

Hochman v Missirlian
2011 NY Slip Op 33209(U)
November 30, 2011
Supreme Court, Nassau County
Docket Number: 17544/10
Judge: Karen V. Murphy
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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ x

LAINIE HOCHMAN,

Plaintiff(s),

Index No. 17544/10

-against-

Motion Submitted: 9/21/11

Motion Sequence: 002, 003, 004

PHIL MISSIRLIAN,

Defendant(s).

_____ x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....XXX
- Answering Papers.....XX
- Reply.....
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....XXX

In a series of motions (Sequences 2, 3, and 4) the parties move for various forms of relief. Plaintiff and defendant oppose each other's motions.

In Motion Sequence 2, defendant moves for an Order dismissing the complaint for plaintiff's allegedly willful failure to comply with discovery demands. In the alternative, defendant requests an Order compelling plaintiff to comply with the Preliminary Conference Order and defendant's discovery demands. Defendant also requests that the Court award him costs and attorney's fees in connection with plaintiff's alleged failure to comply.

In Motion Sequence 3, plaintiff seeks leave to file and serve a proposed amended complaint adding various causes of action, and to compel defendant to comply with her discovery demands.

Currently, plaintiff alleges a first cause of action against defendant for defamation based on specific statements made in a single e-mail dated August 8, 2010. Plaintiff also alleges a second caused of action sounding in intentional infliction of emotional distress as a result of the alleged defamatory e-mail.

In Motion Sequence 4, plaintiff cross-moves to vacate defendant's interrogatories and for a protective order, to seal the record, and to condition all further discovery on the execution of a stipulation and order of confidentiality.

Plaintiff and defendant admittedly had a "consensual relationship," presumably of an intimate nature. Following the demise of that relationship, the allegations giving rise to this action ensued.

The action was commenced by filing the original complaint on August 30, 2010, against "John Doe."

Following Cablevision's response to a court-ordered subpoena for subscriber information regarding the particular e-mail address from which the allegedly defamatory e-mail emanated, an amended complaint naming defendant Phil Missirlian was filed on October 18, 2010. Defendant was served with the supplemental summons and amended complaint on October 27, 2010.

On February 7, 2011, this Court issued a Preliminary Conference Order setting the end date for all disclosure to be September 11, 2011.

In a Decision and Order dated June 9, 2011, this Court set forth a motion schedule with respect to discovery issues. All motions made by either party pertaining to discovery issues were to be served on or before June 21, 2011. Any responses to the respective motions were to be served on or before July 1, 2011. Reply papers, if any, were to be served on or before July 8, 2011.

The Court further determined that failure to timely serve the discovery motions would be deemed a waiver of all discovery issues contained in the Preliminary Conference Order, and that failure to timely oppose a motion would result in the motion being marked as fully submitted without opposition.

With respect to plaintiff's then-anticipated motion to amend the complaint, the Court also specified in its Decision and Order that such motion be filed on or before June 21, 2011. Opposition thereto, if any, was to be served on or before July 1, 2011. Reply papers, if any,

were to be served on or before July 8, 2011.

Plaintiff's cross-motion to vacate defendant's interrogatories (Sequence 4)¹ is dated July 7, 2011, and was received in the Nassau County Clerk's Office on July 8, 2011. Thus, plaintiff's cross-motion is untimely, both as a cross-motion and as opposition to defendant's motion to dismiss the complaint for failure to comply with discovery demands. Accordingly, plaintiff's cross-motion is denied. The only portion of plaintiff's papers (Sequence 4) that will be considered by this Court is that which is labeled as a "Reply In Further Support of Motion to Amend"(Sequence 3), because it was filed on July 8, 2011, the last day for replies specified by the Court's prior Order.

The Court now turns to plaintiff's motion to amend the complaint to add six additional causes of action related to two incidents that occurred after the commencement of this action. Specifically, plaintiff seeks leave to add a cause of action for defamation related to each of the two incidents, a cause of action for intentional infliction of emotional distress related to each of the two incidents, and a cause of action for malicious prosecution related to each of the two incidents.

According to plaintiff, the first incident for which she seeks leave to add additional causes of action occurred on November 3, 2010. On that date, defendant reported to the Nassau County Police Department that his laptop computer and camera had been stolen, accusing plaintiff of having committed the crime.

The second incident allegedly occurred on December 2, 2010 when plaintiff asserts that defendant falsely reported to the Nassau County Office of Child Protective Services ("CPS") that plaintiff had engaged in improper conduct/activities relative to her minor child.

