

Mizrahi v Leon Baer Borstein, Gorstein & Sheinbaum

2014 NY Slip Op 31485(U)

June 5, 2014

Sup Ct, New York County

Docket Number: 152360/13

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

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YONI MIZRAHI,

Plaintiff,

INDEX NO.
152360/13

-against-

LEON BAER BORSTEIN, BORSTEIN & SHEINBAUM,
PRASHANT GUPTA, PRASHANT KHOTARI and
VINAY KHOTARI,

Defendants.

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HON. ANIL C. SINGH, J.:

Motions sequence numbers 003 and 004 are consolidated herein for disposition.

In motion seq. no. 003, defendants Leon Baer Borstein (“Borstein”) and Borstein & Sheinbaum move pursuant to CPLR 3211(a)[1] and [7] for an order dismissing the amended complaint in its entirety.

In motion seq. no. 004, plaintiff (“plaintiff” or “Mizrahi”) moves for an order pursuant to CPLR 3025(b) and 203(f) granting him leave to serve a second amended complaint: (a) amplifying and expanding allegations already pleaded in the complaint and amended complaint; (b) adding causes of action for libel and libel *per se*; (c) adding another claim against Borstein based on Judiciary Law § 487(1); and (d) adding a claim based on conversion.

Plaintiff’s Version of the Facts

Starting in 2007, plaintiff, who worked in the diamond industry, rendered services to K.G.K. Diamonds LLC (“KGK”), which was owned by Vinamra Khotari (“Vinamra”) and

managed by defendant Prashant Gupta (“Gupta”). In January or February 2011, plaintiff formed KS Trade LLC (“KS”). Also in 2011, Vinamra, who along with Gupta, Prashant Khotari (“Prashant”) and Vinay Khotari (“Vinay”), was represented by Borstein (who is an attorney), threatened to sue plaintiff based on “false allegations” that Vinamra was a member of KS and that plaintiff converted the property of KGK and other entities controlled and operated by members of the Khotari family.

In December 2011, plaintiff engaged the services of Jan Ira Gellis, Esq. (“Gellis”) to represent him with respect to Vinamra’s charges. On April 3, 2012, Gellis and plaintiff met with Borstein, Prashant and Vinay at Borstein’s office in an attempt to resolve Vinamra’s threatened lawsuit. At that meeting, Borstein, in the presence of Gellis, Prashant and Vinay, called plaintiff a “dirty Jew” and stated that “it is people like you that give Jews a bad name” (“Borstein’s Epithets”).

On or about May 23, 2012, Vinamra individually and on behalf of KS commenced an action against plaintiff (the “Vinamra Action”) alleging causes of action for breach of fiduciary duties owed to KS, breach of fiduciary duties to Vinamra, and conversion of diamonds and precious stones.

On July 13, 2012, plaintiff moved to dismiss the Vinamra Action. Shortly thereafter, in August 2012, plaintiff filed a grievance against Bornstein with the Disciplinary Committee of the Appellate Division, First Department based on Borstein’s Epithets.¹ On November 20, 2012, approximately seven months prior to the Disciplinary Committee’s denial of the grievance,

¹ By letter to plaintiff dated June 30, 2013, the Disciplinary Committee denied his grievance while stating “in pertinent part” that “the Committee harbors a concern about a comment that he made to you regarding the false stereotype of an ethnic group.”

Borstein advised plaintiff's attorney that he would discontinue the Vinamra Action and exchange releases provided that plaintiff would comply with the following four conditions (the "Four Conditions"): (1) withdraw the grievance; (2) withdraw a letter dated November 14, 2012, that plaintiff wrote to a federal magistrate involving Gupta; (3) withdraw a complaint that plaintiff allegedly filed with "ICE" concerning immigration issues; and, (4) refuse to cooperate with any investigation against Gupta, Prashant and Vinay and advise Borstein if he speaks with any governmental agency.

By order to show cause (Hagler, J.) dated December 28, 2012 in the Vinamra Action, plaintiff moved to disqualify Borstein and Bortein's law firm, Borstein & Sheinbaum, from representing the plaintiffs in that action based on Borstein's alleged conflict of interest stemming from his representing the plaintiffs in the Vinamra Action while simultaneously demanding that the grievance be withdrawn.

