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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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MANUEL ANTONIO LIBERATO, M.L. RESTAURANT, CORP., M.L. SAN JOSE ENTERPRISES, CORP., d/b/a LIBERATO RESTAURANT, NELSON GOMEZ, and SARAH VALLEJO,

Plaintiffs,

Index No. 652130/2014

DECISION AND ORDER

- against -

Mot. Seq. #002

LAUNDRY WORKERS CENTER UNITED, VIRGILIO OSCAR ARAN, ROSANA RODRIGUEZ ARAN, and MAHOMA LOPEZ GARFIAS

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiffs, Manuel Antonio Liberato ("Liberato"), M.L. Restaurant Corp. ("M.L. Restaurant"), M.L. San Jose Enterprises, Corp. ("M.L. San Jose"), d/b/a Liberato Restaurant, Nelson Gomez ("Gomez"), and Sarah Vallejo ("Vallejo") (collectively, "Plaintiffs"), bring this action for defamation, "false light", prima facie tort, private nuisance, trespass and intentional infliction of emotional distress. This action arises from, *inter alia*, various protests that defendants, Laundry Workers Center United ("LWC"), Virgilio Oscar Aran ("Mr. Aran"), Rosana Rodriguez Aran ("Mrs. Aran"), and Mahoma Lopez Garfias ("Garfias") (collectively, "Defendants"), allegedly organized and conducted in front of Plaintiffs' place of work, the Liberato Restaurant, located at 1 W. 183rd Street, Bronx, New York, on a bi-weekly basis.

Plaintiffs commenced this action on July 11, 2014, by summons and complaint. On September 2, 2014, Defendants filed a pre-answer motion to dismiss Plaintiffs' complaint for failure to state a claim. By stipulation dated September 9, 2014, the parties set a briefing schedule extending Plaintiffs' time to oppose until

October 3, 2014. On September 22, 2014, Plaintiffs filed an amended complaint (the "First Amended Complaint").

Defendants now move, by notice of motion dated October 22, 2014, for an Order, pursuant to CPLR §§ 3211(a)(7), and 3211(g), dismissing Plaintiffs' First Amended Complaint on the basis of failure to state a cause of action and as a retaliatory Strategic Litigation Against Public participation ("SLAPP") suit under New York's anti-SLAPP law.

Plaintiffs oppose. Additionally, on March 2, 2015, after all responses and replies were filed and a hearing date for oral argument on Defendants' motion to dismiss Plaintiffs' First Amended Complaint was set, Plaintiffs filed a notice of discontinuance pursuant to CPLR § 3217(a) seeking to discontinue the above-entitled action without prejudice and without costs to any party as of March 2, 2015. Defendants opposed Plaintiffs' application as untimely, particularly in light of the costs incurred in defending this case.

Oral argument was heard on Defendants' motion to dismiss Plaintiffs' First Amended Complaint on March 23, 2015.

CPLR § 3211(g) provides standards for a motion to dismiss in certain cases "involving public petition and participation", known as, Strategic Litigation Against Public Participation ("SLAPP") suits. (CPLR § 3211[g]; Civ. Rights Law § 76-a[1][a]). Pursuant to CPLR § 3211(g):

> [A] motion to dismiss based on paragraph seven of subdivision (a) of this section, in which the moving party has demonstrated that the action . . . subject to the motion is an action involving public petition and participation as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law, shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law . . .

(CPLR § 3211[g]).

The anti-SLAPP statutes, "protect citizen activists from lawsuits commenced by well-financed public permit holders in retaliation for their public advocacy."

(*Guerrero v. Carva*, 10 A.D.3d 105, 116 [1st Dep't 2004] citing *Harfenes v. Sea Gate Assn.*, 167 Misc. 2d 647, 648 [Sup Ct. N.Y. Cnty 1995]). In order to establish that a cause of action is a retaliatory SLAPP suit, the moving party must show that the claim constitutes an "action . . . for damages that is brought by a public applicant or permittee[1], and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission." (Civil Rights Law § 76-a [1][a]; *Guerrero v. Carva*, 10 A.D.3d 105 [1st Dep't 2004]). Additionally, "a SLAPP-suit defendant must directly challenge an application or permission in order to establish a cause of action under the Civil Rights Law." (*Guerrero v. Carva*, 10 A.D.3d 105, 116 [1st Dep't 2004]). "[B]ecause the anti-SLAPP law is in derogation of the common law, it must be narrowly construed." (*Id.*).

Defendants argue that Plaintiffs are "permittees" within the meaning of the anti-SLAPP law. Defendants argue that Plaintiffs are restaurants doing business in New York City, and that as such, Plaintiffs are subject to many permits, regulations, and rules, including Section 57 of the Workers' Compensation Law, and OSHA. Defendants argue that Plaintiffs cannot operate their business without permission of the state, and that Plaintiffs are subject to continuing oversight as a result.

