

Aretakis v Repetti

2010 NY Slip Op 33656(U)

December 15, 2010

Supreme Court, New York County

Docket Number: 113032/2007

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. JUDITH J. GISCHE PART 10

Justice

Aretakis

Plaintiff (s)

INDEX NO.

113032 | 07

- v -

MOTION DATE

MOTION SEQ. NO.

#004

MOTION CAL. NO.

Repetti

Defendant(s)

The following papers, numbered 1 to _____ were 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

FILED

DEC 16 2010

NEW YORK
COUNTY CLERK'S OFFICE

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

Dated: 12/15/10

[Signature]
Hon. Judith J. Gische, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X
John A. Aretakis and Richard Regan,

Plaintiff (s),

DECISION/ ORDER
Index No.:113032/2007
Seq. No.: 004, 005

-against-

PRESENT:
Hon. Judith J. Gische, JSC

George Repetti and Mullholland, Minion and
Roe,

Defendant (s).

-----X

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of
this (these) motion(s):

Papers	Numbered
Motion Seq. # 004	
Notice of Motion, CC affd., exhibits.....	1
JAA affd.....	2
RR affd.....	3
CC affd. in further support, exhibits.....	4
CC Reply affd., exhibits.....	5
 Motion Seq. # 005	
Notice of Motion, WJC affirm., exhibits.....	1
Exhibits continued.....	2
Exhibits continued.....	3
Exhibits continued.....	4
JAA affd.....	5
RR affd.....	6
Rev.RMH affd.....	7
WJC reply affirm.....	8
 Transcript dated 10/7/10.....	9

FILED
DEC 16 2010
NEW YORK
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-----X
Upon the foregoing papers the decision and order of the Court is as follows:

The court presently has before it two motions. The first motion is by non-party Bishop William Murphy to quash a subpoena to take his deposition in this action and for related relief (Mot. Seq.# 004). The second motion is by defendants, seeking dismissal of the complaint under both CPLR §3211 and §3212 (Mot. Seq. #005). Defendants also seek part 130 sanctions. Plaintiffs, each appearing *pro se*, oppose both motions submitted. Issue has been joined and the motion for summary judgment was brought before any Note of Issue has been filed. (CPLR § 3212; Brill v. City of New York, 2 N.Y.3d 648 [2004]). The motion for summary judgment is, therefore, properly before the Court for consideration.

The court will deal with the defendants' motion first, since its disposition impacts consideration and disposition of the earlier motion to quash.

Summary Judgment

A movant seeking summary judgment in its favor must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). The evidentiary proof tendered, however, must be in admissible form (Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 [1979]). Once met, this burden shifts to the opposing party, who must then demonstrate the existence of a triable issue of fact, also through admissible evidence (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]; Forrest v. Jewish Guild for the Blind, 309 A.D.2d 546 [1st Dept 2003]). On a motion for summary judgment, it is for the court to decide any issues

of law that are raised (Hindes v. Weisz, 303 A.D.2d 459 [2nd Dept 2003]).

The complaint alleges four separate causes of action respective for: [1] "false statements, libel and defamations;" [2] tortious interference with business relations; [3] intentional infliction of emotional distress and [4] *prima facie* tort. It also seeks punitive damages. The answer denies the material allegations of the complaint, asserts 11 affirmative defenses and 2 counterclaims. Discovery, which has been supervised, is substantially complete. The only remaining discovery is the dispute over Bishop Murphy's deposition.

Certain facts are either undisputed or indisputable based upon the record developed:

Plaintiff, John Aretakis ("Aretakis"), was a licenced attorney in the State of New York at all times relevant to the claims made in this case. ¹

In January 2006, plaintiff Richard Regan ("Regan"), represented by Aretakis, commenced an action in Nassau County Supreme Court against Father Daniel Babis, the Rockville Centre Diocese and Bishop William Murphy (index # 515/06) ("Nassau County action"). The defendants named in the Nassau County action were represented by the defendants named in this action, who are respectively an attorney ("Repetti") and the law firm at which he practiced at the time ("Mullholland, Minion and Roe").

The Nassau County action was commenced by the service of a summons only.