On January 28, 2013, plaintiff's July 13, 2012 motion to dismiss the Vinamra Action and his December 28, 2012 order to show cause were argued before Justice Shlomo Hagler. Justice Hagler reserved decision with respect to plaintiff's motion to dismiss and denied plaintiff's motion to disqualify Borstein and his law firm. On March 6, 2013, plaintiff moved for leave to reargue his application to disqualify Borstein and his firm. At a hearing held on March 11, 2013, Justice Hagler allowed Borstein to voluntarily withdraw from the Vinamra Action "as a condition of the Borstein and Sheinbaum firm to continue as the [Vinamra] plaintiff's attorney (see hearing transcript, plaintiff's exhibit 6, p 10).

On April 11, 2013, plaintiff entered into a stipulation to discontinue the instant action as to defendants Gupta, Prashant and Vinay.

The amended complaint herein asserts the following seven causes of action: (1) defamation and defamation *per se* based on Borstein's Epithets; (2) violation of Judiciary Law § 487(1) in connection with statements Borstein made to Justice Hagler during oral argument on March 11, 2013, in the Vinamra Action; (3) slander *per se* based on Borstein's Epithets; (4) intentional infliction of emotional distress based on Borstein's Epithets; (5) intentional interference with business prospects based on "the illegal acts alleged herein"; (6) "coercion" in connection with Borstein's demand that plaintiff comply with the Four Conditions as a condition precedent to settlement of the Vinamra Action; and (7) intentional interference with business prospects based on Borstein's Epithets.

Plaintiff seeks compensatory damages of not less than one million dollars and punitive damages of not less than five million dollars on his first, third, fourth, fifth and seventh causes of action, legal fees he paid to Gellis in the Vinamra Action times three on the second cause of action and not less than one million dollars on the sixth cause of action.

Motion Sequence No. 003

A. Defendants' Arguments

In support of their motion to dismiss the amended complaint, the Borstein defendants (Borstein and his law firm, Borstein & Sheinbaum) make the following arguments. Plaintiff's first and third causes of action should be dismissed because Borstein's Epithets constitute non-actionable rhetorical hyperbole and epithets, not slander. Borstein's Epithets are also privileged because they were made in the course of a judicial proceeding (the Vinamra Action).

The doctrine of collateral estoppel bars plaintiff's second cause of action based on Judiciary Law § 487(1) because, *inter alia*, the statements complained of were the subject of

plaintiff's order to show cause, which sought disqualification of the Borstein defendants in the Vinamra Action.

Plaintiff's fourth cause of action based on intentional infliction of emotional distress should be dismissed because the necessary elements of such claim (extreme and outrageous conduct, intent to cause severe emotional distress, causal connection between the conduct and injury and severe emotional distress) are not present in Borstein's Epithets, which were epithets (albeit reprehensible) uttered on a single occasion during a private meeting among counsel and the parties in the Vinamra Action.

The sixth cause of action based on "coercion" fails as conclusory and because plaintiff has failed to articulate a recognized theory of liability under New York law.

The fifth cause of action based on undefined "illegal acts" and the seventh cause of action alleging tortious interference with business relations fail to state an actionable claim because the necessary elements (plaintiff had a business relationship with a third party, defendant knew of and intentionally interfered with that relationship, defendant acted solely out of malice or used improper or illegal means and, defendant's interference caused injury to the relationship) are not alleged.

B. Plaintiff's Opposition

In his affidavit in opposition, plaintiff states that Borstein's Epithets made in the presence of Prashant and Vinay, who are plaintiff's competitors in the diamond industry, have caused him "enormous damages" because certain diamond dealers, including KGK Diamonds, Ltd. (Israel) and KGK Diamonds, LLC (New York), have stopped doing business with him. Plaintiff states further that, in addition to losing business, he has suffered "emotional trauma resulting in

sleepless nights and a loss of appetite” and that Borstein’s Epithets have “tortured and traumatized” him because he is a “proud member of the Jewish faith” (see Mizrahi August 29, 2013 affidavit in opposition, ¶¶ 23 and 24). Plaintiff then states that Borstein “violated the confidentiality of the settlement agreement in the Vinamra Action by delivering the stipulation of discontinuance therein ... to defense counsel before the settlement was consummated” (*id.*, ¶ 27).

