

**Salvan v Rudin**

2014 NY Slip Op 32319(U)

January 16, 2014

Sup Ct, New York County

Docket Number: 109432/11

Judge: Doris Ling-Cohan

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY**  
**PRESENT: Hon. Doris Ling-Cohan, Justice** **Part 36**

**SHERWOOD ALLEN SALVAN,**  
**Plaintiff,**

-against-

**FRANK RUDIN,**  
**Defendant.**

**INDEX NO. 109432/11**  
**MOTION SEQ. NO. 006**

The following papers, numbered 1-4 were considered on this motion by plaintiff for an order granting an award of punitive damages and cross-motion by defendant for an order dismissing the tort claims contained in the amended complaint:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____	<u>1, 2</u>
Reply _____	<u>5</u>
Cross-Motion: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	<u>3, 4</u>

**FILED**

**JAN 22 2014**

Upon the foregoing papers, it is

NEW YORK  
COUNTY CLERK'S OFFICE

ORDERED that plaintiff's motion for an order granting him an award of punitive damages based upon his third cause of action and defendant's cross-motion for an order dismissing the tort claims contained in plaintiff's amended complaint are denied, for the reasons stated below.

Plaintiff commenced this action against defendant seeking to enforce the terms of a September 26, 2003 indemnification agreement ("the agreement"), signed by defendant, which required defendant to indemnify plaintiff for attorneys' fees incurred or paid by plaintiff, defending a third-party action initiated by defendant's former law partners. By order of this court dated July 11, 2013, plaintiff's prior motion to dismiss defendant's affirmative defenses and counterclaims was granted and plaintiff was also granted summary judgment as to liability on plaintiff's claim that defendant breached the parties' agreement; the case was referred to a Special Referee, to determine the issue of damages, as to plaintiff's breach of the indemnification agreement claim.<sup>1</sup>

<sup>1</sup> It is unclear whether the hearing before the Special Referee has been conducted.

In this court's July 11, 2013 order, it was noted that "plaintiff's complaint includes a claim for punitive damages in the amount of \$750,000". The court stated that, "as no basis for [punitive damages] has been supplied in the moving papers, such claim is deemed withdrawn, unless within 20 days of entry of this order, plaintiff files a subsequent motion, with supporting facts and case law, to support an award for punitive damages..." (emphasis supplied). In accordance with such provision of this court's July 11, 2013 order, plaintiff filed the within motion seeking an award of punitive damages. Significantly, however, the within motion fails to contain case law, to support the imposition of punitive damages under the within circumstances, as specifically required by this court's prior order. Thus, the within motion should be denied on such basis alone. Additionally, as detailed below, plaintiff's supporting affidavit fails to contain a sufficient basis to warrant that this court issue an award of punitive damages.

There is no independent cause of action for punitive damages. *A.W. Fiur Co. v. Ataka & Co.*, 71 AD2d 370, 375-76 (1<sup>st</sup> Dept 1979); *Steinberg v. Monasch*, 85 AD2d 403, 405 (1<sup>st</sup> Dept 1982). A separate cause of action for punitive damages, as asserted in the within complaint, will not stand since it constitutes only an element of damages on an underlying cause of action. *Goldberg v. New York Times*, 66 AD2d 718 (1<sup>st</sup> Dept 1978); *Carroll v. New York Property Ins. Underwriting Assn.*, 88 AD2d 527, 528 (1<sup>st</sup> Dept 1982); *APS Food Systems, Inc. v. Ward Foods, Inc.*, 70 AD2d 483 (1<sup>st</sup> Dept 1979). Here, plaintiff's third cause of action contained in his amended complaint, fails to include a legally cognizable cause of action, other than to seek \$750,000 in punitive damages for various alleged false accusations made by defendant and the filing of a false complaint with the grievance committee. While such behavior, if true, is not condoned by this court, it does not constitute independent causes of actions, to justify the imposition of punitive damages.

