

<b>Manhattan Sports Rest. of Am., LLC v Lieu</b>
2015 NY Slip Op 32218(U)
November 13, 2015
Supreme Court, New York County
Docket Number: 654076/13
Judge: Jennifer G. Schechter
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 57

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MANHATTAN SPORTS RESTAURANTS OF AMERICA, LLC,                   Index No. 654076/13

Plaintiff,

-against-

SUSANNE LIEU,

Defendant.

-----x  
SUSANNE LIEU,

Third-Party Plaintiff

-against-

KEITH KANTROWITZ,

Third-Party Defendant.

-----x  
JENNIFER G. SCHECTER, J.:

Motion sequence numbers 03 and 04 are consolidated for disposition. Pursuant to CPLR 3211(a)(5) and (7), in motion sequence number 03, plaintiff Manhattan Sports Restaurants of America, LLC (MSRA) moves to dismiss defendant Susanne Lieu's defamation and intentional infliction of emotional distress counterclaims. In motion sequence number 04 Keith Kantrowitz, who is the managing member of MSRA and the third-party defendant, moves to dismiss the third-party action on the same grounds.

The motions are denied.

Background

As set forth more fully in this Court's prior Decision and Order (Affirmation of Kathleen Massey in Opposition to Dismiss Counterclaims [Aff Opp], Ex D, Decision and Order

dated Sep 11, 2014 [Sept 2014 Order]), this case relates to MSRA's lease of commercial space at One Dag Hammarskjold Plaza in Manhattan. MSRA used the premises to operate Siro's--a restaurant. Plaza Tower, LLC (Plaza Tower) was the over landlord and MSRA leased the space from RCSH Operations, d/b/a Ruth's Chris Steakhouse (RCSH). After MSRA stopped paying its rent, RCSH failed to pay rent to Plaza Tower. Ultimately, in March 2013, prior to expiration of its sub-lease, MSRA vacated the space.

This chain of events precipitated multiple lawsuits over the unpaid rent and additional rent. Plaza Tower obtained a judgment for rent and additional rent against RCSH's guarantor (Index No. 100279/13) and, in a separate action, RCSH is seeking a judgment against MSRA for rent and additional rent (Index No. 151125/13).

In this action, MSRA sues Suzanne Lieu who dealt with Siro's on behalf of Plaza Tower. MSRA alleges, among other things, that Lieu, an attorney, impeded its business (Aff Opp, Ex B [Amended Complaint] ¶¶ 5-9). Lieu moved to dismiss the complaint and her motion was granted in part. Six of MSRA's 11 causes of action against her were dismissed (see Sept 2014 Order), leaving five viable claims: (1) tortious interference with economic relations based on allegations that Lieu improperly interfered with MSRA's relationship with RCSH,

(Sept 2014 Order at 7; Amended Complaint at ¶¶ 55-61), (2) trespass to property based on allegations that Lieu visited Siro's unannounced and disrupted its staff (Sept 2014 Order at 7; Amended Complaint at ¶¶ 62-66), (3) trespass to chattel based on allegations that Lieu interfered with MSRA's move out of the building causing damage such as "spoiled food" and conversion of property (Sept 2014 Order at 9; Amended Complaint at ¶¶ 67-71); (4) fraud based on allegations that Lieu "created, or caused to be created" false invoices misrepresenting amounts owed (Sept 2014 Order at 12; Amended Complaint at ¶¶ 93-103); and (5) violation of New York City Human Rights Law § 8-107(5)(b) based on allegations that Lieu engaged in discrimination "'in the terms conditions or privileges of the . . . rental or lease' because of the race, national origin, alienage or citizenship status of plaintiff's customers" (Sept 2014 Order at 11; Amended Complaint at ¶¶ 88-91).

In its complaint, MSRA alleges that Lieu's illegal discrimination improperly interfered with and impaired its ability to conduct business. For example, MSRA alleges that Lieu "stated to Kantrowitz that she would not permit the image of [Yankees'] stadium or Mariano Rivera's name to be used because she did not want 'ghetto people' from the Bronx congregating in the restaurant" (Amended Complaint at ¶ 15).

MSRA further alleges that Lieu told Kantrowitz that "two African-American gentlemen who worked at Siro's would not be permitted on the patio of the building because 'they did not fit in'" but that she did not "interfere with Caucasians taking smoking or other breaks on the patio" (*id.* at ¶¶ 16-17).

