

Platt v Sokol

2009 NY Slip Op 31660(U)

July 21, 2009

Supreme Court, New York County

Docket Number: 102842/2008

Judge: Louis B. York

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

PRESENT: **LOUIS B. YORK**
J.S.C. Justice

PART 2

Platt
- v -
Sokol

INDEX NO. 102842/08
MOTION DATE 7/07/09
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

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

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 accompanying decision.*

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

FILED
JUL 27 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/24/09

Lby
LOUIS B. YORK J.S.C.

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

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

-----X
GERALD PLATT and VICKI PLATT,

Plaintiffs,

Index No. 102842/2008

-against-

**ROBYN SOKOL, JESSICA SOKOL and
JASON AARON SOKOL,**

Defendants.

-----X
LOUIS B. YORK, J.:

In this action, plaintiffs, the daughter of Maury and Renee Deutsch and her husband, sue defendants, another daughter of Maury and Renee Deutsch along with her daughter, who is also the Deutsch's granddaughter. The action has been discontinued against Jason Aaron Sokol, the son of defendant Robyn Sokol. Currently the Court has before it a motion to dismiss the complaint under CPLR § 3211. The Court denies the motion for the reasons below.

According to the complaint, which the Court accepts as true for the purposes of this motion to dismiss, see Almazon v. Gani Realty Corp., 60 A.D.3d 491, 492, 876 N.Y.S.2d 1, 2 (1st Dept. 2009), defendants first began inflicting emotional harm upon plaintiffs around the time of their mother's illness and death. Among other things, defendants allegedly assaulted and verbally abused plaintiff Gerald Platt at Renee Deutsch's shiva and called the police to the shiva to have Mr. Platt arrested. Subsequently, defendants sought and obtained a protective order against Gerald Platt on two occasions, without basis; then they failed to appear at the court conferences for these proceedings, resulting in the dismissal of the orders with prejudice.

There is even more detailed wrongdoing which relates to the death of Maury Deutsch. According to plaintiffs, defendants wrongfully induced their father prior to his death to change power of attorney from plaintiff daughter to defendant daughter, and made one or more motions to revoke Vicki Platt's guardianship of Maury Deutsch and name Robyn Sokol as guardian instead.¹ Defendants also wrote a letter to Mr. Deutsch's bankers at J.P. Morgan accusing plaintiffs of mishandling his funds and requesting that the bank close his existing accounts and transfer the assets to new accounts to prevent further misconduct. Following the death of Maury Deutsch, defendants filed false charges against plaintiff Vicki Platt with the Office of Professional Medical Conduct, initiating a baseless investigation against her regarding her allegedly harmful treatment of her father. Finally, on numerous occasions within and outside of the court proceedings they accused plaintiffs of theft from and mistreatment of Maury Deutsch. Plaintiffs state that this was all part of a scheme to upset them and strip them of their right to a one third share of Mr. Deutsch's estate.

The complaint also states that because of defendants' behavior, plaintiffs were forced to hire security guards to patrol their daughter's wedding. It is not clear from the complaint why they had to hire the guards. At any rate, plaintiffs state that because of this and the other alleged harassment and misconduct they suffered and continue to suffer great emotional harm. Based on the above, plaintiffs sue defendants on several bases, not all of which are clearly stated in the complaint but which include abuse of process, intentional infliction of emotional distress, prima facie tort and negligent infliction of emotional distress.

Defendants currently move to dismiss the complaint under CPLR § 3211. Although this

¹ According to defendants, Mr. Deutsch passed away before the motions were resolved.

motion was submitted on default, “the mere absence of opposition is not enough for the moving parties to prevail: they must actually prove their case.” In re Judicial Settlement of Accounts of Mosey, 15 Misc. 3d 1104A, 836 N.Y.S.2d 499 (table)(Surr. Ct. Erie County 2007) (avail at 2007 WL 776970, at *2). This imposes on the Court a duty to evaluate the motion to ensure that they have established a right to the requested relief. Moreover, the scope of a court’s review on a motion to dismiss under CPLR 3211 is narrowly circumscribed:

The court must accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory' The complaint must be construed liberally' . . . , and the court must accept as true not only the complaint's material allegations' but also whatever can reasonably be inferred there from' in favor of the pleader In ruling on a motion to dismiss, the court is not authorized to assess the merits of the complaint or any of its factual allegations, but only to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action.

Courtman v. Hudson Valley Bank, 11 Misc. 3d 1068, 816 N.Y.S.2d 694(table) (Sup. Ct. N.Y. County 2006) (avail at 2006 WL 734389, at *3)(citations and internal quotation marks omitted). Accordingly, the Court considers the motion and annexed documents to see whether they justify dismissal of the action.

