

Ullum v The Am. Kennel Club
2014 NY Slip Op 31446(U)
May 30, 2014
Supreme Court, New York County
Docket Number: 159629/2013
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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RALPH G. ULLUM, CHERYL FRENCH, and
TOPAZ SIBERIANS KENNEL,

Plaintiffs,

Index No.
159629/2013

Decision and
Order

- against -

Mot. Seq. 01

THE AMERICAN KENNEL CLUB, a/k/a AKC,
and DENNIS SPRUNG independently and as
President of the AKC,

Defendants.

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

This is an action for defamation, breach of contract, tortious interference, negligent infliction of emotional distress, and prima facie tort arising from an alleged attempted poisoning incident which purportedly took place on December 17, 2010, at a dog show held in Wheaton, Illinois. Plaintiffs, Ralph G. Ullum (“Ullum”), Cheryl French (“French”), and Topaz Siberians Kennel (collectively, “Plaintiffs”), claim that defendants, the American Kennel Club, a/k/a AKC (“AKC”), and Dennis Sprung (“Sprung”) improperly fined and suspended Ullum from AKC events after Ullum was accused of attempting to poison a competitor’s dog at the AKC’s December 17, 2010, dog show in Wheaton, Illinois. Plaintiffs also claim that Ullum’s accuser notified local police about the alleged poisoning incident, and that defendants failed to remove or nullify Ullum’s suspension even after Ullum was cleared of all criminal charges relating to the incident in question.

Defendants move for an Order, pursuant to CPLR §§ 3211(a)(5) and (a)(7), dismissing Plaintiffs’ complaint as time-barred and for failure to state a claim.

Plaintiffs oppose.

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:

(5) the cause of action may not be maintained because of . . . statute of limitations,

(7) the pleading fails to state a cause of action.

An action for defamation must be commenced within one year of publication of the allegedly defamatory words. (CPLR 215[3]). “[T]he publication of a defamatory statement in a single issue of a newspaper, or a single issue of a magazine, although such publication consists of thousands of copies widely distributed, is, in legal effect, one publication which gives rise to one cause of action and that the applicable statute of limitation[s] runs from the date of that publication.” (*Firth v. State*, 98 N.Y.2d 365, 369 [2002]).

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]).

“The elements [of a defamation claim] are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation *per se*.” (*Dillon v. City of New York*, 261 A.D.2d 34 [1st Dept. 1999]).

Additionally, “[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint.” CPLR § 3016(a). The complaint in an action for defamation must allege the time, place and manner of

the defamatory statement, and specify to whom the statement was made. (*Dillon v. City of New York*, 261 A.D.2d 34, 38 [1st Dep't 1999]) (internal citation omitted).

Defamation *per se* “consist[s] of 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.” *Lieberman v. Gelstein*, 80 N.Y.2d 429, 435 (1992).

“Truth provides a complete defense to defamation claims.” (*Dillon v. City of New York*, 261 A.D.2d 34, 39 [1st Dep't 1999]).

Plaintiff's complaint alleges that, “on or about March 6, 2011, the AKC . . . published on its website that Plaintiff Ullum had been suspended for five years, fined \$1,000.00, and forbidden to attend any dog shows for five years, which caused irreparable emotional, financial, and physical harm to plaintiffs Ullum, French, and Topaz Siberian Kennels.” Plaintiff's complaint further alleges, “the AKC's suspension of Ullum was published in writing and on the AKC website and received widespread publicity in other publications, both printed and online, throughout the United States and in Europe despite the fact that plaintiff Ullum had a pending criminal action; had not testified on his own behalf; and it was known by the AKC that such publication could prove harmful to plaintiff's reputation, standing, and financial well-being if plaintiff Ullum was found not guilty.”

Plaintiffs commenced this action on October 18, 2013, more than one year after March 6, 2011, when the claimed defamatory statements, i.e., that “Plaintiff Ullum had been suspended for five years, fined \$1,000.00, and forbidden to attend any dog shows for five years.” allegedly were published. Accordingly, Plaintiffs' defamation claim is not timely filed.

Moreover, Ullum concedes that he was suspended from the AKC, fined \$1,000.00, and prohibited from attending AKC dog shows for five years. Accordingly, even accepting Plaintiff's allegations as true, the four corners of Plaintiffs' complaint fail to state a claim for defamation, since truth is a “complete defense” to the allegedly defamatory statements at issue.

