Yardeny v Jordan
2014 NY Slip Op 30214(U)
January 13, 2014
Sup Ct, Queens County
Docket Number: 21387/12
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **Justice** — **IAS PART 6**

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YACOV YARDENY, Plaintiff,	Motion Date October 28, 2013
-against-	Motion Cal. No. 186
STEVEN S. JORDAN, Defendant.	Motion Sequence No. 5

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Upon the foregoing papers it is ordered that this motion by plaintiff/defendant on the counterclaim, Yacov Yardeny pursuant to CPLR 3211(a)(7) dismissing the three (3)counterclaims of defendant/plaintiff on the counterclaim, Steven Jordan, for failure to state a cause of action is hereby decided as follows:

Plaintiff/defendant on the counterclaims brings a Complaint sounding in defamation. Defendant/plaintiff on the counterclaims asserts counterclaims for defamation, malicious prosecution, abuse of process, and injunctive relief. Plaintiff/defendant on the counterclaims now moves to dismiss the counterclaims.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (Leon v. Martinez, 84 NY2d 83 [1994]). In determining whether plaintiff's complaint states a valid cause of action, the court must accept each allegation as true, without expressing any opinion on plaintiff's ultimate ability to establish the truth of these allegations before the trier of fact (219 Broadway Corp. v. Alexanders, Inc., 46 NY2d 506 [1979]; Tougher Industries, Inc. v. Northern Westchester Joint Water Works, 304 AD2d 822 [2d Dept 2003]). The court must find plaintiff's complaint to be legally sufficient if it finds that plaintiff is entitled to recovery upon any reasonable view of the stated facts (see, CPLR 3211[a][7]; Hoag

v. Chancellor, Inc., 246 AD2d 224 [1st Dept 1998]).

"It is well settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference" (Jacobs v. Macy's East, Inc., 262 AD2d 607, 608 [2d Dept 1999] [internal citations omitted]; Leon v. Martinez, 84 NY2d 83) and a determination by the Court as to whether the facts alleged fit within any cognizable legal theory (1455 Washington Ave. Assocs. v. Rose & Kiernan, Inc., 260 AD2d 770 [3d Dept 1999]). The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, Stukuls v. State of New York, 42 NY2d 272 [1977]; Jacobs v. Macy's East, Inc., supra), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading (see, Rovello v. Orofino Realty Co., Inc., 40 NY2d 633). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (Given v. County of Suffolk, 187 AD2d 560 [2d Dept 1992]). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint (see, Rovello v. Orofino Realty Co., Inc., supra; Kenneth R. v. Roman Catholic Diocese of Brooklyn, 229 AD2d 159). "However, dismissal is warranted if the documentary evidence contradicts the claims raised in the complaint" (Jericho Group, Ltd. v. Midtown Development, L.P., 32 AD3d 294 [1st Dept 2006][internal citations omitted]).

Defendant/plaintiff on the counterclaim asserts three (3) counterclaims. The first counterclaim sounds in defamation. The second counterclaim sounds in malicious prosecution and abuse of process. The third counterclaim sounds in an injunction.

The first cause of action, which sounds in defamation must be dismissed. Under New York law, a claim for defamation must allege: (1) a false statement about the complainant; (2) published to a third party without authorization or privilege; (3) through fault amounting to at least negligence on the part of the publisher; (4) that either constitutes defamation per se or caused special damages" (Fuji Photo Film U.S.A., Inc. v. McNulty, 669 F Supp 2d 405 [SDNY 2009]). A claim for defamation must contain the "particular words complained of" and "provide the time, place and manner of the purported defamatory statement." (Grynberg v. Alexander's Inc., 133 AD2d 667 [2d Dept 1987][internal citaions omitted]; see also, CPLR 3016(a)].

As defendant/plaintiff on the counterclaim has failed to allege the "particular words complained of" and "provide the time, place and manner of the purported defamatory statement", the first counterclaim for defamation shall be dismissed.

The second counterclaim sounds in malicious prosecution. In order to maintain an action for malicious prosecution, a party must demonstrate: "(1) the commencement of a judicial proceeding against the [party claiming the malicious prosecution], (2) at the insistence of the [party who prosecuted the judicial proceeding], (3) without probable cause, (4) with malice, (5) which action was terminated in favor of the [party claiming malicious prosecution,] and (6) to the [injured party's] injury" (Furgang and Adwar, LLP v. Fiber-Shield Industries, Inc., 866 NYS2d 250 [2d Dept 2008]). "To show a termination in its favor, the [party claiming malicious prosecution] must prove that the court passed on the merits of the charge or claim against it under such circumstances as to show its innocence or nonliability, or show that the proceedings were terminated or abandoned at the instance of the [party who prosecuted the action] under circumstances which fairly imply the [party claiming malicious prosecution's] innocence". Id. In addition, a cause of action for malicious prosecution requires special damages beyond legal fees and other expenses and other inconveniences that are normally attendant to defending litigation (Campion Funeral Home, Inc. v. State, 166 AD2d 32 [3d Dept 1991]).