First, the motion alleges that as a matter of law the facts above are not sufficiently outrageous to establish the elements of a claim for intentional infliction of emotional distress. However, movants have not indicated why the behavior at hand is not sufficiently egregious under the prevailing law and it is not the Court’s role to conduct this analysis independently and create an argument on movants’ behalf. There is no application of the legal principles to the facts, no comparison of this case to any factually similar – or, indeed, any – cases where intentional infliction of emotional distress claims have or have not been dismissed for failure to

state a claim. Counsel mentions that this type of claim is hard to prove but this does not mean that the claim should be reflexively dismissed.

Finally on this point, defendants assert that they are not guilty of conduct by which they intended to harm plaintiffs and they support this claim with their affidavits setting forth their side of the story. However, this argument challenges the factual allegations in the complaint. Therefore it is not a persuasive argument in a motion under CPLR § 3211, where the Court accepts the allegations in the complaint as true. See Courtman, 11 Misc. 3d 1068, 816 N.Y.S.2d 694(table) (Sup. Ct. N.Y. County 2006) (avail at 2006 WL 734389, at *3).

In their complaint, plaintiffs assert negligent as well as intentional infliction of emotional distress. It appears that defendants do not address this part of the complaint in their motion, as they limit their discussion to the intentional tort, repeatedly asserting their lack of intent to harm plaintiffs. Therefore, the Court does not address the claims as they relate to negligent infliction of emotional distress.

Second, counsel seeks to dismiss a cause of action based on prima facie tort. Counsel rightly asserts that where traditional causes of action afford a plaintiff total relief, there is no claim for prima facie tort. “Prima facie tort was designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy, and not to provide a ‘catch all’ alternative for every cause of action which cannot stand on its legs.” Lancaster v. Town of East Hampton, 54 A.D.3d 906, 908, 864 N.Y.S.2d 537, 539 (2nd Dept. 2008). However, the motion does not explain how this principal necessitates dismissal of the claims at hand or even applies to it. Again, the Court is the neutral arbiter of the dispute and its role is not to create an argument to benefit defendants where, as here, defendants have not

analyzed the issue in their papers.

One argument the motion does raise on this issue is that defendants did not intentionally cause harm – that, instead, plaintiffs are the ones guilty of extreme and outrageous conduct. It is true that if plaintiffs did not allege intent there would be no cause of action for prima facie tort.

See Kaisman v. Hernandez, 61 A.D.3d 565, 566, 878 N.Y.S.2d 305, 307 (1st Dept. 2009).

Counsel supports this position with the affidavits of the two defendants, former defendant Jason Sokol, and another family member, Faye Fein; the Fein affidavit relates to the guardianship proceeding. The statements in the various affidavits do little more than challenge the version of the facts that plaintiffs set forth in their complaint – criticizing plaintiffs’ treatment of Maury Deutsch, for example, and stating that Robyn Sokol did not file a complaint against her sister with the Office of Professional Misconduct. Here, as earlier, for the purposes of their motion to dismiss under CPLR § 3211 defendants must accept as true the version of the facts in the complaint. See Almazon, 60 A.D.3d at 492, 876 N.Y.S.2d at 2. Accordingly, these factual challenges are unavailing in support of this prong of their motion.

Third, movants seek to dismiss the cause of action alleging abuse of process. Their argument, essentially, is that they had a valid basis for commencing the numerous proceedings against plaintiffs. Robyn Sokol declares that she obtained the restraining order because she feared for her life, but she did not follow up with the order because of the emotional strain the court appearances caused her. Co-defendant Jessica Sokol states that her motions relating to plaintiff Vicki Platt’s status as guardian of Maury Deutsch had a valid basis because Ms. Platt abused his finances and improperly removed him from the hospital when he desperately needed hospital care. For the same reasons as above, these arguments relate to the veracity of the

statements in the complaint and do not support a motion to dismiss for failure to state a cause of action. The Court does not evaluate the reasonableness of Ms. Sokol's decision not to pursue the order of protection proceedings. It does note that because the proceedings did not terminate favorably to Ms. Sokol, she cannot refute the factual allegations in the complaint as a matter of law.

Finally, the Court notes that movants submitted an improper affirmation of service to accompany this motion. It states that the affiant has been sworn, but it is not a notarized document.² In light of the heated nature of the disputes involved in this motion, the parties should adhere strictly to the requirements. Similarly, though service was technically timely defendants served the motion by mail just over two weeks in advance of the return date and made the return date right after a holiday weekend. In the future, the Court hopes that the parties will err on the side of caution and allow for extra time to respond to any motions during holidays.

Based on the above, it is

ORDERED that the motion is denied.

Dated: July 21, 2009

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LOUIS B. YORK
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² The affirmant also does not state that she is an attorney and entitled to affirm rather than notarize the document. However, as she is counsel on the moving papers, the Court would have overlooked the omission had the motion otherwise been in order.