Leave to amend pleadings "shall be freely given" absent prejudice or surprise resulting from the delay (*CPLR § 3025, Northbay Construction Co., Inc. v. Bauco Construction Corp.*, 275 A.D.2d 310, 711 N.Y.S.2d 510 (2d Dept., 2000); *Sewkarran v. DeBellis*, 11 A.D.3d 44, 782 N.Y.S.2d 758 [2d Dept., 2004]), unless the proposed amendment is "palpably insufficient" to state a cause of action or is patently devoid of merit (*Smith-Hoy v. AMC Property Evaluations, Inc.*, 52 A.D.3d 809, 811, 862 N.Y.S.2d 513 (2d Dept., 2008) citing *Lucido v. Mancuso*, 49 A.D.3d 220, 229, 851 N.Y.S.2d 238 [2d Dept., 2008]).

Plaintiff's request for proposed additional causes of action relating to the CPS

¹Defendant's interrogatories are dated December 10, 2010, and were served upon plaintiff's counsel on that same date.

complaint allegedly made by defendant is denied. By Decision and Order of this Court dated May 13, 2011, the Court determined, after *in camera* inspection of CPS records, that the reporting individual is anonymous, that the information contained therein is not necessary to the determination of any issue in this action, and that none of the material will be disseminated.

Accordingly, any statements made to CPS are not attributable to defendant, and cannot form the basis for any cause of action against him (*see Schwegel v. Chiaramonte*, 4 A.D.3d 519, 521, 772 N.Y.S.2d 379 (2d Dept., 2004) [counterclaim for slander dismissed because letter containing alleged defamatory statement failed to identify the source as either of plaintiffs]). Thus, the Court denies plaintiff leave to amend the complaint to assert the proposed sixth, seventh and eighth causes of action against defendant, as litigation of these allegations would be futile (*see generally Castillo v. Starrett City, Inc.*, 4 A.D.3d 320, 322, 772 N.Y.S.2d 74 [2d Dept., 2004]).

As to the November 3, 2010 report made by defendant to the Nassau County Police Department (“NCPD”), plaintiff proposes to add causes of action three through five, alleging defamation, malicious prosecution, and intentional infliction of emotional distress resulting from that report. Plaintiff’s proposed second amended complaint refers to defendant’s supporting deposition made to the NCPD, and annexes it to the proposed amended complaint (paragraph 15).² The supporting deposition states, in pertinent part, that plaintiff was the only person with a key to defendant’s personal office, that the laptop and a camera were missing after the demise of their relationship, and that he did not give plaintiff permission to take the laptop computer or the camera. Defendant concluded his statement by requesting that plaintiff be arrested.

At the conclusion of the police investigation, the assigned detective determined that there was no probable cause to arrest plaintiff for the alleged theft (Plaintiff’s Exhibit 6, NCPD Case Report).

Defamation

In the proposed amended complaint, plaintiff alleges that, “[t]he statement that the plaintiff was a thief as published in the supporting deposition was false, defamatory, and intentionally misleading.”

The elements of defamation are “a false statement, published without privilege or

² Although not physically attached to Exhibit 1 on the instant motion, the supporting deposition is attached to plaintiff’s papers as Exhibit 6.

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” (*Dillon v. City of New York*, 261 A.D.2d 34, 37, 704 N.Y.S.2d 1 [1st Dept., 1999]). Additionally, CPLR § 3016(a) requires that “the particular words complained of shall be set forth in the complaint” Defamation actions are subject to a one-year statute of limitations pursuant to CPLR § 215(3).

One of the categories recognized as “slander per se” is that which charges plaintiff with a serious crime, which relieves plaintiff from having to allege special damages. Not every imputation of criminal conduct is slanderous per se; however, misdemeanors and felonies, including larceny, fall into the “serious crime” category (*Liberman v. Gelstein*, 80 N.Y.2d 429, 435, 605 N.E.2d 344, 590 N.Y.S.2d 857 (1992); *Epifani v. Johnson*, 65 A.D.3d 224, 243, 882 N.Y.S.2d 234 (2d Dept., 2009) (“stealing” constitutes an allegation of a serious crime so as to qualify as slander per se); *Fusco v. Fusco*, 36 A.D.3d 589, 591, 829 N.Y.S.2d 138 (2d Dept., 2007) [filing of a false police report may be slanderous per se because the filing of a false police report is a crime]).

Here, the Court does not find that the proposed amendment to add a cause of action for defamation is “palpably insufficient” to state a cause of action or is patently devoid of merit. Furthermore, the Court determines that defendant would not be surprised or prejudiced by the proposed amendment to add the cause of action for defamation, as he is the one who made the report to the NCPD and is undoubtedly aware that plaintiff was not arrested for the reported larceny. Finally, defendant’s contention that an amendment would result in further delay and additional expenditures to complete discovery is unavailing in view of the fact that minimal discovery has taken place in this matter.

