

Disario v Rynston

2012 NY Slip Op 32036(U)

August 1, 2012

Sup Ct, Suffolk County

Docket Number: 09-14278

Judge: Denise F. Molia

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SHORT FORM ORDER

INDEX No. 09-14278

CAL No. 11-02072OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 3-6-12
ADJ. DATE 5-4-12
Mot. Seq. # 004 - MG; CASEDISP

-----X

PETER DISARIO d/b/a RPM PAINTING,

Plaintiff,

- against -

EARLE RYNSTON a/k/a EARLE S. RYNSTON
and CAROLE RYNSTON,

Defendants.

-----X

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Upon the following papers numbered 1 to 56 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 37; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 38 - 53; Replying Affidavits and supporting papers 54 - 56; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendants Earle Rynston, also known as Earle S. Rynston, and Carole Rynston for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiff's complaint, is granted.

This is an action for defamation, among other things, which arises out of a dispute over a home improvement contract entered into by the parties. In his complaint, the plaintiff alleges that he and the defendants entered into a verbal agreement for the construction of an addition to the defendants' home, that the check delivered to him in payment for his work was returned for insufficient funds, and that the defendant Earle Rynston (Earle) made untrue statements in filing a complaint against him with the local licensing board and in submitting a claim to his insurance company. The complaint sets forth four causes of action sounding in defamation, issuance of a bad check, insurance fraud, and fraud/misrepresentation, respectively.

The defendants now move for summary judgment on the grounds that they have multiple defenses as a matter of law, and that there are no issues of fact requiring a trial of this action. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64

NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]). However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see, Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; *Rebecchi v Whitmore, supra*).

In support of the motion, the defendants submit, among other things, the pleadings, the transcript of the plaintiff's deposition testimony, the affidavits of the two defendants, minutes of the hearing conducted by the local licensing board, various correspondence and e-mails of the parties, copies of the check delivered to the plaintiff and a related stop order, and the deposition transcripts of two nonparty witnesses. Initially, the Court notes that the two nonparty depositions are unsigned, and that the defendants have failed to submit proof that the transcripts were forwarded to the witnesses for their review (*see CPLR 3116 [a]*). Under the circumstances, the deposition testimony of the two nonparty witnesses is not in admissible form (*see Marmer v IF USA Express, Inc.*, 73 AD3d 868, 899 NYS2d 884 [2d Dept 2010]; *Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; *McDonald v Mauss*, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]).

In addition, the Court notes that the affidavits of the defendants in support of their motion are deficient on their face in that they were notarized in the State of Florida and they are not accompanied by certificates verifying that the manner in which they were taken conforms with Florida law (*see CPLR 306 [d]*, 2309 [c]; Real Property Law § 299-a [1]). However, it has been held that the absence of a certificate of conformity is a mere irregularity, not a fatal defect, which can be ignored in the absence of a showing of actual prejudice (*see Betz v Daniel Conti, Inc.*, 69 AD3d 545, 892 NYS2d 477 [2d Dept 2010]; *Matapos Tech. Ltd. v Compania Andina de Comercio Ltd.*, 68 AD3d 672, 891 NYS2d 394 [1st Dept 2009]; *Smith v Allstate Ins. Co.*, 38 AD3d 522, 832 NYS2d 587 [2d Dept 2007]). Here, the Court finds that the plaintiff has not objected to the defect, and that a review of the entire record indicates the absence of actual prejudice to the plaintiff.

At his deposition, the plaintiff testified that, after a dispute over his work at the defendants' home arose, he was fired, and told to leave the job on July 20, 2007. At that time he was owed \$27,000 for the work completed. He acknowledged that the foundation he had installed had not passed inspection by the Town of East Hampton, but that a cure was available to allow it to pass on re-inspection. The plaintiff further testified that, on the day he was fired, Earle delivered a check in the amount of \$18,500 to him as payment for the work that he had completed. Thereafter, Earle delivered a second check to him to replace the first check. However, the second check was returned for insufficient funds, and he was never able to collect on that check. He acknowledged that the defendants' bank advised him that the check was stamped incorrectly by one of its employees when it was returned. The plaintiff stated that Earle made defamatory statements in connection with a complaint Earle filed against him with the Town of East Hampton Licensing Review Board (LRB). He indicated that the defendant Carole Rynston (Carole)

