SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED JUSTICE OF SUPREME COURT Justice PART J

Index Number : 152066/2012
CORSINI, GERARD
vs.
MORGAN, ELIZABETH
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

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

Dated: 6-20-13
JUN 20 2013

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
, 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 5

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GERARD CORSINI,

Plaintiff,

-against- Index No. 152066/12

ELIZABETH MORGAN a/k/a BETSY MORGAN AND ELIZABETH CARY, JONATHAN CARY, AARON SHMULEWITZ, BELKIN BURDEN WENIG & GOLDMAN, LLP, DAN MCKAY (also s/h/a JOHN DOE 1), OFFICERS BUTTACAVOLE, ALYSE, COLON, SGT, ANITRA and DETECTIVE ERIC PATINO of the 10TH PRECINCT OF THE POLICE DEPARTMENT of the CITY OF NEW YORK. THE CITY OF NEW YORK, MAYOR MICHAEL BLOOMBERG and POLICE COMMISSIONER KELLY OF THE CITY OF NEW YORK, and JOHN DOES 1-20 and JANE DOES 1-20,

Defendants.

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HON. KATHRYN E. FREED:

Motion sequence nos. 001 through 004 are consolidated for disposition. In motion sequence no. 001, defendants Aaron Shmulewitz, Esq. and Belkin Burden Wenig & Goldman (Belkin) move: (a) pursuant to CPLR § 3211 (a) (1) and (7), to dismiss plaintiff's initial complaint; (b) pursuant to 22 NYCRR § 130-1.1 *et seq.*, for sanctions to be imposed against plaintiff, who is an attorney; and (c) for an order setting this matter down for a hearing to determine the amount of attorney's fees, costs and disbursements to which the movants are entitled.

In motion sequence no. 002, defendants The City of New York (City), Michael R. Bloomberg s/h/a Mayor Michael Bloomberg, and Police Commissioner Raymond W. Kelly s/h/a Police Commissioner Kelly (collectively, the Municipal Defendants) move, pursuant to CPLR § 3211 (a) (7), for an order dismissing the initial complaint, as to them.

In motion sequence no. 003, defendants Elizabeth Morgan a/k/a Betsy Morgan and Elizabeth Cary, Jonathan Cary, and Daniel J. McKay (also s/h/a John Doe 1) move, pursuant to CPLR § 3211 (a) (1) and (7), to dismiss plaintiff's amended complaint, pursuant to CPLR § 8303 and 22 NYCRR § 130-1.1 *et seq.*, for sanctions to be imposed against plaintiff, and for an order setting this matter down for a hearing on the amount of attorney's fees, costs and disbursements to which the movants are entitled.

In motion seq. no. 004, the Municipal Defendants, and, purportedly, nonparty "THE POLICE DEPARTMENT OF THE CITY OF NEW YORK" move, pursuant to CPLR § 3211 (a) (7), for an order: (1) dismissing the amended complaint as a nullity, as served without leave of court, and (2) dismissing the initial complaint. By letter dated September 10, 2013, Shmulewitz and Belkin request that their motion to dismiss apply to the amended complaint.

This action arises out of plaintiff's anger that his neighbors, Morgan and Cary, license the use of their town house as a site for commercial photography shoots. The block on which

plaintiff and his neighbors live is zoned residential. McKay was at all relevant times employed by Morgan and Cary. Shmulewitz, who is employed by Belkin, was at all relevant times Morgan and Cary's real estate lawyer.

Insofar as is relevant here, CPLR § 3025 (a) provides that a party may amend a pleading "once without leave of court ... within twenty days after service of a pleading responding to it." CPLR § 2103 (b) (2) provides that "where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period... ."

The Municipal Defendants served their answer to the complaint by mail on July 20, 2012. Accordingly, plaintiff had the 20 days provided by CPLR § 3025, plus the five days provided by CPLR § 2103 (b), that is, until August 14, 2012, to serve an amended complaint without leave of court.

The Municipal Defendants acknowledge that plaintiff served his first amended complaint upon them on August 14, 2012. Accordingly, that branch of their second motion that seeks to dismiss the amended complaint as a nullity is being denied. Moreover, inasmuch as the service of an amended complaint supersedes the original complaint, leaving the amended complaint as "`the only complaint in the action'" (*Plaza PH2001 LLC v. Plaza Residential Owner LP*, 98 A.D.3d 89, 99 [1st Dept. 2012]), quoting *Hummingbird Assoc. v. Dix Auto Serv.*, 273 A.D.2d 58, 58 [1st Dept. 2000]), the Municipal

Defendants' motions to dismiss the original complaint are moot. While a party may choose, as Shmulewitz and Belkin have chosen here, and as the defendant in the case cited immediately below chose, to have their motions, which were addressed to an initial complaint, apply to an amended complaint (*Sage Realty Corp. v. Proskauer Rose*, 251 A.D.2d 35, 38 [1st Dept. 1998]), the Municipal Defendants, for reasons best known to themselves, have not done so.

