

MPG Assoc., Inc. v Randone

2011 NY Slip Op 31158(U)

April 18, 2011

Supreme Court, Nassau County

Docket Number: 008057-10

Judge: Timothy S. Driscoll

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

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
**MPG ASSOCIATES, INC., d/b/a THE
KTI GROUP,**

**TRIAL/IAS PART: 20
NASSAU COUNTY**

Plaintiff,

**Index No: 008057-10
Motion Seq. No. 3
Submission Date: 4/4/11**

- against -

BRIAN RANDONE,

Defendant.

-----x

The following papers have been read on the motion:

Order to Show Cause, Affirmation in Support and Exhibits.....x

This matter is before the Court for decision on the Order to Show Cause filed by Plaintiff MPG Associates, Inc., d/b/a The KTI Group ("KTI" or "Plaintiff") on March 16, 2011 and submitted on April 4, 2011. No opposition to the motion was submitted by Defendant Brian Randone ("Randone" or "Defendant") who, as discussed *infra*, is currently incarcerated in the State of California. For the reasons set forth below, the Court denies Plaintiff's Order to Show Cause and vacates the Temporary Restraining Order issued by the Court on April 4, 2011.

BACKGROUND

A. Relief Sought

Plaintiff moves, pursuant to CPLR § 6311, for an Order

enjoining and restraining Defendant from continuing his campaign of injuring the business reputation of [KTI] in the telecommunications industry by falsely and maliciously claiming that KTI fails and refuses to pay its agents and subagents sums contractually due them for services rendered, which campaign has included, but is not limited to: (a) [f]alsely claiming that KTI owes him \$25,000 per month, which it is unjustifiably refusing to pay[;] (b) [i]mpugning KTI's character and integrity by

falsely alleging, among other things, that KTI pretends to be nice to its subagents while it stabs them in their backs[;] and (c) [u]rging subagents to break their contractual arrangements with KTI and to work instead with KTI's competitors.

Defendant, who is incarcerated in the State of California ("California"), and whose parents have communicated with the Court and Plaintiff's counsel on his behalf, has not submitted an opposition to Plaintiff's application.

B. The Parties' History

The parties' history is set forth in a prior decision of the Court dated October 26, 2010 ("Prior Decision") in which the Court denied Plaintiff's motion for a default judgment, directed Defendant to file and serve a Supplemental Answer to the Complaint and directed counsel for the parties to appear for a Preliminary Conference before the Court on February 24, 2011, by which date it was expected that Defendant's criminal matter would be resolved. The Preliminary Conference was subsequently adjourned to February 28, 2011. On or about February 24, 2011, the Court received a communication from Defendant reflecting that he remains incarcerated in the Los Angeles County Jail awaiting a jury trial for the crimes of murder and torture. Defendant stated, further, that his criminal trial in California was delayed due to the illness of his attorney. As a result, Defendant was unable to appear before the Court on February 28, 2011 and requested an adjournment of sixty (60) days. In light of Defendant's incarceration, the Preliminary Conference has not yet taken place. The Court incorporates the Prior Decision herein by reference.

As noted in the Prior Decision, Plaintiff seeks injunctive relief and special, general and punitive damages arising from Defendant's tortious conduct injuring KTI's business reputation by 1) publishing false, defamatory and misleading statements about KTI regarding its lack of trustworthiness and failure to pay sums due to subagents; and 2) encouraging KTI's subagents to terminate their contractual and other business relationships with KTI. The Complaint alleges that Defendant engaged in this conduct following KTI's termination of Defendant for cause, following Defendant's arrest and incarceration for murder and torture charges. The Complaint contains three (3) causes of action. The first and second causes of action are for trade libel and tortious interference with business, for which Plaintiff seeks compensatory damages and punitive damages. The third cause of action is for *prima facie* tort, for which Plaintiff seeks an injunction

permanently restraining Randone from engaging in any of the conduct alleged in the Complaint.

On April 4, 2011, the Court issued a temporary restraining order (“TRO”) directing that, pending the hearing and determination of this motion, Defendant is enjoined and restrained from claiming that KTI fails and refuses to pay its agents and subagents sums contractually due them for services rendered.