¹During the pendency of this action, and for unrelated reasons, Aretakis was suspended from the practice of law for a period of a year. 57 AD3d 1160 (3rd dept. 2008) app. dsmd. 11 NY3d 919 (2009). While at first Aretakis was the attorney of record for both plaintiffs in this matter, since his suspension, each of plaintiffs has been appearing *pro se*.

The summons generally stated: "The nature of this action is sexual abuse of children in the United States and Canada and negligence, negligent supervision, hiring, training and intentional tortious acts and other issues regarding sexual abuse of children and the cover-up of same." Despite a demand by defendants for a formal complaint, none was served. A motion to dismiss the Nassau County action was granted, without opposition, by decision and order dated May 10, 2006.

Regan claims that he withdrew the Nassau County action, based upon the then recent Court of Appeals ruling in Zampano v. Quinn; E/O Boyle v. Smith, (6 NY3d 666 [2006]). In Zampano, the Court of Appeals held that the church's failure to affirmatively come forward with information about sexual abuse of children by members of the clergy did not equitably estop the running of the statute of limitations on civil actions for the related torts. The documentary evidence in the Nassau County action, however, simply shows that Regan defaulted in opposing a motion to dismiss. Whether Regan's decision, to not oppose the motion to dismiss, was motivated by his belief that the claim would otherwise be barred by the statute of limitations, is not knowable on this record. In any event, his motivation does not really impact this decision.

At some point, through Eileen Puglisi, the Diocesan Director of the Office for the Protection of Children, Regan requested a one-on-one meeting with Bishop Murphy to discuss his claims of sexual abuse and a cover-up that occurred when he was a child. In furtherance of this request, Puglisi told Regan to have his attorney contact Bishop Murphy's attorney, Repetti. Aretakis subsequently contacted Repetti on Regan's behalf. Repetti and Aretakis discussed the possibility of the requested meeting on September 14, 2006 and September 27, 2006. Later, however, Repetti sent Aretakis a

letter dated September 27, 2006, declining the request for a meeting between their "clients."

Regan had been speaking to reporters about his claims of sexual abuse which were the subject of newspaper articles². It is undisputed that at least one reporter from Newsday called Repetti about issues related to Mr. Regan's claims and Regan's request to meet Bishop Murphy.

Plaintiffs argue that the claim for defamation is primarily based upon the statements contained in the September 27, 2006 letter. In opposition, Aretakis generally claims that this is not accurate "as the plaintiffs both testified and submitted interrogatories that Mr. Repetti made false and slanderous verbal statements of fact to third persons." No precise communications are ever identified by Mr. Aretakis.

Regan, in his opposition, claims that Mr. Repetti spoke with news reporters from Newsday, the New York Post and other media. His only proof of the actual content of these conversations, however, is Repetti's own deposition testimony. Although Regan quotes truncated portions of the deposition, the actual testimony made by Repetti (Exhibit L to Motion) is as follows:

"A lady from Newsday called me after I had the conversation with you³, and she said that you had told her that I was refusing to allow Regan to meet with the bishop because I was concerned that Mr. Regan was a former detective, has a gun or at least could possibly have a gun permit and possession of a gun and that your claims were that he had psychological damage as a result of sexual abuse many years ago. And she asked me if that was the reason I was asking or directing the bishop

²There articles apparently appeared in Newsday in January 2006 (see September 27, 2006 letter).

³I appears that the "you" referred to was the questioner, Mr. Aretakis.

or advising the bishop not to meet with your client. And I said that one of the reasons that was voiced to Mr. Aretakis on the phone, but please ask Mr. Aretakis for a copy of the letter of September 27th 2006 and he will, if he gives it to you, you will see exactly why I am directing asking the bishop not to meet with Mr. Regan.”

Regan also claims that Repetti testified during his deposition that he had face to face meetings with Bishop Murphy, where he told the Bishop that he should not meet with Regan. Regan speculates that the reason given by Repetti was that the Bishop's physical safety would be in jeopardy.

Miscellaneous Preliminary Issues

There are some collateral issues raised by the parties in this motion that are easily disposed of at the outset.

First, the court rejects any argument that this action is barred by the February 8, 2007 decision of the Hon. Paul A. Crotty. While Judge Crotty imposed sanctions against Aretakis in connection with the filing of the federal case, the non-monetary sanction directed that if Aretakis brought any further RICO actions in the Southern District “he must immediately call to the attention of the Judge assigned to the case that he has filed numerous RICO actions to date, that none have succeeded, and that he was sanctioned in the amount of \$8,000 in this proceeding for violation Rule 11.” Since this instant action is not based on RICO, the non-monetary sanction is not applicable here, and Aretakis' failure to bring the federal court sanction to this court's attention does not bar or otherwise impact the underlying action.