"Inexplicably, [MSRA] also seeks to blame Lieu for a prohibition in the sublease which prevents the service of 'Indian or Asian food' . . . [though it] agreed to that lease term, and [its] attempt to tie it to Lieu is baffling and appears to be an attempt to shore its claim that alleged racism by Lieu impeded its business. [Lieu] points to this overreaching in the complaint arguing that the instant lawsuit is simply an attempt to gain leverage in the related lawsuits. . . . Of course, it would be a very serious matter if plaintiff had brought a frivolous lawsuit simply to strengthen its position in a related case" (Sept 2014 Order at 3-4 [emphasis added]; Amended Complaint at ¶ 18).

Lieu answered MSRA's complaint and commenced a third-party action against Kantrowitz. She asserts claims against MSRA and Kantrowitz for defamation and intentional infliction of emotional distress (Affidavit in Support of Motion to Dismiss Counterclaims [Aff Sup], Ex A [Verified Answer], Counterclaim at ¶¶ 64-72). She urges that the complaint

falsely alleges that she discriminated on the basis of ethnic origin, race or color. For example, she claims that the following allegations in the amended complaint, which Kantrowitz verified, are false and baseless and defamatory:

(1) that she "advised or stated to Kantrowitz that 'she would not permit . . . Mariano Rivera's name to be used because she did not want "ghetto people" from the Bronx congregating in the restaurant in the building she was operating' and for which she was responsible;"

(2) that she advised "or stated to Kantrowitz 'that two African-American gentleman who worked at Siro's would not be permitted on the patio of the building because "they did not fit in;"'"

(3) that she "'would come into the restaurant and harass the employees, directing which stations the television could be turned to so as to make certain the restaurant did not attract certain clientele, i.e. "ghetto people" from the Bronx and persons of color;'"

(4) that she "'stated . . . she did not want "ghetto people" from the Bronx congregating' in the restaurant;" and

(5) that she "'limited [MSRA]'s right to serve Indian or Asian cuisine because having persons from a third world country, the Indian sub-continent and Asia, would not fit in with [Lieu's] idea of that building's image should be like'" (Verified Answer, Counterclaims at ¶¶ 16-18).

Lieu further denies ever telling Kantrowitz that MSRA could not use Rivera's name in promoting Siro's and that she ever uttered the words "ghetto people" (Verified Answer, Counterclaims at ¶¶ 19, 22).

She urges that MSRA and Kantrowitz knew when making the statements in the complaint that they were false and baseless

and that they did so intending to "subject her to scorn, contempt and ridicule, [to] harm her in her trade, business or profession, and [to] inflict extreme emotional distress" (Verified Answer, Counterclaims at ¶¶ 24-25). She further states that MSRA falsely alleges that she used her credibility as an attorney to mislead a court about the facts concerning MSRA's departure from the premises (Verified Answer, Counterclaims at ¶¶ 26, 35-36, 40).

In her counterclaims, under the heading: "MSRA's Abuse of Privilege Relating to Statements Made in Legal Proceedings" Lieu alleges:

- "the purpose of MSRA's litigation against [her] was to assert false and defamatory statements in [its complaint] that would be republished in the press"
- "MSRA commenced this litigation and made false and defamatory statements in the Complaint about [her] purportedly discriminatory conduct with the intent of having such statements republished in the news media"
- MSRA, through among others its managing members Kantrowitz and Paul Carlucci, who is also alleged to be publisher of the New York Post "arranged for the New York Post to publish an article about the Complaint within two days of its having been filed. Upon information and belief, Carlucci, who was the publisher of the New York Post during the relevant period, assisted with arranging to have an article published about the Complaint. Those efforts were successful" and the New York Post published an article titled "Eatery's Rivera room barred due to 'ghetto people' fears: suit" (Verified Answer, Counterclaims at ¶¶ 2, 50-53).

She further alleges that "MSRA commenced litigation against [her] without intending seriously to prosecute or defend these claims" (Counterclaim at ¶ 57).

