

Guy v DeSantis

2007 NY Slip Op 32880(U)

September 13, 2007

Supreme Court, Queens County

Docket Number: 0022561/2006

Judge: Peter Joseph Kelly

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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE PETER J. KELLY**
Justice

IAS PART 16

HENRY GUY,
Plaintiff,
- against -

INDEX NO. 22561/2006
MOTION
DATE September 4, 2007

FRANK V. DESANTIS and STAPLES LAW FIRM,
P.C.,
Defendants.

MOTION
CAL. NO. 11
SEQ. #2

The following papers numbered 1 to 9 read on this motion by the defendants to dismiss the plaintiff's complaint pursuant to CPLR §3211[a][7] for failure to state a cause of action.

	<u>PAPERS NUMBERED</u>
Notice of Motion/Affid(s)-Exhibits-Memo of Law.....	1 - 5
Affid(s) in Opp.-Exhibits.....	6 - 7
Replying Affirmation-Memo of Law.....	8 - 9

Upon the foregoing papers the motion is determined as follows:

On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211[a][7], the allegations contained in the complaint must be presumed to be true and liberally construed (Palazzolo v Herrick, Feinstein, LLP, 298 AD2d 372; Schulman v Chase Manhattan Bank, 268 AD2d 174). In determining such a motion "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (Guggenheimer v Ginzburg, 43 NY2d 268, 275).

In the complaint the plaintiff has attempted to plead three causes of action. However, the express nature of these claims is not identified. As facts in support of these claims, the plaintiff alleges that the defendant Frank V. DeSantis ("DeSantis") was employed by and acting on behalf of the defendant Staples Law Firm, P.C. ("Staples"). Although not stated in the complaint, it is apparent from all the submissions and not disputed that DeSantis was an attorney. The plaintiff asserts that he was a co-owner of real property in Warrensburg, New York with Franz Wascherol ("Wascherol") and Zora Deming ("Deming"). The plaintiff claims that Wascherol and Deming deeded their interest in the property to Sekord Properties, LLC ("Sekord"), a company

formed by Peter Sikora, Sr. ("Sikora") who was a "close personal friend" of Wascherol and Deming. After unsuccessfully attempting to acquire the plaintiff's interest in the property, for the purpose of re-selling it for a profit, the plaintiff asserts Sikora hired DeSantis and Staples to "squeeze, hurt and injure" the plaintiff by filing a "malicious suit", without basis in law or fact, that was "funded by Sikora".

Under the first titled cause of action, the plaintiff pleads that the malicious suit was brought to inflict severe emotional distress upon the plaintiff and seeks monetary damages from DeSantis for personal injury. The second titled cause of action is merely a restatement of all the allegations in the first and seeks monetary damages from Staples for personal injury. Under the title for the third cause of action, in addition to re-alleging the previous claims, the plaintiff asserts DeSantis undertook "the tortious action without any excuse or justification" and as a result he sustained special damages.

The defendants move, pursuant to CPLR §3211[a][7], to dismiss the complaint for failure to state a cause of action.

The plaintiff's assertion that this motion violates the single motion rule contained in CPLR §3211[e] is without merit. A prior motion made by the defendants was marked off the court's calendar based upon the failure of defense counsel to personally appear at the calendar in violation of the court's part rules. This was a mere procedural denial of the motion and consideration of this motion violates "neither the letter nor the spirit of the single motion rule" (See, 767 Third Ave. LLC v Greble & Finger, LLP, 8 AD3d 75; see also, Held v Kaufman, 91 NY2d 425).

The plaintiff's argument that the defendants' motion is untimely as it was made after the time for the service of an answer expired is meritless as a motion made pursuant to CPLR §3211[a][7] may be made "at any time" (See e.g., Schel v Roth, 242 AD2d 697).

To the extent the plaintiff may be asserting a claim of legal malpractice against the defendants, that cause of action fails as claims of professional malpractice against an attorney are barred against those not in privity (See e.g., Good Old Days Tavern, Inc. v Zwirn, 259 AD2d 300). In this case, it is apparent that the defendants did not represent the plaintiff, but rather his adversary, in an underlying legal proceeding.

