

Kaye v Trump

2008 NY Slip Op 31329(U)

May 7, 2008

Supreme Court, New York County

Docket Number: 0116572/2007

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Kay, Eugenia

INDEX NO. 116572/07

MOTION DATE 4/23/08

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -

Trump, Donald

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

Notice of Motion/ Order to Show Cause – Affidavits – _____	FILED MAY 09 2008 COUNTY CLERK'S OFFICE NEW YORK	PAPERS NUMBERED _____
Answering Affidavits – Exhibits _____		_____
Replying Affidavits _____		_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

It is hereby

ORDERED that the application of defendants herein to dismiss the complaint pursuant to CPLR 3211(a)(7), CPLR 3016(a) and Civil Rights Law §74 is granted to the extent that said Complaint is dismissed with prejudice.

CPLR 3211 [a] [7]: Dismiss for Failure to State a Cause of Action

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept

Dated: _____ J.S.C.

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1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR §3026). On a motion to dismiss made pursuant to CPLR § 3211, the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]). However, in those circumstances where the bare legal conclusions and factual allegations are “flatly contradicted by documentary evidence,” they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996], and the criterion becomes “whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1st Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804, 616 NE2d 159 [1993] [CPLR 3211 motion granted where defendant submitted letter from plaintiff’s counsel which flatly contradicted plaintiff’s current allegations of prima facie tort]).

On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211[a] [7] where the parties have submitted evidentiary material, including affidavits, the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS.2d 532 [1st Dept 1989]).

First, there is no independent cause of action for civil conspiracy (*Bronx-Lebanon Hosp. Ctr. v Wiznia*, 284 A.D.2d 265, 266, 726 N.Y.S.2d 847 [2001], *lv. dismissed* 97 N.Y.2d 653, 737 N.Y.S.2d 53, 762 N.E.2d 931 [2001]). And, in light of this court’s dismissal of the remaining purported causes of action below, the cause of action for civil conspiracy may not lie. If a tort claim remained to permit the assertion of a conspiracy claim, the conspiracy allegations herein are conclusory and fail to allege an agreement or common understanding with intent to tortiously injure plaintiff sufficiently to sustain such a cause of action.

Second, to the degree that plaintiff’s complaint asserts a claim for intentional infliction of emotional distress, said claim is inadequately pled. In order to state a cause of action alleging the intentional infliction of emotional distress, the conduct alleged must be “ ‘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’ ” (*Murphy v. American*

Home Prods. Corp., 58 N.Y.2d 293, 303, quoting Restatement [Second] of Torts § 46, comment d; see *Howell v. New York Post Co.*, 81 N.Y.2d 115, 122, *affd* 82 N.Y.2d 690; *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 143; *Hering v. Lighthouse 2001, LLC*, 21 AD3d 449, 451).

In the instant case, even accepting the allegations of the complaint as true, the allegations do not constitute conduct within the rule. With respect to the conduct of Mr. Trump, while these actions may have been unfounded or even improper, they cannot be considered 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" (*Murphy v. American Home Prods. Corp.*, 58 N.Y.2d at 303; cf. *Green v. Fischbein, Olivieri, Rozenholc & Badillo*, 135 A.D.2d 415). Accordingly, the court grants that branch of the defendants' motion to dismiss the complaint to the degree it asserts a claim for intentional infliction of emotional distress pursuant to CPLR 3211(a)(7).

Third, to the degree that the complaint asserts a cause of action for malicious prosecution, in the case of *Gonzalez v Kaye*, Index No. 100596/07 this court has granted voluntary discontinuance of the action brought against plaintiff herein by defendant herein Gonzalez. Further, in the *Gonzalez v Kaye* action, in light of the voluntary discontinuance, the court did not reach the motion for summary judgment. So, there will be no finding that a determination was reached in favor of plaintiff herein.

