

Bailey v Alves

2014 NY Slip Op 33578(U)

November 12, 2014

Supreme Court, New York County

Docket Number: 103187/2012

Judge: Geoffrey D. Wright

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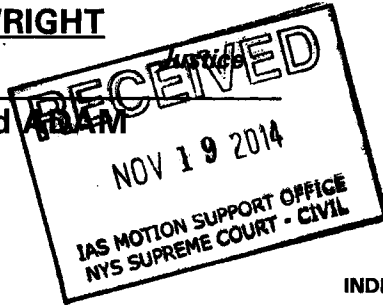
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GEOFFREY D. WRIGHT

PART 47

ADAM LEITMAN BAILEY and
LEITMAN BAILEY, P.C.,

Plaintiffs,



INDEX NO. 103187/2012

MOTION DATE _____

MOTION SEQ. NO. 009

- v -

CAPRICE ALVES

Defendant.

MOTION CAL. NO. _____

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

PAPERS NUMBERED
1, 2

Answering Affidavits — Exhibits _____

3

Replying Affidavits _____

4

Cross-Motion: Yes No

Upon the foregoing papers it is ordered that this motion is decided in accordance with the attached decision and order.

FILED

NOV 20 2014

C
GEOFFREY D. WRIGHT
AJSC

Dated: November 12, 2014 COUNTY CLERK'S OFFICE
NEW YORK

J.S.C.

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Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----x
ADAM LEITMAN BAILEY and ADAM LEITMAN
BAILEY, P.C.,

Plaintiffs,

Index # 103187/2012

-against-

DECISION

CAPRICE ALVES

Defendant.

Present:

Hon. Geoffrey D. Wright

-----x Acting Justice Supreme Court

RECITATION , AS REQUIRED BY CPLR § 2219 (A), of the papers considered in the review of this Motion/Order for summary judgment.

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Order to Show Cause and Affidavits Annexed	<u> </u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u> </u>
Memoranda.....	<u>4</u>
Cross-Motion	<u>5</u>

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NEW YORK

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Defendant Caprice Alves (“Defendant”) moves for an order pursuant to CPLR § 3212 for summary judgment against Plaintiffs Adam Leitman Bailey and Adam Leitman Bailey, P.C. (“Plaintiffs”) Plaintiffs also cross move to strike Defendant’s answer for failure to provide documents in discovery. Defendant asserts counterclaims for intentional infliction of emotional distress, abuse of process, and seeks punitive damages.

This is a defamation action resulting from certain comments posted by Defendant about Plaintiffs on various internet sites which Plaintiffs allege are false, malicious and defamatory. Plaintiffs are a lawyer and law firm that provided legal services to Defendant in a civil court proceeding brought against Defendant concerning the sublet of her cooperative apartment. After Plaintiffs withdrew as Defendant’s counsel from the civil court action in a dispute over legal fees, Defendant began posting comments on internet

sites to complain about the quality of the legal services she received from Plaintiffs. Defendant moves for summary judgment arguing that the comments she made are true and are thus a defense to defamation.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law demonstrating the absence of material issues of fact. (Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 501 N.E.2d 572 (1986)). Once the movant has made such a showing, the burden then shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of any material issues of fact requiring a trial of the action. (Zuckerman v. City of New York, 49 NY.2d 557 (1980)). However, where the moving party fails to make a *prima facie* showing, the motion must be denied regardless of the sufficiency of the opposing party's papers. (Winegrad v. City of New York Univ. Med. Ctr., 64 NY2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 (1985)).

In her Affidavit Defendant repeats statements that she made in internet postings that allege that Plaintiffs provided her with poor legal service and engaged in unethical behavior. Defendant states that Plaintiffs' extensive advertisements were false and misleading in that Plaintiffs promised expert service but instead were unable to resolve what Defendant believes to be a simple case. Defendant also claims that Plaintiffs accepted \$7,850 as down payment for legal services, provided careless and inept legal services, exhausted the money that Defendant paid to Plaintiffs by allowing several attorneys to bill for services rendered to Defendant, and then quit the case when Defendant could no longer pay Plaintiffs' fees. Defendant alleges that Plaintiffs improperly kept her money.

Plaintiffs deny the truth of Defendants statements in the internet postings. Plaintiffs assert that they properly represented the Defendant in the civil court case and "as lawyers tasked with making tactical decisions to accomplish Ms. Alves strategic goals, their decisions were necessary, proper and appropriate in advancing Ms. Alves cause." (Kaufman Affidavit at ¶ 31). Plaintiffs also state that they did not improperly quit Defendants case. Plaintiffs have provided documentary evidence that they moved before the civil court to be relieved as counsel to Defendant on the basis that Defendant refused to pay legal fees to Plaintiffs. Exhibit 1 to the Kaufman Affidavit contains a court order granting their petition to be relieved as counsel. (Kaufman Affidavit at Ex. 1). Plaintiffs deny Defendant's assertion that they kept her money, and provide invoices that document the legal services they provided to Defendant.