Moreover, punitive damages are awarded only in "singularly rare cases". *Rand & Paseka Mfg. Co., v. Holmes Protection, Inc.*, 130 AD2d 429, 431 (1<sup>st</sup> Dept 1987). It is well settled that punitive damages are only available for the vindication of a public right and where the defendant's conduct

is malicious, willful, reckless, or amounts to criminal indifference to a civil obligation. *See id.* at 431. Punitive damages are not warranted when the claim involves “an isolated transaction incident to an otherwise legitimate business”, rather than “a gross and wanton fraud upon the public”. *Walker v. Sheldon*, 10 NY2d 401 (1961); *New Canaan Foreign Car Service, Inc. v. Blohm*, 85 AD2d 509, 510 (1<sup>st</sup> Dept 1981). Punitive damages are not available for a mere breach of a private contract, as sought herein. *Garrity v. Lyle Stuart, Inc.*, 40 NY2d 354, 358 (1976); *Supreme Automotive Mfg. Corp. v. Continental Gas Co.*, 126 AD2d 153 (1<sup>st</sup> Dept 1987). Even if it is established that the breach was caused by an intentional failure with the contract or was in bad faith, punitive damages are not warranted. *See Burger & Brookhaven Med. Arts Bldg.*, 131 AD2d 622, 624 (2<sup>nd</sup> Dept 1987); *Philips v. Republic Ins. Co.*, 65 NY2d 1000, *affirming* 108 AD2d 845.

Here, plaintiff’s allegations do not meet such high standard, to warrant an award of punitive damages. Additionally, as indicated above, plaintiff failed to cite to any case law to support the imposition of punitive damages under the within circumstances, involving a breach of contract between two (2) individuals. As such, plaintiff’s motion for an award of punitive damages is denied.

Defendant’s cross-motion which seeks an order dismissing “the tort claims contained in the amended complaint” is denied, as, no basis for such relief is supplied in the moving papers, and since it does not appear that tort claims have been asserted in plaintiff’s amended complaint. As stated above, by this court’s July 11, 2013 order, plaintiff was granted summary judgment as to liability on his breach of the indemnification agreement, and defendant’s affirmative defenses and counterclaims were dismissed; this case was to proceed to a hearing on damages before a Special Referee. While this court’s July 11, 2013 order allowed for the filing of the within motion by plaintiff as to punitive damages, such order did not provide for the filing of the within cross-motion on this case which was deemed “disposed”, but for the hearing on damages.

Accordingly, based upon the above, it is .

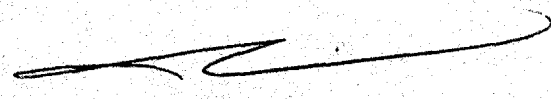
ORDERED that plaintiff’s motion and defendant’s cross-motion are denied; and it is further

ORDERED that within 30 days of entry of this order, defendant shall serve a copy upon

plaintiff, with notice of entry; it is further

ORDERED that, if plaintiff has yet to have this matter scheduled for a hearing before a Special Referee as to damages as provided in this court's order dated July 11, 2013, as a courtesy, since there has been motion practice, plaintiff's time to comply with this court's order dated July 11, 2013 with respect to scheduling this matter for a hearing on damages before a Special Referee is extended, as follows: within 30 days of service of a copy of this order with notice of entry, plaintiff shall serve a copy of this order and the July 11, 2013 order upon the Special Referee Clerk (Room 119M), to arrange a calendar date for the reference to a Special Referee<sup>2</sup>; the failure to comply with the above will result in a waiver of such damages claim.

Dated: 1/16/14

  
DORIS LING-COHAN, J.S.C.

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION  
Check if Appropriate:  DO NOT POST

J:\Punitive damages\salsvan rudin.wpd

**FILED**  
JAN 22 2014  
NEW YORK  
COUNTY CLERK'S OFFICE

\_\_\_\_\_

<sup>2</sup> It is noted that in this court's order dated July 11, 2013, partial summary judgment was awarded to plaintiff on the issue of liability and this court referred the issue of damages, to a Special Referee, to hear and determine, in accordance with CPLR §4317.