Plaintiff’s Counsel has provided an Affirmation of Service reflecting that he served the instant Order to Show Cause 1) on Defendant’s parents, via fax and overnight delivery, and 2) to Defendant at the Los Angeles County Jail, via first class mail, return receipt requested.

In his Affirmation in Support of the Order to Show Cause, Plaintiff’s Counsel refers to the allegations in the Complaint, which was verified by Ginamarie Pigott, Plaintiff’s President, in support of Plaintiff’s application. Those allegations are discussed in detail in the Prior Decision, and are incorporated herein by reference.

C. The Parties’ Positions

Plaintiff’s Counsel submits that 1) Plaintiff has demonstrated a likelihood of success on the merits by virtue of the verified allegations in the Complaint which establish a prima facie case against Defendant with respect to the causes of action alleged; 2) a balancing of the equities favors Plaintiff whose business reputation will suffer if Randone is not enjoined from making the allegedly false statements about Plaintiff; and 3) Plaintiff will suffer irreparable harm without the requested relief because its business reputation will be further injured by Defendant’s comments.

Defendant has submitted no opposition to the instant Order to Show Cause.

RULING OF THE COURT

A. Standards for Preliminary Injunction

A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving papers. *William M. Blake Agency, Inc. v. Leon*, 283 A.D.2d 423, 424 (2d Dept. 2001); *Peterson v. Corbin*, 275 A.D.2d 35, 36 (2d Dept. 2000). Injunctive relief will lie where a movant demonstrates a likelihood of success on the merits, a danger of irreparable harm unless the injunction is granted and a balance of the equities in his or her favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990); *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981); *Merscorp, Inc. v.*

Romaine, 295 A.D.2d 431 (2d Dept. 2002); *Neos v. Lacey*, 291 A.D.2d 434 (2d Dept. 2002). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1073 (2d Dept. 2008); *City of Long Beach v. Sterling American Capital, LLC*, 40 A.D.3d 902, 903 (2d Dept. 2007); *Ruiz v. Meloney*, 26 A.D.3d 485 (2d Dept. 2006).

Proof of a likelihood of success on the merits requires the movant to demonstrate a clear right to relief which is plain from the undisputed facts. *Related Properties, Inc. v. Town Bd. of Town/Village of Harrison*, 22 A.D.3d 587 (2d Dept. 2005); see *Abinanti v. Pascale*, 41 A.D.3d 395, 396 (2d Dept. 2007); *Gagnon Bus Co., Inc. v. Vallo Transp. Ltd.*, 13 A.D.3d 334, 335 (2d Dept. 2004). Thus, while the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that subvert the plaintiff's likelihood of success on the merits to such a degree that it cannot be said that the plaintiff established a clear right to relief. *Advanced Digital Sec. Solutions, Inc. v. Samsung Techwin Co., Ltd.*, 53 A.D.3d 612 (2d Dept. 2008), quoting *Milbrandt & Co. v. Griffin*, 1 A.D.3d 327, 328 (2d Dept. 2003); see also CPLR § 6312(c). The existence of a factual dispute, however, will not bar the imposition of a preliminary injunction if it is necessary to preserve the status quo and the party to be enjoined will suffer no great hardship as a result of its issuance. *Melvin v. Union College*, 195 A.D.2d 447, 448 (2d Dept. 1993).

A plaintiff has not suffered irreparable harm warranting injunctive relief where its alleged injuries are compensable by money damages. See *White Bay Enterprises v. Newsday*, 258 A.D.2d 520 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record demonstrated that alleged injuries compensable by money damages); *Schrager v. Klein*, 267 A.D.2d 296 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record failed to demonstrate likelihood of success on merits or that injuries were not compensable by money damages).

B. Relevant Causes of Action

The tort of trade libel or injurious falsehood requires the knowing publication of false and derogatory facts about the plaintiff's business of a kind calculated to prevent others from dealing with the plaintiff, to its demonstrable detriment. *Banco Popular North America v. Lieberman*, 75 A.D.3d 460, 462 (1st Dept. 2010), citing *Waste Distillation Tech. v. Blasland & Bouck Engrs., P.C.*, 136 A.D.2d 633 (2d Dept. 1988). In addition, the facts so published must cause special damages, in the form of actual lost dealings. *Id.*, citing *SRW Assoc. v. Bellport Beach Prop. Owners*, 129 A.D.2d 328, 331 (2d Dept. 1987).

