

**Landsman v Luna**

2015 NY Slip Op 32783(U)

October 17, 2015

Supreme Court, Nassau County

Docket Number: 601107/15

Judge: F. Dana Winslow

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**

**LLOYD D. LANDSMAN, M.D., LLOYD D. LANDSMAN, P.C. and KAREN SALANT,**

**TRIAL/IAS, PART 3  
NASSAU COUNTY**

**Plaintiffs,**

**-against-**

**MOTION SEQ. NO.: 001  
MOTION DATE: 6/22/15**

**OFELIA C. LUNA, JEFFREY A. GUZMAN, ESQ.,  
ROSS C. RAGGIO, ESQ., THE YANKOWITZ  
LAW FIRM, P.C. and KRENTSEL AND  
GUZMAN, LLP,**

**INDEX NO.: 601107/15**

**Defendants.**

**The following papers having been read on the motion (numbered 1-6):**

Notice of Motion.....	1
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Notice of Cross Motion.....	3
Affirmation in Opposition.....	4
Reply Affirmation.....	5
Memorandum of Law.....	6

Motion by defendant The Yankowitz Law Firm, P.C. (“Yankowitz”) for an Order dismissing the complaint pursuant to CPLR 3211(a)(7), motion by defendants Jeffrey A. Guzman, Esq., Ross C. Raggio, Esq., and Krentsel & Guzman, LLP (“the Krentzel & Guzman defendants”) and cross-motion by defendant Ofelia C. Luna (“Ms. Luna”) for an Order dismissing the complaint pursuant to CPLR 3211(a)(1) and (a)(7), are determined as follows.

Following abdominoplasty (a tummy tuck) and umbilicoplasty (belly button surgery), Ms. Luna commenced a medical malpractice action in Supreme Court, Suffolk County, in 2014 under Index #061072/2014 (“the Suffolk action”) against Dr. Landsman, his P.C., and his employee Karen Salant. In early 2015, Dr. Landsman, his P.C., and employee Karen Salant commenced this action in Supreme Court, Nassau County, under Index #601107/15 (“the Nassau action”) against Ms. Luna, and the attorneys and law firms listed in the complaint in the Suffolk action.

The complaint in the instant action contains ten causes of action. At this time all of the defendants seek judgment dismissing the complaint herein for failure to state a cause of action. They allege that this is an improper retaliatory action with the motive of punishing them for representing Ms. Luna in the Suffolk action.

#### CPLR 3211 Dismissal Standard

On a motion to dismiss pursuant to CLR 3211, the facts as alleged must be accepted as true, the pleader must be accorded the benefit of every favorable inference, and the court must determine only whether the facts as alleged fit within any cognizable theory (*ABN AMRO Bank, N.V. v. MBIA, Inc.*, 17 N.Y.3d 208, 227 [2011] citing *Leon v. Martinez*, 84 N.Y.2d 83, 87 [1994]).

The criterion on a motion pursuant to CPLR 3211(a)(7) is whether the pleader has a cause of action (*Leon, supra*, at 88; *Baumann v. Hanover Community Bank*, 100 A.D.3d 814, 816 [2d Dept. 2012]). However, claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss (*Godfrey v. Spano*, 13 N.Y.3d 358, 373 [2009]; *Barker v. Amorini*, 121 A.D.3d 823 [2d Dept. 2014]; *Goldberg v. Rosenberg*, 116 A.D.3d 919 [2d Dept. 2014]). Bare legal conclusions are not presumed to be true (*Goldberg, supra*; *Jaymer Communications, Inc. v. Associated Locksmiths of Am., Inc.*, 84 A.D.3d 888 [2d Dept. 2011]).

#### Discussion

The first cause of action in the complaint herein is for abuse of process, based upon the alleged wrongful complaint in the Suffolk action. However, for purposes of an abuse of process claim, the institution of a civil action by summons and complaint is not process capable of being abused (*Curiano v. Suozzi*, 63 N.Y.2d 113, 116 [1984]; *Muro-Light v. Farley*, 95 A.D.3d 846, 847 [2d Dept. 2012]). Consequently plaintiffs have no cause of action for abuse of process against any of the defendants, and the first cause of action must be dismissed.

Plaintiffs' second cause of action herein is for punitive damages. As New York does not recognize an independent cause of action for punitive damages (*Nocella v. Fort Dearborn Life Ins. Co. of N.Y.*, 99 A.D.3d 872, 877 [2d Dept. 2012]; *Stein v. Doukas*, 98 A.D.3d 1024, 1026 [2d Dept. 2012]), this cause of action must be dismissed against all defendants.

The third, fourth and fifth causes of action allege claims for defamation by Dr. Landsman, the P.C., and Ms. Salant, respectively. All of the alleged defamatory statements are direct quotes from the complaint in the Suffolk action. Defendants argue that these statements are protected by the absolute privilege accorded statements made during the course of judicial proceedings.

The absolute privilege asserted by defendants “embraces anything that may possibly pertinent” to the judicial proceedings in which they arose (*Martirano v. Frost*, 25 N.Y.2d 505, 507 [1969]). Nothing that is said in the court room may be the subject of an action for defamation unless, “it is “so obviously impertinent as not to admit of discussion, and so needlessly defamatory as to warrant the inference of express malice” (*Martirano, supra* at 508, quoting *Youmans v. Smith*, 153 N.Y.214, 220 [1897]). “The statement must be so outrageously out of context as to permit one to conclude, from the mere fact that the statement was uttered, that it was motivated by no other desire than to defame” (*Martirano, supra* at 508; *Fabirzio v. Spencer*, 248 A.D.2d 351 [2d Dept. 1998]).

