

Balan v Rothschild

2008 NY Slip Op 32472(U)

September 9, 2008

Supreme Court, New York County

Docket Number: 0115403/2007

Judge: Joan A. Madden

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

PRESENT: Hon Joan A. Madden
Justice

PART 11

Index Number : 115403/2007
BALAN, NELLO
vs
ROTHSCHILD, NAT
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE 5-22-08
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for dismiss + for sanctions
+ cross-motion to amend.

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

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order.

FILED
SEP 11 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: Sept 9, 2008

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

-----X
NELLO BALAN,

Plaintiff,

-against-

NAT ROTHSCHILD AND LE CALL,

Defendants.

FILED

Index No. 115403/07

SEP 11 2008

COUNTY CLERK'S OFFICE
NEW YORK

Joan A. Madden, J.:

In this action seeking redress for damage caused to plaintiff's designer umbrella, defendants move to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211 (a) (7), and seek sanctions pursuant to 22 NYCRR § 130-1.1. Plaintiff opposes the motion and cross moves for leave to file an amended complaint.

Background¹

Plaintiff Nello Balan is the owner of Nello's Restaurant ("Nello's"), in New York City. On or about April 25, 2007, after defendant Le Call ("Call"), a model, had lunch at the restaurant, plaintiff loaned the umbrella to Call that is the subject of this action. According to plaintiff, the umbrella is a limited edition leather umbrella given to him at an earlier date by its designer Jean-Paul Gaultier, and that he told Call that the umbrella was valuable to him, and requested that she take good care of it and return it as soon as possible.

When Call did not return the umbrella by May 25, 2007, plaintiff contacted Call and requested she return the umbrella. Although Call said she would do so, she did not return the

¹The following facts are based on the allegations in the complaint and the proposed amended complaint which, for the purposes of this motion, must be accepted as true as well as the documentary evidence submitted by the parties.

umbrella at or around that time, nor did she return it between May 25, 2007 and October 2007, despite repeated requests by plaintiff.

Between November 1, 2007 and November 5, 2007, plaintiff again asked Call to return the umbrella. Call notified plaintiff that she had given the umbrella to defendant Nat Rothschild (“Rothschild”), and that Rothschild’s chauffeur would return the umbrella to plaintiff.

Rothschild’s chauffeur brought the umbrella to Nello’s at approximately 11:00 am on November 6, 2007. The chauffeur presented the umbrella to plaintiff at which point plaintiff noticed it was in two pieces, one piece consisting of approximately eight inches of the umbrella’s handle, and the other piece consisting of the remainder of the umbrella. Plaintiff refused to accept the umbrella from Rothschild’s chauffeur.

At approximately 3:00 pm on November 9, 2007, the umbrella, which had been glued together, was delivered to Nello’s through ATOZNYC, a messenger service.

Plaintiff commenced this action against Call and Rothschild on November 14, 2007, seeking compensatory and punitive damages for the broken umbrella, and alleging causes of action for prima facie tort, the intentional infliction of emotional distress, and for damage to the umbrella which is allegedly valued at \$5,000.

Defendants now move to dismiss the complaint, arguing that the claims for prima facie tort and the intentional infliction of emotional distress fail to state a cause of action. Specifically, defendants argue that plaintiff has failed to show special damages through allegations of “specific and measurable loss,” or the infliction of harm required to state a claim for prima facie tort, or the “extreme and outrageous conduct” necessary to plead a claim for the intentional infliction of emotional distress. In addition, defendants assert that the complaint fails to allege the type of willful or malicious conduct needed to warrant an award of punitive damages.

Defendants next argue that this action belongs in Small Claims Court or in Civil Court since, as, even if it is assumed that defendants are responsible for breaking the umbrella, plaintiff's damages are at most \$5,000, the alleged value of the umbrella. Defendants also assert that this action has been filed in this court in an effort to obtain publicity for Nello's Restaurant. Therefore, defendants argue, plaintiffs should be sanctioned for knowingly bringing claims that lack merit and which were filed in the Supreme Court for the sole purpose of obtaining media attention. In support of these contentions, defendants submit tabloid and newspaper articles that contain quotes from plaintiff and his attorney regarding this lawsuit.

Plaintiff opposes the motion and cross moves for leave to serve and file an amended complaint. Plaintiff's proposed amended complaint dated April 4, 2008 omits the intentional infliction of emotional distress claim, retains the claims for prima facie tort and damage to the umbrella, and adds as a proposed measure of damages, \$30,000, which is the amount plaintiff alleges it would cost to pay the copyrights to reproduce an umbrella identical to the one broken by defendants.