In his August 29, 2013 memorandum of law, plaintiff argues that his first cause of action for “slander” states a valid claim because Borstein’s “dirty Jew” comment imputes to plaintiff “fraud, dishonesty, misconduct or unfitness in [his] business which constitutes slander *per se*...”² Plaintiff adds that “[c]alling someone a liar, which is tantamount to calling Mizrahi ‘dirty’ is likewise defamatory *per se*” and that Borstein’s use of the word “dirty” is tantamount to falsely accusing plaintiff of larceny or imputing dishonesty to plaintiff. Next, plaintiff argues that he has sustained special and “enormous” damages because Borstein’s calling him a “dirty Jew” in the presence of Prashant and Vinay, who are plaintiff’s competitors in the diamond industry (which consists of a small group of individuals), caused certain diamond dealers, including KGK Diamonds, Ltd. (Israel) and KGK Diamonds LLC (New York), to stop doing business with plaintiff. Plaintiff argues further that absolute privilege does not apply because Borstein’s Epithets were not made by him as attorney of record in the Vinamra Action.³

Plaintiff then argues that his second cause of action based on a second alleged violation of Judiciary Law § 487(1) by Borstein when he was before Justice Hagler is validly pleaded and not

² For this contention, plaintiff cites *Vacca v General Electric Credit Corporation*, 88 AD2d 740 (3d Dept 1982) wherein the words complained of were “crooks” and “hijackers.”

³ Plaintiff’s contention is incorrect.

barred by the doctrine of collateral estoppel because the alleged violation was not considered by Justice Hagler and has yet to be addressed by a court.⁴

Next, plaintiff argues that the third cause of action for slander *per se* is valid because calling plaintiff a “dirty Jew” “is equivalent to stating that Mizrahi is a thief and dishonest” and charging him with “larceny.”

The fourth cause of action for intentional infliction of emotional distress is defended on the ground that Borstein’s Epithets were “so extreme and outrageous in degree [that they] exceed all bounds of human decency in a civilized society.”

Plaintiff then argues that the fifth cause of action based on *prima facie* tort is valid because the necessary elements (intentional infliction of harm, resulting in special damages, without excuse or justification, by an act that would otherwise be lawful) are pleaded.

The sixth cause of action is based on allegations of “coercion” which plaintiff contends is a recognized tort in New York and validly pleaded. Borstein’s coercive acts, according to plaintiff, were demanding that the Four Conditions be met, threatening to “bankrupt” plaintiff unless he complied with those conditions, threatening to subject plaintiff to investigation and/or prosecution for withholding information about criminal activity committed by Gupta, Prashant and Vinay and, demanding that plaintiff denounce the letter he wrote to a federal magistrate.

Finally, plaintiff contends that the seventh cause of action for tortious interference with business relations properly alleges the elements necessary to sustain his claim (business relations with a third party, defendant’s interference with those relations, defendant acted with the sole

⁴ Plaintiff’s second § 487(1) claim was addressed by Justice Hagler.

purpose of harming plaintiff or used dishonest or improper means, and injury to the business relationship).

According to plaintiff, none of his claims are barred by documentary evidence (see CPLR 3211[a]1).

C. Defendants' Reply

In reply, defendants first state that plaintiff's memorandum of law improperly exceeds the 30-page limit imposed by Rule 14(b) of the New York County, Supreme Court, Civil Branch Rules of the Justices.⁵ Defendants then argue that Borstein's Epithets are not defamatory as a matter of law because they reference religion and are a disparaging view of plaintiff's character and nothing more. Defendants note that the Epithets were uttered in the presence of the other parties in the Vinamra Action in which plaintiff was charged with theft. Next, defendants reiterate that plaintiff's (second) Judiciary Law § 487(1) charge is barred by collateral estoppel because the issues raised therein were before Justice Hagler, who allowed Borstein to voluntarily withdraw as counsel in the Vinamra Action while allowing Borstein's law firm to continue to represent the defendants therein. Defendants further argue that plaintiff's fourth cause of action for intentional infliction of emotional distress should be dismissed because the Borstein Epithets were uttered on a single occasion during a meeting between counsel and the parties in the privacy of a law office. Defendants reiterate that "coercion" is not a recognized tort in this State and that plaintiff's claim for tortious interference must be dismissed because, *inter alia*, Borstein's Epithets were not unlawful.