The question raised here is whether the statements set forth in the complaint in the Suffolk action (Suffolk complaint, pars. 19-32, and 70-71) are pertinent to the claims therein of medical malpractice, negligence, and lack of informed consent. Allegations regarding Ms. Salant’s credentials and conduct are plainly not “so outrageously out of context” in the Suffolk action, “as to permit” it the conclusion that the allegations “were motivated by no other desire than to defame” (*Id.*). Despite plaintiffs’ claims to the contrary, the allegations in the Suffolk complaint are pertinent to that litigation, and therefore absolutely privileged. Under these circumstances plaintiffs’ claims of defamation in the third, fourth, and fifth causes of action herein are not actionable, and must be dismissed.

The sixth and seventh causes of action (misidentified in the complaint herein as a second fifth cause of action and the sixth cause of action) allege claims by Dr. Landsman and the PC, and Ms. Salant, for malicious prosecution. A cause of action for malicious prosecution accrues when the action alleged to have been brought maliciously terminates favorably to the plaintiff (*Rockwell Global Capital, LLC v. Soreide Law Group, PPLC*, 100 A.D.3d 448, 449 [1<sup>st</sup> Dept. 2012]; *Scomello v. Caronia*, 232 A.D.2d 625 [2d Dept. 1996]; *Health-Chem Corp. v. Adler*, 201 A.D.2d 326 [1<sup>st</sup> Dept. 1994]). As the Suffolk action is ongoing, the sixth and seventh causes of action must be dismissed as premature.

In the eighth cause of action plaintiffs allege that the alleged defamatory statements in the complaint in the Suffolk action “cast plaintiffs in a false light” (Suffolk complaint, par. 123). New York does not recognize a claim for portrayal in a “false light” (*Messenger v. Gruner + Jahr Print. & Publ.*, 94 N.Y.2d 436, 443 [2000], cert. den. 531 U.S. 818 [2000]; *Beverley v. Choices Women’s Med. Ctr.*, 141 A.D.2d 89, 95 [2d Dept. 1988]). Consequently, the eighth cause of action must be dismissed.

In the ninth cause of action plaintiffs allege a claim for prima facie tort. There is no recovery in prima facie tort unless “disinterested malevolence” is the sole motive for the defendants’ otherwise lawful act [*Curiano, supra* at 117, citing *Burns Jackson Miller Summit v. Lindner*, 59 N.Y.2d 314, 333 [1983]]. Furthermore, “New York courts have consistently refused to allow retaliatory lawsuits based on prima facie tort predicated on the malicious institution of a prior civil action (*Curiano, supra* at 118). To hold otherwise would allow plaintiffs to avoid the stringent requirements of a claim for malicious prosecution, and negate the “strong public policy of open access to the courts for all parties without fear of reprisal in the form of a retaliatory lawsuit” (*Curiano, supra* at 119).

As it cannot be said that the sole motive for the commencement of the Suffolk action was a “disinterested malevolence,” the court is compelled to conclude that the ninth cause of action fails to state a claim for prima facie tort and must be dismissed.

The tenth cause of action in the complaint herein is for business or trade defamation. This tort is the knowing publication of a false matter derogatory to the plaintiff’s business of a kind calculated to prevent or interfere with business relationships between plaintiff and others to plaintiff’s detriment (*Jurlique, Inc. v. Austral Biolab Pty.*, 187 A.D.2d 637, 639 [2d Dept. 1992]; *Waste Distillation Tech. v. Blasland & Bouck Engrs.*, 136 A.D.2d 633, 634 [2d Dept. 1988]), and special damages, or actual losses, must be identified for such a cause of action (*Waste Distillation Tech., supra*; *Penn Warranty Corp. v. DiGiovanni*, 10 Misc.3d 998, 1003 [Sup. Ct., N.Y.Cty., 2005]). Round figures, with no attempt at itemization, denote general, not special, damages (*Drug Research Corp. v. Curtis Publ. Co.*, 7 N.Y.2d 435, 441 [1960]; *Cambridge Assoc. v. Inland Vale Farm Co.*, 116 A.D.2d 684, 686 [2d Dept. 1986]).

Here, no special damages are alleged in the tenth cause of action. Moreover,

the absolute privilege that applies to the defamation claims, applies to the tenth cause of action to render any business or trade defamation set forth in the Suffolk complaint non-actionable. Consequently the tenth cause of action must also be dismissed. The Court does not need to reach defendants' motion to dismiss under CPLR §3211(a)(1).

Based on the foregoing, it is

ORDERED, that the motion by Yankowitz for an Order dismissing the complaint pursuant to **CPLR §3211(a)(7)** as asserted against it is **granted**; and it is further

ORDERED, that the motion by the Krentzel & Guzman defendants for an Order dismissing the complaint pursuant to **CPLR §3211(a)(7)** as asserted against them is **granted**; and it is further

ORDERED, that the cross-motion by defendant Ofelia C. Luna for an Order dismissing the complaint pursuant to **CPLR§3211(a)(7)** as asserted against her is **granted**.

This constitutes the Order of the Court.

Dated: 10/17/15  J.S.C.

ENTERED  
OCT 29 2015  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE