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SHORT FORM ORDER mg, md

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 4

Present: HON. UTE WOLFF LALLY
Justice

LOUIS J. GACCIONE, JR.,

Plaintiff,

-against-

ESTELLE SCARPINATO and
EMANUAL J. SCARPINATO,

Defendants.

Motion Sequence #4, #5
Submitted June 30, 2010

INDEX NO: 3567/06

The following papers were read on this motion for partial summary judgment:

Notice of Motion and Affs.....1-3
Notice of Cross-Motion and Affs.....4-6
Affs in Opposition.....7-14
Affs in Reply.....15-17
Affs in Sur Reply.....18-21
Memorandum of Law.....22-22a

Upon the foregoing papers, it is ordered that this motion by defendants Estelle Scarpinato and Emanual J. Scarpinato for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the plaintiff's complaint as against them is granted to the extent provided herein.

This cross-motion by the plaintiff Louis J. Gaccione, Jr. for an order pursuant to CPLR 3025(b) granting him leave to amend its complaint is determined as provided herein.

In this action, the plaintiff Gaccione seeks to recover money damages upon the defendants' alleged slander as well as their alleged malicious interference with his prospective economic relationships and his custodial and parental rights to his children. The defendants seek summary judgment dismissing the complaint.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Sheppartd-Mobley v King*, 10 AD3d 70, 74, *aff'd. as mod.*, 4 NY3d 627, *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." (*Sheppard-Mobley v King*, *supra*, at p. 74; *Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. (*Alvarez v Prospect Hosp.*, *supra*, at p. 324). The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. (See, *Demishick v Community Housing Management Corp.*, 34 AD3d 518, 521, *citing Secof v Greens Condominium*, 158 AD2d 591).

In his complaint, the plaintiff Louis Gaccione, an attorney, alleges that since 1993, he shared offices with Pat R. Mercurio, Esq., who was the principal attorney for defendant Emanuel Scarpinato's real estate ventures and that as a result, he himself earned hundreds of thousands of dollars rendering legal services to Scarpinato's Enterprises, as

well as to many connections realized via his relationship with Scarpinato Enterprises. He alleges that he married Debra Perangelo on January 13, 1996 and that they had two children, Gabriela born on March 19, 2001 and Lydia born on April 9, 2002. He further alleges that Debra absconded with their children on December 18, 2004 and commenced an action for divorce on or about January 6, 2006. He alleges that visitation with his children was extremely problematic and that he sought defendant Estelle Scarpinato's assistance as an intermediary to resolve that problem with his wife. He nevertheless alleges that when he told Estelle that because of his wife's dilatory conduct, he had no alternative but to seek custody of his girls, she became enraged and threatened to do "everything in her power to prevent that from happening." He alleges that to that end, Estelle falsely told her husband defendant Emanuel Scarpinato that he had threatened her and their children, which Emanuel and/or Estelle have allegedly repeated to, *inter alia*, Scarpinato Enterprise's accountant Andrew Urchenko, an office manager for one of Scarpinato Enterprise's managing agents, Isabel Ocasio, and one of Scarpinato Enterprise's attorneys, James Griffin, who, he alleges, repeated the statement at a court conference in his matrimonial action. The plaintiff further alleges that Emanuel, in fact, told Ocasio that his problems would "go away if he 'would stop fighting for custody of his children.' " The plaintiff also alleges that Estelle herself repeated the false defamatory statement to his wife's attorney, Robert G. McDermott and that Estelle also falsely told his wife that he had also threatened her attorney and his wife, children and parents with physical violence. He alleges that the statements' circulation in the community has caused his neighbors and former and potential clients to shun and avoid him.

As and for his first cause of action, the plaintiff seeks to recover for slander, claiming that the defendants' statements were false, libelous per se and have harmed him in his profession and subjected him to scorn and ridicule in the community and caused emotional distress.

As and for his second cause of action, the plaintiff seeks to recover for malicious interference with prospective economic relationships. He claims that the plaintiff Estelle's false statements were made with the intent and ultimate success of getting him fired by Scarpinato Enterprise, as well as others, his eviction from his law office of 10 years, and caused an increase in the rent on his marital residence.

As and for his third cause of action, the plaintiff claims that defendants embarked upon their campaign of falsehoods to hinder his attempt to exercise his parental rights.

The defendants maintain that even assuming that the facts as the plaintiff alleges, his claims fail as a matter of law.