Defendant's defense to Plaintiffs' claims are that her statements about the Plaintiffs are true. Defendant's Affidavit and exhibits fail to provide documentary evidence to prove that the statements she has made about Plaintiffs are true. Plaintiffs, as stated above, offer evidence that Defendant's statements are false. "Making a false statement that tends to expose a person to public contempt, hatred, ridicule, aversion or disgrace constitutes defamation." Thomas H. v. Paul B., 18 N.Y.3d 580, 584 (2012). There exist issues of material fact as to whether Defendant's statements regarding

Plaintiffs are in fact true. “We find that a determination of the truth of the allegedly defamatory communications depends upon the credibility of all concerned, which can only be resolved by the trier of fact.” Misek-Falkoff v. Keller, 153 A.D.2d 841, 842 (2nd Dep’t 1989).

Accordingly, Defendant’s motion for summary judgment as to Plaintiffs’ claims for defamation per se, commercial defamation, and a permanent injunction is denied.

Defendant’s Counterclaims

1. Intentional Infliction of Emotional Distress

The elements of a claim for intentional infliction of emotional distress are: “(i) extreme and outrageous conduct; (ii) intent to cause or disregard of a substantial probability of causing severe emotional distress; (iii) a causal connection between the conduct and the injury; and (iv) severe emotional distress.” Howell v. New York Post Co., 81 N.Y.2d 115, 121 (1993). “The first element—outrageous conduct—serves the dual function of filtering out petty and trivial complaints that do not belong in court, and assuring that plaintiff’s claim of severe emotional distress is genuine.” Id.

Defendant argues that Plaintiffs have engaged in extreme and outrageous conduct by bringing this defamation suit which Defendant claims is frivolous, and by Plaintiffs’ conduct in the civil court matter. Defendant claims that this defamation action is brought by Plaintiffs to “bully and harass” the Defendant and that Plaintiffs have acted “viciously”, in “bad faith”, and with “cruelty and recklessness” during the course of this litigation. (Affidavit of Caprice Alves at ¶¶ 146-148) “An action may lie for intentional infliction of severe emotional distress ‘for conduct exceeding all bounds usually tolerated by decent society’”. Fischer v. Maloney, 43 N.Y.2d 553, 557 (1978). This Court finds that by merely initiating this defamation suit Plaintiffs have not engaged in extreme and outrageous conduct, and furthermore their conduct in the civil matter, in which they withdrew from the case, also does not amount to extreme and outrageous conduct. “It suffices for present purposes to note that the conduct charged...in the present case does not give rise to liability under this doctrine by any proper definition.” Id. Defendant fails on the first element of the tort and thus has failed to state a cause of action for intentional infliction of emotional distress.

Defendant’s counterclaim for intentional infliction of emotional distress is hereby dismissed, with prejudice.

2. Abuse of Process

Defendant argues that Plaintiffs have engaged in abuse of process by bringing “this frivolous case” against Defendant to retaliate against Defendant for submitting a

disciplinary complaint against Plaintiffs. (Affidavit of Caprice Alves at ¶ 159).

In order to state a claim for abuse of process Defendant must satisfy three key elements: “(1) regular issued process, either civil or criminal (2) an intent to harm without cause or justification and (3) use of process in a perverted manner to obtain a collateral objective.” Curiano v. Suozzi, 63 N.Y.2d 113, 116 (1984). The process used must involve “an unlawful interference with one’s person or property.” Id. Here, Defendant has not alleged that Plaintiffs interfered with her person or property. “The mere commencement of a civil action, without unlawful interference with person or property, is insufficient to state a cause of action for abuse of process.” Mago, LLC v. Singh, 47 A.D.3d 772, 773 (2nd Dep’t 2008). “Moreover, institution of a civil action by summons and complaint is not legally considered process capable of being abused.” Id. Here Defendant accuses Plaintiffs of abuse of process for merely bringing this defamation suit, therefore Defendant has failed to state a cause of action for abuse of process.

Accordingly, Defendant’s counterclaim for abuse of process is dismissed, with prejudice.

Punitive Damages

Defendant alleges that Plaintiffs have engaged in “frivolous, vexatious, and harmful litigation.” (Affidavit of Caprice Alves ¶ 167). Defendant seeks punitive damages to ensure that she is made whole and that any similar misconduct by Plaintiffs is deterred in the future. Id.

“The standard for an award of punitive damages is that a defendant manifest evil or malicious conduct beyond any breach of professional duty. There must be ‘aggravation or outrage, such as spite or malice, or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of interests of others that the conduct may be called wilful or wanton.’” Dupree v. Giugliano, 20 N.Y.3d 921, 924 (2012).

This Court finds that Plaintiffs have not engaged in any fraudulent or malicious conduct in the prosecution of this defamation action. Defendant’s claim for punitive damages is denied.

Plaintiffs' Cross Motion to Strike The Answer

The decision as to Plaintiffs' cross motion to strike the answer is reserved pending an oral argument. Parties are directed to appear on January 15, 2015 at 2:15 p.m. at 80 Centre Street, Room 122. This constitutes the decision and order of the Court.

FILED

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GEOFFREY D. WRIGHT
AJSC

Dated: November 12, 2014

JUDGE GEOFFREY D. WRIGHT
Acting Justice of the Supreme Court