The amended complaint alleges the following seven causes of action: (1) assault, false imprisonment, false arrest, malicious prosecution, and intentional infliction of emotional distress (against Morgan, Cary, Shmulewitz, Belkin, defendant police officers Buttacavole and Alyse, defendant Sergeant Anitra, John Doe 3, and the Municipal Defendants); (2) slander and intentional infliction of emotional distress (against Morgan, Cary, Shmulewitz, Belkin, McKay, and Jane Doe 1); (3) violation of plaintiff's constitutional rights and intentional infliction of emotional distress (against defendant police officer Colon, the City, Bloomberg, and Kelly); (4) assault and battery, and intentional infliction of emotional distress (against Morgan, Cary, their driver (John Doe 2), Shmulewitz, and Belkin); (5) improper threats of criminal prosecution and disciplinary proceedings (against Shmulewitz, Belkin, Morgan, and Cary); (6) intentional infliction of emotional distress (against Morgan, Cary, Shmulewitz, Belkin, McKay, John Doe 2, and Jane Doe 1); and (7) false arrest,

intentional infliction of emotional distress, and violation of plaintiff's First and Fourth Amendment rights (against Morgan, Cary, Shmulewitz, Belkin, the City, Bloomberg, Kelly, and defendant Detective Eric Patino).

The first cause of action, which jumbles five separate torts, arises out of the April 29, 2011 arrest of plaintiff by Sergeant Anitra and police officers Buttacavole, Alyse, and John Doe 3. As against Morgan, Cary, Shmulewitz, and Belkin, the claims must be dismissed because a private person, who has not played an active role in an arrest, but only sought the assistance of the police and provided them with information, leaving the officers free to make their own judgment as to whether to make the arrest, cannot be held liable for either malicious prosecution or false imprisonment. *Narvaez v. City of New York*, 83 A.D.3d 516 (1st Dept. 2011) (malicious prosecution); *Petrychenko v. Solovey*, 99 A.D.3d 777, 779 (2d Dept. 2012) (false imprisonment); *see also Du Chateau v. Metro-North Commuter R.R. Co.*, 253 A.D.2d 128, 131 (1st Dept. 1999). The amended complaint alleges only that Morgan, Cary, Shmulewitz, and Belkin "induced caused and conspired" with the police officer defendants to falsely arrest and falsely imprison plaintiff. Amended complaint ¶ 10. That vague and entirely conclusory allegation is insufficient to support the claims of malicious prosecution and false imprisonment, or the claim of intentional infliction of emotional distress. Finally, with regard to this

[* 7]

cause of action, the claim of assault must be dismissed, as against Morgan, Cary, Shmulewitz, and Belkin because plaintiff does not allege that any of them engaged in "physical conduct placing plaintiff in imminent apprehension of harmful contact." *Holtz v. Wildenstein & Co.*, 261 A.D.2d 336, 336 (1st Dept. 1999). The Court notes that the only allegation against Shmulewitz and Belkin in the first cause of action is the conclusory statement, unsupported by any allegation of fact, that they "aided and abetted" Morgan, Cary, and McKay (against whom the first cause of action is not alleged) to "induce[], cause[] and conspire[] with [the police officer defendants]." Amended complaint ¶ 10.

The second cause of action is based upon a number of alleged oral statements by Morgan and others. Plaintiff alleges that: (1) on April 21, 2011, Morgan said to persons at her house (whom plaintiff fails to identify), "He's just gotten worse and worse. People on the block say he's just becoming crazier and crazier"; (2) on April 25, 2011 Morgan said in front of neighbors and passersby that plaintiff was "crazy," "a stalker," "totally nuts," and "a crazy stalker"; (3) an unidentified person who was delivering some boxes to Morgan and Cary shouted at plaintiff that he was a "psycho" who "needs help"; (4) on June 9, 2011, McKay stated that plaintiff "takes pictures of [Morgan's] kids and probably puts them on the internet"; and (5) on June 29, 2011, Jane Doe 1 stated that plaintiff was a "perv," a "stalker," "interested

in young girls," "a creepy porno nut," and that he was "crazy." Amended complaint ¶¶ 17-21.

As an initial matter, statements number 3 and number 5, above, are alleged to have been made by persons unknown to plaintiff. While the amended complaint alleges that "Morgan, Cary, McKay (John Doe 1), Shmulewitz and Belkin aided and abetted one another and conspired among themselves pursuant to a common plan designed and devised by and/or created with the substantial assistance of defendants Shmulewitz and Belkin ... to have false and defamatory statements [about plaintiff] published in public," plaintiff alleges no facts to evidence any such plan or conspiracy. Accordingly, statements number 3 and 5 are not actionable against any of the named defendants.

