

BCRE 230 Riverside LLC v Fuchs

2007 NY Slip Op 33686(U)

November 5, 2007

Supreme Court, New York County

Docket Number: 0109809/2006

Judge: Walter Tolub

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

PRESENT: _____

PART _____

Justice _____

Index Number : 109809/2006

BCRE 230 RIVERSIDE LLC

vs.

FUCHS, ERICH

SEQUENCE NUMBER : # 006

VACATE PRIOR ORDER

INDEX NO.

109809-06

MOTION DATE

MOTION SEQ. NO.

#006

MOTION CAL. NO.

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

NOV 09 2007

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: _____

WKT/ea

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WALTER B. TOLUB J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

REFERENCE

[* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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BCRE 230 RIVERSIDE LLC

Index No. 109809/06
Mtn. Seq. 006

Plaintiff

-against-

ERICH FUCHS

Defendant
-----x

WALTER TOLUB, J.:

By this motion Plaintiff seeks an order (1) granting this court's prior order of July 23, 2007; (2) granting reargument and renewal of said motion; and (3) denying Defendant's motion to amend its pleadings, and dismissing all counterclaims.

Facts

On July 14, 2006 Plaintiff commenced this action against the Defendant seeking injunctive and declaratory relief. Plaintiff sought a declaration that Defendant was in violation of his lease agreement for throwing urine and other matter from the balcony of his apartment. On August 10, 2006, Defendant answered the complaint denying the allegations and asserted three counterclaims; (1) tortious conduct consisting of retaliation and harassment and resulting damages in the sum of \$500,000; (2) defamation arising from the publication of an New York Post article and damages in the sum of \$2.5 million; and (3) attorneys' fees.

FILED
NOV 09 2007
COUNTY CLERK'S OFFICE
NEW YORK

On December 20, 2006, this court issued its Findings of Fact and Conclusions of Law dismissing the complaint and awarding judgment to the Defendant. The Order indicated that it constituted the final disposition of the case even though the issues raised in the counterclaims were not addressed. So, on February 8, 2007, this court issued a superceding order placing the case back on the court's calendar. On May 4, 2007, at a conference, Defendant stated that it wanted to amend its counterclaims and this court directed that Defendant move for leave to amend the counterclaims.

Defendant's original motion seeking to amend its counterclaims was made returnable on June 18, 2007. However, on June, 8, 2007, prior to the actual making of the motion, a conference was held where the motion was discussed. Plaintiff's attorney claims that it was her understanding that the court set July 23, 2007 as the date that Defendant's motion to amend would be submitted and argued. On June 19, 2007 Defendant's motion was granted on default since Plaintiff did not appear at the call of the calendar.

Discussion

Vacating the Default

A motion to vacate an order entered on default pursuant to CPLR §5015 shall be granted where, in the sound discretion of the court, the movant has established that its default was based upon

excusable neglect and there is a meritorious defense to the underlying action. (38 Holding Corp. v. City of New York, 179 AD2d 486 [1st Dept 1992]; Santora & McKay v. Mazzella, 211 AD2d 460 [1st Dept 12995]). Here, Plaintiff's default was based on its attorney's mistaken belief that the for the motion was adjourned until July 23, 2007. Additionally, Plaintiff claims that it has a number of meritorious defenses to the underlying action, including Defendant's failure to state a cause of action. Since the client should not suffer for counsel's mistake and there is a meritorious argument, Plaintiff's motion to vacate the default judgment is granted and upon review, this court denies Defendant's motion to amend its counterclaims.

Leave to Amend Counterclaims

Pursuant to CPLR § 3015(b), leave to amend pleadings shall be freely granted. (CPLR §3015(b); Ditmar Explosives v. A&E Ottaviano, Inc., 20 NY2d 498 [1967]). The purpose behind this principle is to insure the full and complete litigation of a controversy. (Rife v. Union College, 30 AD2d 504 [3d Dept 1968]). However, a counterclaim must have the essential elements to support an independent cause of action against the Plaintiff in the same capacity in which the Plaintiff sues. (Geddes v. Rosen, 22 AD2d 394 [1st Dept 1965]).

Defendant's motion seeks to amend its counterclaims to consist of: (1)malicious prosecution; (2) defamation arising from

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the publication of an New York Post article and damages in the sum of \$2.5 million; (3) tortious conduct consisting injurious falsehood; and (4) attorneys' fees.