DiSario v Rynston
Index No. 09-14278
Page 3

did not make any defamatory statements at a hearing held by the LRB, and that he did not know of any allegedly defamatory statements made by Earle outside the LRB process, or other than those made to the members of the LRB. The plaintiff further testified that Earle filed a false claim with the plaintiff's insurance company, alleging that the foundation that the plaintiff installed was "porous," and that he received a letter from his insurance company stating that any claim was outside of the coverage of his policy, which described his business as being "residential painting." He acknowledged that the building inspector's report indicates that the addition had a porous foundation. The plaintiff stated that the defendants told him that the designer who developed the plans for the addition to their home was an architect, that the designer was not an architect, and that he would have asked for the plans to be stamped by an architect if he had known the truth. He admitted that he was aware that the plans he filed with the Town of East Hampton were not stamped by an architect, and that he could have discovered that the designer was not an architect before commencing work at the defendants' home. The plaintiff further testified that this falsehood damaged him in that it caused Earle to blame him for the fact that additional work had to be done, resulting in his not being paid for the job.

The Court notes that it has given almost no weight to Carole and Earle's affidavits. Carole's affidavit is essentially a recitation of the governing law, which is already set forth in the affirmation of counsel for the defendants. Similarly, Earle's affidavit contains a great deal of information regarding the governing law, points out discrepancies or deficiencies in the plaintiff's testimony and the allegations in his complaint, and refers to the exhibits submitted in support of the motion, all of which is already set forth in the affirmation of counsel for the defendants.

Here, the defendants have established their entitlement to summary judgment dismissing the four causes of action set forth in the plaintiff's complaint. The Court will discuss each cause of action *seriatim*.

First Cause of Action for Defamation

Initially, the Court notes that the complaint does not include any allegations that Carole made any false written or oral statements regarding the plaintiff. Accordingly, the plaintiff's first cause of action against the defendant Carole Rynston is dismissed.

It has been held that a communication to a licencing agency relative to its licensing function is entitled to an absolute privilege (*Allan and Allan Arts Ltd. v Rosenblum*, 201 AD2d 136, 615 NYS2d 410 [2d Dept 1994]; *Schettino v Alter*, 140 AD2d 600, 528 NYS2d 862 [2d Dept 1988]; *Stilsing Elec., Inc. v Joyce*, 113 AD2d 353, 495 NYS2d 999 [3d Dept 1985]; *Marino v Wallace*, 65 AD2d 946, 410 NYS2d 488 [4th Dept 1978]; *Julien J. Studley, Inc. v Lefrak*, 50 AD2d 162, 376 NYS2d 200 [2d Dept 1975] *affd* 41 NY2d 881, 393 NYS2d 980 [1977]). A review of the complaint, and the entire record, reveals that every alleged defamatory writing or oral statement made by Earle was made to the LRB, which is charged with the oversight of licensed contractors within the Town of East Hampton (Town of East Hampton Code § 156-30). Thus, the statements made by Earle are privileged, and the plaintiff has failed to raise an issue of fact regarding the privileged nature of said statements, written or oral.

DiSario v Rynston
Index No. 09-14278
Page 4

In addition, the filing of such a communication, even for an ulterior purpose, does not, without more, constitute a legally sufficient claim for abuse of process (*Julien J. Studley, Inc. v Lefrak, supra*). In fact, it has been held that such communications do not amount to "process" at all. A communication alleging misdeeds by an individual and merely requesting that the agency take whatever steps it deems appropriate cannot be regarded as process for it is not a "direction or demand that the person to whom it is directed perform or refrain from the doing of some prescribed act" (*Julien J. Studley, Inc. v Lefrak, supra*). To the extent that the plaintiff's opposition raises the issue of abuse of process, not plead in the complaint, it is without merit.

Accordingly, the plaintiff's first cause of action is dismissed.

Second Cause of Action for Issuing a Bad Check

Initially, the Court notes that the complaint does not include any allegations that Carole drew or delivered the allegedly bad check to the plaintiff. Accordingly, the plaintiff's second cause of action against the defendant Carole Rynston is dismissed.

The complaint alleges that the second check delivered to him was returned for insufficient funds and that, as a result, the defendants have been unjustly enriched and the plaintiff damaged in the amount of \$18,500. A review of the record reveals that the subject check was marked incorrectly by the defendants' bank, that Earle informed the plaintiff that he was placing a stop order on the check before the plaintiff deposited it in his bank, that Earle placed the stop order, and that the check was not paid based on that stop order. In light of the Court's findings herein, any claim that Earle violated the Penal Law, or otherwise is subject to sanction for maintaining insufficient funds in the subject checking account, is without merit.

