

Roven v Fraboni

2014 NY Slip Op 33447(U)

October 20, 2014

Supreme Court, New York County

Docket Number: 103246/12

Judge: Donna M. Mills

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10/20/14
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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS

PART 58

Justice

GLEN ROVEN,

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NYS SUPREME COURT - CIVIL

INDEX No. 103246/12

Plaintiff

MOTION DATE _____

-v-

MOTION SEQ. No. 003

ANGELO FRABONI,

Defendant.

MOTION CAL No. _____

The following papers, numbered 1 to _____ were read on this motion for _____.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits....

FILED

1

Answering Affidavits- Exhibits _____

2

Replying Affidavits _____

OCT 21 2014

3

CROSS-MOTION: _____ YES

NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: 10/20/14

Donna M. Mills
DONNA M. MILLS, J.S.C.

Check one: _____ FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 58

-----X

GLEN ROVEN,

Plaintiff,

Index No. 103246/12
Mot Seq. No. 003

- against -

ANGELO FRABONI,

Defendant.

-----X

DONNA M. MILLS, J:

Defendant, Angelo Fraboni, moves, pursuant to CPLR 3211(a)(5) and (7), and CPLR 3025, to dismiss the Complaint in this action for conversion. Defendant also moves to dismiss based on the failure of plaintiff's attorney to appear at multiple conferences.

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Plaintiff, Glen Roven, initially commenced this action seeking to recover damages from defendant for conversion. The parties are producers who collaborated on several projects. Plaintiff takes issue with defendant's use of the words "executive producer" instead of "co-executive producer" in his resume in describing his work on a 2004 production at the Mount Laurel Center for the Arts, and defendant's use of the word "producer" instead of "associate producer" in his resume in describing his work on a 2001 animated television show and CD called Santa Baby. Plaintiff claims that defendant, by misstating his job titles on the projects, wrongfully converted property, title, and qualifications belonging to plaintiff.

Plaintiff also claims that his future business opportunities were damaged as a result of defendant's wrongful activities.

By order, entered February 7, 2013, this Court (Mills, J), granted so much of a prior motion by defendant as sought to dismiss the first, second, and third causes of action in an amended Complaint (Order, Affirm in Opp, Exh D). The Court also granted plaintiff's cross motion to further amend the complaint to the limited extent that the fourth (unjust enrichment) and fifth (tortious interference with prospective economic relations) causes of action in the amended Complaint annexed to the moving papers were deemed served upon service of a copy of the order with notice of entry (*id.*). The Court stated:

Here, plaintiff's cause of action for unjust enrichment is sufficient at this early stage of the proceeding based on the allegation that defendant wrongfully stole the qualifications and product of plaintiff

Tortious interference with prospective economic relations requires an allegation that plaintiff would have entered into an economic relationship but for the defendant's wrongful conduct. At this early stage of the proceeding, the analysis is not whether the plaintiff can make a *prima facie* case at trial, but whether the cause of action is properly pled and has an indicia of merit

(*id.*).

Plaintiff asserts that the February 7, 2013 order permitted him to amend the Complaint to include causes of action based on the theory of unjust enrichment and tortious interference with prospective economic relations, and dismissed the causes of

action based on conversion. Thus, plaintiff filed a second amended Complaint alleging claims for lost business opportunities (first cause of action); injurious falsehood (second cause of action); defamation and libel per se (third cause of action); violation of §51 of the Civil Rights Law (fourth cause of action); violation of plaintiff's common law rights to exclusive control of the commercial use of his likeness, identity, persona, image, portrait and characterization (fifth cause of action); intentional infliction of emotional distress (sixth cause of action); tortious interference with business relations (seventh cause of action); unjust enrichment (eighth cause of action); civil conspiracy (ninth cause of action); criminal impersonation in the second degree (tenth cause of action); and identity theft in the third degree (eleventh cause of action).

Defendant maintains that the filing of a second amended Complaint was improper, and insists that the Court's order limits the factual allegations in the pleadings to causes of action for unjust enrichment and tortious interference with prospective economic relations. Nevertheless, the affirmation submitted with defendant's motion to dismiss states that defendant stipulated to allow the amendment while preserving his right to move to dismiss.

Defendant again seeks to dismiss the amended Complaint.

DISCUSSION

Preliminarily, defendant's assertion that plaintiff has no standing to bring this action lacks merit since the factual allegations in the pleadings make clear that plaintiff has an actual legal stake in the matter being adjudicated (see *Lyman Rice, Inc. v Albion Mobile Homes, Inc.*, 89 AD3d 1488, 1488-1499 [4th Dept 2011]). Furthermore, the assertion that plaintiff's claims are time-barred is similarly unavailing since the claims are based on defendant's alleged continuous, wrongful conduct (see *Shannon v MTA Metro-North R.R.*, 269 AD2d 218, 219 [1st Dept 2000]).

Defendant also argues that the second amended Complaint fails to state viable claims for relief, and that dismissal is warranted based on the failure of plaintiff's attorney to appear at multiple conferences. On a motion to dismiss, pursuant to CPLR 3211(a)(7), the pleading is to be afforded a liberal construction (see CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine whether the facts as alleged fit within any legally cognizable legal theory (*Leon v Martinez, supra*). The court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and "the criterion is whether the proponent of the pleading has a cause of

action, not whether he has stated one" (*id.*, quoting *Guggenheimer v Ginsburg*, 43 NY2d 268 [1977]).

