

<b>Klinko v Rock &amp; Republic Enters., Inc.</b>
2007 NY Slip Op 32191(U)
July 11, 2007
Supreme Court, New York County
Docket Number: 0101063/2007
Judge: Leland G. DeGrasse
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. LELAND DEGRASSE

PRESENT: \_\_\_\_\_

PART 25

Justice

K Linko, Markus

INDEX NO. 101063/07

- v -

Rock + Republic Enterprises

MOTION DATE 4/2/07

MOTION SEQ. NO. 001

MOTION CAL. NO. 10

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED

JUL 20 2007

NEW YORK COUNTY CLERK'S OFFICE

JUL 11 2007

*Handwritten initials*

Dated: \_\_\_\_\_

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NEW YORK : I.A.S. PART 25

----- X  
MARKUS KLINKO and MARKUS KLINKO :  
PHOTOGRAPHY, INC., d/b/a MARKUS :  
KLINKO & INDRANI PHOTOGRAPHY, :  
 :  
Plaintiffs, :  
 :  
-against- :  
 :  
ROCK & REPUBLIC ENTERPRISES, INC. :  
d/b/a ROCK & REPUBLIC JEANS and :  
MICHAEL BALL, individually, :  
 :  
Defendants. :  
----- X

Index No.: 101063/07  
Cal. No.: 10 of 4/2/07

**FILED**  
JUL 20 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**DeGRASSE, J.:**

Defendants move for an order pursuant to CPLR 3024 (b) striking paragraphs 21 and 24 of the complaint as scandalous and prejudicial matters that are unnecessarily inserted in plaintiffs' pleading.

Plaintiff Markus Klinko is a photographer and the co-owner of plaintiff Markus Klinko Photography, Inc., d/b/a Markus Klinko & Indrani Photography. Defendant Michael Ball is the CEO and founder of defendant Rock & Republic Enterprises, Inc., d/b/a Rock & Republic Jeans, a clothing manufacturer. Plaintiffs commenced this action by the filing of a summons and verified complaint on January 24, 2007, seeking declaratory and injunctive relief, as well as money damages. The verified complaint asserts the following six causes of action: (1) extortion, (2) tortious interference with prospective business relations, (3) prima facie tort, (4) intentional infliction of emotional distress, (5) breach of contract, and (6) unjust enrichment.

With respect to plaintiffs' tort claims, the complaint's Statement of Facts alleges that "[f]ueled by jealousies over an ex-fiancé [actress/model Fernanda Romero] that abandoned Ball and who subsequently entered into a long term romantic relationship with [Klinko] ... Ball embarked on a crusade to intimidate Klinko personally and professionally."

Plaintiffs' first cause of action, for extortion, alleges that Ball threatened that "if Klinko did not relinquish his rights to property, namely money plaintiffs are entitled to, and if Klinko did not cease all communications with Romero," Ball would (1) publicize personal documents and photographs which would subject Klinko to "contempt, ridicule or embarrassment," (2) "assist in accusing Klinko of a crime and/or cause criminal charges to be instituted against him," and (3) "use his influence in the fashion industry ... to defame, bad mouth and harm Klinko."

Plaintiffs' second cause of action, for tortious interference with prospective business relations, alleges that Ball's wrongful actions "exhibit an intentional, malicious and unjustified interference with plaintiffs' current and future business relations with [defendants] and advertisers, and those employed in the entertainment industry."

Plaintiffs' third cause of action, for prima facie tort, alleges that "Ball's wrongful conduct was completely unjustified and was intended solely to inflict substantial harm against plaintiffs."

Plaintiffs' fourth cause of action, for intentional infliction of emotional distress, alleges that "Ball acted with malice, and with the intent to cause severe emotional distress to ... Klinko."

With respect to plaintiffs' breach of contract claims, the complaint's Statement of Facts alleges that on December 5, 2006, the parties entered into a contract whereby plaintiffs were hired by defendants to do a photo shoot of defendants' clothing line for a major advertising campaign to be revealed in the New York Fashion Week Runway Shows in February 2007. The parties agreed

that: “(i) plaintiffs would be guaranteed ‘on page ad credit’ for their work; and (ii) plaintiffs were to be granted exclusive rights to shoot future campaigns for the brand. In return, plaintiffs agreed to: (a) waive their session fee (which consisted of a day rate of \$30,000.00); (b) grant international usage of images produced for one year (valued at \$30,000.00); and (c) provide digital post production services at cost.” It is further alleged that despite being pleased with the success of the photo shoot, Ball refused to (1) compensate plaintiffs’ for their work, (2) use any of plaintiffs’ images, and (3) use plaintiffs in any further advertisement campaigns.