As for Plaintiffs' second cause of action, "The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." (*Flomenbaum v New York Univ.*, 2009 NY Slip Op 8975, *9 [1st Dept. 2009]).

Plaintiffs' complaint alleges that, "on December 17, 2010 upon the signing of an AKC entry form, plaintiffs Ullum, French and Topaz agreed to be bound by the terms and conditions of said contractual agreement and relied upon the AKC, its members, agents and representatives to abide by those same terms and agreements." Plaintiffs' complaint further alleges, "the entry form for all AKC dog shows contains the following language: 'I (we) agree to abide by the rules and regulations of the American Kennel Club in effect at the time of the event and . . . I (we) agree to conduct myself (ourselves) in accordance with all such Rules and Regulations (including all provisions applying to discipline) and to abide by any decisions made in accordance with them,'" and asserts that this "provision of the entry form constitutes a contract between the AKC and the exhibitors such as (sic) that both will abide by the AKC Rules applying to misconduct and discipline."

Plaintiffs' complaint also alleges that the AKC's rules pertaining to misconduct at dog shows provide various procedural requirements for AKC disciplinary proceedings, including "The AKC is prepared to support the decision of the committee provided the rights of the accused were not abridged; that the hearing was conducted fairly; and that the recorded evidence substantiates the findings of the committee" and, "If the Staff Committee determines that there were serious procedural errors or that the evidence does not support the findings of the Event Committee, it will overturn the findings of the Event Committee and nullify the penalty" and "A serious procedural error is an error that, if it occurs, could affect the outcome of the hearing or the ability of the accused to adequately defend himself or herself. Having a witness to the event, whether testifying or not, who serves as a member of the Event Committee is an example of a serious procedural error."

Plaintiffs' complaint asserts that the AKC breached the contractual agreement contained in the entry form by:

[F]ailing to uphold the terms and conditions of said agreement; improperly, unfairly and against AKC protocol upholding the Starved Rock Kennel Club Bench Committee's (The Committee) recommendations as to plaintiff Ullum despite the evidence that the Committee violated the civil rights and liberties of Ullum by requiring that he attend and testify at the hearing knowing full well that he was facing criminal charges and was advised by his attorneys to not testify at any formal proceedings prior to the conclusion of his criminal trial.

Additionally, Plaintiffs' complaint alleges, "Dennis Sprung as President of the AKC, had the authority to grant a stay of the suspension," that "the AKC negligently and against AKC protocol, custom, and practice refused to Stay Plaintiff Ullum's suspension", and that, even though Ullum filed a request for reconsideration after "meeting all necessary requirements" for the filing of such a request, "the AKC negligently, wrongfully, and willfully denied the Request [for reconsideration] on October 24, 2012, in violation of the AKC's own protocols and procedures."

Here, even accepting Plaintiffs' allegations as true, the four corners of Plaintiffs' complaint fail to allege a breach of the purported entry form agreement. Plaintiffs' complaint does not identify an AKC rule or procedural requirement which prohibits the AKC from upholding a disciplinary hearing held while a related criminal case is pending. Nor does Plaintiffs' complaint allege that Defendants were contractually obligated, rather than merely "authorized," to stay Ullum's suspension or grant Ullum's request for reconsideration. Plaintiffs' allegation that Ullum chose not to testify at the hearing when he was afforded the opportunity to do so, is insufficient, without more, to plead that Defendants failed to perform under the entry form's alleged terms and conditions. Accordingly, even accepting Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiffs' complaint fail to state a claim for breach of contract against the AKC.

Furthermore, even accepting Plaintiffs' allegations as true, Plaintiffs' complaint does not plead that individual defendant Sprung was a party to the alleged entry form agreement in his individual, rather than organizational, capacity.

Accordingly, even accepting Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiffs' complaint fail to state a claim for breach of contract against Sprung.

As for Plaintiffs' third cause of action, "[t]o prevail on a claim for tortious interference with business relations in New York, a party must prove (1) that it had a business relationship with a third party; (2) that the defendant knew of that relationship and intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the relationship with the third party." (*Amaranth LLC v J.P. Morgan Chase & Co.*, 71 A.D.3d 40, 47 [1st Dep't 2009]).

Plaintiffs' complaint alleges that Defendants, "by their negligent acts, negligent publications and defamation have allowed such activities to be done in a manner which has resulted in the interference with business relationships, the plaintiffs' Ullum, French, and Topaz Siberian Kennels have had with purchasers, exhibitors, trainers, and previous financial contributors to the business enterprise of Topaz Siberians and plaintiffs Ullum/French."