The Court also rejects Regan's argument that without the deposition testimony of Bishop Murphy, he is unable to oppose this motion to dismiss

and/or for summary judgment. Where a party opposed to summary judgment contends that discovery is incomplete, the court may consider whether there is information necessary to fully oppose the motion that remains under the control of the proponent of the motion (CPLR § 3212 [f]; Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 AD3d 324 [1st Dept. 2004]). Regan has not shown what information, if any, Bishop Murphy has that will bear upon the particular legal issues raised by defendant's motion for dispositive relief.

False Statements, Libel and Defamations

The first cause of action is for "false statements, libel and defamations." Defamation is the injury to one's reputation, either by written expression (libel) or oral expression (slander). (Morrison v. National Broadcasting Co., 19 NY2d 453 [1967]). A statement is defamatory if it tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of the plaintiff. Golub v. Enquirer/Star Group Inc., 89 NY2d 1074 (1997).

The elements of libel are: [1] a false and defamatory statement of fact; [2] regarding the plaintiff; [3] which are published to a third party and which [4] result in injury to plaintiff. (Idema v. Wager, 120 FSupp2d 361 [SDNY 2000]; Ives v. Guilford Mills, 3 FSupp2d 191 [NDNY 1998]). Certain statements are considered libelous per se. They are limited to four categories of statements that: [1] charge plaintiff with a serious crime; [2] tend to injure plaintiff in its business, trade or profession; [3] plaintiff has some loathsome disease; or [4] impute unchastity. (Liberman v. Gelstein, 80 NY2d 429 [1992]); Harris v. Hirsh, 228 AD2d 206 [1st dept. 1996]). Where statements are libelous per se, the law

presumes that damages will result and they need not be separately proved.⁴

Any claim for defamation is defeated by a showing that the published statements are substantially true. (Newport Service & Leasing v. Meadowbrook Distributing Corp., 18 AD3d 454 [2nd dept. 2005]). They are also subject to a defense that the material, when read in context, would be perceived by a reasonable person to be nothing more than a matter of personal opinion. (Immuno AG v. Moor-Jankowski, 77 NY2d 235 [1991]).

It is black letter law that while false statements of fact are actionable; matters of personal opinion are not. (Steinhilber v. Alphonse, 68 NY2d 283 [1986]). The task of separating fact from opinion, while difficult, is for the court to determine in the first instance. (Mann v. Abel, 10 NY3d 271 [2008]; Golub v. Enquirer/Star Group, Inc., *supra*; Rejent v. Liberation Publications Inc., 197 AD2d 240 [1st dept. 1994]). The operative standard is whether the reasonable reader would have believed the challenged statements were conveying facts about the plaintiff. (Mann v. Abel, *supra*). The following factors should be considered: [1] whether the specific language used has a precise meaning which is readily understood or whether it is indefinite or ambiguous, [2] whether the statement is capable of being objectively characterized as true or false, [3] the full context of the entire communication or the broader social context surrounding the communication, including any custom or convention that might signal to the

⁴There is some concern that the doctrines of per se defamation may not withstand first amendment constitutional scrutiny. See: (Lieberman v. Gelstein, 80 NY2d 429, 434 [1992], *supra*, footnote 1. Since this argument has not been raised at bar, the court does not reach it.

audience that the communication is opinion. (Mann v. Abel, *supra*). A court, however, should neither strain to place a particular construction on the language complained of, nor should the court strain to interpret the words in their mildest and most inoffensive sense, to hold them non-libelous. (Rejent v. Liberation Publications, Inc., *supra*).

Competing with an individual's right to protect one's own reputation, is the constitutionally guaranteed right to free speech. One of the staples of a free society is that people should be able to speak freely. (United States Constitution v. New York State Constitution, Article I § 8.) Consequently, even offensive, vituperative or unreasonable statements are not actionable if they merely express an opinion. (Immono AG v. Moore-Jankowski, *supra*).

