

Ching Chou Wu v Troy
2013 NY Slip Op 31547(U)
July 12, 2013
Supreme Court, New York County
Docket Number: 150664/2013
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Rakower
Justice

PART 15

Index Number : 150664/2013
WU AKA JOE WU, CHING CHOU
vs
TROY FKA JOHN TSAI, JOHN
Sequence Number : 001
DISMISS ACTION

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

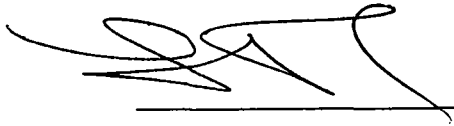
The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>all</u>
Answering Affidavits — Exhibits _____	No(s). <u>et seq</u>
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: 7/12/13


_____, J.S.C.

HON. EILEEN A. RAKOWER

- 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 15

-----X

CHING CHOU WU a/k/a JOSE WU,
AH FONG CHANG a/k/a MISA CHANG,
ERIC C.F. MA and JASSICA ZULUETA,

Index No.:150664/2013

Plaintiffs,

- against -

Decision and Order
Motion Seq: 001

JOHN TROY f/k/a JOHN TSAI and JOHN TROY &
ASSOCIATES, PLLC a/k/a TROY & ASSOCIATES,
PLLC,

Defendants.

-----X

HON. EILEEN A. RAKOWER, J.S.C.

Defendants John Troy f/k/a John Tsai and John Troy & Associates, PLLC a/k/a Troy & Associates, PLLC (collectively, "Defendants") move for an Order, pursuant to CPLR §§3211(a)(1) and (a)(7), to dismiss Plaintiffs' Complaint. Plaintiffs oppose.

This action arises out of Complaint filed by Defendants, as lawyers and on behalf of Cheng Chung Liang, Tey Kui Sun, and Fu Hsiung Chen, in the US District Court for the Southern District of New York on or about February 10, 2012 ("the SDNY Complaint"). The SDNY Complaint named as defendants J.C. Broadway Restaurant, Inc. d/b/a Empire Szechuan Upper Manhattan ("ESUM"), and Empire Szechuan Noodle House, Inc. d/b/a Empire Szechuan Kyoto, as well as naming Plaintiffs individually. The SDNY Complaint alleged claims for, *inter alia*, violation of federal and state labor laws in connection with the alleged failure of ESUM to make payments of minimum and overtime wages. The SDNY Complaint named Plaintiffs, employees of ESUM, as individual defendants based on allegations that they were owners, officers, and/or managers of the corporate defendants. The SDNY Action is still pending.

In this action, Plaintiffs allege that the allegations contained in the SDNY Complaint were inaccurate and constitute misrepresentations. Plaintiffs also allege that the allegations were never authorized by Chen, one of the plaintiffs in the SDNY Action, who is not a plaintiff in this action. Plaintiffs allege the following causes of action arising out of the allegations contained in the SDNY Complaint: (1) defamation; (2) defamation per se; (3) prima facie tort; and (4) abuse of process.

CPLR §3211 provides, in relevant part:

- (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
 - (1) a defense is founded upon documentary evidence;
 - (7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

On a motion to dismiss pursuant to CPLR §3211(a)(1) “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted) “When evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one.” (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

Plaintiffs’ first cause of action alleges defamation, and the second alleges defamation per se based on the allegations set forth in the SDNY Complaint.

“The Court of Appeals long ago established that a statement made in the course of judicial proceedings is absolutely privileged if it is at all pertinent to the litigation.” *Depalo v Lapin*, 2009 N.Y. Misc. LEXIS 5963 (N.Y. Misc. 2009)(citations omitted). “In judicial proceedings, the protected participants include the Judge, the jurors, the attorneys, the parties and the witnesses.” (*Id.*)(citations omitted). Furthermore, “an absolute privilege affords a speaker or writer immunity from liability for an otherwise defamatory statement to which the privilege applies, regardless of the motive with which the statement was made.” *Sexter & Warmflash, P.C. v. Margrabe*, 38 AD3d 163, 170-71(1st Dept 2007)(citations omitted). Here, since Plaintiffs’ claims of defamation against Defendants arise solely out of the allegations contained in the SDNY Complaint, such claims are barred by the judicial proceedings privilege.

Plaintiffs’ third cause of action alleges prima facie tort. Plaintiffs allege that Defendants “intentionally and for the purpose of inflicting pecuniary harm, i.e. strong-arm[ed] Plaintiffs into a monetary settlement despite Plaintiffs’ lack of liability,” “without any excuse or justification other than the advancement of their own pecuniary interests,” and Plaintiffs “have incurred special damages as a result.” The Complaint also alleges that Defendants’ actions are “extreme and outrageous, and were undertaken maliciously, deliberately, and with willful intent to cause harm to Plaintiffs.”

A prima facie tort consists of the following four elements: “(1) intentional infliction of harm, (2) causing special damages, (3) without excuse or justification, (4) by an act or series of acts that would otherwise be lawful.” *Curiano v. Suozzi*, 63 N.Y. 2d 113, 117 [1984]. In *Curiano*, Plaintiffs alleged that the defendants had defamed them in another action then pending, alleging abuse of process and prima facie tort. (*Id.*). The Court affirmed the Appellate Division’s dismissal of Plaintiff’s prima facie tort claim on the basis that Plaintiff did not plead special damages and that the sole motivation for the other action was “disinterested malevolence.” (*Id.*). The Court also held, “We need not base our decision upon technical pleading grounds, however, for New York courts have consistently refused to allow retaliatory lawsuits based on prima facie tort predicated on the malicious institution of a prior civil action.” (*Id.*).

Plaintiffs’ fourth cause of action alleges abuse of process. The Complaint alleges that Defendants “knew at the time they commenced the SDNY Action that they SDNY Plaintiffs were not entitled to recover the sums demanded therein, knew

or should have known that the SDNY Allegations were materially false, and knew that they were not authorized by Chen to act on his behalf and name him as plaintiff therein.”

“Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective.” *Curiano*, 63 N.Y.2d at 116. However, the mere commencement of a civil action by summons and complaint does not constitute abuse of process and a malicious motive alone does not give rise to a cause of action to recover damages for abuse of process. (*Id.*).

Defendants’ filing of the still pending SDNY Action does not constitute a prima facie tort or abuse of process. While Plaintiffs contend that Defendants were not authorized by Chen to act on his behalf and name him as plaintiff in the SDNY Action, Chen is not the only plaintiff in the SDNY Action. There are two other named plaintiffs in the SDNY Action. Plaintiffs have not plead any factual allegations to sustain either a prima facie tort or abuse of process cause of action. Plaintiffs’ third and fourth causes of action fail to state a claim.

Wherefore, it is hereby,

ORDERED that defendants John Troy f/k/a John Tsai and John Troy & Associates, PLLC a/k/a Troy & Associates, PLLC’s motion to dismiss is granted; and the Complaint is dismissed as against said defendants, and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: 7/12/13



EILEEN A. RAKOWER, J.S.C.

HON. EILEEN A. RAKOWER