Solomon v Jageswar
2015 NY Slip Op 32852(U)
September 30, 2015
Supreme Court, Westchester County
Docket Number: 60294/2015
Judge: Sam D. Walker

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

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DEAN SOLOMON,

Plaintiff,

-against-

MONICA JAGESWAR, REBECCA SOLOMON, MARJORIE BLAKE, ELEANOR GROSZ, TOMOKO KATAOKA and ELEANOR GROSZ LAW FIRM,

Defendants.

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Index No. 60294/2015
Seq #1
Decision & Order

The following papers were read on a motion by the defendants for an order, pursuant to C.P.L.R. 3211(a)(1) and (a)(7), dismissing the plaintiff's action due to documentary evidence and for failure to state a cause of action.

PAPERS	**NUMBERED**
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The plaintiff and the defendant, Rebecca Solomon ("Ms. Solomon"), were married to each other and were divorced in June 2014. The parties have joint custody of the three

children of the marriage. The defendant, Monica Jageswar ("Ms. Jageswar")was employed by the plaintiff until November 2014, when she was terminated for cause, as per the plaintiff, and has been working exclusively for Ms. Solomon as a nanny since that time. The defendant, Marjorie Blake ("Ms. Blake") is the mother of Ms. Solomon and as per the plaintiff, pays Ms. Jageswar's wages as Ms. Solomon's employee. The defendants, Eleanor Grosz and Tomoko Kataoka were Ms. Solomon's attorneys during the divorce and as per the plaintiff, is currently representing Ms. Solomon in Family Court. Eleanor Grosz is a principal and Tomoko Kataoka is an associate of Eleanor Grosz Law Firm.

The plaintiff alleges that on April 16, 2015 at approximately 7:00pm, he called Ms. Solomon's home and cell phone to speak with his son and received no answer. Approximately ten minutes later, the plaintiff called the two numbers again and received no answer. The plaintiff then called Ms. Blake and received no answer. The plaintiff alleges that he became worried and then called Ms. Jageswar's phone to ask her to speak with his son. He alleges that when she answered the telephone, she asked him what he wanted and when he told her that he wanted to speak with his sons, she screamed that he was not allowed to call her on her phone, said she was going to call the cops and hung up the telephone. The plaintiff alleges, that on April 17, 2015, the next day, Ms. Jageswar filed a false criminal complaint against him, with the encouragement of all the other defendants.

The plaintiff commenced this action on June 15, 2015, by filing a Summons and Complaint alleging five causes of action for (1) defamation and defamation per se; (2) intentional infliction of emotional distress; (3) vicarious liability; (4) conspiracy; and (5) aiding and abetting. The defendants filed this pre-answer motion seeking dismissal of the plaintiff's action, pursuant to CPLR § 3211(a)(1) and 3211 § (a)(7), arguing that there is

documentary evidence requiring dismissal and that the pleadings fail to state any cause of action against them. The plaintiff opposes the motion, arguing that defendants did not provide any documentary evidence sufficient for dismissal and the Complaint is pleaded sufficiently to withstand a motion to dismiss.

Discussion

Rule 3211 of the Civil Practice Law and Rules provides, in relevant part that,

"[a] party may move for judgment dismissing one or more causes of action asserted against [it] on the ground that:
(1) A defense is founded upon documentary evidence; or
(7) the pleading fails to state a cause of action..."
N.Y. Civ. Prac. L. & R. 3211(a)(1) and (a)(7) (McKinney 2012).

In such motions, the facts alleged in the complaint are accepted as true, and the only determination is whether the facts alleged fit within any recognizable legal theory of recovery. However, this rule does not apply to legal conclusions lacking factual support, or to factual claims that are contradicted by documentary evidence. See, *Doria v. Masucci*, 230 A.D.2d 764 (2d Dept.1996).

With regard to the motions pursuant to CPLR 3211(a)(1), "[a] motion to dismiss pursuant to CPLR 3211(a)(1) may be appropriately granted only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law". *730 J & J LLC v. Fillmore Agency, Inc.*, 303 A.D.2d 486, 755 N.Y.S.2d 887 (2d Dept., 2003). Under CPLR 3211(a)(7), initially "[t]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law...". *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182 (1977). On a motion to dismiss for failure to state a cause of action, the court must view the

challenged pleading in the light most favorable to the non-moving party, and determine whether the facts as alleged fit within any cognizable legal theory. *Brevtman v Olinville Realty*, LLC, 54 AD3d 703 (2d Dept. 2008).See, also, *EBC 1, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, (2005); *Leon v Martinez,* 84 NY2d 83 (1994).