In response to the defendants' motion for summary judgment, the plaintiff seeks to amend his complaint to add a claim for intentional infliction of emotional distress and to clarify ¶ 30 of his complaint.

In opposition to this motion, the plaintiff has submitted the examination before trial testimony of Eleanor Mercurio who testified that Estelle Scarpinato told her on August 5, 2005 that the plaintiff had threatened her and her children. He has also submitted a letter written by the children's Law Guardian dated January 26, 2007 which advised that Mrs. Scarpinato was not fond of the plaintiff, that she made her feelings known to her clients (the children), and that as such, that information should be considered by the court-appointed child psychiatrist Dr. Favaro in deciding whether these children should be

exposed to her. The plaintiff has also submitted the affidavit of Anthony Yovino, his attorney in his matrimonial action, who attests that in August, 2005, his wife's former attorney James Griffen, Esq., appeared at a court conference on behalf of Mr. Scarpinato (who was not even a party) and stated that the plaintiff had threatened his client's wife and children and that Gaccione had been terminated as an attorney for the Scarpinato Enterprises as a result. The plaintiff has also submitted an affidavit of Isabel Ocasio, a former employee of the Scarpinato Enterprises who attests, *inter alia*, that Emanuel Scarpinato told her not to employ the plaintiff when she sold her house and urged her not to testify for plaintiff in his matrimonial action. He has also submitted the affidavit of a client Frank Pecoraro who attests that while at the plaintiffs' office on November 2, 2005, he heard Estelle Scarpinato say, "[o]h, you have a client. I'll make sure you never have another one."

SLANDER

"The elements of a cause of action (to recover money damages) for defamation are a 'false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se'." (*Salvatore v Kumar*, 45 AD3d 560, 563, quoting *Dillon v City of New York*, 261 AD2d 34, 38). "Generally, a plaintiff alleging slander must plead and prove that he or she has sustained special damages, i.e., 'the loss of something having economic or pecuniary value.' " (*Rufeh v Schwartz*, 5 AD3d 1002, 1003, quoting *Liberman v Gelstein*, 80 NY2d 429, 434-435). "A plaintiff need not prove special damages, however, if he or she can establish that the alleged defamatory statement constituted

slander per se." (*Rufeh v Schwartz*, *supra*, at p. 1003). "The four exceptions which constitute 'slander per se' are statements (i) charging plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman." (*Epifani v Johnson*, 65 AD3d 224, 234, *citing Liberman v Gelstein*, *supra* at p. 435).

Slander *per se* premised upon injury to a plaintiff in his or her trade, business or profession " 'is limited to defamation of a kind incompatible for the proper conduct of the business, trade, profession or office itself. The statement must be made with reference to a matter of significance and importance for that purpose, rather than a more general reflection upon the plaintiff's character or qualities.' " (*Rufeh v Schwartz*, *supra*, at p.1004-1005, *citing Zysk v Fidelity Title Ins. Co. of N.Y.*, 14 AD3d 609). "Special damages . . . are defined as the loss of something having economic or pecuniary value such as loss of profits." (*Wolf Street Supermarkets, Inc. v McPartland*, 108 AD2d 25, 32, *citing Hogan Herald Co.*, 84 AD2d 470, 480, *aff'd* 58 NY2d 630, Restatement, Second of Torts § 575).

> "Special harm may be a loss of presently existing advantages as a discharge from employment. It may also be a failure to realize a reasonable expectation of gain, as the denial of employment which, but for the currency of the slander, the plaintiff would have received. It is not necessary that he be legally entitled to receive the benefits that are denied him because of the slander. It is enough that the slander has disappointed his reasonable expectation of receiving a gratuity." Restatement, Second of Torts § 575.

"For the defamation to be a legal cause of the special harm, it is necessary that it be a substantial factor in bringing about the harm . . . [i.e., it] must be a necessary antecedent of the harm, which would not have occurred without it. It is not necessary . . . that the

defamation be the sole cause of the special harm, so long as it has played a substantial part in bringing it about." Restatement, Second Torts § 622A.

The alleged defamatory statements do not constitute slander per se. [*Liberman v Gelstein*, *supra*; *Cammarata v Cammarata*, 61 AD3d 912; *Hassig v FitzRandolph*, 8 AD3d 930 (threats to kill not libelous per se); *Warlock Enterprises v City Center Assoc.*, 204 AD2d 438) (where the "alleged statement at worst reflects upon one's character and qualities and does not relate to his trade, business or profession," statement is not libelous per se); see also, *Golub v Enquirer/Star Group, Inc.*, 89 NY2d 1074; *Kowalczyk v McCullough*, 55 AD3d 1208; *Rufeh v Schwartz*, *supra*; *Stephan v Cawley*, 24 Misc. 3d 1204(A) (Supreme Court New York County 2009)].