As defendant/plaintiff on the counterclaim has failed to identify a lawsuit commenced by plaintiff against defendant in which defendant has been adjudicated to be the prevailing party and as defendant/plaintiff on the counterclaim has failed to allege special damages, the second counterclaim for malicious prosecution is dismissed.

The second counterclaim sounding in abuse of process must be dismissed. In order to maintain an action for abuse of process, "[f]irst, there must be regularly issued process, civil or criminal, compelling the performance or forbearance of some prescribed act. Next, the person activating the process must be moved by a purpose to do harm without that which has been traditionally described as economic or social excuse or justification . . . Lastly, defendant must be seeking some collateral advantage or corresponding detriment to the plaintiff which is outside the legitimate ends of the process" (Board of Education of Farmingdale Union Free School Dist. v. Farmingdale Classroom Teachers Association, Inc., 38 NY2d 397 [1975]). Merely commencing a civil action, "without unlawful interference with person or property", is not sufficient to state a cause of action sounding in abuse of process (Artzt v. Greenburger, 555

NYS2d 127 [1st Dept 1990]; Mago v. Singh, 47 AD3d 772 [2d Dept 2008]). Also, commencing a civil action via summons and complaint is not legally considered process capable of abuse (Mago, supra at 773). In the instant case, defendant/plaintiff on the counterclaim has failed to allege in the Answer that there was "regularly issued process", and as such, the second counterclaim is dismissed.

The third counterclaim sounding in injunction must also be dismissed. The third counterclaim seeks an injunction enjoining plaintiff from "filing further and continuing motions and complaints with the Court against Defendant."

"The law is well settled that to prevail on an application for preliminary injunctive relief, the moving party must demonstrate '"(1) a likelihood of ultimate success on the merits; (2) irreparable injury absent the granting of the preliminary injunction; and (3) that a balancing of equities favors [the movant's] position"'(Barone v. Frie, 99 AD2d 129, 132 [2d Dept 1984] quoting from Gambar Enterprises v. Kelly Servs., 69 AD2d 297, 306, 418 [2d Dept 1979); Aetna Ins. Co. v. Capasso, 75 NY2d 860, 552 [1990]; and W.T. Grant Co. v. Srogi, 52 NY2d 496, 517, [1981]; see also, Merscorp, Inc. v. Romaine, 295 AD2d 431, 562 [2d Dept 2002]; and Neos v. Lacey, 291 AD2d 434 [2d Dept 2002]). The existence of factual disputes will not preclude the granting of temporary injunctive relief in order to maintain the *status quo* (U.S. Reinsurance Corp. v. Humphreys, 205 AD2d 187, 192, 618 [1st Dept 1994]); *see also*, CPLR 6312[c]; and Albany Medical College v. Lobel, 296 AD2d 701,702 [3d Dept 2002]). The determination as to whether to issue a preliminary injunction is a matter left to the sound discretion of the Court (see, Doe v. Axelrod, 73 NY2d 748, 750 [1988]). Preliminary injunctive relief is a drastic remedy which will not be granted 'unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing an undisputed right rests upon the movant (First Nat. Bank of Downsville v. Highland Hardwoods, 98 AD2d 924, 926, 471 NYS2d 360; accord, 607 Buegler v. Walsh, 111 AD2d 206; Orange County v. Lockey, 111 AD2d 896, 897 [1985]; William M. Blake Agency, Inc. v. Leon, 283 AD2d 423, 424 [2d Dept 2001]; and Peterson v. Corbin, 275 AD2d 35, 36 [2d Dept 2000]). As the court stated in Tucker v. Toia, 54 AD2d 322, 325-326, however, "it is not for this court to determine finally the merits of an action upon a motion for preliminary injunction; rather, the purpose of the interlocutory relief is to preserve the status quo until a decision is reached on the merits (Hoppman v. Riverview Equities Corp., 16 AD2d 631; Weisner v. 791 Park Ave. Corp., 7 AD2d 75, 78-79; Peekskill Coal & Fuel Oil Co. v. Martin, 279 App Div 669,

670; Swarts v. Board of Educ., 42 Misc 2d (761, 764, supra; cf. Walker Mem. Baptist Church v. Saunders, 285 NY 462, 474)." The existence of factual disputes will not preclude the granting of temporary injunctive relief in order to maintain the *status quo* (U.S. Reinsurance Corp. v. Humphreys, 205 AD2d 187, 192, 618 [1st Dept 1994]); see also, CPLR 6312[c]; and Albany Medical College v. Lobel, 296 AD2d 701,702 [3d Dept 2002]).

As the Court finds that defendant/plaintiff on the counterclaim has failed to allege a likelihood of success on the merits, the third counterclaim for injunctive relief is dismissed.

Accordingly, all three counterclaims are dismissed.

This constitutes the decision and order of the Court.

Dated: January 13, 2014

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Howard G. Lane, J.S.C.