Since Defendant's counterclaims do not contain the essential elements to support an independent cause of action against the Plaintiff, the motion to amend the counterclaims is denied for the reasons set forth below.

Malicious Prosecution

The requisite elements of malicious prosecution are (1) the commencement or continuation of a civil or criminal proceeding, where the court granted a provisional remedy or there occurred other interference with the Defendant's person or property; (2) termination of the proceeding in Defendant's favor; and (3) actual malice. (Manti v. New York City Transit Authority, 165 AD2d 373 [1st Dept 1991]).

Here, Defendant has failed to show actual malice. While the Defendant argues that no proof need be provided in support of these allegations at this stage of the litigation, this court has already held a trial concerning Plaintiff's entitlement to an injunction against the Defendant based upon his alleged conduct at the premises. The request for relief was denied by this court after trial, however, there is a lengthy record of testimony, including the testimony of five witnesses. In considering a motion pursuant to CPLR 3211, the court does not need to deem as

true, nor grant any favorable inference, to allegations which have been negated beyond substantial question by affidavits and evidence submitted or that has been flatly contradicted by documentary evidence. (Biondi v. Beekman Hill House Apartment Corp., 257 AD2d 76 [1st Dept 1999]). Here there is no evidence that this action was commenced and motivated by malice. It follows that Defendant's counterclaim for malicious prosecution cannot stand.

Defamation

Defamation is a false statement resulting in injury to reputation. (Rinaldi v. Holt, Rinehart & Winston, Inc., 42 NY2d 369 [1977]). Defamation occurs in the form of libel or slander. Libel involves publication, something in writing or pictures, and slander involves statements, something spoken. The elements of a defamation claim are: (1) a false and injurious statement of fact concerning the plaintiff that exposes a person to hatred, contempt or aversion or causes an unsavory opinion of him or her in the minds of a substantial number in the community; (2) publication to a third-party; and (3) special damages. (Golub v. Enquirer/Star Group, 89 NY2d 1074 [1997]).

Plaintiff argues that Defendant's counterclaim for defamation must be dismissed because there is no recitation if (1) the actual words of the defamation; (2) the identity of the alleged defamers; (3) the identity of the person(s) to whom the

alleged defamatory remarks were published; (4) there is no specification of damages. Instead, Plaintiff argues that Defendant's claim is based on a New York Post article that contains no more information than could be found as a matter of public record within the court's file.

Defendant argues that although CPLR 3016(a) requires a party to set forth the particular words constituting defamation, the Defendant was not present at the time Plaintiff uttered the defamatory statements to the reporters who wrote the Post article and therefore the Defendant should have an opportunity to conduct depositions. This court disagrees. Although the Defendant claims to have sought out depositions of the Post reporters, they have not sought to do so with the instruments provided by the CPLR. No one from the Post was served with a subpoena, or with a Notice of Deposition. Since subpoenas were not served, reporters from the Post have refused to appear for depositions since they are non-parties. Accordingly, Defendant's counterclaim for defamation is insufficient and cannot stand.

Injurious Falsehood

The elements of a cause of action for injurious falsehood are that Plaintiff intentionally uttered or made false statements regarding the Defendant, which resulted in damage to the Defendant with out a legal excuse or justification. (Penn-Ohio Steel Corp. v. Allis-Chalmers Mfg. Co., 7 AD2d 441 [1st Dept

1959]). The utterance or furnishing of false and misleading information may be actionable if done maliciously or with the intention to harm another, or so recklessly and without regard to its consequences, that a reasonably prudent person should anticipate that damage to another will naturally flow. (Id.) It has been occasionally suggested that such an action is within the orbit of a prima facie tort, but there is no valid support in law for the suggestion. (Id.)

By its very nature a false statement intentionally made is wrongful. If it inflicts material harm upon another, which was or should have been in the contemplation of the actor, and it results in actual damage to the Defendant's economic or legal relationships, an action may lie. (Id.) It logically follows that to sustain a complaint, it is not necessary that the pleading must allege that the Plaintiff was solely motivated to injure the Defendant. It is enough if the falsehoods charged were intentionally uttered and did in fact cause the plaintiff to suffer actual damage in his economic or legal relationships.

Here, the alleged statements that defendant claims constitute injurious falsehood, were made concerning Defendant's behavior. Defendant does not plead an identifiable actual loss proximately related to the utterance of any such statements. There is no causal connection between the publishing of the alleged falsehoods and any damage to Defendant's economic or