Thus, a motion to dismiss pursuant to CPLR 3211 (a) (7) will not succeed if, taking all facts alleged as true and affording them every possible inference favorable to the nonmoving party, the Complaint states in some recognizable form any cause of action known to law (see *Leon v Martinez*, supra; *Fisher v DiPietro*. 54 AD3d 892 (2d Dept 2008); *Shava B. Pac., LLC v Wilson. Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, (2d Dept. 2006). "Indeed, a motion to dismiss pursuant to CPLR 3211(a)(7) must be denied 'unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it'". *Bokhour v. GTI Retail Holdings, Inc.*, 94 A.D.3d 682, 683, 941 N.Y.S.2d 675, 677 (2d Dept. 2012).

The plaintiff's first cause of action is for defamation and defamation *per se.* "The elements of a cause of action for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se" *Konig v. WordPress.com*, 1112 A.D.3d 936, 937, 978 N.Y.S2d 92, 93 (2d Dept. 2013). "[T]he dispositive inquiry is whether a reasonable listener or reader could have concluded that the statements were conveying facts about the plaintiff" *Id.* 'Further, "[a] false statement constitutes defamation per se when it charges another with a serious crime or

tends to injure another in his or her trade, business or profession" *Id.* The elements of the cause of action for defamation and for defamation per se are identical except that a claim of defamation per se does not require proof of special damages.

The plaintiff's first cause of action for defamation and defamation per se is pleaded against all defendants. Since only Jageswar filed a criminal complaint against the plaintiff, this cause of action is dismissed as against all of those non-filing defendants. Additionally, the statement made by Jageswar was an oral statement and was not published. Therefore, the plaintiff was not defamed. The proper cause of action against Jageswar, would have been for slander per se. However, looking at defamation or slander as against Jageswar, the plaintiff fails to state a cause of action in both cases.

"Public policy mandates that certain communications, although defamatory, cannot serve as the basis for the imposition of liability in a defamation action." *Toker v. Pollak*, 44 N.Y.2d 211, 218, 376 N.E.2d 163, 405 N.Y.S.2d 1 (1978). "Communications falling within this category are deemed privileged, either absolutely or qualifiedly." *Id.* Communications protected by a qualified privilege do not provide immunity against liability in a defamation action, however, any presumption of implied malice is negated, placing the burden of proof upon the plaintiff. *Id.* The same reasoning as to qualified privilege also applies to slander.

Here, Jageswar's communication with the police falls under the category of a qualified privilege and therefore, the plaintiff is required to plead and show malice, which he has failed to do. Furthermore, the plaintiff has not supported in his papers that Jageswar filed a complaint for aggravated harassment. The allegations stated in his complaint do not state the elements of such a claim. Therefore, the plaintiff's first cause of action is dismissed. In addition, the plaintiff has not pleaded any special damages. The

defendant states in his opposition that his special damages amounts to a lost day of work at $560.00. However, he did not plead this in his complaint, nor has he shown that he has actually lost such income.

The plaintiff's second cause of action is for intentional infliction of emotional distress. "In order to state a cause of action to recover damages for intentional infliction of emotional distress, the complaint must allege conduct that was 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency . . . and [was] utterly intolerable in a civilized community'," *Borawski v. Abulafia*, 117 A.D.3d 662, 985 N.Y.S.2d 284 (2d Dept. 2014). Courts are reluctant to allow recovery under the banner of intentional infliction of emotional distress absent a deliberate, systematic and malicious campaign of harassment, intimidation, humiliation and abuse of [defendant], *Seltzer v. Bayer*, 272 A.D.2d 263, 709 N.Y.S.2d 21 (1st Dept. 2000). "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community," *Howell v New York Post Co.*, 81 N.Y.2d 115, 596 N.Y.S.2d 350 (1993); *Murphy v American Home Prods. Corp.*, 58 N.Y.2d 293, 303, quoting Restatement [Second] of Torts § 46, comment d.

