SHORT FORM ORDER INDEX NO. 1606/2007

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:
Hon. Paul J. Baisley, Jr.

DEAN NASCA,

Plaintiff,

-against-

MICHAEL R. DENKOVICH, THE LAW FIRM OF DENKOVICH & BURSHTEYN, A PARTNERSHIP, YURI Y. BURSHTEYN and DENKOVICH & BURSHTEYN, P.C.,

Defendants,

ORIG. RETURN DATE: March 5, 2007
FINAL RETURN DATE: March 16, 2007
MTN. SEQ. #: 001 - CASEDISP

PROSE:
Dean Nasca
89 Gillette Avenue
Bayport, New York 11705

DEFT'S ATTORNEY:
Denkovich & Burshteyn, P.C.
46 Knickerbocker Road
Plainview, New York 11803

Upon the following papers numbered 1 to 25 read on this motion to dismiss: Notice of Motion and supporting papers 1; Affidavit in Opposition and supporting papers 2 - 16; Reply Affidavit and supporting papers 17 - 25: it is,

ORDERED that this motion by the defendants for an order dismissing the complaint pursuant to CPLR 3211(a)(7) is granted and the complaint is dismissed; and it is further

ORDERED that counsel for the defendants is directed to serve a copy of this decision and order with notice of entry upon the plaintiff within 30 days of the date of this decision and order.

This is an action for defamation and related causes of action arising out of a prior litigation (***Nasca v Finocchio*** [Sup Ct, Suffolk County, Index No. 30628/02]) between this same plaintiff and a defendant who was subsequently represented by the defendants herein (a law firm and its individual partners; hereinafter, "the law firm") on a motion seeking to renew a prior motion in that earlier case, which was denied, seeking to vacate a default judgment.

This plaintiff, who is self-represented, was also self-represented in the earlier case, at least until it went to an inquest on damages at which time this plaintiff retained counsel.

When the law firm put in their motion papers on behalf of the defendant in the earlier action, counsel for the plaintiff submitted a cross motion seeking sanctions for a "frivolous" motion. In response to that cross motion, the individual defendant herein, Michael R. Denkovich, acting as a member of the law firm and counsel for the defendant in that case, submitted an affirmation in opposition which argued against the imposition of sanctions and made allegations that plaintiff's counsel was without "clean hands."[1]

[1] The underlying motion and cross motion in ***Nasca v Finocchio*** were denied. The court notes that the cross motion addressed the same alleged "frivolous" conduct as is alleged here and the court there found the conduct not to be frivolous and imposed no sanctions.

The plaintiff in this case interprets some of the statements made in that affirmation in opposition to be directed against him personally and brought this action against the Denkovich law firm and the partners individually alleging six causes of action, to wit:

1) Defamation
2) Slander per se
3) Libel
4) Perjury and fraud
5) Attorney's fees pursuant to 22 NYCRR 130-1.1
6) Punitive damages

The law firm seeks to dismiss the underlying complaint for the failure to state any cause of action. In support of this motion, the law firm makes the following arguments:

1) The first three causes of action - all defamation based - are barred by the absolute privilege doctrine which applies to submissions in a legal proceeding;

2) The fourth cause of action - alleging perjury and fraud - is barred by the common law principle that the State does not recognize civil actions for damages arising out of alleged acts of perjury in a prior civil proceeding; and

3) As to the fifth and sixth causes of action - attorney's fees and punitive damages - they are insufficient as a matter of law in view of the lack of merit of the prior causes of action.

In opposition to this motion, the plaintiff submits, inter alia, his affidavit in which he argues that he has, at the very least, stated valid causes of action in his complaint and that is all that is required to defeat a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7). He also states, in an conclusory fashion, that the substance of the alleged defamation was so clearly beyond the bounds of privileged statements, so needlessly defamatory and irrelevant to the underlying issues in that earlier case that said statements are an exception to the absolute privilege doctrine.

It is true that in considering a motion to dismiss pursuant to CPLR 3211, the court's role is limited to "determining whether a cause of action is stated within the four corners of the complaint, and not whether there is evidentiary support for the complaint [citations omitted]" (***Frank v Daimler Chrysler Corp.,*** 292 AD2d 118, 121, 741 NYS2d 9, 12 [1st Dept 2002], *lv denied* 99 NY2d 502, 752 NYS2d 589 [2002]). In addition, the pleading "is to be afforded a liberal construction (CPLR 3026), and the court should accept as true the facts alleged in the complaint, accord the plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory [citations omitted]" (*Id.*, at 120-121, 12).

