Strujan v Kaufman & Kahn, LLP
2015 NY Slip Op 32928(U)
June 5, 2015
Surpreme Court, Queens County
Docket Number: 11180/14
Judge: Timothy J. Dufficy
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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice

FILED
JUN 16 2015
COUNTY CLERK
QUEENS COUNTY

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ELENA STRUJAN,

Plaintiff,

Index No.: 11180/14
Mot. Dates: 1/12/15
1/22/15
2/2/15

-against-

Mot. Cal. No. 166, 99, 167, 127
Mot. Seq.: 1, 2, 3 and 4

KAUFMAN & KAHN, LLP., FIDEN & NORRIS, LLP, and JOE/JANE DOE,,

Defendants.

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The following papers numbered 1 to 56 read on this motion by defendant Fiden & Norris, LLP (Fiden & Norris) for an extension of time to answer the complaint; and on this motion by plaintiff for a default judgment against defendants, to deny an extension of time for Fiden & Norris to answer the complaint, and to disqualify Rivkin & Radler, LLP (Rivkin & Radler) as counsel for Fiden & Norris due to a conflict of interest; and on this motion by defendant Kaufman & Kahn, LLP (Kaufman & Kahn) to dismiss the complaint pursuant to CPLR 3211(a)(7); and on this motion by Fiden & Norris to dismiss the complaint pursuant to CPLR 3211(a)(1), (a)(5), and (a)(7) or, in the alternative, for an order compelling plaintiff to provide a more definite statement and striking scandalous and prejudicial material from the complaint; and on this cross motion by plaintiff to deny an extension of time for Fiden & Norris to answer the complaint and to disqualify Rivkin & Radler as counsel for Fiden & Norris due to a conflict of interest and illegal practices; and on this cross motion by Fiden & Norris for an order barring plaintiff from interposing any further motions in this action except by order to show cause.

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As an initial matter, the motions, designated as Motion Sequence Nos. 1, 2, 3 and 4 are consolidated for purposes of disposition.

Upon the foregoing papers it is ordered that the motions and cross-motions are determined as follows:

This is an action stemming from a dispute between the plaintiff and her former landlord, Glencord Building Corp. (Glencord). Kaufman & Kahn represented Glencord in a prior nonpayment proceeding brought by Glencord against the plaintiff in New York City Civil Court, in which Glencord obtained a judgment, in the amount of $17,966.20, for back rent. Meanwhile, the plaintiff commenced a personal injury action against Glencord in Supreme Court, Kings County (Index No. 18853/09), in which she alleged, *inter alia*, that Glencord was intentionally poisoning her with carbon monoxide. In that action, Glencord was represented by Fiden & Norris. On July 24, 2014, the plaintiff commenced the within action against both law firms based on their alleged misconduct during the course of the underlying actions, asserting claims for legal malpractice, gross negligence, harassment, intentional harm, intentional infliction of emotional distress, defamation, contributory negligence, and discrimination of pro se rights and human rights.

Initially, the Court finds that the branch of the plaintiff's motion for a default judgment against the defendants is denied. When a defendant has failed to appear, plead, or proceed to trial, a plaintiff may seek a default judgment against that defendant (CPLR 3215[a]). On a motion to enter a default judgment against a defendant for the failure to appear or answer the complaint, where as here, a plaintiff must submit proof of service of the summons and complaint, proof by affidavit of the facts constituting the claim, and proofof the defendant's default and the amount due (CPLR 3215[f]). Here, defendants did not default in appearing in this action since Fiden & Norris made a motion seeking an extension of time to answer the complaint and both defendants made motions to dismiss the complaint (*see e.g. Jeffers v Stein*, 99 AD3d 970 [2012]; *Carlin v Carlin*, 52 AD3d 559 [2008]). Furthermore, given that Fiden & Norris has made a motion to dismiss, its motion for an extension of time to answer the complaint, as well as those branches of the plaintiff's motion and cross-motion to deny that request, are also denied as moot.