However, this exclusion is subject to the well recognized exception which permits a cause of action where "through the wrongful act of his present adversary, a person is involved in earlier litigation with a third person in bringing or defending an action to protect his interests, . . . is entitled to recover the reasonable value of attorneys' fees and other expenses thereby suffered or incurred" (Shindler v Lamb, 25 Misc2d 810, 812, affd 10 AD2d 826, affd 9 NY2d 621; see also, Hermann v Bahrami, supra at 516; Donn v Sowers, supra). In

particular, attorneys may be found liable to non-clients for acts of "fraud, collusion, malicious acts or other special circumstances" (Viscardi v Lerner, 125 AD2d 662; Tender Care, Inc. v Selin, 90 AD2d 547, 548; see also, Judiciary Law §487). Here, the plaintiff's complaint is defective as it does not state with the requisite particularity what fraudulent or other prohibited acts the defendants allegedly perpetrated (See generally, 3016[b]; C.P.J. Inc., v 234 High Seas Restaurant Corp., 260 AD2d 524). Instead, the alleged acts of the defendants are stated in the most general terms and are more akin to those made in a battery cause of action (e.g. "squeeze, hurt and injure").

To the extent the plaintiff may be attempting to state a claim for malicious prosecution it also fails as the complaint does not identify the underlying proceeding, where it was prosecuted, what claims were made against the plaintiff and whether it was terminated in the plaintiff's favor (See, Engel v CBS, Inc., 93 NY2d 195). More importantly, the plaintiff fails to plead "some special damage to, or interference with, personal or property rights beyond the damages normally attendant upon being sued" (Honzawa v Honzawa, 268 AD2d 327, 329).

With the respect to the plaintiff's allegation of sustaining emotional distress, even assuming the allegations in the complaint to be true and affording the plaintiff every possible favorable inference, the complaint fails to state either a claim for negligent or intentional infliction of emotional distress. With respect to negligent infliction of emotional distress, the plaintiff fails to allege any conduct by the plaintiff "that unreasonably endanger[ed] the plaintiff's physical safety or cause[ed] the plaintiff to fear for his or her physical safety" (Lipton v Unumprovident Corp., 10 AD3d 703, 706). Any claim of intentional infliction of emotional distress is defective as the complaint is decidedly conclusory and does not identify any conduct that could even remotely be characterized as extreme and outrageous (See, Welsh v. Haven Manor Health Care Ctr., 15 AD3d 572; Poliah v Westchester County Country Club, Inc., 14 AD3d 601).

Any claim in the complaint for prima facie tort also fails as "New York courts have consistently refused to allow retaliatory lawsuits based on prima facie tort predicated on the malicious institution of a prior civil action" (Curiano v Suozzi, 63 NY2d 113, 118).

The plaintiff's argument that the motion must be denied as there is outstanding discovery is flawed as the plaintiff fails to identify what facts are in the sole possession of the defendant that are necessary to oppose this motion (See, CPLR §3211[d]; Glassman v Catli, 111 AD2d 744).

The plaintiff's application for leave to re-plead is a matter that is left to the sound discretion of the court (See, Andux v Woodbury Auto Park, Inc., 30 AD3d 362). However, plaintiff's application must be denied since the plaintiff failed to annex any supporting documents,

including an affidavit from plaintiff which would expound upon the very conclusory allegations made in his present complaint. Nor has the plaintiff submitted a proposed amended complaint from which the court could evaluate the viability of his proposed claims. In essence, the opposition papers contain a recitation of the procedural history of this case, an unfounded legal argument as to why the motion is procedurally improper, a request that defendants provide discovery, and nothing more. Consequently the court has no factual basis upon which it can evaluate what specific causes of action any amended complaint may contain.

Accordingly, the defendant's motion pursuant to CPLR §3211[a][7] is granted and the plaintiff's complaint is dismissed.

Dated: September 13, 2007

Peter J. Kelly, J.S.C.