

**Rosenberg v Hrbek**

2007 NY Slip Op 33543(U)

October 26, 2007

Supreme Court, New York County

Docket Number: 0112033/2007

Judge: Jane S. Solomon

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

PRESENT: SOLOMON

PART 55

Index Number : 112033/2007

ROSENBERG, ARMAND

vs

HRBEK, DEBORAH

Sequence Number : 001

DISMISS

INDEX NO. 112033/2007

MOTION DATE 10 - 15 - 2007

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 7 were read on this motion to/for dismiss

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

PAPERS NUMBERED

1 - 4

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

5 - 6

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

7

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

is decided in

accordance with the annexed memorandum decision and order.

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

**FILED**  
OCT 31 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 10/26/07

  
**JANE S. SOLOMON** J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 55

-----X

ARMAND J. ROSENBERG,

Plaintiff,

INDEX NO. 112033/2007

-against-

DEBORAH HRBEK and HRBEK LAW LLC,

DECISION and ORDER

Defendants

**FILED**  
OCT 31 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
JANE S. SOLOMON, J.

Plaintiff Armand J. Rosenberg ("Plaintiff"), an attorney appearing *pro se*, sues the law firm Hrbek Law LLC and its principal Deborah Hrbek (collectively, "Defendants") for libel and abuse of process, alleging that Defendants, on behalf of Plaintiff's wife, instituted a matrimonial action in this court against him (Index number 309179/2007 [the "Matrimonial Action"]) in bad faith. Defendants move under CPLR § 3211(a)(7) to dismiss the Complaint for failure to state a cause of action. For the reasons discussed herein, the motion is granted.

On or about August 15, 2007, Defendants, on behalf of Plaintiff's wife, commenced the Matrimonial Action by filing a Summons with Notice with the New York County Clerk. The Summons with Notice is labeled an "Action for Divorce" and states "Notice: The nature of this action is to dissolve the marriage

between the parties, on the grounds: DRL § 170 subd(2) - Constructive Abandonment." Plaintiff alleges that Defendants served an employee at his Manhattan law office, and not him personally, with the Summons with Notice, along with a cover letter dated August 16, 2007.

The letter states that the "only purpose" for bringing the Matrimonial Action is to obtain "by means of discovery, the items requested in [Defendants'] correspondence dated June 26, 2007." The letter further states that if Plaintiff provided the documents voluntarily, Plaintiff's wife would withdraw the divorce proceedings. On August 21, 2007, Plaintiff faxed Defendants a demand to withdraw the Summons. Defendants responded that Plaintiff's wife would do so upon receipt of "(1) the prenuptial agreement between the parties and/or a revocation of the same; and (2) [Plaintiff's] last will and testament." Defendants made the same request by telephone and fax on September 4, 2007.

Contemporaneously with these exchanges, Plaintiff commenced the instant proceeding. The Complaint alleges that, because neither Plaintiff nor his wife reside in New York County, the Matrimonial Action was brought here solely to embarrass Plaintiff, and further, that Defendants libeled Plaintiff, "an octogenarian with a significant medical history" and "a member of

the Bar of the State of New York for over 5 decades," by filing the Summons with Notice with the County Clerk, thereby knowingly and falsely alleging he was liable for "Constructive Abandonment" in a public record. The Complaint also states that these actions "constituted a willful and wrongful use of the legal process for a purpose for which it was not intended and in a manner not legally justifiable constituting abuse of process." Plaintiff claims damages in the amount of \$500,000 for the foregoing, and brings a second cause of action for punitive damages.

Plaintiff's first cause of action purports to state a claim for libel or abuse of process. "It is well established that a statement made in the course of legal proceedings is absolutely privileged if it is pertinent to the litigation." Lacher v. Engel, 33 A.D.3d 10, 13 (1<sup>st</sup> Dep't 2006). As argued by Defendants, the minimal statements made in the Summons with Notice are pertinent to the Matrimonial Action, and thus, as a matter of law are absolutely privileged and do not provide the basis for a libel claim.

Although the Court of Appeals has defined abuse of process "as the misuse or perversion of regularly issued legal process for a purpose not justified by the nature of the process" (Board of Education v. Farmingdale Classroom Teachers Ass'n, 38 N.Y.2d 397, 400 [1975]), it has also held that "the institution

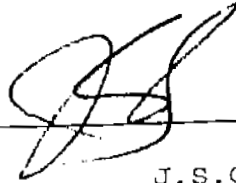
of a civil action by summons and complaint is not legally considered process capable of being abused" (Curiano v. Suozzi, 63 N.Y.2d 113, 116 [1984]). Moreover, "[n]o action for abuse of process will lie premised upon the commencement of a civil action, even if such action is commenced with malicious intent." I.G. Second Generation Partners, L.P. v. Duane Reade, 17 A.D.3d 206, 207 (1<sup>st</sup> Dep't 2005).

On a motion to dismiss, this court must accept the allegations contained in the Complaint as true and accord Plaintiff the full benefit of every favorable inference (Leon v. Martinez, 84 N.Y.2d 83 [1994]), and must "sustain the pleading when a cause of action may be discerned, even if inartfully stated" (Fischbach & Moore, Inc. v. E.W. Howell Co., 240 A.D.2d 157, 157 [1<sup>st</sup> Dep't 1997]). Plaintiff argues the he may have mislabeled the contents of the Complaint, and that his claim might more appropriately be labeled malicious prosecution, conspiracy, prima facie tort, fraud or "whether or not in fact the judicial system was betrayed by an attorney, as defendant in this case." However, until the Matrimonial Action is concluded, it would appear no claim has matured. In any event, as respects ~~the~~ the second cause of action, New York does not recognize an independent claim for punitive damages. See Rocanova v. Equitable Life Assur. Soc. Of U.S., 83 N.Y.2d 603 (1994).

Accordingly, the motion is granted, and it hereby is  
ORDERED that the Complaint is dismissed, with costs  
and disbursements to Defendants as taxed by the Clerk of the  
Court, and the Clerk is directed to enter judgment accordingly.

Dated: October 26, 2007

ENTER:

  
\_\_\_\_\_  
J.S.C.

JANE S. SOLOMON

**FILED**  
OCT 31 2007  
NEW YORK  
COUNTY CLERK'S OFFICE