Plaintiffs’ fifth cause of action, for breach of contract, alleges that Ball breached its agreement with plaintiffs by (1) “failing to pay plaintiffs for their services duly rendered,” (2) “refusing to use plaintiffs’ images and provide plaintiffs with credit acknowledgment of the same,” and (3) “failing to provide plaintiffs exclusivity for their services as ‘partners’ with regard to future advertising campaigns.”

Plaintiffs’ sixth cause of action, for unjust enrichment, alleges that defendants “[have] been unjustly enriched by receiving the benefit of the services provided by the plaintiffs.”

Defendants now move pursuant to CPLR 3024 (b) to strike the allegations contained in paragraphs 21 and 24 of the complaint’s Statement of Facts on the grounds that said paragraphs contain scandalous and prejudicial matters that are unnecessary to establish any of plaintiffs’ causes of action. Specifically, defendants argue that the allegations concerning Ball’s alleged participation in immigration fraud have no conceivable bearing on plaintiffs’ tort and contract claims. Defendants further argue that “[t]hese allegations, if not stricken, are likely to cause Ball continuing reputational and economic damage.” In opposition to the motion, plaintiffs maintain that paragraphs 21 and 24 are material and necessary to establish Ball’s intent and motivation because “central to this action

is the intimate relationship between these three individuals [Ball, Klinko and Romero], their knowledge of each others' personal affairs and what motivations caused the resulting harm.”

The scandalous matter objected to consists of the following allegations:

“21. ... at various times during 2005, Ball assisted and/or aided Romero in procuring a fraudulent marriage for immigration purposes, and also assisted and advised Romero in obtaining a false social security identification card while utilizing two different social security numbers.”

“24. On numerous occasions, Romero referred to sensitive matters regarding their prior relationship, such as instances of violence by Ball leading to police involvement, and Romero's complaints to the police, immigration fraud and his complicity in her fraudulent marriage and the procurement of false social security numbers, tapes of their therapy sessions and conversations regarding his sexuality.”

CPLR 3024 (b) permits the court to “strike any scandalous or prejudicial matter unnecessarily inserted in a pleading.” The test for determining if portions of a pleading should be stricken pursuant to CPLR 3024 (b) is “[w]hether the allegation is relevant, in an evidentiary sense, to the controversy and, therefore, admissible at trial” (*Wegman v Dairylea Coop., Inc.*, 50 AD2d 108, 111 [1975], *appeal dismissed*, 38 NY2d 918 [1976]). Additionally, in order to strike portions of a pleading, the allegations must be scandalous or prejudicial and not merely unnecessary or irrelevant (*Card v Budini*, 29 AD2d 35 [1967]; *Matter of Emberger*, 24 AD2d 864 [1965]). Material is scandalous if it is both immaterial and reproachful or capable of producing harm without justification (*Hurley v Hurley*, 266 AD 701 [1943]; *Matter of Stevens*, 101 Misc2d 1013 [1979]). Material is prejudicial when it impairs a substantial right of a party or causes harm to the party and is not necessary to the challenged pleading (*JC Mfg., Inc. v NPI Elec., Inc.*, 178 AD2d 505, 506 [1991]; *Schachter v Massachusetts Protective Assoc.*, 30 AD2d 540 [1968]).

Upon review of paragraphs 21 and 24, the court finds that the allegations asserted therein are not relevant to plaintiff's claims as they relate to events outside the scope of this lawsuit and are potentially prejudicial to defendants (see *Halford v First Jersey Sec., Inc.*, 182 AD2d 1003, 1005 [1992]; *Talbot v Johnson Newspaper Corp.*, 124 AD2d 284, 285 [1986]; *Shenandoah v Hill*, 124 AD2d ). These paragraphs should therefore be stricken from the complaint pursuant to CPLR 3024 (b).

Accordingly, the motion is granted and paragraphs 21 and 24 shall be stricken from the complaint.

This constitutes the decision and order of the Court.

DATED: JUL 11 2007

J.S.C.  
**HON. LELAND DeGRASSE**

**FILED**  
JUL 20 2007  
NEW YORK  
COUNTY CLERK'S OFFICE