.2d 207 (1st Dept. 2002). The claimed defamatory remarks were alleged to have been made to certain unspecified third persons, at dates, times and places left unspecified. In any event, to the extent any of the claims are not libelous *per se*, they are further defective because of defendant's failure to allege special damages. Liberman v. Gelstein, 80

N.Y.2d 429 (1992). Accordingly, plaintiff's motion for summary judgment on the third and fifth counterclaims is hereby granted and the third and fifth counterclaims are hereby dismissed.

It is unclear what theory defendant is proceeding under in her second counterclaim. From the complaint, it seems that defendant claims that the plaintiff harassed her clients, to wit: "[p]laintiff has continuously phoned and threatened defendant's clients in an effort to interfere with [d]efendant's business, including, but not limited to, the filing of harassing and vexatious subpoenas for information from defendant's clients." However, defendant, in opposition to the instant motion, states that she pled intentional infliction of emotional distress and/or abuse of process for her second counterclaim. Under any of these theories, defendant has not met her burden of proof in opposing plaintiff's motion.

New York does not recognize a civil cause of action for harassment. Hartman v. 536/540 E. 5th St. Equities, Inc., 19 A.D.3d 240 (1st Dept. 2005). If defendant seeks recovery for emotional distress intentionally inflicted by plaintiff in filing subpoenas in connection with this action, as she states in her opposition, she has made no allegation that this proceeding was brought without justification, or, except as authorized by court order, that plaintiff's person or property was interfered with. Matter of Walentas v. Johns, 257 A.D.2d 352 (1999), *lv. dismissed* 93 N.Y.2d 958 (1999).

In any event, defendant's allegations with respect to plaintiff's conduct falls short of the extreme, outrageous conduct necessary to support a counterclaim for the intentional infliction of emotional distress. Sheila C. v. Povich, 11 A.D.3d 120 (1st Dept. 2004).

Likewise, defendant's counterclaim, if for abuse of process, would be without foundation. There are three essential elements of the tort of abuse of process: (1) regularly issued process, civil or criminal, compelling the performance or forbearance of some prescribed act; (2) the party utilizing process must be moved by a purpose to harm without that which has been traditionally described as economic or social excuse or justification; and (3) the party must be seeking some collateral advantage or corresponding detriment to adverse party which is outside the legitimate ends of the process. Board of Educ. of Farmingdale Union Free School Dist. v. Farmingdale Classroom Teachers' Assn., 38 N.Y.2d 397 (1975).

Here, defendant has failed to allege any facts which would establish that plaintiff's filing of subpoenas for information from her client's had no lawful purpose. Rather, plaintiff has utilized process in a manner consonant with the purpose for which it was designed. Accordingly, plaintiff's motion for summary judgment on the second counterclaim is hereby granted and the second counterclaim is hereby dismissed.

In order to establish a validly stated counterclaim for tortious interference with contract (fourth counterclaim) a plaintiff must 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 A.D.3d 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 N.Y.2d 183 (1980); Miller v. Mt. Sinai Medical Center, 288 A.D.2d 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 A.D.2d 488 (2nd dept. 1995).

The counterclaim for tortious interference with contract must fail, because apart from mere allegations in the complaint, defendant has failed to allege any facts which would establish such a counterclaim. In order to defeat the plaintiff's motion for summary judgment, the defendant was required to specify the third-party contracts, and the terms thereof, which were lost due to plaintiff's alleged conduct. The plaintiff's conclusory allegations are insufficient, and thus there is no genuine issue of fact to preclude the granting of summary judgment to the plaintiff. Zuckerman, supra. Accordingly, plaintiff's motion for summary judgment on the fourth counterclaim is hereby granted and the fourth counterclaim is hereby dismissed.

Defendant's counterclaim for tortious interference with business relationships (first counterclaim) is also unavailing. Tortious interference with business relations is a distinct and separate claim from tortious interference with contract. Carvel Corp. v. Noonan, 3 N.Y.3d 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 N.Y.2d 183 (1980).

Shared Communications Services of ESR, Inc. v. Goldman Sachs & Co., 23 A.D.3d 162 (1st dept. 2005).

Here, as in her fourth counterclaim, defendant's conclusory allegations do not support her counterclaim. While defendant has identified one particular business relationship which she claims plaintiff allegedly interfered with, plaintiff states that he merely communicated to his clients information to "protect [his] business and mitigate [his] damages and *there was no malicious intent*" (emphasis added). Plaintiff has therefore met his initial burden in establishing entitlement to summary judgment, thereby shifting the burden to defendant to assemble, lay bare and reveal her proof in order to show that her counterclaim is capable of being established at trial. Zuckerman, supra. This defendant has offered no evidence in opposition and therefore is deemed to have admitted that there exists no material question of fact with respect to her counterclaim. Accordingly, plaintiff's motion for summary judgment on the first counterclaim is hereby granted and the first counterclaim is hereby dismissed.

The counterclaims and the case in chief are hereby dismissed.

Any relief not expressly addressed herein has nonetheless considered by the court and is denied.

This shall constitute the Decision and Order of the Court.

Dated: New York, New York
June 6, 2006

SO ORDERED:



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

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