In considering plaintiffs' cause of action for defamation, the first issue for the court to parse out is what statements are or can the plaintiffs rely upon. In general, CPLR § 3016 (a) requires that the particular words complained of be set forth in a complaint alleging defamation. In evaluating plaintiff's claim, only the words alleged in the complaint as constituting the libel should be considered by the Court as the actionable language. (Kahn v. Reade, 7 AD3d 311 [1st dept. 2004]; Sassower v. Finnerty, 96 AD2d 585 [2nd dept. 1983] app dismd 61 NY2d 756 [1984]).

At bar, the only specific communications referenced in the complaint are those statements made in the September 27, 2006 letter. There is also a claim that the same statements were made orally in telephone calls to Newsday and the New York Post on October 1, 2006. The remainder of plaintiff's claims, as

alleged in the complaint, are blunderbuss and lack the specificity required to sustain a claim.

In opposition to the motion, Aretakis fails to identify any other particular words as actionable. Regan's opposition consisted of only the following specific communications as constituting defamation: [1] the September 27, 2006 letter, [2] a telephone call Repetti admitted to having with a Newsday reporter and [3] a conversation Repetti admitted to having with his client, Bishop Murphy. Although the conversations Repetti had with Newsday and his own client are not actually alleged in the complaint, the court will still address whether such communications can form the basis for a claim of defamation because the complaint could otherwise be amended. (CPLR §3016[b]).

Plaintiffs' general non-specific claims about communications taking place between parties other than themselves, are inadmissible hearsay. They are not sufficient to defeat summary judgment dismissing defamation which requires evidence in admissible form (Friends of Animals v. Assoc. Fur Manufacturers, *supra*). Thus, for example, the plaintiffs' sworn statement about what defendants told Newspaper reporters, will not support a claim for defamation. Likewise, the affidavit of Rev. Robert M. Hoatson does not contain any conversation that he personally had with the defendants and, *a fortiori*, contains no admissible evidence that can form the basis for a claim of defamation.

The court has otherwise examined the specific communications claimed by plaintiffs and finds that they do not support a claim of defamation for the reasons set forth below.

The communication to the Newsday reporter, at most, conveys Repetti's opinion that Regan is dangerous. It is based upon facts stated that Regan was a former detective and possibly owned a gun. This is clearly a personal opinion based upon stated facts and cannot form the basis for defamation. (Immono AG v. Moore-Jankowski, *supra*).

Repetti's communications with his client, advising him not to meet with Regan personally, are not defamatory. Regan can only speculate as to why Repetti advised Bishop Murphy not to meet with him. Regan has no admissible evidence that the conversation between Repetti and his client included defamatory statements about him. Nor would further discovery reveal any such communications, because the communications between Repetti and Bishop Murphy are protected by an attorney client privilege. (Clark v. Schuylerville Central School District, 57 AD3d 1145 [3rd dept. 2008] and Clark v. Schuylerville Central School District, 74 AD3d 1528 [3rd dept. 2010]).

The court has reviewed the September 27, 2006 letter and finds that it is not defamatory. In this regard the characterizations of the statements made in the letter as alleged in the complaint are simply not correct. The direct references to Regan in the letter refer to an incident where Regan brought Newspaper reporters and cameramen outside of St. Agnes Cathedral and to Newspaper articles in Newsday, both of which Repetti characterized as an effort to "embarrass" Bishop Murphy. There are no references calling Regan a liar, mentally ill, accusing Regan of potentially harming the Bishop or that Regan could not be trusted, as alleged in paragraph 14 of the complaint.

The letter also gives various opinions that Repetti holds concerning Aretakis and recites the facts on which he bases those conclusions. While the letter insinuates that Aretakis was violating the "Cannons of Ethics and Disciplinary Rules," it was based on Aretakis' statement to Repetti that the Nassau county action was brought to "harass" Bishop Murphy. The letter does not contain statements that Aretakis committed perjury; had been arrested, fabricated evidence; or that his law license was under review as set forth in paragraph 22 of the complaint.