Because opinions are constitutionally protected speech that is not actionable as defamation (*Rinaldi v. Holt, Reinhart & Winston*, 42 N.Y.2d 369, 380, *cert denied* 434 US 969 [1977]; *Guerrero v. Carva*, 10 A.D.3d 105, 111 [1st Dept. 2004]), a statement must be factual, and thus capable of being shown to be false, in order to be actionable. *Thomas H. v. Paul B.*, 18 N.Y.3d 580, 584 (2012). Whether a statement is one of fact is for the court to determine. *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 290 (1986). In addition to ascertaining whether the challenged statement can be proven true or false, the court must determine "whether the specific language in issue has a precise meaning which is readily understood" and

"whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to `"signal ... readers or listeners that what is being read or heard is likely to be opinion, not fact."'" *Brian v. Richardson*, 87 N.Y.2d 46, 51 (1995), quoting *Gross v. New York Times Co.*, 82 N.Y.2d 146, 153 (1993), quoting *Steinhilber v. Alphonse*, 68 N.Y.2d at 292.

Accordingly, a plaintiff alleging slander must quote not only the specific words objected to, as required by CPLR § 3016 (a), but also enough of the complete statement to enable the court to determine whether the words complained of assert facts, or merely convey an opinion. *See Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dept. 1999).

Statement number 2 consists of isolated words lacking any context. Accordingly, those words are not actionable. Similarly, Morgan's alleged statements, that plaintiff is "crazy," "a stalker," "totally nuts," and "a crazy stalker," are words lacking any context. Moreover, in the context of the ongoing acrimony between plaintiff and Morgan, those words would clearly be understood by those who heard them as "[l]oose, figurative, or hyperbolic" expressions of exasperation. *Id.* at 38.

Morgan's statement, that plaintiff has "just gotten worse and worse," is indefinite in meaning, and her statement about what people on the block are saying is a report of the speech of others,

which does not lend a definite and ascertainable meaning to the "worse and worse" statement. Consequently, these statement are not actionable.

It is well settled that truth is an absolute defense to a claim of defamation. *See e.g. Panghat v. New York Downtown Hosp.*, 85 A.D.3d 473 (1st Dept. 2011). Plaintiff does not allege that McKay's statement, that plaintiff photographs Morgan's children, is false. As for the second part of McKay's statement, that plaintiff probably posts the photographs on the internet, the word "probably" indisputably indicates that McKay was voicing an opinion, rather than asserting a fact.

Moreover, as a general rule, slander is not actionable absent an allegation that the plaintiff has suffered special damages, that is, the loss of "something having economic or pecuniary value." *Liberman v. Gelstein*, 80 N.Y.2d 429, 434-435 (1992) (citation and internal quotation marks omitted). There are four exceptions to this rule, however, to wit, "statements: (i) charging plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman." *Id.* at 435. Plaintiff does not claim that he has suffered economic damage as the result of the statements discussed above. The only one of the exceptions to the general rule that is even remotely applicable here is the first.

Stalking in the fourth degree is a class B misdemeanor. Penal Law § 120.45. As the Appellate Division, Fourth Department, has observed, class B misdemeanors are the lowest grade of crime. If such a crime, of itself, is considered a serious crime, then all crimes must be considered to be serious crimes. *Cavallero v. Pozzi*, 28 A.D.3d 1075, 1077 (4th Dept 2006).

The fourth cause of action alleges that: on April 25, 2011, John Doe 2 "threw" plaintiff against the iron fence in front of Morgan and Cary's house; on April 26, 2011, an unidentified truck driver who was delivering materials to Morgan and Cary's house punched plaintiff in the stomach; and, later that evening, another unidentified truck driver assaulted plaintiff (in an unspecified manner), while stating that plaintiff is a "psycho" who needs help. This cause of action alleges, without alleging a single supporting fact, that: John Doe 2 was acting within the scope of his employment "and pursuant to the plan devised by Shmulewitz and Belkin, who substantially assisted and aided and abetted the conduct" (amended complaint ¶ 35); the truck driver who punched plaintiff did so "at the direction, inducement and prompting" of Morgan and Cary "pursuant to the plan devised by defendants Shmulewitz and Belkin"; and the second driver acted "at the prompting of defendants Morgan, Cary and McKay [against whom this cause of action is not alleged] as aided and abetted by defendants Shmulewitz and Belkin and in furtherance of the plan devised by

them." Amended complaint ¶ 37. In sum, this cause of action makes not a single allegation of fact against Morgan, Cary, Shmulewitz, or Belkin, or, needless to say, McKay.