To the extent that the plaintiff's allegations can be read to assert a claim for unjust enrichment, it is rejected as duplicative of a previously filed action, *Peter DiSario d/b/a RPM Painting v Earle Rynston a/k/a Earle S. Rynston and Carole Rynston, Index No. 08-27197*, in which the plaintiff seeks to foreclose on a mechanic's lien filed against the defendant's property, and to recover damages representing the value of the work completed thereon. By order of this Court (Molia, J.), dated August 11, 2009, the previously filed action was joined with the instant action for the purposes of joint trial and joint discovery. An action may be dismissed on the ground that "there is another action pending between the same parties for the same cause of action" (CPLR 3211 [a] [4]). A review of the complaint served in the previously filed action, submitted in support of the defendants' motion herein, reveals that the plaintiff's second cause of action involves the same facts, and involves the same questions of law as those presented in his previously filed action.

Accordingly, the plaintiff's second cause of action is dismissed.

Third Cause of Action for Insurance Fraud

Initially, the Court notes that the complaint does not include any allegations that Carole communicated with the plaintiff's insurance company, or otherwise was involved in the filing of a claim

DiSario v Rynston
Index No. 09-14278
Page 5

against the plaintiff. Accordingly, the plaintiff's third cause of action against the defendant Carole Rynston is dismissed.

In his complaint, the plaintiff alleges that Earle filed a claim with the plaintiff's insurance company, Essex Insurance Company (Essex), which falsely indicated that "the plaintiff constructed a poorly made foundation," and that as a result of the "fraudulent claim ... Essex Insurance refused to renew plaintiff's general liability policy." The plaintiff also contends that this placed him in the position of "unlimited liability" with respect to the work he had completed at the defendants' home.

The defendants have submitted Earle's letter dated November 5, 2007, faxed to Essex, which reads in relevant part: "this is to put you on notice of a possible claim resulting from a poorly made foundation ... [t]he Town of East Hampton's building inspector saw and rejected the work, finding it was poorly done, being too porous ..." The defendants also submit, among other things, a copy of the building inspector's report, a copy of an e-mail to the plaintiff from the Town of East Hampton, and two letters from Essex to the plaintiff. A review of the record reveals that the building inspector did not pass the subject foundation on his first inspection, noting that it was "pourous" (sic), that Essex acknowledged that Earle's claim was speculative, that Essex refused to renew the plaintiff's insurance policy for reasons unrelated to the alleged claim made by Earle, and that the plaintiff and his business are no longer associated with the project in the records of the Town of East Hampton Building Department. Therefore, any contention that the plaintiff or his business could have "unlimited liability" regarding the project is purely speculative, and without merit.

In an affidavit submitted in opposition to an earlier motion made by the defendants, the plaintiff alleges that the "[d]efendant deliberately fabricated an insurance claim in violation of the Penal Code § 176.05, 176.10 of the State of New York." The Court has found no authority giving an individual a private cause of action for "insurance fraud." In addition, the Court finds that the fax to Essex was not intended to be a formal claim against the plaintiff's insurance policy regardless of the manner in which Essex chose to handle the matter.

Reading the allegations in the plaintiff's third cause of action in a most favorable light, the cause of action could possibly be read to be a claim for defamation, or perhaps, prima facie tort. In either case, Earle has established his entitlement to summary judgment herein. The Court finds that Earle's statements to Essex were truthful in that the foundation did not initially pass inspection, and the building inspector did cite the specific reason to be that it was porous. It is well established that truth is an absolute defense to a libel action (*Matovcik v Times Beacon Record Newspapers*, 46 AD3d 636, 849 NYS2d 75 [2d Dept 2007]; *Kamalian v Reader's Digest Ass'n., Inc.*, 29 AD3d 527, 814 NYS2d 261 [2d Dept 2006]). "[T]ruth is an absolute, unqualified defense to a civil defamation action ... Provided that the defamatory material on which the action is based is substantially true (minor inaccuracies are acceptable), the claim to recover damages ... must fail" (*Ingber v Lagarenne*, 299 AD2d 608, 609, 750 NYS2d 172 [3d Dept 2002]; *see also Proskin v Hearst Corp.*, 14 AD3d 782, 787 NYS2d 506 [3d Dept 2005]).