Even were the September 27, 2006 letter libelous, it would be protected by an absolute privilege that applies to pending and/or contemplated litigation. Any statement, whether written or oral, is absolutely privileged, and therefore not defamatory, if it may be considered pertinent to anything "possibly or plausibly" relevant, "with the barest rationality" to litigation. (Martirano v. Frost, 25 N.Y.2d 505 (1969); Joseph v. Larry Dorman, P.C., 177 A.D.2d 618, 619 [2nd dept. 1991]; see also Oguagha v. Ropes & Gray, 830 N.Y.S.2d 660 [1 Dept. 2007]). Although the privilege will not protect a gratuitous statement that is wholly "outside the cause," there is clear appellate authority that trial courts should broadly construe what constitutes an out-of-court communication relating to pending or contemplated litigation. (Caplan v. Winslet, 218 A.D.2d 148 [1st dept. 1996]; Lemberg v. John Blair Communications, Inc., 258 A.D.2d 291 [1st dept. 1999]). The absolute privilege has also been applied to statements by non-attorneys, such as accountants and the parties themselves. (Joseph v. Larry Dorman, P.C., *supra*).

The evidence that exists in this record is that Repetti sent the September 27, 2006 letter only to Aretakis. It was not sent to any newspaper reporters or any other third party. Repetti's deposition testimony makes it clear that when he spoke to the Newsday reporter, he did not give her a copy of the September 27, 2006 letter, but suggested she get a copy of it from Aretakis. Plaintiffs have not come forward with the statement by any reporter or any other third party that defendants gave them a copy of the letter.

Plaintiffs argue that the litigation privilege does not apply to the September 27, 2006 letter because Aretakis was not Regan's attorney at the time the letter was sent and there was no pending litigation to which the letter could have pertained. These arguments are rejected by the court.

The claim that Aretakis was only acting as Regan's "representative" and not as his attorney at the time the letter was sent is simply incredible as a matter of law. At oral argument it was apparent from the plaintiffs' own arguments that this claim is completely untenable. On September 27, 2006 Aretakis was still licensed to practice law. He had represented Regan in the Nassau County action. There is no dispute that Regan's request to Puglisi for a personal meeting with Bishop Murphy was met with a requirement Regan's attorney contact the Bishop's attorney. Aretakis was the person who contacted Repetti in accordance with that requirement. The September 27, 2006 letter refers to Regan as Aretakis' client, clearly implying that Repetti believed Aretakis to be Regan's attorney. There is no letter, nor any other communication by Aretakis (or anyone else), asserting that Aretakis was not wearing his attorney "hat" for

the communications regarding a potential meeting.

The court also finds that when the letter was sent by Repetti to Aretakis there were pending and/or contemplated litigations that concerned Regan's underlying claims of sexual abuse and/or cover-up.

Even though the Nassau County action had been dismissed, given the broad interpretation given by the Courts to what constitutes pending or contemplated litigation, the September 27, 2006 letter, between attorneys, was still protected. The Nassau County action had not been withdrawn with prejudice by Regan, leaving open the possibility that he could move to open up his default on the motion to dismiss. There was no express finding that Regan's particular action was barred by the applicable statute of limitations and the Court of Appeals decision in Zampano v. Quinn; E/O Boyle v. Smith, (6 NY3d 666 [2006]) left open the possibility of legislative action to extend the statute of limitations.

As important, on September 27, 2006, there were a pending collateral litigation and another potential litigation, related to the sexual abuse claims against the Archdiocese, by other Aretakis' clients. The letter itself refers to potential litigation that Aretakis claimed he would be filing on behalf of Janique McKenny. There was also a pending federal RICO litigation filed by Aretakis on behalf of Father Robert Hoatson, who alleged that he lost his position within the Archdiocese for having exposed allegations of sexual abuse against the clergy and the ensuing cover-up⁵. Regan claims, in his affidavit, that Fr. Hoatson wrote

⁵This action was dismissed by the decision and order of Judge Crotty dated 2/8/07, which was after the September 27, 2006 letter.

to Bishop Murphy on behalf of the entire Regan family about covering up the abuse perpetrated by Fr. Babis. Thus, the September 27, 2006 letter which concerned Regan meeting with Bishop Murphy to discuss issues of abuse by Fr. Babis and a cover-up, pertained to pending litigation relating to such issues. Consequently, the publication of the September 27, 2006 letter to Aretakis is privileged and may not form the basis for a defamation claim.

In view of the forgoing, summary judgment dismissing the first cause of action is warranted.

Interference with Contract

The second cause of action alleges tortious interference with contract.