⁵ Defendants' point is well taken. Plaintiff's memorandum of law is 33 pages. However, the court would appreciate it if defendants' attorney would number the pages of affidavits and memoranda in the future.

Motion Seq. No. 004

Apparently impressed with defendants' efforts, plaintiff has moved for leave to serve a second amended complaint allowing him to "amplify" his prior allegations and add four additional causes of action: libel and libel *per se*, a second claim based on Judiciary Law § 487(1), and a second claim based on conversion.

A. Plaintiff's Arguments

The proposed libel and libel *per se* claims are based on a March 22, 2012, letter that Borstein (as Vinamra's attorney) sent to Mizrahi's attorney Gellis with copies to Vinamra, Gupta and Eric C. Zabicki, Esq. (Vinamra's prior counsel) in the Vinamra Action (the "March 22, 2012 letter"), in which Borstein made the following statements: "any jury will also find that your client [plaintiff] purloined over \$900,000 in precious stones and jewelry from KS Trade which he is still secreting"; "your client wrongfully and fraudulently removed over \$236,000 from the company bank account by filing a false document with a federally insured bank ... and opened another account making the same false filing;" plaintiff has a "separate secret illegal account..."; plaintiff "secretly removed all of the goods of KS Trade after he thought Vinamra left for India"; and plaintiff is a "disloyal employee" (see exhibit 6 to plaintiff's October 22, 2013 affidavit).

Plaintiff contends that the proposed eighth and ninth causes of action for libel and libel *per se* should be allowed because the supporting allegations relate back to the original complaint. He then argues that his proposed tenth cause of action based on a second violation of Judiciary Law § 487(1) should be allowed because Borstein made false representations to Justice Hagler concerning plaintiff's ownership of KS and Borstein's representation of KS, and Borestein made false representations in his answer in a contempt proceeding brought against him by plaintiff in

September 2013. Plaintiff concludes that his proposed eleventh cause of action based on conversion should be allowed because the underlying allegations that Borstein wrongfully exercised dominion and control over property belonging to plaintiff and wrongfully usurped economic interest belonging to plaintiff by e-filing the settlement stipulation in the Vinamra Action on April 16, 2013, before the settlement was consummated on April 26, 2013, state a valid claim.

B. Defendants' Opposition

In opposition, defendants first state that “[t]he proposed Second Amended Complaint constitutes the eighth judicial application initiated by plaintiff against Borstein personally to seek vengeance in connection with [the] already settled [Vinamra Action]” (see Borstein November 6, 2013 memorandum in opposition, unnumbered p 1). Defendants state further that if plaintiff is permitted to serve a second amended complaint, they will be required to prepare and file a third pre-answer motion to dismiss.

Defendants, turning to their legal arguments, contend that the proposed eighth and ninth causes of action based on the March 22, 2012 letter are time-barred by the one-year statute of limitations applicable to libel and slander (CPLR 215) and that plaintiff’s original complaint dated March 14, 2013, and amended complaint dated May 29, 2013, gave no notice of plaintiff’s now proposed claims. Defendants add that the March 22, 2012 letter is protected speech subject to absolute privilege because it was issued in connection with a legal proceeding and pertinent thereto. Defendants further contend that plaintiff is estopped from litigating statements made in the March 22, 2013 letter because the statements made therein became the allegations upon which the complaint in the Vinamra Action was based.

Next, defendants argue that the proposed tenth cause of action for violation of Judiciary Law § 487(1) is predicated on Borstein's purported "falsely sworn denials" and "falsely sworn denials of knowledge or information" contained in his verified answer filed in the contempt action brought against him by plaintiff which is still pending before Justice Hagler. As such, plaintiff's allegations must be resolved in the contempt action, not here (*cf.* CPLR 3211[a]4).

Defendants argue, *inter alia*, that the proposed eleventh cause of action based on "conversion" (Borstein's e-filing the stipulation of discontinuance in the Venamra action on April 11, 2013) makes no sense because the stipulation is not "property" owned by plaintiff. Defendants add that there was no confidentiality provision in the stipulation and no requirement that it be filed under seal.

Defendants' last argument is that "the procedural history establishes a frivolous campaign of judicial harassment initiated by plaintiff Yoni Mizrahi against defendant Leon Baer Borstein." Defendants state that plaintiff's current application to amend the previously amended complaint constitutes his eighth judiciary application to punish Borstein in connection with his participation in the Venamra Action. Defendants set forth plaintiff's eight judicial applications on unnumbered pages 9 and 10 of their November 6, 2013 memorandum in opposition to plaintiff's motion (seq. no. 004).

Defendants conclude that, in the context of plaintiff's pattern of judicial harassment, his current application to amend the complaint is "frivolous" as defined in 22 NYCRR § 130-1.1(c) and that plaintiff's perversion of the judicial process is tantamount to "fraud upon the court."

C. Plaintiff's Reply

In his reply memorandum, plaintiff (via his attorney) states that his application should be granted because issue has yet to be joined, discovery has yet to be held and defendants'

opposition is “utterly meritless.” He adds that this State has a liberal policy of allowing amended pleadings. He then states that the sworn accusations in his supporting affidavit are admittedly true because Borstein has not been heard from on either motion and defendants’ lawyers’ affirmation is “pure hearsay.”⁶ Plaintiff then states that “[d]efendants’ request for sanctions is sanctionable because it is frivolous” (citing 22 NYCRR § 130-1.1 [c]) and “Borstein speaks out of both sides of his mouth.” Plaintiff contends that there is no merit in Borstein’s arguments that plaintiff’s proposed eighth and ninth causes of action based on libel and libel *per se* are palpably insufficient because the claims asserted therein relate back to the original complaint. Plaintiff then argues: there is no merit to Borstein’s arguments concerning the March 22, 2012 letter, plaintiff’s proposed tenth cause of action based on Judiciary Law § 487(1), and plaintiff’s proposed eleventh cause of action based on conversion. In a parting lagnieppe plaintiff states “[a]s usual Borstein is deceitful about the facts...”

Discussion

The court will first address defendants’ motion to dismiss the amended complaint (seq. no. 003).

On a motion pursuant to CPLR 3211(a)[1] and [7] “the pleadings must be liberally construed and the facts alleged accepted as true; the court must determine ‘only whether the facts as alleged fit within any cognizable legal theory’.... So liberal is the standard under these provisions that the test is simply ‘whether the proponent of the pleading has a cause of action, not even whether he has stated one’” (*Wiener v Lazard Freres & Co.*, 241 AD2d 114, 120 [1st Dept

⁶ The affirmations submitted by defendants’ attorney, Brian M. Oubre, Esq. in both motions are utilized solely to present exhibits.

1998], citing *Leon v Martinez*, 84 NY2d 83, 87-88 [1994] and *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Dismissal pursuant to CPLR 3211(a)(1) is warranted if the proffered documentation definitively disposes of the claim (see *Demas v 325 West End Avenue Corp.*, 127 AD2d 476, 477 [1st Dept 1987]; see also *Ladenburg Thalmann & Co. v Tim's Amusements, Inc.*, 275 AD2d 243, 246 [1st Dept 2000] [dismissal of complaint pursuant to CPLR 3211(a)[1] is warranted if the documentary evidence conclusively establishes a defense as a matter of law]).

Plaintiff's first, third, fourth and seventh causes of action (defamation and defamation *per se*, slander *per se*, intentional infliction of emotional distress and, interference with business relations) are based on the undisputed fact that defendant Leon Baer Borstein called plaintiff Yoni Mizrahi a "dirty Jew" in the presence of Gellis, Prashant and Vinay during settlement discussions in the Vinamra Action followed by the statement that "it is people like you that give Jews a bad name."

Unfortunately, the epithet "dirty Jew" has been the subject of prior litigation. In *Goodstein v Chalfonte Hotel Corp.*, 198 Misc 1068 [Sup Ct, NY Cty, 1950], Justice DiFalco stated that the epithet "dirty Jew" was "malodorous, offensive, distasteful and outrageous" while concluding that the term did not constitute slander *per se* because "wounded pride and outraged sensibilities are not actionable in the absence of an allegation of special damages" (198 Misc at 1070). In *Herlihy v Metropolitan Museum of Art* (a wrongful discharge case) the plaintiff Cecile Herlihy, who was an employee of the Museum, was accused of making the following anti-Semitic statements: "you Jews are such liars," "you Jews are all alike" and, referring to Jewish volunteers as "f- - king whores," "liars" and "undependable." Herlihy denied that she made the comments. In addressing these epithets, Justice Greenfield stated that "there is no question but

that the use of racial or religious slurs and derogatory characterizations about an entire ethnic, racial or religious group are bigoted and hurtful” (160 Misc 2d 279, 283 [Sup Ct, NY Co, 1994], affd as mod 214 AD2d 250 [1st Dept 1995]).

Notwithstanding the liberal standards favoring a pleading subject to a motion to dismiss pursuant to CPLR 3211(a)7, the court finds that plaintiff’s first, third, fourth and seventh causes of action (defamation *per se*, slander *per se*, intentional infliction of emotional distress and, malicious interference with prospective business relationships, respectively) should be dismissed because these causes of action are based on Borstein’s Epithets, which were uttered during settlement discussions pertaining to the Venamra Action. As a result, the Epithets are protected by the absolute privilege applicable to judicial proceedings (see *Park Knoll Associates v Schmidt*, 59 NY2d 205, 208 [1983] [“A privileged communication is one which but for the occasion it was uttered, would be defamatory and actionable”]; *Mossesson v Jacob D. Fuchsberg Law Firm*, 257 AD2d 381, 382 [1st Dept 1999] [“A statement made in the course of legal proceedings is absolutely privileged if it is at all pertinent to the litigation,” citing *Youmans v Smith*, 153 NY 214, 219 [1897]; *Sexter & Warmflash, PC v Margrabe*, 38 AD3d 163, 174-175, 177 [1st Dept 2007] [the privilege is extended to all pertinent communications among the parties and their counsel in or out of court, including statements made at a settlement conference pertaining to a threatened lawsuit]).

The requirement that the statement be pertinent in order to qualify for the privilege is easily met herein. Plaintiff claims that Borstein’s “dirty Jew” comment is tantamount to imputing to plaintiff “fraud, dishonesty, misconduct and unfitness” in his business and that calling plaintiff “dirty” is tantamount to calling him a liar and falsely accusing him of larceny or

imputing dishonesty to him (see plaintiff's 8/29/13 memorandum of law, pp 8-9). The complaint in the Venamra Action alleges, *inter alia*, that plaintiff stole diamonds and precious stones, over \$240,000 in cash, accounts receivable and assets from Vinamra and his company KS Trade, LLC, and asserts causes of action against plaintiff for breach of fiduciary duty and conversion (see exhibit B to defendants' motion to dismiss). Plaintiff's interpretation of Bornstein's Epithets is thoroughly consistent with the allegations of the Vinamra complaint.

Plaintiff's second cause of action is based on allegations that Borstein violated Judiciary Law § 487(1) (Borstein's second alleged violation of § 487[1] according to plaintiff) by making false representations at a hearing before Justice Hagler in connection with the Four Conditions he demanded to settle the Vinamra Action. The transcript of the March 11, 2013 hearing reflects that Justice Hagler stated "Counsel, you have the last word with regard to this and I will rule" (see defendants' Notice of Motion, exhibit D, p 9). Justice Hagler then stated "I'm going to allow the voluntary withdrawing of Mr. Borstein as a condition to the Borstein & Sheinbaum firm to continue as the plaintiff's attorney. I'm modifying my ruling in that respect" (*id.*, p 10). The court finds that plaintiff's second cause of action is barred by the doctrine of collateral estoppel, which precludes a party from relitigating in a subsequent action an issue raised and resolved in a prior action (see *Ryan v New York Telephone*, 62 NY2d 494, 500 [1984]).

In his memorandum of law in opposition to defendants' motion, plaintiff argues that his fifth cause of action for *prima facie* tort is based on the Four Conditions demanded by Borstein, Borstein's Epithets, Borstein's misrepresentations to Justice Hagler and Borstein's continued participation in the Vinamra Action. Plaintiff argues further that his sixth cause of action for "conversion" is based on the Four Conditions and threats related thereto (*id.*, p 31).

