SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X **TRIAL/IAS PART 16**

MICHAEL J. BORRELLI and BORRELLI & ASSOCIATES, PLLC,

Plaintiff(s),

INDEX # 600668/14
Mot. Seq. 2
Mot. Date 7.17.14
Submit Date 7.24.14

-against-

ROSS ROSENFELD,

Defendant(s).

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The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed..... 1
Answering Affidavit 2
Reply Affidavit..... 3

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Plaintiffs move by notice of motion for an order pursuant to CPLR 3211(a)(5) and 3211(a)(7) dismissing defendant's counterclaims with prejudice.

On or about December 27, 2005, defendant Rosenfeld retained Levine & Blit, PLLC (L&B), a Manhattan-based law firm at which Mr. Borrelli was working in an "of counsel" position, in connection with Rosenfeld's legal matters. At some point during L&B's representation of Rosenfeld, a dispute arose regarding legal fees and expenses owed in addition to the fees outlined in the retainer agreement. In July 2010, plaintiff Michael Borrelli, no longer working for L& B, and having established the firm Borrelli & Associates PLLC in the meantime, attempted to withdraw from representation of Rosenfeld. Rosenfeld's case resolved unsuccessfully, and Rosenfeld, unhappy with the outcome, proceeded to place blame on Borrelli and created two public websites where he published allegedly false statements against plaintiffs, both personally and against plaintiff's firm. Plaintiffs therefore commenced the instant action via

the filing of a summons and complaint on February 12, 2014, asserting one cause of action for libel per se. On March 8, 2014, issue was joined via Rosenfeld's service of a notice of appearance and answer with counterclaims.

Rosenfeld brought two counterclaims. In paragraph 5 of defendant's affirmation in opposition, defendant withdraws his second counterclaim, due to the settlement of a related small claims litigation. Defendant states, regarding "the second counterclaim for the overpayment of $4,0000.00 . . . defendant at this time has been paid the $4,000.00 and we withdraw the counterclaim." Therefore, only the first counterclaim remains to be adjudicated. The first counterclaim, paragraph 63 of defendant's notice of appearance and answer with counterclaims states as follows:

> "The Defendant is seeking a judgment of sanctions §130-1.1. Costs against the Plaintiff; Sanctions (a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engaged in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part."

Plaintiffs argue that defendant fails to state any facts to support his allegation that plaintiff should be subject to sanctions. Plaintiffs further assert that nowhere in the statute, 22 NYCRR §130-1.1(a), does it state that an imposition of sanctions may be made as a distinct cause of action through a pleading. Therefore, plaintiffs maintain that defendant failed to state a cause of action for sanctions and this first counterclaim should be dismissed pursuant to CPLR 3211(a)(7).

Defendant argues that throughout his answer and counterclaims he has stated facts, and therefore the pleading for sanctions and fees should not be dismissed. Defendant explains that his basic claim for sanctions and legal fees is that the "defendant has a freedom of speech issue which the defendant [sic] is trying to deny and that the alleged libel per se action is not supported by evidence as even alleged in the complaint." Defendant does not include any facts, explanations or arguments to explain this alleged theory.

Plaintiffs reply, arguing that because a request for sanctions is not a cause of action that can be affirmatively brought in a pleading, defendant's first counterclaim seeking only sanctions has failed to state a cause of action and should be dismissed. Additionally, plaintiffs contend that

even if a request for sanctions could be brought as a cause of action, the defendant has not pleaded any facts at all demonstrating his entitlement to this requested relief. The court agrees with both of these contentions.

On a motion to dismiss for failure to state a cause of action, pursuant to CPLR § 3211 (a) (7), the court must determine whether, from the four corners of the pleading "factual allegations are discerned, which taken together, manifest any cause of action cognizable at law." (*Salvatore v. Kumar*, 45 A.D.3d 560 [2nd Dept. 2007], lv to app den. 10 N.Y.3d 703 [2008], quoting *Morad v. Morad,* 27 A.D.3d 626, 627 [2006]). Further, the pleading is to be afforded a liberal construction, the facts alleged in the complaint accepted as true, and the plaintiffs accorded the benefit of every possible favorable inference (*Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]). However, "[w]hile the allegations in the complaint are to be accepted as true when considering a motion to dismiss . . . , 'allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration' " (*Garber v. Board of Trustees of State Univ. of N.Y.*, 38 A.D.3d 833, 834 [2nd Dept. 2007], quoting *Maas v. Cornell Univ.*, 94 N.Y.2d 87, 91 [1999]).

The Second Department recently held, "[s]ince New York does not recognize an independent cause of action for the imposition of sanctions under . . . Rules of the Chief Administrator of the Courts (22 NYCRR) § 130–1.1 (*see Schwartz v. Sayah,* 72 A.D.3d 790, 792, 899 N.Y.S.2d 316; *Greco v. Christoffersen,* 70 A.D.3d 769, 770–771, 896 N.Y.S.2d 363; *Yankee Trails v. Jardine Ins. Brokers,* 145 Misc.2d 282, 283, 546 N.Y.S.2d 534), the Supreme Court should have granted that branch of the plaintiff's motion which was to dismiss the defendants' counterclaim seeking the imposition of sanctions." (*Cerciello v. Admiral Ins. Brokerage Corp.,* 90 A.D.3d 967, 968 [2d Dept 2011]). Furthermore, "[a]ny determination respecting fees and sanctions should await disposition of the substantive issues" (*Cardo v. Bd. of Managers, Jefferson Vill. Condo 3*, 29 A.D.3d 930, 932 [2d Dept 2006]).

The facts and documents establish that defendant has failed to state a cause of action in his counterclaims against plaintiffs. There is no independent cause of action for the imposition of sanctions, and therefore the remaining first counterclaim is hereby dismissed.

Accordingly,

Plaintiff's motion to dismiss defendants' counterclaims with prejudice is **GRANTED**.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
September 29, 2014

ENTER:

HON. JEFFREY S. BROWN
J.S.C.

Attorney for Plaintiff
Alexander Coleman, Esq.
Borrelli & Associates, PLLC
1010 Northern Blvd., Ste. 328
Great Neck, NY 11021
5162486027@fax.nycourts.gov
atc@employmentlawyernewyork.com

Attorney for Defendant
Seth Rosenfeld, Esq.
118-21 Queens Blvd., Ste. 509
Forest Hills, NY 11375