The elements of a claim for tortious interference with contract are: [1] the existence of a valid contract between plaintiff and a third party; [2] defendant's intentional and unjustified procurement of the third party's breach of that contract and [3] resultant damages. (JM Ball Chrysler LLC v. Marong Chrysler-Plymouth, Inc, 19 AD3d 1094 [4th dept. 2005]). This cause of action also requires that a defendant actually know about the contract that it is allegedly interfering with. White Plains Coat & Apron Co. Inc. V. Cintas Corp., 8 NY3d 422 [2007]).

Aretakis withdrew his personal claim for tortious interference with business contract (Motion Exhibit J, pp. 699-700).

Regan's claim is that he had an agreement with certain newspapers that they would publish follow-up stories about him and his family, focusing on their sexual abuse claims against the clergy, but once Repetti made false statements made about Regan's credibility, the press never published any follow up articles.

This claim fails. Regan cannot prove that he had an enforceable contract with any particular newspaper to print a follow up story about his families' ordeal.

In general, a newspaper editorial board has complete discretion on what articles it chooses to print. (see: Johnson v. Staten Island Advance Newspaper, Inc., 13 Misc3d 1215 [NY City Civ. Ct. 2004]). Regan has not come forward with any proof showing that his relationship with the news media was anything other than their interest in pursuing a newsworthy story. In the absence of a contract, there is no claim for the tort of interference with contract.

Intentional Infliction of Emotional Distress

The third cause of action alleges intentional infliction of emotional distress.

The elements of this tort are: (1) extreme and outrageous conduct; (2) intent to cause severe emotional distress or a substantial probability of causing severe emotional distress; (3) a causal connection between the conduct and the injury, and (4) severe emotional distress. (Howell v. NY Post Co. Inc., 81 NY2d 115 [1993]). Whether conduct complained of is outrageous, in the first instance is for the court to decide. (Rocco v. Smithtown, 229 AD2d 1034 [4th dept. 1996]). Satisfying the element of outrageous conduct is rigorous and difficult. (Roach v. Stern, 252 AD2d 488 [2nd dept. 1998]).

Plaintiffs' claims for emotional distress rest on their assertion that defendants provided defamatory information about them to the news media. As previously determined herein, there was no defamatory information disseminated to the press. (See also: Cunningham v. Security Mutual Insurance Co., 260

AD2d 983 [3rd dept. 1999]. This cause of action, therefore, cannot be sustained.

Prima Facie Tort

The fourth cause of action alleges *prima facie* tort.

Elements of a cause of action for *prima facie* tort are: [1] intentional infliction of harm, [2] resulting in special damages, [3] without excuse or justification and [4] by act of series of acts that are otherwise lawful. (Curjano v. Suozzi, 63 NY2d 113 [1984]; DeMicco Brothers, Inc. V. Consolidated Edison Co. of New York, Inc., 8 AD3d 99 [1st dept. 2004]). The requirement of special damages is a strict one. (Del Vecchio v. Nelson, 300 AD2d 277 [2nd dept. 2002]). There are no special damages plead, nor are any special damages set out in opposition to this motion. Defendants are, therefore, entitled to summary judgment dismissing the cause of action for *prima facie* tort.

Punitive Damages

Since none of plaintiffs' other causes of action withstand summary judgment, the claim for punitive damages must be dismissed as well. Punitive damages can only be awarded as ancillary relief to an underlying claim for relief. (Hubbell v. Trans World Life Ins. Co of New York, 50 NY2d 899 [1980]).

Dismissal

The defendants alternatively move for dismissal of the complaint pursuant to CPLR §3211. Since the court has otherwise found that the defendants are entitled to summary judgment dismissing the complaint, there is no basis to consider whether the pleading sets forth any valid causes of action. The branch

of the motion seeking dismissal pursuant to CPLR §3211 is denied as moot.

Sanctions

Defendants seek to have this court impose sanctions against the plaintiffs. Pursuant to 22 NYCRR §130-1, sanctions can be imposed when conduct complained of is frivolous.

Conduct is frivolous within the meaning of Part 130 if:

"(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false."

The Court must set forth the basis for the imposition of sanctions and the amount of sanctions imposed. (Yemon Corp. v 155 Wooster Street, Inc., 33 AD3d 67 [1st dept. 2006]); Any remedy must be dictated by fairness and equity. (Levy v. Carol Management Corp., 260 AD2d 27 [1st dept. 1999]).

