

Chiffert v Kwiat

2010 NY Slip Op 33821(U)

June 4, 2010

Sup Ct, New York County

Docket Number: 1000785/2010

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD
Justice

PART 61

MARC A. CHIFFERT,

Plaintiff,

-against-

GREGG KWIAT,

Defendant.

INDEX NO. 100785/2010
MOTION DATE April 14, 2010
MOTION SEQ. NO. 002
MOTION CAL. NO. 30

The following papers, numbered 1 to 4 were read on this motion to dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-2</u>
Answering Affidavits — Exhibits _____	<u>3</u>
Replying Affidavits _____	<u>4</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion to dismiss the complaint and for sanctions is decided in accordance with the accompanying decision and order.

NYS SUPREME COURT
REVIEWED
JUN 10 2010
E-FILING DEPT.

FILED
Jun 10 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: June 4, 2010

O.P. Sherwood
O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

NYS SUPREME COURT E-FILED AS DOCUMENT # _____

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

6-10-10

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61**

-----X
MARC A. CHIFFERT,

Plaintiff,

-against-

GREGG KWIAT,

Defendant.
-----X

**DECISION AND
ORDER**

Index No. 100785/2010

O. PETER SHERWOOD, J.:

Defendant, Gregg Kwiat ("defendant"), makes this motion to dismiss the twelve count complaint of *pro se* plaintiff, Marc Chiffert's ("plaintiff"), pursuant to CPLR §§3211(a)(1) on the ground that a defense is founded on documentary evidence, 3211(a)(3) on the ground that plaintiff lacks legal capacity to sue, 3211(a)(7) for failure to state a cause of action and 3016(a) and (b) for failure to state a cause of action with particularity. Plaintiff is a resident of a nine unit condominium. He is not a unit owner. Defendant is also a resident of the building and serves as president of the condominium Board of Managers. The complaint alleges that defendant disparaged plaintiff in connection with matters relating to the condominium. Specifically, the complaint alleges that:

In response to plaintiff's disagreement with [the position defendant took in a dispute with the sponsor of the condominium], defendant has lead a campaign against plaintiff by knowingly spreading false, defamatory, disparaging, and slanderous accusations and statements against and about plaintiff.

Defendant did on numerous separate occasions tell to different unit owners of the Condominium, the property manager, attorneys, and other building staff that plaintiff made negative reports about the Condominium to the New York City Department of Buildings and that plaintiff did not pay his Condominium fees.

Defendant's statements were false and defamatory in that they alleged that plaintiff made negative reports about the Condominium to the New York City Department of Buildings or the New York City Fire Department when plaintiff had done no such thing.

DISCUSSION

On a motion to dismiss a plaintiff's claim pursuant to CPLR §3211(a)(7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see Campaign*

for *Fiscal Equity v. State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v. Alexander's Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish his allegations is not part of the calculus in determining a motion to dismiss" (see *EBC I v. Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support therefor (see *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]). Where the motion to dismiss is based on documentary evidence pursuant to CPLR §3211(a)(3), dismissal is warranted only if the documentary evidence establishes a defense as a matter of law (see *McMorrow v. Dime Sav. Bank of Williamsburg*, 48 AD3d 646 [2d Dept 2008]). In applying these and other applicable standards, the court will review each cause of action.

In the first cause of action for defamation, plaintiff is required to set forth in the complaint "the particular words complained of" CPLR §3016(a). This requires that the complaint allege the time, place and manner of the false statement, and specify what and whom it was said (see *Bell v. Alden Owners, Inc.*, 299 AD2d 207 [1st Dept 2002]; *Sirianni v. Rafaloff*, 284 AD2d 447 [2d Dept 2001]). Further, in order to state a cause of action for defamation, plaintiff must allege (1) a false statement, (2) published without privilege or authority to a third party, (3) constituting fault as judged by, at minimum, a negligence standard, and (4) special damage or defamation per se (see *Dillon v. City of New York*, 261 AD2d 34, 38 [1st Dept 1998]). The complaint fails to satisfy both the pleading and elements of proof standards. The complaint does not allege a false statement but assuming defamatory remarks were published, they are alleged to have been made to persons having an interest in the matter and therefor these communications are protected by the common interest privilege (see *Lieberman v. Gelstein*, 80 NY2d 429, 437 [1996]). The first cause of action must be dismissed.

Plaintiff's second cause of action for injurious falsehood is duplicative of his defamation claim and must be dismissed (see *Alexander & Alexander of New York v. Fritzen*, 114 AD2d 814 [1st Dept 1985]). Moreover, the complaint does not set forth any injurious statements with particularity, and fails to allege special damages (see *Stern v. Burke*, 20 Misc3d 1101A, 867 NYS2d 20 [Sup Ct., New York County 2008]).