Those branches of the plaintiff's motion and cross-motion to disqualify Rivkin & Radler from representing Fiden & Norris in the present litigation due to conflict of interest are denied. Disqualification of an attorney is a matter which rests within the sound discretion of the court (*see Aryeh v Aryeh*, 14 AD3d 634 [2005]). A party's entitlement to be

represented by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing by the movant that disqualification is warranted (*see Horn v Municipal Info. Servs.*, 282 AD2d 712 [2001]). When faced with a disqualification motion, the court's function is to take such action as is necessary to insure the proper representation of the parties and fairness in the conduct of the litigation (*see Solomon v New York Prop. Ins. Underwriting Assn.*, 118 AD2d 695 [1986]). Moreover, any doubts as to the existence of a conflict of interest must be resolved in favor of disqualification (*see Sirianni v Tomlinson*, 133 AD2d 391 [1987]). An attorney must avoid not only the fact but also the appearance of representing conflicting interests (*see Sellouk v USAA*, 166 AD2d 641 [1990]). Here, the Court finds that plaintiff failed to offer sufficient evidence demonstrating the existence of a conflict of interest requiring disqualification of Rivkin & Radler as counsel for Fiden & Norris.

Next, the Court will address those branches of the defendants' separate motions to dismiss the complaint, pursuant to CPLR 3211(a)(7). On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must accept the facts alleged by the plaintiff as true and liberally construe the complaint, according it the benefit of every possible favorable inference (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 406, 414 [2001]). The role of the court is to "determine only whether the facts as alleged fit within any cognizable legal theory" (*id.*).

Applying these principles to the case at bar, the Court finds that the plaintiff's complaint should be dismissed. The complaint alleges claims for legal malpractice, gross negligence, harassment, intentional harm, intentional infliction of emotional distress, defamation, contributory negligence, and discrimination of pro se rights and human rights. First, in an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused the plaintiff to sustain actual and ascertainable damages (*see Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]; *Von Duerring v Hession & Bekoff*, 71 AD3d 760 [2010]). Here, the plaintiff fails to allege facts in the complaint upon which the existence of an attorney-client relationship between plaintiff and defendants could be inferred (*see Rovello v Klein*, 304 AD2d 638 [2003]). In fact, the complaint indicates that thje plaintiff represented herself in the underlying actions and that defendants were counsel for adverse parties in those same actions.

Similarly, the plaintiff's cause of action for gross negligence must be dismissed because the complaint fails to allege that defendants owed a duty to plaintiff (*see e.g. Sargent v New York Daily News, L.P.*, 42 AD3d 491, 493-494 [2007]; *Russo v Reyes*, 2014 NY Slip Op 33010[U] [Sup Ct, New York County 2014]). In any event, the gross negligence cause of action is duplicative of the legal malpractice cause of action since both claims arose from the same operative facts (*see Mecca v Shang*, 258 AD2d 569 [1999]).

In addition, the cause of action alleging contributory negligence is dismissed as it is an affirmative defense, not a separate cause of action (*see generally Arbegast v Board of Educ. of S. New Berlin Cent. School*, 65 NY2d 161, 166 [1985]). Moreover, to the extent that plaintiff seeks to assert a cause of action for ordinary negligence against the defendants, such a claim must also fail because, as previously discussed, the defendants did not owe a duty of care to the plaintiff.

Likewise, the cause of action for harassment must be dismissed because New York does not recognize a common-law cause of action to recover damages for harassment (*see Santoro v Town of Smithtown*, 40 AD3d 736 [2007]).