As stated, the first cause of action in the second amended Complaint seeks damages based on lost business opportunities. Plaintiff essentially alleges that defendant, by claiming credit for plaintiff's works and professional activities, used wrongful means to engage in conduct aimed at misinforming third parties with whom plaintiff seeks to have a business relationship. The pleadings assert that as a result of defendant's alleged wrongful activities, plaintiff was deprived of business opportunities flowing from his credit for the Santa Baby CD and other creative activities. However, the first cause of action must be dismissed since the pleadings fail to allege that plaintiff had an interest or tangible expectancy in the opportunity at issue (*see Lio v Mingyi Zhong*, 21 Misc 3d 1107[A], [Sup Court, NY County 2008]).

The second cause of action, for injurious falsehood, alleges that defendant made false statements on his curriculum vitae and biographies that he was executive producer of Mount Laurel, which were posted online with intent to harm plaintiff. The tort of injurious falsehood consists of the knowing publication of false matter derogatory to the plaintiff's business of kind calculated to prevent others from dealing with the business or otherwise interfering with plaintiff's relations with others, to its detriment (*see Waste Distillation Tech., Inc. v Blasland & Bouck Engrs.*, 136 AD2d 633, 634 [2d Dept 1988]). The false publication

must play a material and substantial part in inducing others not to deal with the plaintiff, with the result that special damages, in the form of lost dealings, are incurred (*id.*). In pleading special damages, actual losses must be identified and causally related to the alleged tortious act (*id.*).

Here, even construed in the most favorable light, the pleadings fail to specify any lost dealings related to the alleged false publications. Thus, the second cause of action must be dismissed.

In the third cause of action, for defamation and libel per se, plaintiff alleges that defendant's knowingly false statements that he was the executive producer for the inaugural season of MLCPA and the producer of Santa Baby constitute false and scurrilous statements amounting to defamation and libel per se committed against plaintiff. Whether particular words are defamatory presents a legal question to be resolved by the Court in the first instance (*Golub v Enquirer/Star Group*, 89 NY2d 1074, 1076 [1997]). If the words are not reasonably susceptible to a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction (*id.*). Generally, a written statement may be defamatory if it tends to expose a person to hatred, contempt, or aversion, or if it tends to induce an evil or unsavory opinion of the person in the minds of a substantial number in the community (*id.*).

Here, a review of the factual allegations in the pleadings reveals no such defamatory words. Thus, the third cause of action is dismissed.

The fourth cause of action alleges violation of §51 of New York's Civil Rights Law, which prohibits the use of a person's name, portrait, picture, or voice for advertising without the person's written consent. Section 51 provides, in part:

Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait, picture or voice in such manner as is forbidden or declared to be unlawful by section fifty of this article.

Here, no claim under §51 is triggered since the pleadings do not allege that defendant used plaintiff's name, portrait, picture or voice for advertising purposes without plaintiff's consent (see, NY Civil Rights Law §51; *Wojtowicz v Delacorte Press*, 43 NY2d 858, 860 [1978]). Thus, the fourth cause of action must be dismissed.

The fifth cause of action, alleging a violation of plaintiff's common law rights to exclusive control of the commercial use of his likeness, identity, persona, image, portrait, and characterization, must also be dismissed since

there is no recognized common law right of privacy in this State (see *Nader v General Motors Corp.*, 25 NY2d 560, 573 [1970]).

In the sixth cause of action, plaintiff asserts that defendant's intentional misrepresentation of his roles on the projects caused plaintiff to suffer emotional distress. In order to state a cause of action for intentional infliction of emotional distress, the pleadings must allege extreme and outrageous conduct; intent to cause, or disregard of a substantial probability of causing, severe emotional distress; a causal connection between the conduct and injury; and severe emotional distress (*Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]). Extreme and outrageous conduct is conduct that is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community (see *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 [1983]). Here, the alleged conduct was not sufficiently outrageous to state a viable claim for relief.

At this stage, construed in the light most favorable to plaintiff, the factual allegations in the seventh cause of action, that plaintiff would have entered into an economic relationship but for defendant's wrongful conduct, sufficiently sets forth a claim for tortious interference with business relations so as to survive a motion to dismiss (see *Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 294, [1st Dept 1999]).

Similarly, the eighth cause of action for unjust enrichment is sufficient at this stage of the proceeding based on the allegation that defendant wrongfully stole the qualifications and product of plaintiff (see *State of New York v Barclays Bank of N.Y.*, 76 NY2d 533, 540-541 [1990]).

The ninth cause of action for civil conspiracy must be dismissed as there is no independent tort of conspiracy in New York (see *Alexander & Alexander of N.Y. v Fritzen*, 68 NY2d 968, 969 [1986]).

The tenth cause of action for criminal impersonation in the second and eleventh cause of action for identity theft in the third degree, misdemeanor offenses under Penal Law §§190.25 and 190.78, respectively, must be dismissed since the claims do not provide a basis for a private right of action for damages.

The conclusory request for dismissal based on the failure of plaintiff's counsel to appear at multiple conferences is denied.

Accordingly it is

ORDERED that defendant's motion to dismiss is granted to the extent that the first through sixth, and ninth through eleven causes of action in the amended Complaint are severed and dismissed, and the motion is otherwise denied, and it is further


ORDERED that the seventh cause of action for tortious interference with business relations and eighth cause of action for unjust enrichment are continued; and it is further

ORDERED that defendant is directed to serve an answer to the amended Complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 574, 111 Centre Street, on December 5, 2014, at 10:00 (A)M/PM.

Dated: 10/20/14

ENTER:



J. S. C.

DONNA M. MILLS, J.S.C.

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