The elements of a cause of action for prima facie tort are: (1) the intentional infliction of harm; (2) causing of special damages; (3) without lawful excuse or justification; and (4) by an act or series of

acts that would be otherwise unlawful (*see Frehofer v Hearst Corp.*, 65 NY2d 135, 490 NYS2d 735 [1985]); *Curiano v Suozzi*, 63 NY2d 113, 480 NYS2d 466 [1984]). There can be no recovery under this tort unless malevolence is the sole motive for the defendant's otherwise lawful act (*see Lynch v McQueen*, 309 AD2d 790, 765 NYS2d 645 [2nd Dept 2003]; *Landor-St. Gelais v Albany Intl. Corp.*, 307 AD2d 671, 763 NYS2d 369 [3d Dept 2003]). Also, where there are other motives, such as self interest or business advantage, there is no recovery under this tort (*see Squire Records v Vanguard Rec. Socy.*, 25 AD2d 190, 268 NYS2d 251 [1st Dept 1996], *aff'd* 19 NY2d 797, 279 NYS2d 737 [1967]). Here, the Court finds that Earle was motivated, at least in part, by a desire to protect himself should a problem arise with the foundation constructed by the plaintiff.

The plaintiff has failed to raise an issue of fact requiring a trial in this action regarding any of the claims made in his third cause of action. Accordingly, the plaintiff's third cause of action is dismissed.

Fourth Cause of Action for Fraud/Misrepresentation

In his complaint, the plaintiff alleges that the defendants fraudulently stated that the designer of the project was an architect, that the designer was not an architect, and that his dispute with the defendants arose because his estimate for the job was incorrect because of the designer's faulty plans for the construction of the addition to the defendants' home.

At his deposition, the plaintiff testified that the defendants' fraudulent statements that the designer was an architect "forced me to have [Earle] blame me for [the designer's] mistake ...," and that his damages are that "I never got paid." In addition, he indicated that he has a record with the Town of East Hampton for building an addition designed by an unlicensed architect, and that he has liability "for that." The record reveals that the latter two statements are without merit. Therefore, the Court finds that the only damages sought herein are for damages under the contract between the parties.

It is well settled that a simple breach of contract is not considered a tort unless a legal duty independent of the contract has been violated (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389, 521 NYS2d 653 [1987]; *see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 639 NYS2d 283 [1995]; *Sommer v Federal Signal Corp.*, 79 NY2d 540, 583 NYS2d 957 [1992]). A party to a contract may be liable in tort when it has "breached a duty of reasonable care distinct from its contractual obligations, or when it has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations" (*New York Univ. v Continental Ins. Co.*, *supra*, at 316, 639 NYS2d 283; *see North Shore Bottling Co. v C. Schmidt & Sons*, 22 NY2d 171, 292 NYS2d 86 [1968]; *D'Ambrosio v Engel*, 292 AD2d 564, 741 NYS2d 42 [2d Dept], *lv denied* 99 NY2d 503, 753 NYS2d 806 [2002]). However, the legal duty must arise from circumstances "extraneous to, and not constituting the elements of, the contract, although it may be connected with and dependant on the contract" (*Clark-Fitzpatrick, Inc. v Long Is. R.R.*, *supra*, at 389, 521 NYS2d 653; *see Rich v New York Cent. & Hudson Riv. R.R. Co.*, 87 NY 382 [1882]; *Krantz v Chateau Stores of Canada*, 256 AD2d 186, 683 NYS2d 24 [1st Dept 1998]). Here, plaintiff does not allege in its pleadings that the defendants breached a duty independent of their contractual obligations, or that they engaged in tortious conduct separate from their alleged duty to correctly inform him of the designer's status to enable him to perform that contract (*see Probst v Cacoulidis*, 295 AD2d 331, 743 NYS2d 509 [2d Dept 2002]; *Givoldi, Inc. v United Parcel*

DiSario v Rynston
Index No. 09-14278
Page 7

Serv., 286 AD2d 220, 729 NYS2d 25 [1st Dept 2001]; *Massena Town Ctr. Assocs. v Sear-Brown Group*, 255 AD2d 893, 680 NYS2d 349 [4th Dept 1998]; *Bristol-Meyers Squibb, Indus. Div. v Delta Star*, 206 AD2d 177, 620 NYS2d 196 [4th Dept 1994]).

Accordingly, the fourth and final cause of action is dismissed, and the complaint is dismissed in its entirety.

Hon. Dante F. Molit

Dated: August 1, 2012

J.S.C.

X FINAL DISPOSITION NON-FINAL DISPOSITION