On a motion to dismiss a claim for libel on the ground that the offending statement is not defamatory, the court must determine whether the contested statements are reasonably susceptible of a defamatory connotation. *Ava v. NYP Holdings, Inc.*, 64 A.D.3d 407, 412-413 (1st Dept. 2009), quoting *Armstrong v. Simon & Schuster*, 85 N.Y.2d 373, 380 (1995) and citing *James v. Gannett Co.*, 40 N.Y.2d 415, 419 (1976). In determining whether the statement is reasonably susceptible of a defamatory meaning, the court must examine not only the particular words claimed by the plaintiff to be defamatory but the entire communication in which those words appeared. *Id.* at 413, citing *James, supra*, at 419-420.

To state a cause of action to recover damages for tortious interference with prospective contractual relations, the plaintiff must allege that the defendant engaged in culpable conduct that interfered with a prospective contractual relationship between the plaintiff and a third party. *Adler v. 20/20 Companies*, 2011 NY Slip Op. 1962, * 2 (2d Dept. 2011), citing *Smith v. Meridian Techs., Inc.*, 52 A.D.3d 685 (2d Dept. 2008). As a general rule, such culpable conduct must amount to a crime or an independent tort, and may include wrongful means, defined as physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure. Mere knowing persuasion would be insufficient. *Id.*, quoting *Lyons v. Menoudakos & Menoudakos, P.C.*, 63 A.D.3d 801, 802 (2d Dept. 2009) (internal citations omitted).

To establish a claim of tortious interference with contract, plaintiff must show the existence of a valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages. *White Plains Coat &*

Apron v. Cintas Corp., 8 N.Y.3d 422, 426 (2007).

To state a claim for prima facie tort, plaintiff must plead 1) the intentional infliction of harm, 2) which results in special damages, 3) without any excuse or justification, 4) by an act or series of acts that would otherwise be lawful. *Posner v. Lewis*, 80 A.D.3d 308, 312 (1st Dept. 2010), quoting *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 142-143 (1985).

C. Application of these Principles to the Instant Action

The Court is mindful of Plaintiff's frustration at the allegedly improper conduct of Defendant as outlined in the Complaint, and the delay of the litigation of this matter due to Defendant's incarceration in California. Notwithstanding those considerations, the Court concludes that injunctive relief is not appropriate because Plaintiff has not demonstrated a likelihood of success on the merits.

The causes of action in the Complaint are premised on allegedly false statements made by Defendant about Plaintiff, to Plaintiff's detriment. Plaintiff, through its verification, has sworn to the truth of the allegations in the Complaint. Defendant, however, has expressed his intention to contest those allegations when he is released from jail, where he is awaiting trial on serious criminal charges. Although this is not a motion to dismiss the complaint, the principles cited above regarding the need to examine not only the particular words claimed by the plaintiff to be defamatory but the entire communication in which those words appeared are instructive.

Given the business relationship between the parties, the nature of the allegations which suggest that Plaintiff's termination of its relationship with Defendant was contentious, and the *scienter* that is required to prove the causes of action alleged, the Court cannot conclude at this juncture that Plaintiff has demonstrated a likelihood of success on the merits. Accordingly, the Court vacates the TRO previously issued and denies Plaintiff's application in its entirety.

All matters not decided herein are hereby denied.

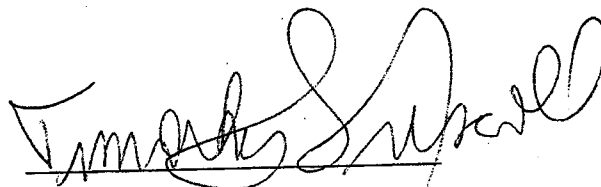
This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court on June 16, 2011 at 9:30 a.m. for a Preliminary Conference. Either party's failure to appear on that date may result in the Court entertaining an application by the appearing party for sanctions, or other relief, against the non-appearing party.

ENTER

DATED: Mineola, NY

April 18, 2011



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

APR 21 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**