Defendants also argue that the instant action is an action for damages and is materially related to—and indeed, retaliation for—Defendants' efforts to report on Plaintiffs' applications or permissions. Defendants argue that they are community organizers and volunteers who provide aid, training, and support to low wage workers, including certain of Plaintiffs' employees. Defendants argue that they supported a group of Plaintiffs' employees in bringing federal and stage wage and hour and discrimination claims as against Plaintiffs, and that the instant suit is an effort to retaliate against that support.

Plaintiffs, in turn, argue that Defendants engaged in an unfounded smear campaign against Plaintiffs. Plaintiffs' Amended Complaint alleges that Defendants engaged in a "long campaign of harassment against Mr. Liberato and Liberato Restaurant." (Compl. ¶ 30). Plaintiffs' Amended Complaint further alleges that, "the tactics used by the Defendants have escalated and no longer provide any semblance of permissible picketing and protesting." (Compl. ¶ 30). Such tactics allegedly

[1] Civil Rights Law § 76-a (1)(b) defines "a public applicant or permittee" as, "any person who has applied to obtain a permit, zoning change, lease, license, or other permission from any government body." (Civil Rights Law § 76-a [1][b]).

include, "disseminating plaintiffs' telephone numbers (including Mr. Liberato's non-public personal cell phone number) via the internet, various social media channels such as Facebook, and encouraging people to call to complain. Specifically, Defendants publicly call on all of the members of the LWC, members of affiliated organizations, members of the public, and anyone else who may be interested to continuously call and demand an end to allegedly abusive labor practices", (Compl. ¶ 31), and, "organizing and conducting biweekly protests in front of Liberato Restaurant . . . to yell at potential patrons in order to discourage them from entering the establishment". (Compl. ¶ 36).

Additionally, Plaintiffs argue that the instant suit does not name any Liberato workers as defendants. Plaintiffs argue that they bring this action based solely on the conduct alleged in Plaintiffs' Amended Complaint, and that the instant action does not constitute a SLAPP suit. To this end, Plaintiffs' argue that individual plaintiffs Gomez and Vallejo are Liberato Restaurant employees. Plaintiffs argue that Gomez and Vallejo are neither employers within the meaning of the labor law, nor permittees under the anti-SLAPP law.

Even under a narrow construction of the anti-SLAPP law, this lawsuit "has all of the earmarks of a SLAPP suit." (*Street Beat Sportswear, Inc. v. National Mobilization Against Sweatshops*, 182 Misc. 2d 447, 453 [Sup. Ct. N.Y. Cnty. 1999]). Although the activities alleged in Plaintiffs' complaint are not activities which directly challenged, before a public agency, Plaintiffs' license, permit, or application to conduct business, when considering the larger picture, it is evident that Defendants were involved in bringing claims against Plaintiffs for violations of the Fair Labor Standards Act ("FLSA").

As set forth in Mirer's affirmation, several Liberato workers filed a federal complaint (the "Federal Complaint") against Plaintiffs alleging that Plaintiffs deprived Liberato workers of minimum wages and overtime; unlawfully withheld workers' tips; subjected workers to retaliatory firing; required workers to sign fraudulent work records, and subjected certain female workers to sexual harassment and pregnancy discrimination. (Mirer Aff. ¶ 8). The Federal Complaint was filed after certain Liberato workers attended a workers' rights rally sponsored in part by LWC and met individual defendants Mr. Aran and Mrs. Aran. (Mirer Aff. ¶ 10). One of these workers also attended an LWC forum on federal and state employment law. (Mirer Aff. ¶ 11). The Federal Complaint alleges that, after attending the LWC rally and forum, this worker returned to work and informed his coworkers of their

rights, and, after a failed attempt to resolve their issues with management, the Federal Complaint ensued. (Mirer Aff. ¶ 12). In this context, therefore, it is clear that Defendants were involved in taking actions with respect to Plaintiffs' right to operate as a registered business, and that the instant action is "materially related" to the efforts of the Liberato Workers to report Plaintiffs' alleged labor law violations. (*Street Beat Sportswear, Inc.*, 182 Misc. 2d at 453 [Sup. Ct. N.Y. Cnty. 1999]).

Accordingly, Plaintiffs' action violates the anti-SLAPP law. Insofar as Plaintiffs do not demonstrate a substantial basis for their claims—which Plaintiffs even attempted to unilaterally withdraw—CPLR 3211(g) requires dismissal of Plaintiffs' Amended Complaint.

Wherefore it is hereby,

ORDERED that Defendants' motion to dismiss is granted and Plaintiffs' Amended Complaint as against Defendants, Laundry Workers Center United, Virgilio Oscar Aran, Rosana Rodriguez Aran, and Mahoma Lopez Garfias, is dismissed in its entirety and the clerk is directed to enter judgement accordingly.

This constitutes the decision and order of the Court. All other relief requested is denied.

Dated: May 8, 2015

Eileen A. Rakower, J.S.C.