In the *Board of Managers of 220 Riverside Boulevard at Trump Place et al v Kaye et al* action, Index No. 604291/06, Justice Lehner's decision rendered therein does not translate into a finding that the entire proceeding lacked probable cause, was commenced with malice or establish that the plaintiff had special injury. And, the complaint in the instant action fails to sufficiently allege interference with plaintiff's person or property relating to the actions.

This court grants that branch of the defendants' motion which was pursuant to CPLR 3211(a)(7) to dismiss the complaint to the degree it asserts a cause of action alleging malicious prosecution (see *Hoppenstein v. Zemek*, 62 A.D.2d 979, 403 N.Y.S.2d 542; *Pagliarulo v. Pagliarulo*, 30 A.D.2d 840, 293 N.Y.S.2d 13; see generally *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 401 N.Y.S.2d 182, 372 N.E.2d 17).

Likewise, to the degree the complaint asserts a cause of action alleging abuse of process, the motion to dismiss is granted. "In its broadest sense, abuse of process may be defined as misuse or perversion of regularly issued legal process for a purpose not justified by the nature of the process" (*Board of Educ. of Farmingdale Union Free School Dist. v. Farmingdale Classroom Teachers Assn., Local 1889, AFT AFL-CIO*, 38 N.Y.2d 397, 400, 380 N.Y.S.2d 635, 343 N.E.2d 278). The mere institution of the two civil actions against plaintiff herein, is not

sufficient to support a cause of action alleging abuse of process (*see Curiano v. Suozzi*, 63 N.Y.2d 113, 117, 480 N.Y.S.2d 466, 469 N.E.2d 1324; *Leon v. Couri*, 285 A.D.2d 493, 727 N.Y.S.2d 639).

Finally, this court finds that plaintiff's defamation claim, likewise, is deficient to maintain a cause of action.

All remaining claims asserted in the complaint are insufficient to overcome the instant motion.

Plaintiff's application for leave to replead is denied. It is well established that leave to amend a pleading shall be freely granted absent prejudice or surprise resulting from the delay (CPLR 3025 [b]; *Crimmins Contr. Co. v. City of New York*, 74 NY2d 166; *McCaskey, Davies & Assocs. v. New York City Health & Hosps. Corp.*, 59 NY2d 755). The First Department, however, has consistently held that in order to conserve judicial resources, an examination of the proposed causes of action is warranted (*Non-Linear Trading Co. v Braddis Assocs.*, 243 AD2d 107, 116; *East Asiatic Co. v. Corash*, 34 AD2d 432), and leave to amend will be denied where the proposed pleading fails to state a cause of action (*Tishman Constr. Corp. v City of New York*, 280 AD2d 374; *Stroock & Stroock & Lavan v. Beltramini*, 157 AD2d 590), or is palpably insufficient as a matter of law (*Bankers Trust Co. v. Cusumano*, 177 AD2d 450, lv dismissed 81 NY2d 1067; *Bencivenga & Co. v. Phyfe*, 210 AD2d 22).

In the instant case, plaintiff has failed to submit a proposed amended pleading. The court recognizes that affidavits submitted by a plaintiff may be considered for the limited purpose of remedying defects in the complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-36 [1976]; *Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]). But, to the degree that plaintiff's submissions outline arguments to be made in a proposed amended pleading, they are inadequate to grant said leave.

Based on the foregoing, it is hereby

ORDERED that the application of defendants herein to dismiss the complaint pursuant to CPLR 3211(a)(7), CPLR 3016(a) and Civil Rights Law §74 is granted to the extent that said **Complaint is dismissed with prejudice, and the Clerk of the Court is directed to enter judgment accordingly;** and it is further

ORDERED that the application of plaintiff for leave to amend the complaint is **denied;** and it is further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiff.

This constitutes the decision and order of this court.

FILED
MAY 09 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated 5/7/08

ENTER: *Carol Edmead* J.S.C.

HON. CAROL EDMEAD

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