In her third-party action against Kantrowitz, Lieu alleges that he caused MSRA to file a verified complaint and that he verified the complaint knowing that it was "replete with false and defamatory allegations" (Affidavit in Support of Motion to Dismiss Third-Party Complaint, Ex B [Third-Party Complaint] at ¶¶ 4-6). Lieu alleges that the statements that Kantrowitz verified were made in his presence were never, in fact, made (Third-Party Complaint at ¶ 25) and alleges that Kantrowitz caused MSRA's abuse of privilege relating to statements in legal proceedings (Third-Party Complaint at 13). Lieu seeks damages from Kantrowitz personally for defamation and intentional infliction of emotional distress (Third-Party Complaint at ¶¶ 71-81).

MSRA and Kantrowitz move for dismissal of Lieu's claims against them, urging that the "law is crystal clear that statements made by plaintiff's attorneys or witnesses in the course of judicial proceedings are absolutely privileged" even if made maliciously so long as the allegations are material and pertinent to the issues" in litigation (Aff Supp at ¶ 10). They further assert that Lieu is collaterally estopped from claiming that MSRA's claims are frivolous because they

withstood dismissal (Aff Supp at ¶ 1[a][ii]). Lieu opposes the motion, arguing that her counterclaims sufficiently plead facts that, if true, could defeat the applicability of the privilege.

### Analysis

For purposes of this motion--as was the case when MSRA's complaint was challenged--Lieu's allegations must be given a liberal construction and accepted as true (*Johnson v Proskauer Rose LLP*, 129 AD3d 59, 67 [1st Dept 2015]). Whether Lieu can ultimately establish the allegations "is not part of the calculus in determining a motion to dismiss" (*id. citing EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Lieu's counterclaim and third-party action sufficiently state causes of action for defamation and intentional infliction of emotional distress. She alleges the specific statements made by MSRA and Kantrowitz, publication, that the statements were false, known to be false and that the statements were made to injure her (*Halperin v Salvan*, 117 AD2d 544, 546 [1st Dept 1986]). She also sufficiently states a claim for intentional infliction of emotional distress by claiming that the statements in the pleadings were outrageous and beyond the bounds of decency, false and baseless and that

both MSRA and Kantrowitz knew the statements were false and baseless and published the statements to intentionally malign and harass Lieu and cause her emotional distress (*id.*).

In order to protect litigants and witnesses, "a statement made in the course of legal proceedings is absolutely privileged if it is at all pertinent to the litigation" and any doubt about a statement should be resolved in favor of relevancy and pertinency (*Mosesson v Jacob D. Fuchsberg Law Firm*, 257 AD2d 381, 382 [1st Dept 1999], *lv denied* 93 NY2d 808 [1999]). The privilege, however, "is lost if abused, and is limited to statements which are pertinent to the subject matter of the lawsuit, made in good faith and without malice" (*Halperin v Salvan*, 117 AD2d at 548). It will not be conferred, for example, if the underlying lawsuit is a "sham action brought solely to defame the defendant" (*Flomenhaft v Finkelstein*, 127 AD3d 634, 638 [1st Dept 2015]).

Moreover, on "a motion to dismiss a defamation action because of the privilege, the [allegations] must be construed in a light most favorable to the [pleader] and that where there is a question as to the applicability of the privilege, the issue should be decided at trial" (*Flomenhaft v Finkelstein*, 127 AD3d at 638).

Lieu sufficiently pleads facts that, if true, could overcome the privilege. Significantly, this Court's denial of Lieu's motion to dismiss was in no way a determination that MSRA's allegations have merit or were not made in bad faith (see Sept 2014 Order at 4 ["what is before the court at this time is whether plaintiff has properly pleaded its causes of action"]). Rather, like here, the Court did not address the merit--or lack thereof--of any of the allegations and simply concluded that the pleadings were sufficient to withstand outright dismissal. In the same vein, these motions to dismiss must be denied based on the sufficiency of the pleadings. Under the circumstances of this case and based on its current posture, the Court cannot conclude as a matter of law that the privilege was not abused as Lieu contends.

Accordingly, it is

ORDERED that the motions by MSRA and Kantrowitz to dismiss Lieu's counterclaims and third-party claim are denied. MSRA and Kantrowitz are to reply/answer within 20 days of the e-filing of this Decision and Order.

This constitutes the Decision and Judgment of the Court.

Dated: November 13, 2015

  
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HON. JENNIFER G. SCHECTER