Nevertheless, whether the plaintiff has sustained special damages presents an issue of fact. In his second amended Bill of Particulars, the plaintiff has specifically identified 47 clients in addition to Scarpinato Enterprises whose business he alleges he has lost on account of the defendants' defamatory statements. The absence of relevant financial data to precisely establish the plaintiff's loss at this juncture is of no moment.

INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONSHIPS

Where, like here, a claim is based on interference with prospective non-binding business contractual relationships, "the plaintiff must show that defendant's conduct was not 'lawful' but 'more culpable.' The implication is that, as a general rule, the defendant's conduct must amount to a crime or an independent tort." (*Carvel Corp. v Norman*, 3 NY3d 182, 190; *citing Guard-Life Corp. v S. Parker Hardware Mfg. Corp.*, 5 NY2d 183; *NBT Bancorp. Inc. v Fleet/Norstar Fin. Group, Inc.*, 87 NY2d 614) " 'A plaintiff must show that

the defendant interfered with the plaintiff's business relationships either with the sole purpose of harming the plaintiff or by means that were unlawful or improper.' " (*Out of Box Promotions, LLC v Koschitzki*, 55 AD3d 575, 577, quoting *Nassau Diagnostic Imaging & Radiation Oncology Assoc v Winthrop-University Hosp.*, 197 AD2d 563, *citing Guard Life Corp. v Parker Hardware Mfg. Corp.*, *supra*; *BGW Dev. Corp. v Mount Kisco Lodge No. 1552 of Benev. and Protective Order of Elks of the United States of America, Inc.*, 247 AD2d 565). "Wrongful means includes physical violence, fraud, misrepresentation, civil suits, crime prosecutions and some degree of economic pressure but more than simple persuasion is required." (*Guard Life Corp. v Parker Hardware Mfg. Corp.*, *supra*, at p. 191).

There is at a minimum a question of fact whether the defendants' alleged acts were "solely malicious" and done only for the purpose of harming the plaintiff. There is no evidence to indicate they were done because of economic self-interest. Similarly, the alleged defamatory statements, if made and untrue, constitute wrongful means. [See, *Smith v Meridian Technologies, Inc.*, 57 AD3d 685; *Coan v Estate of Chapin*, 156 AD2d 318; *Herlihy v Metropolitan Museum of Art*, 160 Misc. 2d 279 (Supreme Court New York County 1994)].

INTERFERENCE WITH CUSTODIAL RIGHTS

"The tort of intentional interference with a parent's custodial rights is rather narrow." (*Casivant v Greene County Community Action Agency, Inc.*, 234 AD2d 818, 819, *aff'd* 90 NY2d 969). "Cases upholding the existence of this tort have involved 'violent abduction, willful disobedience of a court custody order, and wrongful detention.' " (*Casivant v*

Greene County Community Action Agency, Inc., *supra*, at p. 819, quoting *Johnson v Jamaica Hosp.*, 62 NY2d 523).

Even if true, the allegations regarding defendants' interference with the plaintiff's parental and custodial rights simply fail as a matter of law.

PROPOSED AMENDMENT: INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The conduct alleged did not constitute the extreme outrageous wrongdoing necessary to support a claim for intentional infliction of emotional distress. (*Howell v New York Post Co.*, 81 NY2d 115, 121; *Murphy v American Home Prods. Corp.*, 58 NY2d 1; *Freihofer v Hearst Corp.*, 65 NY2d 135). In any event, the plaintiff has not provided the required medical evidence (*Walentas v Johnes*, 257 AD2d 352, *citing Leone v Leewood Serv. Sta.*, 212 AD2d 699, 672, *lv den.* 86 NY2d 709), and that claim would be untimely (*Kwarren v American Airlines*, 303 AD2d 722; *Peters v Citibank, N.A.*, 253 AD2d 830).

As for the proposed amendment amplifying to whom defendants made the alleged defamatory statements, leave is granted.

Leave to amend the complaint to add a cause of action sounding in intentional infliction of emotional distress is denied.

In conclusion, the third cause of action alleging interference with custodial rights is dismissed pursuant to CPLR 3212.

Dated: August 16, 2010

UTE WOLFF LALLY, J.S.C.

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