The third cause of action must be dismissed as New York does not recognize a cause of action for false light (*see Beverley v. Choices Women's Medical Ctr.*, 141 AD2d 89, 95 [2d Dept 1988]). Similarly, because there is no New York Unfair Trade Practices Act, the twelfth cause of action must be dismissed as well.

In order to state a cause of action for intentional infliction of emotional distress, the complaint must allege (1) extreme and outrageous conduct; (2) intent to cause or disregard of the substantial probability of causing severe emotional distress; (3) a causal connection between the conduct and the injury; and (4) severe emotional distress (*see Benyo v. Sikarjak*, 50 AD3d 1074, 1077 [2d Dept 2008]; *Howell v. New York Post Company*, 82 NY2d 690, 618 NE2d 650, 601 NYS2d 572 [1993]). None of these elements are present in this complaint.

As to the fifth cause of action, breach of fiduciary duty, plaintiff is not a unit owner in the condominium. It appears that he resides in a unit owned by his spouse. Because the complaint fails to allege facts sufficient to show that a fiduciary relationship exists between plaintiff and defendant, the complaint must be dismissed pursuant to CPLR §3011(a)(3) for lack of standing to sue (*see Levine v. Marray Hill Manor Co.*, 143 AD2d 298, 301 [1st Dept 1988]).

The complaint does not allege that plaintiff was actually and wrongfully prevented from entering into or continuing in a specific business relationship. General allegations of a "business expectancy ... of providing engineering services and tutoring work in the future to other unit owners" (Compl. ¶56) without reference to any particular business relationship or contract that was impaired by defendant is insufficient (*see White v. Ivy*, 63 AD3d 1236, 1238 [3d Dept 2009]). The sixth cause of action for tortious interference with business relations must be dismissed.

The complaint fails to satisfy the heightened pleading requirements to support a claim pursuant to the civil liability provisions of the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 USC §1964 (*see CFJ Assocs. v. Hanson Indus.*, 274 AD2d 892, 896 [3d Dept 2000]). The seventh cause of action must be dismissed because the complaint does not specify any facts that could support a civil RICO claim (*see Besicorp, Ltd. v. Kahn*, 290 AD2d 147, 151-52 [3d Dept 2002]).

"A claim of tortious interference with contract requires: (1) the existence of a valid contract between plaintiff and a third party, (2) defendant's knowledge of the contract, (3) defendant's

intentional procurement of a breach of the contract without justification, (4) actual breach of the contract, and (5) resulting damages, (*see Snyder v. Sony Music Entertainment, Inc.*, 252 AD2d 294, 299 [1st Dept 1999]). The complaint is devoid of allegations required to satisfy the elements of this claim. The eighth cause of action must be dismissed.

To establish a cause of action for negligence, plaintiff must prove “that the defendant owed a duty to [plaintiff], that the defendant breached that duty, and that the breach proximately caused [plaintiff’s] injury” (*see J.E. v. Beth Israel Hospital*, 295 AD2d 281, 283 [1st Dept 2002]). As a mere “building occupant” (Compl. ¶67), defendant has no “special relationship” with either the condominium or the president of its Board of Managers. RPL, Article 9-B which involves rights of condominium unit owners is not applicable. Plaintiff’s ninth cause of action for negligence shall be dismissed.

General Business Law §349 is a consumer protection statute which prohibits deceptive practices in the conduct of any business. The tenth cause of action must be dismissed for want of any showing of any “consumer oriented” act or practice that affects the public at large as distinguished from a private contractual dispute (*see Elacqua v. Physicians’ Reciprocal Insurers*, 52 AD3d 886, 888 [3d Dept 2008]).

A claim of fraud requires: (1) a false representation; (2) made by the defendant with knowledge or belief (scienter) that the representation is false or that he or she did not have sufficient basis of information with which to make it; (3) defendant’s intent to induce the plaintiff to act or to refrain from action in reliance upon the misrepresentation; (4) plaintiff’s justifiable reliance upon the representation in taking action or refraining from it; and (5) damage to the plaintiff resulting from such reliance (*see Lama Holdings Co. v. Smith Barney Inc.*, 88 NY2d 413 [1996]). The complaint must also state “the circumstances constituting the wrong ... in detail” CPLR §3016(b). The complaint is devoid of any allegations that are sufficient to maintain a claim for fraud.

Although all twelve causes of action must be dismissed and at least some are frivolous, defendant’s request to impose sanctions and to require prior court approval of any future litigation is not warranted at this time. The request is denied.

Accordingly, it is

ORDERED that the motion to dismiss the complaint is GRANTED and the complaint is hereby DISMISSED with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: June 4, 2010



ENTER,

A handwritten signature in cursive script that reads "O. Peter Sherwood".

O. PETER SHERWOOD

J.S.C.