

Campanelli v Somer

2012 NY Slip Op 30663(U)

March 5, 2012

Supreme Court, Nassau County

Docket Number: 009311-11

Judge: Vito M. DeStefano

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 19
NASSAU COUNTY

ANDREW J. CAMPANELLI,
CAMPANELLI & ASSOCIATES, P.C.,

Decision and Order

Plaintiffs,

-against-

MOTION SEQUENCE:01
INDEX NO. 009311-11

STANLEY J. SOMER, JEFFREY T. HELLER,
MELISSA CORWIN and SOMER & HELLER, LLP,

Defendants.

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
Affirmation in Opposition	2
Memorandum of Law in Support	3
Memorandum of Law in Opposition	4
Reply Memorandum of Law in Further Support	5

In this action to recover, *inter alia*, damages pursuant to Judiciary Law § 487, the Defendants move for an order: “(1) pursuant to CPLR 3211 (a) (7), dismissing the verified complaint on the ground that it fails to state a cause of action as a matter of law; (2) alternatively, striking the demand for punitive damages; [and] (3) alternatively, pursuant to CPLR 2201, for a stay of this action pending the determination of a prior pending action”.

Factual and Procedural Background

For the reasons that follow, the branch of the motion seeking dismissal of the complaint is granted and the remaining branches of the motion are denied as academic.

The complaint alleges that in 2006, non-party Thomas Gesuale retained the Defendants herein to commence litigation against his former wife Margaret Acerra ("Acerra") to compel her to transfer title to real property located in Commack, New York. At some point thereafter (allegedly during the pendency of the action), the Defendants caused Gesuale to transfer title to the Commack property to them. Although the property was valued at \$2 million, the Defendants tendered only half that amount along with a promissory note and "an agreement with their client under which they offered to provide current and future legal services to him and that Mr. Gesuale would not be required to pay them for such services, but instead, the value of services would be continuously applied against the remaining debt which said Defendants owed to Mr. Gesuale. * * * In short, Defendants * * * set up an arrangement where they could 'eat away' at the monies they owed to Mr. Gesuale for the property [in violation of the New York Rules of Professional Conduct] * * * Apart from that * * * [Defendants] undertook and engaged in a pattern of (a) unnecessarily prolonging litigation within which they were representing such client; and (b) filing a host of frivolous and baseless lawsuits against various defendants" (Ex. "A" to Motion: Plaintiff's Complaint at pp.2-4).

More specifically, the Plaintiffs assert that the Defendants filed frivolous lawsuits in federal and state courts, and made frivolous applications, for the purpose of reducing the financial obligation owed to Gesuale. In this regard, the Defendants "in collusion" with Gesuale, allegedly fabricated false claims against Plaintiffs, including that Plaintiffs were disqualified from representing Acerra because Gesuale had hired Plaintiffs to form various companies for him. In a prior litigation, the Defendants filed a motion to disqualify Plaintiffs from representation, however, Plaintiffs never did any such work and the companies referred to by Defendants were formed two years before Plaintiffs allegedly met any of the parties involved (Ex "A" to Motion: Complaint pp. 12-13). The motion was later withdrawn by the Defendants after Plaintiffs presented proof of the date of formation of the aforementioned companies.

Plaintiffs assert that Defendants filed a "baseless action" in Federal Court alleging, *inter alia*, the Plaintiffs were "engaged in the business of the manufacturing; supply; sale; leasing; use; distribution and or importation of shipping containers". According to the Plaintiffs, Defendants knew that the Federal Court action was frivolous because they were aware that the subject of the litigation, to wit, certain patents, had been transferred by Gesuale to an irrevocable trust (Ex "A" to Motion: Complaint at pp.14-15).

In the Federal Court action, the Plaintiffs' answer contained many of the same allegations recited in the instant complaint. In addition, the answer contained a claim seeking damages against the Defendants herein (excluding Melissa Corwin) pursuant to 28 USC § 1927 (Exhibit "B" to Motion: Answer in Federal Court action).¹

In a stipulation dated December 22, 2009, the Federal Court action was discontinued. The Plaintiffs herein discontinued their claim against the Defendants with prejudice (Exhibit "C" to Motion: Unsigned Copy of Stipulation).

Thereafter, the Defendants brought another action on behalf of Gesuale against Plaintiffs in Supreme Court, Suffolk County seeking \$50,000,000.00 in damages and alleging, *inter alia*, that the Plaintiffs committed fraud in sending a letter without the authorization of their client, Acerra. The allegation was based on the response by Acerra at a deposition to a question concerning the letter, which contained insertions by someone that were not part of the letter actually sent. In this regard, when Acerra was asked whether she authorized sending the letter containing the insertions (which were allegedly made by Gesuale or the Defendants), she denied it.

After the Plaintiffs provided affidavits concerning their alleged authority to send the disputed letter, the Defendants "continued to press their baseless action forward, and have mired the Plaintiffs in a wholly frivolous, albeit substantial, discovery dispute" (Ex "A" to Motion: Complaint at p.20). The Suffolk County action is pending.

The Plaintiffs claim that working in tandem, the defendants and their client Thomas Gesuale have repeatedly proffered false and/or fraudulent statements and claims to multiple courts and third parties. Plaintiffs allege that as is known to the defendants, in his desire to punish his ex-wife, his son and anyone representing them, with lawsuits and attacks, Thomas Gesuale, as aided by his attorneys, routinely and knowingly submitted false statements and fraudulently altered documents to courts in the context of litigation, and to third parties.