Malicious Prosecution

Malicious prosecution plaintiffs must establish the following four elements: 1) that a criminal proceeding has been commenced or continued against the plaintiff by defendant; 2) that the criminal proceeding terminated in favor of the accused; 3) that probable cause for the criminal proceeding was absent, and 4) that the defendant commenced or continued the criminal proceeding with actual malice (*see Smith-Hunter v. Harvey*, 95 N.Y.2d 191, 734 N.E.2d 750, 712 N.Y.S.2d 438 (2000); *Hollender v. Trump Village Cooperative, Inc.*, 58 N.Y.2d 420, 448 N.E.2d 432, 461 N.Y.S.2d 765 (1983); *Broughton v. State of New York*, 37 N.Y.2d 451, 335 N.E.2d 310, 373 N.Y.S.2d 87 [1975]).

Plaintiff alleges in her proposed fourth cause of action that the larceny complaint was made against her; that the conclusion of the police investigation was that no probable cause existed for her arrest, and that defendant made the complaint with malice and ill will, among

other motivations.

Keeping in mind the liberal standard for leave to amend pleadings, this Court is satisfied that the proposed amended complaint alleging malicious prosecution as a fourth cause of action against defendant meets that standard. As noted above, the Court also determines that defendant will suffer neither surprise nor prejudice from this proposed amendment.

Intentional Infliction of Emotional Distress

“The tort has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress” (*Howell v. New York Post Company, Inc.*, 81 N.Y.2d 115, 121, 612 N.E.2d 699, 596 N.Y.S.2d 350 [1993]).

Plaintiff’s proposed fifth cause of action alleges each of the elements of the tort of intentional infliction of emotional distress. Whether plaintiff will be able to produce a sufficient evidentiary showing to establish the commission of this tort by defendant is not for the Court’s consideration here. “No evidentiary showing of merit is required under CPLR § 3025(b)” (*Lucido, supra* at 229; *Benyo v. Sikorjak*, 50 A.D.3d 1074, 1076, 858 N.Y.S.2d 215 [2d Dept., 2008]). The Court also notes that the original complaint already contains a cause of action related to the alleged defamatory e-mail that alleges intentional infliction of emotional distress related thereto. Thus, the Court finds that defendant would not suffer from surprise as a result of the proposed addition of the same tort albeit related to a different incident.

Based on the foregoing, the Court grants plaintiff’s request for leave to amend the complaint to include three additional causes of action (three through five) sounding in defamation, malicious prosecution, and intentional infliction of emotional distress related to the November 3, 2010 police report filed by defendant against plaintiff.

Plaintiff shall serve the proposed second amended summons and complaint, including any and all annexed exhibits, upon defendant on or before December 20, 2011.

Discovery

This Court recognizes the preference for matters to be decided on their merits. Furthermore, the Court has not previously issued a Final Compliance Conference Order in this action. Thus, defendant’s request for dismissal of the complaint is denied; however,

defendant's request to compel plaintiff to respond to his discovery demands as set forth in Sequence 2, and plaintiff's request that the Court order that defendant comply with her discovery demands as set forth in Sequence 3, are granted to the extent that the requested discovery has not already been exchanged.

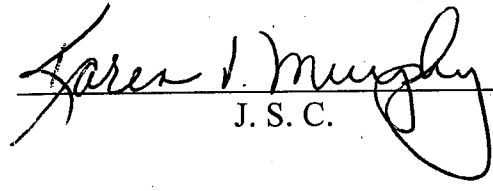
Each of the parties is directed to comply with the outstanding paper discovery requests as identified in each of their respective motions on or before December 31, 2011. Depositions of the parties are to be completed on or before January 20, 2012. Any Independent Medical Examination(s) (IME) of plaintiff shall be designated within fifteen (15) days of the completion of plaintiff's deposition, and shall be conducted within thirty (30) days of designation. Failure to comply with the Court's directives will result in sanctions, upon notice, including but not limited to dismissal of the complaint, orders prohibiting the disobedient party from supporting or opposing designated claims or defenses, or rendering a judgment by default against the disobedient party.

There shall not be any adjournments of the dates specified in this Decision and Order without prior approval of this Court.

Any relief not specifically addressed herein is denied.

The foregoing constitutes the Order of this Court.

Dated: November 30, 2011
Mineola, N.Y.



J. S. C.

ENTERED
DEC 07 2011
NASSAU COUNTY
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