The plaintiff alleges that the defendants' conduct was extreme and outrageous and exceeded the bounds of decency in a civilized society and that as a result he suffered severe emotional distress. However, the defendant's cause of action for intentional infliction of emotional distress must be dismissed, as such allegations are not sufficiently particular, in that, the complaint fails to plead every material element of the cause of action of intentional infliction of emotional distress, CPLR § 3013. Specifically, the defendant has

failed to set forth allegations of extreme and outrageous conduct which intentionally or recklessly caused him severe emotional distress, *Catli v. Lindenman*, 40 A.D.2d 714, 715 (2d Dept. 1972); *Howell v. New York Post*, 81 N.Y.2d at 122; *Dillon v. City of New York*, 261 A.D.2d 34, 41 (1st Dept. 1999). All that the defendant has offered are, conclusory, unsubstantiated bare allegations which are insufficient to support a cause of action for intentional infliction of emotional distress. The filing of a false police report does not remotely approach the standard of outrageous behavior for a cause of action for intentional infliction of emotional distress. *Brown v Sears Roebuck and Co.*, 297 A.D.2d 205, 746 N.Y.S.2d 141 (1st Dept. 2002). Furthermore, a cause of action for intentional infliction of emotional distress is duplicative of a cause of action for defamation. Also, as with the cause of action for defamation, the other defendants did not make a statement to the police, nor file any charges against the plaintiff and therefore, they are not subject to this cause of action. Therefore, the cause of action for intentional infliction of emotional distress, is dismissed.

The third cause of action alleges vicarious liability against Ms. Solomon and Ms. Blake. The Complaint alleges that Ms. Jageswar was employed by Ms. Solomon and that Ms. Blake paid Ms. Jageswar's wages. "The doctrine of respondeat superior renders a master vicariously liable for a tort committed by his servant while acting within the scope of employment" *Fenster v. Ellis*, 71 A.D.3d 1079, 898 N.Y.S.2d 582, 583 (2d Dept. 2010). "An act is considered to be within the scope of employment if it is performed while the employee is engaged generally in the business of his employer, or if his act may be reasonably said to be necessary or incidental to such employment" *Id.*

Here, the report made to the police cannot be considered to be within the scope of Ms. Jageswar's employment, since it was not performed while she was engaged generally in the business of her employment and the reporting was not necessary or even incidental to her employment. Furthermore, even if Ms. Blake provided funds to Ms. Solomon to pay Ms. Jageswar, she is not her employer. Therefore, the cause of action for vicarious liability, is dismissed.

The fourth cause of action is for conspiracy. The plaintiff alleges that on April 16, 2015 or April 17, 2015, or both, the defendants discussed the telephone call made to Ms. Jageswar and agreed that she should file a false criminal complaint against the plaintiff, even though the defendants knew or should have known, that any statements alleging criminal conduct committed by the plaintiff would be false. However, "New York does not recognize a substantive tort of conspiracy...." *MBF Clearing Corp. v. Shine*, 212 A.D.2d 478, 623 N.Y.S.2d 204 (1st Dept. 1995) and does not recognize civil conspiracy as an independent tort. *Fisther v. Bristol Myers, Inc.*, 224 A.D.2d 657, 638 N.Y.S.2d 729 (2d Dept. 1996). Therefore, the fourth cause of action for conspiracy, is dismissed.

The fifth cause of action is for aiding and abetting against all defendants, with the exception of Ms. Jageswar. To plead a claim for aiding and abetting, the complaint must allege, (1) the existence of the underlying tort, knowledge of the tort on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the tort. *Standfield Offshore Leveraged Assets, Ltd. v. Metropolitan Life Ins. Co.*, 64 A.D.3d 472, 883 N.Y.S.2d 486 (1st Dept. 2009). 'Substantial assistance exists "where (1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required

to do so enables the fraud to proceed, and (2) the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated" *Id.*

Here, the plaintiff has failed to plead this essential element of substantial assistance. The plaintiff has not alleged any specific facts or instances to properly plead a cause of action for aiding and abetting. The plaintiff uses pure conjecture and provides no basis for his allegations. Further, the Court has already dismissed the underlying torts in the action. Therefore, without any underlying torts, this claims fails as a matter of law and this cause of action is dismissed.

Accordingly, the defendant's motion seeking dismissal of the Complaint is GRANTED; and it is

ORDERED that the action is dismissed.

To the extent any relief requested in Motion Sequence 1 and 3 was not addressed by the Court, it is hereby deemed denied. The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York
September 30, 2015

HON. SAM D. WALKER, J.S.C.