In support of his cross motion, plaintiff submits his own affidavit and an affidavit from Gilbert Center ("Center"), who describes himself as an experienced umbrella maker and repairman. Center states that even if he could buy the equipment to reproduce the umbrella, he could not do so since the handle indicates that the umbrella is subject to copyright protection. Balan states that to re-create the exact umbrella, he would have to buy the copyrights from the designer for approximately \$30,000, but provides no evidentiary basis for this estimate.

In reply, defendants argue that permission to amend the complaint should be denied since, like the original complaint, the amended version is insufficient as a matter of law, and that plaintiff's assertion that he is entitled to \$30,000, based on the copyright costs is an improper

measure of damages and is an obvious attempt to retain jurisdiction in this court and to avoid the imposition of sanctions.

Discussion

Under CPLR 3025(b), motions to amend are freely granted in the absence of prejudice or unfair surprise resulting from delay, unless the proposed amendment is plainly lacking in merit. Thomas Crimmins Contracting Co., Inc. v. City of New York, 74 N.Y.2d 166 (1989). To demonstrate merit, “proponent must allege legally sufficient facts to establish a prima facie cause of action or defense in the proposed amended pleading. If the facts alleged are incongruent with the legal theory relied on by the proponent the proposed amendment must fail as a matter of law.” Daniels v. Empire-Orr, Inc., 151 A.D.2d 370, 371 (1st Dep’t 1989) (citations omitted). When the proponent meets this initial burden, “the merit of the alleged pleading must be sustained...unless the alleged insufficiency or lack of merit is clear and free from doubt.” Id.

As set forth below, as this is an action for property damage, there is no legal or factual basis for a claim of prima facie tort, an award of punitive damages, or for compensating plaintiff for the cost of replicating the umbrella. Accordingly, the motion to dismiss is granted to the extent indicated below, and the cross motion to amend is denied.

Prima facie tort is a cause of action arising out the intentional infliction of economic damages, without excuse or justification. Board of Education v. Farmingdale Classroom Teachers Assoc., 38 N.Y.2d 397, 405-406 (1975). In this case, plaintiff does not allege, and there is no basis for finding that, the damage to plaintiff’s umbrella involved an intent by defendants to cause economic damage to plaintiff. Moreover, to state a cause of action for prima facie tort, plaintiff must plead special damages in the form of a “specific and measurable loss.” Freihofer v. Hearst Corp., 65 N.Y.2d 135, 143 (1985). Here, plaintiff has not met this

requirement but, instead, generally alleges that he suffered damages in the patently excessive amount of \$1,000,000 for the loss of an umbrella allegedly worth \$5,000. See R.I. Island House, LLC v. North Town Phase II Houses, Inc., 51 A.D.3d 890 (2d Dep't 2008) (holding that allegations for prima facie tort were properly dismissed where the complaint failed to allege special damages with specificity); Leather Development Corp. v. Dun & Bradstreet, Inc., 15 A.D.2d 761 (1st Dep't 1962), aff'd, 12 NY2d 909 (1963) (holding that round sums such as \$500,000 and \$1,000,000, absent itemization, must be deemed allegations of general, and not special, damages). Accordingly, the claim for prima facie tort must be dismissed.

Plaintiff's request for punitive damages is also without merit. An award of punitive damages is reserved for those cases where it can be shown that a defendant's conduct was "egregious, willful or morally culpable." Munoz v. Peretz, 301 A.D.2d 382 (1st Dep't 2003). Under this standard, allegations that defendants intentionally damaged plaintiff's umbrella are clearly insufficient to warrant the recovery of punitive damages. Anderson v. Nottingham Village Homeowner's Ass'n, Inc., 37 A.D.3d 1195, 1198 (4th Dep't 2007) (holding that even where damage to property and the health of others results, a high degree of moral culpability is necessary to recover punitive damages).

Equally unavailing is plaintiff's position that he can recover \$30,000 in damages based on the estimated cost of reproducing the designer umbrella, including the alleged copyright costs.²

²Center states in his affidavit that the umbrella cannot be repaired to restore it to its original state, as the handle would show some difference between the original and the mended portion. Assuming arguendo the truth of Center's statement, when repairs cannot return an item to its original condition, the measure of damages is the difference in the market value of the property before the damage and after the repair and not the cost replicating the damaged item. See Pat Hartley, Inc v. American Reciprocal Insurers, 21 A.D. 2d 761 (1st Dept 1964) (holding that the measure of damages for damage to property is the difference in the market value of the property before and after the injury); Johnson v. Scholz, 276 A.D.163, 165 (2d Dep't 1949)

Moreover, notably absent from the record is any evidentiary support for allegations in the amended complaint and the statement in plaintiff's affidavit that the costs of replicating the umbrella would be \$30,000. Accordingly, as there is no factual or legal basis for seeking \$30,000 in damages for replacing an umbrella allegedly valued new at \$5,000, the complaint may not be amended to add this proposed measure of damages.

