

Klinko v Rock & Republic Enters., Inc.

2007 NY Slip Op 33664(U)

November 9, 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

Index Number : 101063/2007

PART 25

KLINKO, MARKUS

vs

ROCK & REPUBLIC ENTERPRISES

Sequence Number : 003

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

NOV 09 2007

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Dated: _____

J.S.C.

Check one: FINAL DISPOSITION MOST NON-FINAL DISPOSITION

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

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

-----X
MARKUS KLINKO and MARKUS KLINKO
PHOTOGRAPHY, INC. d/b/a MARKUS KLINKO
& INDRANI PHOTOGRAPHY,

Plaintiffs,

-against-

Index No. 101063/07

ROCK & REPUBLIC ENTERPRISES, INC., d/b/a
ROCK & REPUBLIC JEANS and MICHAEL BALL,
individually,

Defendants.

-----X

DeGrasse, J.:

Defendants move for an order dismissing the complaint pursuant to CPLR 3211 (a)(1) and (7). Under the first cause of action, plaintiffs alleged that defendant Michael Ball committed extortion by threatening to harm their professional reputation. Extortion, a criminal offense, cannot be pleaded as a cause of action in a civil action (*see Crandall v Bernard, Overton & Russell*, 133 AD2d 878 [1987]). To establish tortious interference with prospective business relations, as alleged under the second cause of action, a plaintiff must establish that:

“(1) it had a business relationship with a third party; (2) the defendant knew of that relationship and intentionally interfered with it; (3) the defendant acted solely out of malice, or used dishonest, unfair, or improper means; and (4) the defendant’s interference caused injury to the relationship” (*Carvel Corp. v Noonan*, 350 F3d 6, 17 [2003]).

Conduct constituting the tort is not directed at the plaintiff but at a party with which plaintiff has or seeks to have a relationship (*Carvel Corp. v Noonan*, 3 NY3d 182, 192 [2004]). Plaintiffs’

tortious interference claim is not viable because it is based upon threats communicated to plaintiffs by Ball. Moreover, the claim cannot be based upon interference with plaintiffs' relationship with Ball's company, defendant Rock & Republic Enterprises, Inc. (RRE) because RRE is not a "third party." Prima facie tort, which is alleged under the third cause of action, consists of : (1) the intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, (4) by an act or series of acts which are otherwise legal (*Cardo v Bd. of Mgrs., Jefferson Vil. Condo 3*, 29 AD3d 930, 931 [2006]). This claim is also deficient because plaintiffs have not alleged or demonstrated that they have suffered a "specific and measurable loss" (*see id.*). Plaintiffs have made no showing that defendants' conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Therefore the claim of intentional infliction of emotional distress alleged under the fourth cause of action is not viable (*see Murphy v Am. Home Prods. Corp.*, 58 NY2d 293, 303 [1983]). Plaintiffs allege under the fifth cause of action that RRE breached an agreement which purportedly gave plaintiff exclusive rights with respect to an advertising campaign. At paragraph 30 of the complaint, plaintiffs state the following: "Attached as Exhibit 'A' is *the* [emphasis added] parties' agreement." The agreement obligates RRE to do nothing more than pay the sum of \$37, 550 in exchange for services described therein. It makes no mention of the exclusive rights plaintiffs claim to have been granted. The agreement coupled with RRE's canceled check in the specified sum constitute a defense founded upon documentary evidence. Moreover, the existence of the contract precludes plaintiffs' unjust enrichment cause of action (*Katz v Am. Mayflower Life Ins. Co.*, 14 AD3d 195, 201-202 [2004]).

For the foregoing reasons, the fifth cause of action by which plaintiffs allege breach of contract is dismissed pursuant to CPLR 3211 (a)(1). It is adjudged and declared that RRE has not breached its agreement with plaintiffs. The remaining causes of action are dismissed pursuant to CPLR 3211 (a)(7). Notwithstanding plaintiff's request, the provision for leave to replead set forth under CPLR 3211 (e) was repealed as of January 1, 2006 by L. 2005, ch. 616 (*Andix v Woodbury Auto Park*, 30 AD3d 362, 363 [2006]). Settled judgment and order.



Dated: November 9, 2007

J. S. C.

HON. LELAND DEGRASSE