The Court's Determination

On a motion to dismiss pursuant to CPLR 3211(a)(7), the "pleading is to be liberally construed, the facts alleged in the complaint accepted as true, and the plaintiff accorded the

¹28 USC § 1927 provides: Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

benefit of every favorable inference” (*Fay Estates v Toys "R" Us, Inc.*, 22 AD3d 712 [2d Dept 2005]). ”Such a motion should be granted only when, even viewing the allegations as true, the plaintiff still cannot establish a cause of action. The standard is not whether the plaintiff has stated a cause of action, but whether the plaintiff has a cause of action” (see *McGuire v Sterling Doubleday Enters., L.P.*, 19 AD3d 660, 661 [2d Dept 2005]).

A review of the Plaintiffs’ complaint reveals that it contains numerous undelineated and conclusory claims appertaining to different actions, different forums and different parties in one cause of action alleging that the Defendants violated Judiciary Law § 487. Notwithstanding the wide array of allegations, much of which does not state a viable claim under Judiciary Law § 487, the only allegation in the complaint that actually alleges damages relates to the presently pending Suffolk County action². In this regard, Paragraph 115 of the complaint reads as follows:

115. As a result of same, the plaintiffs sustained damages in that they have been forced to expend labor and supplies, and the labor of its payroll employees, at direct and substantial monetary costs to the plaintiffs, to defend the frivolous action, the defense of which is ongoing.³

In the absence of a claim of injury arising from the myriad incidents of wrongful conduct articulated in the complaint, a claim under Judiciary Law § 487 is not stated in regard to them. Judiciary Law § 487 [Misconduct by attorneys] reads as follows:

An attorney or counselor who:

²For example, in no event can the Plaintiffs advance any claim under Judiciary Law § 487 based on conduct in proceedings to which they were not parties (*E.g. Sarasota, Inc. v Kurman & Eisenberg, LLP*, 28 Ad3d 237 [1st Dept 2006]).

³The court notes that the opening phrase contained in paragraph 115, to wit, “[a]s a result of same”, which appears to reference all of the alleged wrongful conduct on the part of the defendants, is inconsistent with the balance of the paragraph which clearly references the ongoing defense of the Suffolk County action. Moreover, the assertion by counsel in a supporting affirmation that Plaintiffs have “spent hours upon hours and have wasted huge sums of money defending a baseless grievance (which was eventually dismissed), frivolous motions and frivolous lawsuits, filed by the Defendants on behalf of their client * * * for the purpose of eating away at a note owed to [him]” (Memorandum of Law in Opposition to Motion at p.14), cannot be considered in assessing the viability of Plaintiffs’ claim (*cf.*, *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010] [court can look to affidavits to remedy defect in pleadings]).

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,

2. Wilfully delays his [or her] client's suit with a view to his [or her] own gain; or, wilfully receives any money or allowance for or on account of any money which he [or she] has not laid out, or becomes answerable for,

Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he [or she] forfeits to the party injured treble damages, to be recovered in a civil action.

“To sustain a claim for violation of Judiciary Law § 487(1), plaintiffs must show ‘a chronic and extreme pattern of legal delinquency’ along with the statutorily required intent to deceive” (see *McGiverny v Sobel, Ross, Fliegel & Suss, LLP*, 2011 NY Slip Op. 33523U [Supreme Court New York County 2012] quoting *Kaminsky v. Herrick, Feinstein LLP*, 59 AD3d 1, 13 [1st Dept 2008]). Injury being an essential element of plaintiff’s claim under section 487, where a complaint fails to allege that damages were sustained as a result of deceitful conduct, the complaint will be dismissed (see *Maksimiak v. Schwartzapfel Novick Truhowsky Marcus, P.C.*, 82 AD3d 652 [1st Dept 2011]).

At bar, the complaint, as indicated, contains one paragraph which relates the alleged wrongful conduct to Plaintiffs’ alleged damages. The damages relate solely to the Defendants’ allegedly improper conduct in commencing and maintaining the pending Suffolk County action, and, consequently, the sufficiency of that claim alone is at issue on this motion. Of significance is that no claim for damages is made in regard to the Federal Court action.

Regarding the Plaintiffs’ claim based on the Suffolk County action, having reviewed the parties’ submissions, the court concludes that the complaint fails to state a cause of action for relief under Judiciary Law § 487. In this regard, the complaint alleges that the Defendants filed a baseless and frivolous lawsuit based on the deposition testimony of Acerra that she did not authorize the transmission of a letter and on subsequently prepared affidavits in which she and her son indicated that letter was, in fact, authorized.

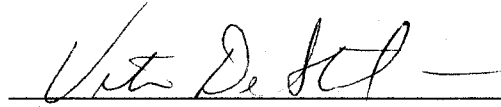
Putting aside the merits of the Suffolk County action and the possibility that the Defendants therein (the Plaintiffs herein) may ultimately prevail, the wrong complained of—as stated in the complaint— to wit, bringing an action based on alleged improper conduct of the

Plaintiffs in sending a letter without authorization, and as elaborated on in the attachments to the complaint, are not deceitful. Moreover, allegations that the Suffolk County action is frivolous, are likewise, insufficient to support a claim pursuant to section 487 (*see Ticketmaster Corp. v Lidsky*, 245 AD2d 142 [1st Dept 1997] [assertion of unfounded allegations in a pleading, even if made for improper purposes, does not provide a basis for liability under section 487]).

In conclusion, it is hereby ordered that: the branch of the Defendants' motion for dismissal pursuant to CPLR 3211(a)(7) is granted and the complaint is dismissed; the remaining branches of the motion are denied as academic.

This constitutes the decision and order of the court.

Dated: March 5, 2012



Hon. Vito M. DeStefano

ENTERED
MAR 09 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE