ESRT Observatory TRS, L.L.C. v Henson
2014 NY Slip Op 32143(U)
August 7, 2014
Supreme Court, New York County
Docket Number: 150263/2014
Judge: Geoffrey D. Wright
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 47

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ESRT OBSERVATORY TRS, L.L.C and
ESRT EMPIRE STATE BUILDING, L.L.C.,

Plaintiff,

-Against-

ALLEN HENSON,

Defendant

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Index #150263/2014

DECISION/ORDER
Pursuant To Present:
Hon. Geoffrey Wright
Judge, Supreme Court

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion for Summary Judgment.

PAPERS	NUMBERED
Notice of Petition/Motion, Affidavits & Exhibits Annexed	1
Order to Show Cause, Affidavits & Exhibits	
Answering Affidavits & Exhibits Annex	3
Replying Affidavits & Exhibits Annexed	4
Other (Cross-motion) & Exhibits Annexed	2
Supporting Affirmation	
Memorandum	5, 6

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows: Plaintiff ESRT Observatory TRS, L.L.C. and ESRT Empire State Building L.L.C's (collectively "ESRT") moves for an order pursuant to CPLR 3211(a)(7) to dismiss Defendant Allen Henson ("Henson") counter-claim of defamation and in addition moves for sanctions pursuant to Part 130-1.1 of the rules of the Chief Administrator. Defendant Henson cross-moves pursuant to CPLR 3211(a)(7) to dismiss plaintiff's claim of trespass. Plaintiff's motions to dismiss defendant's counter-claim is granted. Defendant's motion to dismiss plaintiff's trespass claim and ESRT's request to have sanction levied are both denied.

On August 9th, 2013, Defendant entered the Observatory of Plaintiff, accompanied by a female companion. The companion removed her top and posed topless for photos taken by the defendant. The photos were taken for a commercial purpose, of which ESRT was never notified. Subsequently, ESRT filed a complaint against defendant alleging trespass and seeking a permanent injunction. Defendant filed a counter-claim alleging defamation, and cross-moved to

dismiss plaintiff's trespass claim. Defendant has not moved to dismiss plaintiff's second cause of action seeking a permanent injunction, so it is not at issue here.

The dismissal of a complaint is appropriate where it fails to state a viable cause of action, or where the cause of action cannot succeed upon any reasonable view of the facts. Campaign for Fiscal Equity v. New York, 86 N.Y.2d 307, 318 (1995). Claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss. Godfrey v. Spano, 13 N.Y.3d 358, 373 (2009)

Defendant files a counter-claim alleging defamation by implication and injurious falsehood. Defamation by implication is premised not on direct statements, but on false suggestions, impressions and implications arising from otherwise truthful statements. Herbert v. Lando, 781 F.2d 298, 307 (2d Cir. 1986). Statements, which by themselves may not be defamatory but might lead a reader to draw an inference that is damaging to the party bringing the claim. Id. When the knowing publication of such false matter, derogatory to the party's business, is calculated to prevent others from dealing with the party's business or interferes with the party's business relations, injurious falsehood is actionable. Waste Distillation Tech. Inc. v. Blashand v. Bouck Engineers P.C., 136 A.D.2d 633 (2d Dept. 1988); Kasada, Inc. v. Access Capital, Inc., 01 Civ. 8893, 2004 WL 29033776 at *15 (S.D.N.Y. Dec. 14, 2004)

Henson's defamation claim's are not based in "false light" and are in fact cognizable. However, it is well settled that in New York, a party raising any claim of defamation must allege: (1) a defamatory statement of fact concerning the plaintiff, (2) publication to a third party by the defendant, (3) falsity in the defamatory statement, (4) some degree of fault, and (5) special damages or per se actionability. Dillion v. City of New York, 704 N.Y.S.2d 1, 5 (1st Dep't 1999). Casting the complaints as defamation by implication or injurious falsehood does not relieve a party of these requirements. Ello v. Singh, 531 F.Supp.2d 552, 580 (S.D.N.Y. 2007). Specifically, Henson must identify the allegedly defamatory statements that were uttered, identify to whom they were uttered, and identify actual losses that causally relate to the alleged tortious act. *Waste Distillation Technology*, 523 N.Y.S.2d at 877.

Henson has failed to meet the burden of defamation required by New York State. The defendant failed to set forth any specific alleged defamatory statements uttered by the plaintiff, failed to prove the falsity in ESRT's alleged statements (as the underlying fact are undisputed) and failed to make any showing of actual losses casually related to the alleged statements.

Defendant points to the lawsuit in itself as casting defendant in a false light. Henson claims that the lawsuit portrays him as a person who has violated the terms of a license, created a public disturbance, and violated the law. Such implications, defendant argues, have caused the defendant damage. However, it is within the courts discretion to determine whether alleged statements are susceptible of a defamatory meaning. Kimmerle v. New York Evening Journal, Inc., 262 N.y.99, 102 (1933); Fairly v. Peekskill Star Corporation, 445 N.Y.S.2d 156, 158 (2d Dept. 1981); Yonaty v. Mincolla, 945 N.Y.S.2d 774, 776 (3d Dept. 2012); Idema v. Wager, 2002 WL 243119, 1 (2d Cir. 2002). In the view of this court allegations set forth in a complaint, as the bases of an adjudication, are not on their face defamatory.

Supp. 2d 248, 253 (S.D.N.Y. 2001). Henson claims that stories based on judicial proceedings are actionable if the story is not a fair and substantially accurate portrayal of the events in question. Cholowsky v. Guiletti, 69 A.D3d 110 (2d Dept. 2009). Second, where the underlying litigation is a sham, the statements are not privileged. Neither argument is applicable here.

This litigation cannot be characterized as a sham or an exaggeration of fact because the core allegations and factual assertions are undisputed. Defendant admits that the occurrence at the heart of this case was not a mere coincidence. He admits that he deliberately entered the observatory with the intention of photographing his companion topless, and ESRT does not dispute that Henson dutifully purchased a ticket for admission, and never refused to leave upon request. Secondly, ESRT's trespass claim is meritorious and was not brought maliciously. As such, defendants counter-claim of defamation is dismissed.

A claim of trespass requires an affirmative act resulting in an intentional intrusion upon another's property. Congregation B'nai Jehuda v. Hiyee Realty Corp., 35 A.D.3d 311, 312 (1st Dep't 2006); Realty LLC v. Duane Reade, 2004 WL 3029873 *5 (Sup. Ct. N.Y. Cty. Nov. 23, 2004). A refusal to leave ones property after permission has been granted but thereafter withdrawn also raises an actionable trespass claim. Volunteer Fire Assn. of Tappan, Inc. v. County of Rockland, 101 A.D.3d 853, 855 (3d Dept. 2011)

Here, Henson and a female companion were granted consent to enter the famed observation deck at the Empire State Building, after purchasing a ticket. At no time did either party refuse to exit the premises when prompted. However, it is undisputed that defendant entered the observatory with the intention of photographing his companion topless. Defendant admitted as much during oral arguments before the court. It was not mere happenstance that a female spectator removed her top, and defendant happened to be in the right place at the right time to capture it. Henson is a well-known photographer whose infamous art project "*Boobs Around Town*", has been documented by numerous media outlets including *THE GOHAMIST* and *THE DAILY NEWS*. By conducting his impromptu photo-shoot at the observatory, Henson ignored ESRT's detailed and published requirements of admission for commercial photo shoots.

Defendant did not seek or receive permission from ESRT to conduct a commercial photo shoot. As a licensee, Henson exceeded the scope of his license, or in this case his purchased ticket. It is well established in New York that a licensee must bring themselves within the terms of their permission in order to justify the license. Capel v. Lyons, 22 N.Y.S. 378 (Comm. Pleas Ct. of N.Y., 1983); Long Island Gynecological Services v. Murphy, 298 A.D.2d 504 (2d Dep't 2002); Blakeslee v. Punnett, 368 N.Y.S.2d 216 (1st Dep't 1975). If a license is given to enter one's property, but the license is exceeded, the acts exceeding the restrictions of such license may constitute a trespass. Id.

Defendant argues that plaintiff does not claim title or possessory interest in the observatory, precluding plaintiff from bringing the trespass claim. However, defendant offers no form of proof to support such a claim. Furthermore, the complaint defines the *Empire State Building* as both the building and the observatory, and indicates that ESRT maintains possession of and operates the observatory. For these stated reasons, defendant's motion to dismiss plaintiff's trespass claim is denied.

While this court does find defendants defamation claim to be meritless, procedurally this case is still in the a pre-discovery stage. As such, it is this courts view that applying sanctions so early on would be an extreme remedy. Plaintiff's requests for sanctions are denied, but denied without prejudice. Plaintiff has the opportunity to renew its application for sanctions at a later stage.

Dated: August 7, 2014

GEOFFREY D. WRIGHT
AJSC

JUDGE GEOFFREY D. WRIGHT
Acting Justice of the Supreme