The fifth cause of action is based exclusively on a December 2, 2010 "cease and desist" letter that Shmulewitz sent to plaintiff. The amended complaint alleges that the letter falsely states that Morgan and Cary do not conduct photography shoots at their house, falsely states that the people carrying props and photographic equipment are Morgan's and Cary's guests, and improperly threatens prosecution of, and disciplinary procedures against plaintiff, unless plaintiff stops photographing the commercial activities taking place at Morgan and Cary's house.

In fact, however, the letter, which plaintiff attaches as exhibit H to his affidavit in opposition to the motion of Morgan, Cary, and McKay, states that plaintiff has falsely stated that Morgan has a commercial photo studio in her house (as distinguished from licensing the use of her house for photographic shoots), and that she is, thereby, violating the law, and that plaintiff has repeatedly accosted Morgan at her house and in the street and repeatedly accosted and photographed guests and visitors on their way into and out of her house. Even had the letter stated what plaintiff represents it to have stated, and even if it had, thus, violated a disciplinary rule, as plaintiff argues that it does, the violation of a disciplinary rule does not, of itself, give rise to

a cause of action. *William Kaufman Org. v. Graham & James*, 269 A.D.2d 171, 173 (1st Dept. 2000).

The sixth cause of action alleges that, on June 11, 2011, McKay, knowing of plaintiff's April 29, 2011 arrest, rang the downstairs buzzer for plaintiff's apartment, several minutes after defendant Sergeant Anitra had left the apartment and, when plaintiff answered, shouted "New York City police," thereby causing plaintiff to fear that he was about to be arrested again. Although clearly reprehensible, McKay's alleged act does not constitute conduct "`so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency.'" *Rogin v. Rogin*, 90 A.D.3d 507, 508 (1st Dept. 2011), quoting *Howell v. New York Post Co.*, 81 N.Y.2d 115, 122 (1993). In *Rogin*, a landlord's commencement of a summary nonpayment proceeding against the plaintiff, despite knowing that she had an equitable defense to that action, was held not to constitute intentional infliction of emotional distress. In *Howell*, defendant's publication of a photograph of the plaintiff on the grounds of a psychiatric hospital was held insufficient to support a claim.

The seventh cause of action arises out of the August 31, 2011 arrest of plaintiff by Detective Patino. The allegation against Morgan, Cary, Shmulewitz, Belkin, and McKay is that:

> "Morgan and Cary, aided and abetted by and in conspiracy with defendants Shmulewitz, Belkin and McKay and in furtherance of the above-mentioned common plan, induced, caused and conspired with defendant Patino acting on

> behalf of himself and [the Municipal Defendants], with their full knowledge and approval ... to falsely arrest and falsely imprison plaintiff ... ."

Amended complaint ¶ 46. Here, again, the mere repetition of the phrase "aided and abetted," and of the entirely conclusory allegation of a conspiracy, does not suffice to state a claim against Morgan, Cary, Shmulewitz, Belkin, or McKay.

Although plaintiff's claims against Morgan, and Cary, and even more so his claims against Shmulewitz and Belkin, are meritless, plaintiff's filing of the amended complaint does not, of itself, warrant the imposition of sanctions.

Accordingly, it is hereby

ORDERED that, in motion sequence no. 001, the motion of defendants Aaron Shmulewitz, Esq. and Belkin Burden Wenig & Goldman is granted in part and the amended complaint is severed and dismissed as against said defendants with costs and disbursements as calculated by the Clerk of Court upon the submission of an appropriate bill of costs, and the remainder of the motion is denied; and it is further

ORDERED that, in motion sequence no. 002, the motion of defendants The City of New York (City), Michael R. Bloomberg s/h/a Mayor Michael Bloomberg, and Police Commissioner Raymond W. Kelly s/h/a Police Commissioner Kelly is denied as moot; and it is further

ORDERED that, in motion sequence no. 003, the motion of defendants Elizabeth Morgan a/k/a Betsy Morgan and Elizabeth Cary, Jonathan Cary, and Daniel J. McKay (also s/h/a John Doe 1) is granted in part and the amended complaint is severed and dismissed as against said defendants with costs and disbursements as calculated by the Clerk of Court upon the submission of an appropriate bill of costs, and the remainder of the motion is denied; and it is further

ORDERED that, in motion sequence no. 004, the motion of defendants The City of New York, Michael R. Bloomberg s/h/a Mayor Michael Bloomberg, and Police Commissioner Raymond W. Kelly s/h/a Police Commissioner Kelly is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the rest of this action shall continue.

Dated: June 20, 2013

ENTER:

JUN 2 0 2013

Hon. Kathryn E. Freed
J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT