Okoli v Paul Hastings LLP
2012 NY Slip Op 33539(U)
September 14, 2012
Supreme Court, New York County
Docket Number: 152536/12
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN J.S.C. Justice

PART 55

Index Number : 152536/2012
OKOLI, KENECHUKWU C
vs.
PAUL HASTINGS LLP
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. 152536/12

MOTION DATE

MOTION SEQ. NO. 01

The following papers, numbered 1 to ____ , were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 9/14/12

CK
, J.S.C.
CYNTHIA S. KERN J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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KENECHUKWU C. OKOLI,,

Plaintiff,

Index No. 152536/12

-against-

DECISION/ORDER

PAUL HASTINGS LLP and ALLAN S. BLOOM,

Defendants.

----------x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Cross-Motion and Affidavits Annexed.....	
Answering Affidavits to Cross-Motion.....	
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff commenced the instant action against defendants Paul Hastings LLP ("Paul Hastings") and Allan S. Bloom ("Mr. Bloom") to recover damages stemming from certain conduct which occurred at a deposition of defendants' client on August 16, 2011. Defendants now move pursuant to CPLR § 3211(a)(7) to dismiss plaintiff's complaint on the ground that it fails to state a cause of action. For the reasons set forth below, defendants' motion is granted.

The relevant facts are as follows. Plaintiff and Mr. Bloom are lawyers who were engaged to represent their clients in employment litigation in Kings County. During that litigation, on August 16, 2011, plaintiff took the deposition of Gisela Brooks, defendants' client, at plaintiff's office and Mr. Bloom, a partner at the law firm Paul Hastings, defended at the deposition. Over

the course of the deposition, the parties argued over such issues as whether plaintiff's questioning of a witness was relevant or harassing, whether plaintiff should have produced a document introduced as an exhibit during the deposition and whether Mr. Bloom's objections were properly made.

Defendants allege that during the deposition, plaintiff told Mr. Bloom "keep your mouth shut" four different times before slapping him in the face. Plaintiff alleges that during the deposition, Mr. Bloom called him "uncivilized, ignorant, and incompetent" in front of his client. Plaintiff further alleges that after that altercation, Mr. Bloom then left the deposition room, but then rushed back into the room, speaking in a loud voice at plaintiff, "shaking his pointed index finger violently less than one foot from plaintiff's face." Plaintiff alleges that at that moment "spittle from BLOOM's wide open mouth hit [plaintiff's] face and [plaintiff] quickly reacted to protect himself by slapping BLOOM's face away from him." Olga Caro, plaintiff's client who was also present at the deposition, testified that Mr. Bloom began walking away after being slapped, but turned around and approached plaintiff while rolling up his sleeve, and "at [that] point, [plaintiff] stood up from his chair and told Mr. Bloom to desist from approaching in that manner if he did not want to be punched and Mr. Bloom stopped." Mr. Bloom then called the police and escorted his deposition witness from plaintiff's offices.

On August 17, 2011, the day after the deposition, Mr. Bloom requested that, in the interest of safety, Justice Saitta should order further depositions to be held in the courthouse at plaintiff's expense. Plaintiff resisted Mr. Bloom's request, sending a letter to Justice Saitta where he tried to justify slapping Mr. Bloom in the face by claiming that Mr. Bloom deliberately provoked him into violence in order to end the deposition and avoid potentially damaging testimony. In response to an Order to Show Cause, both parties submitted briefs and were

present for Oral Argument before Justice Saitta on November 17, 2011. After hearing argument from both parties, Justice Saitta stated that "there is really no material issue of fact here...Plaintiff's counsel admits in his own papers that he slapped defense counsel. There is no - that was a line that should not have been crossed." Justice Saitta then signed an order that directed all future depositions to be held at the offices of Paul Hastings and videotaped at plaintiff's expense. Plaintiff then appealed the order, which is currently pending.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover "a complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept. 1990). "Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to 'whether it states in some recognizable form any cause of action known to our law.'" *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977) (*citing Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956). Further, whether a plaintiff can ultimately establish its allegations is not part of the determination. *See Sokol v. Leader*, 74 A.D.3d 1180 (2d Dept 2010).

In the instant action, defendants' motion to dismiss plaintiff's complaint pursuant to CPLR § 3211 (a)(7) on the ground that it fails to state a cause of action is granted. As an initial matter, this court finds that plaintiff's first cause of action for slander must be dismissed. New York provides an "absolute privilege to oral...communications made in the course of judicial proceedings and which relate to the litigation. The privilege attaches not only at the trial or hearing phase, but to every step of the proceeding in question, even if it is preliminary and/or investigatory." 14 N.Y. Prac., New York Law of Torts § 1:50 (West 2011). "Public policy

mandates that certain communications, although defamatory, cannot serve as the basis for the imposition of liability in a defamation action." *Toker v. Pollak*, 44 N.Y.2d 211, 218 (1978). "Communications afforded an absolute privilege are perhaps more appropriately thought of as cloaked with an immunity, rather than a privilege against the imposition of liability in a defamation action." *Id.* at 219. "This immunity, which protects communications irrespective of the communicant's motives, has been stringently applied. In general, its protective shield has been granted only to those individuals participating in a public function, such as judicial, legislative or executive proceedings." *Id.* Further, the Court of Appeals has held that a statement made in a judicial proceeding is

> absolutely privileged if, by [any] view or under the circumstances, it may be considered pertinent to the litigation...In considering whether a particular statement is pertinent...we are not limited...to the narrow and technical rules applied to the admissibility of evidence. Nothing said in the court room may be the subject of an action for defamation unless it is so obviously impertinent as not to admit of discussion, and so needlessly defamatory as to warrant the inference of express malice.

Further, the Second Department has explained that

> [t]he interest of society requires that whenever [persons] seek the aid of the courts of justice...speech and writing therein must be untrammelled and free...the law offers a shield to the one who in legal proceedings publishes a libel, not because it wishes to encourage libel, but because if [persons] were afraid to set forth their rights in legal proceedings for fear of liability to libel suits, greater harm would result, in the suppression of the truth.

In the instant action, this court finds that plaintiff's first cause of action for slander must be dismissed for failure to state a cause of action. The complaint alleges that during the course of the deposition, "BLOOM said to [plaintiff], 'You're uncivilized, ignorant and incompetent,' in the presence of the stenographer and Ms. Caro, plaintiff's client." As these allegedly defamatory

statements were made in the course of a deposition, which is a judicial proceeding, they are cloaked with immunity, and thus, cannot be actionable. It is immaterial whether the statements are in fact defamatory, as statements made during a judicial proceeding are afforded immunity, and thus, a defamation claim against Mr. Bloom cannot stand. The statements allegedly made by Mr. Bloom involved plaintiff's behavior during the deposition and the litigation of that case and the statements were not so needlessly defamatory as to warrant the inference of express malice. Thus, as plaintiff has failed to state a cause of action against defendants for slander, defendant's motion to dismiss the first cause of action is granted.

Additionally, defendants' motion to dismiss plaintiff's second cause of action for common law assault is granted. "To sustain a cause of action to recover damages for assault, there must be proof of physical conduct placing the plaintiff in imminent apprehension of harmful contact." *Marilyn S. v. Independent Group Home Living Program, Inc.*, 73 A.D.3d 895, 897 (2d Dept 2010), citing *Fugazy v. Corbetta*, 34 A.D.3d 728, 729 (2d Dept 2006); *see also Hassan v. Marriott Corp.*, 243 A.D.2d 406 (1st Dept 1997). Common law assault in New York

> seeks to redress injuries due to mental suffering for fright, New York courts require a showing of well grounded fear of imminent physical danger against the body of the plaintiff in order to recover. "Mere words" or threats without an overt unequivocal action or gesture are not actionable as an assault...

14 N.Y. Prac., New York Law of Torts Sec. 1:4, citing *Marilyn S.*, 73 A.D.3d 895(finding that genuine issue of material fact existed where defendant's employee drove a van within close proximity to resident's mother, causing apprehension of imminent harmful contact.)

In the instant action, plaintiff's complaint fails to state a cause of action for common-law assault as it fails to allege physical conduct which placed plaintiff in imminent apprehension of

harmful contact. The complaint alleges that after the last exchange between plaintiff and Mr. Bloom at the end of the deposition, Mr. Bloom began walking to the door and then "[a]ll of a sudden and without any warning, BLOOM rushed to [plaintiff] bending over [plaintiff] who was still seated in his chair, and began yelling at the top of his lungs and shaking his pointed index finger violently less than one foot from [plaintiff's] face." The complaint further alleges that Mr. Bloom's conduct caused plaintiff to believe "that the much younger BLOOM would push [plaintiff] over in his chair and that [plaintiff] would sustain serious injuries if [he] were to fall to the ground from his sitting position." Plaintiff further alleges that "as BLOOM continued to yell in [his] face, spittle from BLOOM's wide open mouth hit [plaintiff's] face and plaintiff quickly reacted to protect himself by slapping BLOOM's face away from him." However, these allegations are insufficient to state a cause of action for common law assault as finger wagging and yelling is not enough to rise to the common-law assault standard as plaintiff did not allege specifically what conduct made him fearful that Mr. Bloom would push plaintiff over in his chair. Further, the fact that Mr. Bloom spat in plaintiff's face is without merit as plaintiff even alleges in the complaint that such conduct was not intentional, but occurred due to Mr. Bloom's yelling. Thus, plaintiff's second cause of action for common law assault is dismissed.

Accordingly, defendants' motion to dismiss plaintiff's complaint is granted. The complaint is hereby dismissed in its entirety. This constitutes the decision and order of the court.

Dated: 9/14/12

Enter: CPK
J.S.C.
CYNTHIA S. KERN
J.S.C.