But here, the legal arguments put forth by the law firm require the court to dismiss all the causes of action for failure to state any viable cause of action under the law and the documentary evidence in this case.

Absolute Privilege

In the recently decided case of ***Sexter & Warmflash, P.C. v Margrabe*** (38 AD3d 163, 828 NYS2d 315 [1st Dept 2007]), Associate Justice David Friedman went into a lengthy discussion of the law in this very area. The opinion pointed out that there is an absolute privilege for statements made in the course of litigation which affords the "speaker or writer immunity from liability for an otherwise defamatory statement to which the privilege applies, regardless of the motive with which the statement was made [citations omitted]" (*Id.*, at __, 322). In order to qualify for the privilege, in addition to the statements being made in the context of the litigation, the statements must also be pertinent to the litigation. In such an event, the personal malice of the writer, if any, does not matter (*Id.*, at __, 323).

The only exception to this privilege is if a statement is "so outrageously out of context as to permit one to conclude, from the mere fact that the statement was uttered, that it was motivated by no other desire than to defame [citing ***Martirano v Frost,*** 25 NY2d 505, 508, 307 NYS2d 425 [1969]" (*Id.*, at __, 324). Moreover, with regard to whether a statement is pertinent or not, the issue is a question of law for the court and "any doubts are to be resolved in favor of pertinence [citations omitted]" (*Id.*). And lastly, in establishing whether a statement is pertinent or not, "the barest rationality, divorced from any palpable or pragmatic degree of probability, suffices" (*Id.*).

The statements at issue here, all contained in the Denkovich affirmation, are directed to the statements made and actions taken by plaintiff's counsel in the course of the earlier litigation; and particularly with regard to said counsel's supporting affirmation on the cross motion for sanctions . As such, Denkovich's statements are clearly pertinent, there is nothing of a malicious nature and certainly qualify for the absolute privilege afforded such statements in the context of litigation.

Accordingly, the first three causes of action - based upon defamation - must be dismissed.

Perjury

It is well-settled that the "courts of this State will not entertain civil actions for damages arising from alleged subornation of perjury in a prior civil proceeding [citations omitted]" (***Newin Corp. v Hartford Acc. & Indem. Co.***, 37 NY2d 211, 217, 371 NYS2d 884, 889 [1975]), unless "the perjury is merely a means to the accomplishment of a larger fraudulent scheme [citations omitted]" (*Id.*, at 217, 890; *see also* ***Retina Assocs. of Long Island, P.C. v Rosberger,*** 299 AD2d 533, 751 NYS2d 50 [2d Dept 2002, *lv denied* 99 NY2d 624, 760 NYS2d 89 [2003]).

Here, there are no factual allegations to support either perjury or, even if there was arguably perjury, that it was in furtherance of any larger fraudulent scheme. The statements, for the most part, were merely arguments and opinions as to the possibility of inappropriate conduct on the part of plaintiff's counsel - not the plaintiff - in the course and furtherance of the earlier litigation.

There was one statement in the Denkovich affirmation which could possibly be taken as directed at the plaintiff individually and that was that the plaintiff's motion for a default judgment in that earlier case (which may have preceded his retaining counsel) was made upon "knowingly false" pretenses. But such a statement is clearly pertinent to the motion to vacate the default judgment and clearly based upon information and belief such that it was not perjurious and, in any event, it was privileged.

Attorney's Fees and Punitive Damages

The last two causes of action (5th and 6th) seek attorney's fees based upon the actions of the law firm being frivolous and sanctionable and punitive damages for same.

The law firm argues that in light of the insufficiency of the preceding causes of action, these two causes of action must fail as being insufficient as a matter of law. The court agrees. In view of the preceding causes of action being dismissed in accordance with this decision, these two remaining causes of action, which are based upon the viability of the preceding ones, must fail as a matter of law.

Accordingly, the entire complaint is dismissed pursuant to CPLR 3211 (a)(7) for the failure to state any cause of action. In addition and in any event, the plaintiff mistakenly interprets most, if not all, of the statements in the Denkovich affirmation as pertaining to him when they actually pertained to his counsel at the time.

This decision constitutes the order of the court.

Dated: May 22, 2007

HON. PAUL J. BAISLEY, JR.

HON. PAUL J. BAISLEY, JR. J.S.C.