

Spector v Wender

2011 NY Slip Op 31089(U)

March 30, 2011

Sup Ct, Nassau County

Docket Number: 3615/10

Judge: F. Dana Winslow

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**SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK**

Present:

**HON. F. DANA WINSLOW,
Justice**

TRIAL/IAS, PART 4

NEAL S. SPECTOR,

Plaintiff,

**MOTION DATE:11/24/10
MOTION SEQ. NO.: 002**

-against-

INDEX NO.: 3615/10

**HOWARD WANDER, THELMA WANDER,
THE THELMA WANDER REVOCABLE TRUST,
and HOWARD WANDER and THELMA WANDER,
as the Co-Trustees of the THELMA WANDER
REVOCABLE TRUST,**

Defendants.

The following papers read on this motion (numbered 1-3):

Notice of Motion.....	1
Plaintiff's Affidavit in Opposition.....	2
Reply Affidavit.....	3

Defendants move for an order: (i) pursuant to **CPLR §3211(a)(7)**, dismissing the complaint; (ii) pursuant to **CPLR §3212**, granting summary judgment in favor of defendants; (iii) pursuant to **22 NYCRR 130-1.1(d)**, imposing sanctions against plaintiff for commencing and maintaining a frivolous action; (iv) awarding defendants' costs and attorneys fees related to defending the action and making this motion.

In this action, plaintiff *pro se* seeks to recover damages for causes of action sounding in alienation of affection and intentional infliction of emotional distress. Plaintiff is the defendant in a matrimonial action brought by his wife, Alice Spector ("Alice"), entitled *Alice Spector v. Neal Spector*, Index No. 203093/09, currently pending in the Supreme Court, Nassau County (the "Matrimonial Action"). Plaintiff and Alice have two sons, one a minor at the time of the alleged acts. Defendants HOWARD WANDER and THELMA WANDER (together, the "WANDERS") are Alice's parents,

and co-trustees of defendant, the THELMA WANDER REVOCABLE TRUST (the "Trust").

Plaintiff claims that the WANDERs have engaged in a course of conduct designed to separate him from his children, to destroy his relationship with his children, and to cause him extreme emotional distress. The Complaint alleges, among other things, that the WANDERs: (i) "poisoned [his children's] thoughts, feelings and ideas against him" by speaking negatively and untruthfully about plaintiff, instructing the children to disregard and disobey plaintiff, and requiring the children to cease communications with plaintiff; (ii) conspired with, planned with, assisted and enabled Alice to covertly move out of the family home on November 13, 2009 and to take their minor son with her; (iii) paid for the move and for subsequent support of the minor son; (iv) harbored the minor son in a private, gated condominium owned by the Trust, and kept him in their sole and exclusive control; (v) deprived plaintiff of knowledge of his minor son's whereabouts and impeded plaintiff's access to his son; (vi) between December 17, 2009 and January 5, 2010, transported plaintiff's minor son across state lines to place him in the exclusive custody of Gary Wander, a member of a radical religious cult. In his Affidavit in Opposition, plaintiff alleges that defendants have used economic leverage, as well as brainwashing techniques employed by religious cults, in furtherance of their scheme. As a result of the above, plaintiff claims, he has lost all contact and communication with his sons for almost a year, and has suffered extreme emotional injury, including, among other things, pain, insomnia, anxiety and depression. He seeks compensatory damages in the sum of \$10 million dollars against each defendant, and punitive damages in the sum of \$5 million dollars against each defendant.

Defendants dispute the factual allegations. They seek dismissal, however, on the legal grounds that (1) there is no cause of action in New York for third-party alienation of affection, or parent-child alienation of affection; (2) plaintiff's allegations fail to state a claim for intentional infliction of emotional distress; or, defendants are entitled to summary judgment dismissing such claim. Defendants seek sanctions, including costs and attorneys fees, on the ground that the claims are frivolous, and plaintiff, a licensed and practicing New York attorney, should have known that they were frivolous.

New York Civil Rights Law §80-a ("Section 80-a"), also known as the "Heart Balm Act," abolished the common law cause of action to recover damages for alienation of affection, including any claim against a third party for parent-child alienation. *See Sahid v. Chambers*, 237 AD2d 175. Accordingly, to the extent that such cause of action is stated, it must be dismissed. Plaintiff effectively concedes that point in his opposition, framing his argument, and characterizing the conduct complained of, in terms of intentional infliction of emotional distress.