Defendants also move for sanctions under 22 NYCRR § 130-1.1, asserting that plaintiff and his attorney engaged in "frivolous conduct" by knowingly filing claims lacking merit so that this action could be commenced in Supreme Court. Under Part 130, conduct is frivolous if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification and reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

In considering whether specific conduct is frivolous, courts are required to examine "whether or not the conduct was continued when its lack of legal or factual basis was apparent [or] should have been apparent." 22 NYCRR 130-1.1 [c]; Navin v. Mosquera, 30 A.D.3d 883 (3d Dep't 2006).

Here, plaintiff filed this action in Supreme Court, even though it involves the loss of an

("Where the repairs do not restore the property to its condition before the accident, the difference in market value immediately before the accident and after the repairs have been made may be added to the cost of repairs."); cf. D. Appelton & Co. v. Zeese-Wilkinson Co., 140 Misc. 653 (App Term 1931)(holding that proof of replacement costs less depreciation is a properly considered in determining the measure of damages for the loss of plates for illustrating book with no market value, but that plaintiff failed to show the reasonableness of amounts expended on the new plates which were a different type than the plates lost).

umbrella valued at \$5,000, a claim that is within the jurisdictional limit of Small Claims Court. See New York Civil Court Act § 1801(providing that claims seeking \$5,000, exclusive of costs and interest, may be brought in Small Claims Court). Moreover, as indicated above, there is no legal or factual basis for plaintiff's claims for prima facie tort, the intentional infliction of emotional distress, the request for punitive damages, or his request for compensation of \$30,000 for an umbrella allegedly valued at \$5,000. Furthermore, plaintiff refused to transfer this action to a lower court even after defendants' counsel sent plaintiff's counsel a letter dated January 25, 2008, notifying him of the frivolous nature of plaintiff's claims and his intention to move for sanctions. In addition, when defendants made the dismissal motion, plaintiff opposed the motion, but cross moved for leave to amend the complaint.

Plaintiff's pursuit of claims without any legal or factual basis has resulted in unnecessary legal fees to be incurred by defendants in connection with this motion and the waste of judicial resources in connection with the determination of the motion and cross motion. Under these circumstances, it is appropriate to impose sanctions against plaintiff's attorney as directed below. Bernadette Panzella, P.C. v. De Santis, 36 A.D.3d 734 (2nd Dep't 2007) (holding that an improper motion to remove a commercial small claims action to the trial court warranted sanctions, including \$2,500 to be paid to the Lawyers' Fund for Client Protection).

Conclusion

In view of the above, it is

ORDERED that defendants' motion to dismiss is granted to the extent of dismissing the claims for prima facie tort, the intentional infliction of emotional distress and the request for punitive damages, and the claim for property damage to the umbrella remains; and it is further

ORDERED that the plaintiff's cross motion to amend is denied; and it is further

ORDERED the motion for sanctions is granted to the extent that on or before October 15, 2008, plaintiff's counsel William S. Beslow, Esq. shall pay the sum of \$500.00 to the Lawyer's Fund for Client Protection, 55 Elm Street, 3d Floor, Albany, New York 12210; and it is further

ORDERED that proof of such payment be provided to the Clerk of Part 11, and defendants' counsel within 30 days after service of copy of this order; and it is further

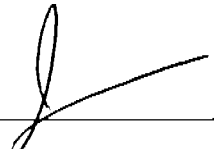
ORDERED that the remainder of this action, bearing Index No. 115403/07 be, and it hereby is, removed from this Court and transferred to the Civil Court of the City of New York, County of New York; and it is further

ORDERED that the Clerk of New York County shall transfer to the Clerk of the Civil Court of the City of New York, County of New York, all papers in this action now in his possession, upon payment of his proper fees, if any, and the Clerk of the Civil Court of the City of New York, upon service of a certified copy of this order upon him and upon delivery of the papers of this action to him by the Clerk of the County of New York, shall issue to this action a Civil Court Index Number; and it is further

ORDERED that the above-entitled action be, and is hereby, transferred to said Court, to be heard, tried, and determined as if originally brought therein but subject to the provisions of CPLR 325(d).

A copy of this decision and order is being mailed by my chambers to counsel for the parties.

Dated: September 9, 2008



J.S.C.

FILED
SEP 11 2008
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NEW YORK