Aretakis has certainly had problems with previous litigations, having been suspended from the practice of law and sanctioned in a Federal RICO case. Part 130 sanctions, however, are based upon actions taken in the matter pending before the court. (22 NYCRR §130-1.1). The court will not consider Aretakis' past history in deciding whether sanctions are warranted in this particular case.

Nor, as defendants argue, should sanctions be awarded based on any

violation of Judge Crotty's order. As this court previously held, Judge Crotty's order has not application to this particular case. (See: decision, *supra*).

Defendants also argue that sanctions should be granted because this case lacks merit and it was brought "for no other reason than to cause harm to the defendants." Citing Nytray v. New York Athletic Club of the City of New York, (274 AD2d 326 [1st dept 222]) defendants argue that this action is baseless and brought in furtherance of campaign of harassment against the church and others.

The court declines to award sanctions in this case. The fact that the underlying case is dismissed is not, in itself, sufficient to impose sanctions. The court does find that the quality of legal advocacy on the part of the plaintiffs in this case was lacking. For example, there is no law that supports the repeated, blunderbuss non-specific allegations of defamation that were included in this case. The court also believes that some of plaintiffs' arguments were obviously meritless (eg: Aretakis claiming he was not Regan's attorney on September 27, 2006). Notwithstanding these deficiencies, there are insufficient facts in the record as a whole for the court to conclude that this action was brought with the specific intent of harming defendants. This is not a case where repeated litigation based on the same allegations has been initiated against these defendants. This is also not a case where the claims in repetitive actions were barred by collateral estoppel. In this regard this particular situation is distinguishable from Nytray v. New York Athletic Club of the City of New York, *supra*.

The motion for sanctions is denied.

Motion to Quash

Since the court is granting summary judgment dismissing the underlying action, there is no need for further discovery, non-party or otherwise. The motion to quash the non-party subpoena directed to Bishop Murphy is, therefore, granted.

Counterclaims

The court notes that Aretakis makes arguments in his opposition papers that the counterclaims also lack merit. Although no cross-motion was made to dispose of the counterclaims, (CPLR §2215; Clements v. Peters, 33 AD2d 1096 [4th dept. 1970]), the court finds that, although denominated counterclaims by defendants, they are no more than interrelated defenses to the underlying claims that cannot proceed in light of this decision.

The first counterclaim is really a contribution/cross-claim against Aretakis, claiming that if defendants committed defamation, then Aretakis is liable to defendants for having republished defendants' statements. Since the court has held that there is not defamation, the counterclaim cannot proceed.

The second counterclaim is for sanctions based upon plaintiffs having filed a frivolous action. The issue of sanctions has been fully resolved here. To the extent that defendants sought and were denied such ultimate relief in this motion, a separate counterclaim cannot proceed.

In view of the foregoing, the court, in the interest of justice, dismisses the

first and second "counterclaims".

Conclusion

In accordance herewith it is hereby:

ORDERED that the motion by non-party Bishop William Murphy to quash the June 4, 2010 subpoena (motion sequence # 004) is hereby granted, and it is

ORDERED that defendants' motion for summary judgment dismissing the complaint and other relief (motion sequence #005) is granted to the extent summary judgment dismissing the complaint is granted in favor of defendants and against plaintiffs, and it is further

ORDERED that defendants' motion for summary judgment dismissing the complaint and other relief (motion sequence #005) is denied to the extent it seeks sanctions against the plaintiffs, and it is further

ORDERED that defendants' motion for summary judgment dismissing the complaint and other relief (motion sequence #005) is otherwise denied except to the extent set forth herein, and it is further

ORDERED that defendants' first and second counterclaims are dismissed, and it is further


ORDERED that the clerk of the court shall enter a judgment in favor of defendants and against plaintiffs dismissing the complaint in its entirety, together with costs and disbursements as taxed by the court, and it is further

ORDERED that clerk of the court shall enter a judgment in favor of plaintiffs and against the defendants dismissing the counterclaims, and it is further

ORDERED that any requested relief not expressly granted herein is denied and that his constitutes the decision and order of the court.

Dated: New York, NY
December 15, 2010

SO ORDERED:

J.G. J.S.C. 

FILED
DEC 16 2010
NEW YORK
COUNTY CLERK'S OFFICE