No matter how the alleged cause of action is couched, however, the essence of the harm and the source of the emotional distress claimed by plaintiff is the injury to his relationship with his children. A plaintiff cannot avoid the bar of **Section 80-a** by re-characterizing a prohibited cause of action as a claim for emotional distress. **Grafas v. TSK Franchise Systems, Inc.**, 2010 WL 2301295 (EDNY); **Sahid**, 237 AD2d at 175; **Scher v. Scher**, 19 Misc.3d 1134(A); **McGrady v. Rosenbaum**, 62 Misc.2d 182, *aff'd* 37 AD2d 917.

Furthermore, public policy considerations militate against allowing recovery for emotional distress in matters arising out of the interpersonal relationships in a matrimonial context. **Weicker v. Weicker**, 22 NY2d 8, 9; **Nacson v. Semmel**, 292 AD2d 432, 433; **Eller v. Eller**, 136 AD2d 678, 679; **Galvin v. Francis**, 2003 WL 21696740 (NY Sup.); **Friedman v. Friedman**, 79 Misc. 2d 646. “To sustain the claim for damages would result in a revival of evils not unlike those which prompted the Legislature in 1935 to outlaw actions for alienation of affections ...” **Weicker**, 22 NY2d at 9. *Compare* **Murphy v. Murphy**, 109 AD2d 965 (allowing the claim where the documented abusive conduct was a direct infliction of emotional harm, including killing the plaintiff’s pet Canadian goose, breaking screens and smashing windows to force entry into the house, and using threats, force, and assaults upon plaintiff).

The Appellate Division has had occasion to consider substantially the same facts as presented here. In **McGrady** [62 Misc.2d at 182, *aff'd* 37 AD2d 917], the plaintiff sued his former wife and her parents upon allegations that the wife abandoned the plaintiff to take up residence with her parents, that the former wife absconded with their child without plaintiff’s knowledge or consent, that the former wife refused to advise plaintiff of the child’s whereabouts, and that her parents financed, induced and physically assisted the wife in the abandonment and divorce (including the payment of legal fees, transportation and living expenses). Further, the plaintiff in **McGrady** alleged that the parents induced and conspired with the wife to deprive the plaintiff of knowledge of the whereabouts and condition of his child, and ultimately induced and assisted the wife to take up permanent residence in a foreign country, providing the financing for her trip and residence there.

In dismissing the claims against the parents, the trial court found that “inextricably wound into the allegations is a banned cause of action for alienation of affections.” **McGrady**, 62 Misc.2d at 189 (internal citation omitted). Noting the privilege of a parent to furnish support in the context of an abandonment or divorce, the Court stated: “Even assuming some measure of malice attended the [parents’] advice and assistance to their daughter, an action does not lie against one whose motives may be mixed, but who has a legitimate purpose or who pursues a protected objective.” **McGrady**, 62 Misc.2d at 189,

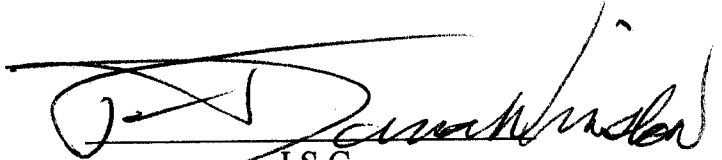
citing **Beardsley v. Kilmer**, 236 NY 80; **Servis v. Servis**, 172 NY 438. The Appellate Division affirmed without discussion.

In short, even if the facts alleged by plaintiff are accepted as true, and plaintiff is given the benefit of every favorable inference, the claims against defendants cannot stand. The Court does not find, however, that the imposition of sanctions is warranted at this time. Notwithstanding the apparent ill-will among the parties, there is no evidence that the claim was interposed in bad faith, for the sole or primary purpose of harassing or inflicting harm upon defendants. Although the Court finds that the claim for intentional infliction of emotional distress is unsustainable, the Court does not find that it was beyond any reasonable argument for an extension, modification or reversal of existing law. See **CPLR §8303-a, 22 NYCRR 130-1.1**. Moreover, to date, the Court has seen no repetitive or continuous advancement of the non-meritorious claims. The Court cautions that henceforth plaintiff will be deemed on notice of the judicial determination that the facts alleged do not state any cognizable cause of action under New York law. If he proceeds with this litigation, he does so at his peril.

Based upon the foregoing, it is

ORDERED, that defendants motion is **granted** to the extent that the complaint is **dismissed** in its entirety. The application for sanctions is **denied**. Defendants may recover costs and expenses, except attorneys fees, as provided by the CPLR.

Dated Mar 30 2011


J.S.C.

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