Plaintiffs' complaint further alleges that, "the defendant's tortious interference with the plaintiffs' business relationships with others in the dog breeding and dog show industry has resulted in an economic loss to the plaintiffs all to their detriment." Plaintiffs' complaint also asserts that, "as part of Ullum's suspension, the AKC prohibited him from attending any AKC licensed dog show, regardless of the organization, which actually sponsored the show or whether the venue was open to the public" and further asserts that, "the AKC prohibition prevented Plaintiff Ullum from not only attending and participating in dog shows as a spectator, but also from attending dog shows as a co-owner of Topaz Siberians and as an assistant to plaintiff French, all to the economic detriment of the plaintiffs."

Here, even accepting Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiffs' complaint fail to state a claim for tortious interference with business relationships. Plaintiffs' complaint does not allege a specific business relationship with which Defendants

allegedly interfered. (*Schoettle v. Taylor*, 282 A.D.2d 411 [1st Dep't 2001]). Plaintiffs' complaint also fails to plead the requisite level of intent for a tortious interference claim, since the complaint does not allege that Defendants acted with the sole purpose of harming Plaintiffs, and merely alleges "negligence" on Defendants' part.

As for Plaintiffs' fourth cause of action, "A cause of action for negligent infliction of emotional distress, which no longer requires physical injury as a necessary element, generally must be premised upon the breach of a duty owed to plaintiff which either unreasonably endangers the plaintiff's physical safety, or causes the plaintiff to fear for his or her own safety." (*Sheila C. v. Povich*, 11 A.D.3d 120, 130 [1st Dep't 2004]).

Here, Plaintiffs' complaint alleges that, "as a result of the defendants, the American Kennel Club and Dennis Sprung, upholding the decision of the Bench Committee; wrongfully suspending Ullum; widely publishing the unwarranted and unlawful disciplinary actions, and continuing the suspension of Ullum despite his having been fully cleared of all the criminal charges, that said negligent actions of these defendants have resulted in the infliction of physical and emotional distress to the Plaintiffs."

Plaintiffs' complaint further alleges that, "as a result of defendant Sprung, and/or other high-ranking AKC officials having personal relationships with the handler, who made the initial complaints against Plaintiff Ullum, the owner of the dog allegedly involved and the fiancé of the handler, and participated in the decisions to suspend and to continue the suspension of him despite his acquittal on all criminal charges, that said plaintiffs were treated unfairly, inadequately, and in a manner to embarrass, harass and prejudice said plaintiffs all to their emotional/physical detriment."

Even accepting Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiffs' complaint fail to plead a cause of action for negligent infliction of emotional distress. Plaintiffs' complaint fails to plead a duty owed to Plaintiffs, and Defendants' purported conduct falls short of the atrocious conduct required to support such a claim. (*Sheila C. v. Povich*, 11

A.D.3d 120, 130 [1st Dep't 2004]). Additionally, Plaintiffs' complaint fails to allege that Plaintiffs feared for their physical safety at any point. (*Capellan v Marsh*, 71 A.D.3d 505 [1st Dep't 2010]). Accordingly, the four corners of Plaintiffs' complaint do not adequately plead a cause of action for negligent or intentional infliction of emotional distress.

Finally, with respect to Plaintiffs' fifth cause of action, the "cause of action of prima facie tort consist[s] of 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]).

"[T]here is no recovery in prima facie tort unless malevolence is the sole motive for defendant's otherwise lawful act or, in Justice Holmes' characteristically colorful language, unless defendant acts from 'disinterested malevolence'". (*Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 333 [1983]) (citations omitted).

Plaintiffs' complaint alleges that, "the defendants AKC and Dennis Sprung by reason of their refusal to stay any supervision proceedings, their negligent refusal to properly oversee, monitor and interfere in any committee hearings held regarding this matter and the defendants' negligent publication of disparaging details regarding the improper suspension prior to the conclusion of a criminal trial regarding these allegations which formed the basis for plaintiff's improper suspension have caused the plaintiff to suffer physical, emotional, and economic harm/damages."

Here, even accepting Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, Plaintiffs' "prima facie tort cause[] of action cannot stand because . . . [Plaintiffs] do not allege that defendants' sole motivation was 'disinterested malevolence.'" (*Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 333 [1983]).

Wherefore it is hereby,

ORDERED that Defendants' motion to dismiss is granted; and the complaint is dismissed in its entirety.

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

Dated: May 30, 2014



Eileen A. Rakover, J.S.C.