The court finds that plaintiff's fifth and sixth causes of action should be dismissed because they are based on alleged statements made in connection with the Vinamra Action which are shielded by the absolute privilege applicable to judicial proceedings (see cases p¹⁴ *supra*; see also *El Jamal v Weil*, 2014 WL 1377711 [2d Dept 2014]).

In motion sequence no. 004, plaintiff seeks leave to amend the already amended complaint to add an eighth cause of action for defamation and a ninth cause of action for libel *per se*, both of which are based on the March 22, 2012 letter. Plaintiff also seeks to add a tenth cause of action for violation of Judiciary Law § 487(1) and an eleventh cause of action for conversion based on allegations that Borstein converted plaintiff's property and economic interests by e-filing the stipulation of settlement in the Vinamra Action on April 16, 2013, before the settlement agreement in the Vinamra Action was consummated on April 26, 2013 (see exhibit A to plaintiff's notice of motion, pp 19-24).

Generally, leave to amend should be freely given (see CPLR 3025[b]; *Viacom International, Inc. v Midtown Realty Co.*, 193 AD2d 45, 52 [1st Dept 1993]). "The decision of whether to do so, however, is in the discretion of the trial court" (*Nasuf Construction Corp. v State of New York*, 185 AD2d 305, 306 [2d Dept 1992]), and "where the proposed amendments are patently lacking in merit so as to be wasteful of judicial resources, leave to amend should be denied" (*Scavo v Allstate Insurance Company*, 238 AD2d 571 [2d Dept 1997], citation omitted).

The proposed eighth and ninth causes of action will not be allowed. The statements complained of in the March 22, 2013 letter⁷ (see p 9 *supra*) were a preview of the Vinamra complaint. In that letter, Borstein states that "we would be very happy to put this controversy to

⁷ Plaintiff's exhibit 6.

rest pursuant to a settlement agreement and payment of the accounts receivable but barring that, my clients intend to commence an action immediately” and “I look forward to attempting to settle this matter with you in the immediate future...” (see plaintiff’s exhibit 6, p 3). “[A] letter among parties and counsel on the subject of pending or prospective litigation enjoys the protection of the absolute privilege for judicial proceedings” (see *Sexter & Warmflash, PC v Margrabe, supra*, 38 AD3d at 174; see also *Vodopia v Ziff Davis Publishing Co.*, 243 AD2d 368 [1st Dept 1997]). The court also agrees with defendants’ arguments concerning the statute of limitations (CPLR 215), and lack of notice in the two prior complaints.

Plaintiff’s proposed tenth cause of action is based on allegations that defendants violated Judiciary Law § 487(1) in the contempt proceeding brought by him in connection with the Vinamra Action by making false and deceitful representations in the pleadings, litigation documents and in court before Justice Hagler. Plaintiff’s proposed tenth cause of action will not be allowed because the defendants’ representations were privileged (see *Sexter & Warmflash v Margrabe, supra*, 38 AD3d 163). Furthermore, the contempt proceeding is still pending before Justice Hagler (*cf.* CPLR 3211[a]4), who is in a better position to resolve plaintiff’s claims. Finally, in view of the court’s findings herein, resurrecting plaintiff’s contempt claims in this action would result in a further and unmerited usurpation of judicial resources.

Plaintiff’s proposed eleventh cause of action will not be allowed because the underlying allegation that Borstein converted plaintiff’s property and economic interests by e-filing the stipulation of settlement in the Vinamra Action on April 16, 2013 does not support a claim of conversion.

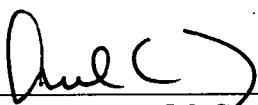
Accordingly, the motion (seq. no. 003) to dismiss plaintiff's amended complaint against Borstein and Borstein & Sheinbaum is granted in its entirety.

Plaintiff's motion (seq. no. 004) for leave to serve a second amended complaint is denied in its entirety.

The Clerk is hereby directed to enter judgment dismissing the complaint.

This constitutes the decision and order of the court.

DATED: *June 5*, 2014



J.S.C.

**HON. ANIL C. SINGH
SUPREME COURT JUSTICE**