The allegations in the complaint are insufficient to state a cause of action for "intentional harm," or prima facie tort. Prima facie tort affords a remedy for damages caused by the infliction of intentional harm, without excuse or justification, by an act or series of acts which would otherwise be lawful (*see Freihofer v Hearst Corp.*, 65 NY2d 135, 142-143 [1985]). A critical element of a prima facie tort cause of action is that the plaintiff suffered specific and measurable loss, which requires an allegation of special damages (*id.* at 143). Moreover, "there is no recovery in prima facie tort unless malevolence is the sole motive for [the] defendant's otherwise lawful act" (*see Cusimano v United Health Servs. Hosps., Inc.*, 91 AD3d 1149, 1153 [2012]). Even egregious conduct by an attorney during the course of representing a client that aids to some degree the attorney's client generally will not satisfy the disinterested malevolence requirement of a prima facie tort because such conduct is not motivated solely to harm the defendant (*see Lisi v Kanca*, 105 AD3d 714 [2013]). In this case, while affording the complaint a liberal construction, there are no facts supporting the contention that the defendants' conduct during the course of the representation of their respective clients in the underlying actions were motivated solely to harm the plaintiff (*see Wiggins & Kopko, LLP v Masson*, 116 AD3d 1130 [2014]). In addition, no special damages were pleaded.

The cause of action to recover damages for intentional infliction of emotional distress is also dismissed. The elements of intentional infliction of emotional distress are (1) extreme and outrageous conduct, (2) the intent to cause, or the disregard of a substantial likelihood of causing, severe emotional distress, (3) causation, and (4) severe emotional distress (*see Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]). The tort of intentional infliction of emotional distress predicates liability on the basis of conduct that is "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" (*see Fischer v Maloney*, 43 NY2d 553 [1978]). Here, based on a careful review of the complaint, the Court finds that the plaintiff's conclusory assertions are insufficient to set forth a cause of action sounding in the intentional infliction of emotional distress (*see Welsh v Haven Manor Health Care Ctr.*, 15 AD3d 572 [2005]).

Additionally, the complaint fails to state a cause of action to recover damages for defamation. The elements of a defamation claim 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 (*see Geraci v Probst*, 61 AD3d 717 [2009]). A statement made by counsel during a judicial proceeding, even if made with malice or bad faith, is protected by absolute privilege as long as the statement may, in some way, be considered pertinent to the litigation (*see Sexter & Warmflash, P.C. v Margrabe*, 38 AD3d 163, 171 [2007]). Here, the plaintiff's allegations of defamation are based on statements made by the defendants in judicial proceedings during the underlying actions and, therefore, are protected by an absolute privilege *(see Rabiea v Stein*, 69 AD3d 700 [2010]).

Turning to plaintiff's claim for "discrimination of pro se rights and human rights," said cause of action is dismissed. There is no common-law cause of action for "discrimination of pro se rights." Moreover, a plaintiff asserting a claim under 42 USC § 1983 must show that a person acting under the color of state law deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States (*see Chavis v City of New York*, 94 AD3d 440, 442 [2012]). In this case, the defendants are private law firms, who were representing their respective clients in a landlord-tenant action and personal injury action, and, thus, were not acting under color of state law.

In light of the foregoing, the Court need not reach the additional grounds for dismissal raised in Fiden & Norris' motion to dismiss.

Finally, the Court will address the cross-motion by Fiden & Norris seeking to bar plaintiff from interposing any further motions in this action except by order to show cause. While public policy generally mandates free access to the courts, a party may forfeit that right if he or she abuses the judicial process by engaging in meritless litigation motivated by spite or ill will (*see Matter of McNelis v Carrington*, 105 AD3d 848 [2013]; *Breytman v Olinville Realty, LLC*, 99 AD3d 651 [2012]; *Sassower v Signorelli*, 99 AD2d 358 [1984]).

In light of the plaintiff's history of engaging in vexatious litigation and protracted motion practice, this Court finds that the plaintiff is enjoined from making further motions in this action except by order to show cause (*see e.g. Matter of Horike v Freedman*, 37 AD3d 978 [2007]).

Accordingly, it is

ORDERED, that the motion by Foden & Norris for an extension of time to answer the complaint is denied, as academic, based upon the foregoing order of dismissal; and it is further

ORDERED, that the plaintiff's motion and cross-motion for a default judgment against defendants, to deny an extension of time for Fiden & Norris to answer the complaint, and to disqualify Rivkin & Radler, LLP (Rivkin & Radler) as counsel for Fiden & Norris are denied; and it is further

ORDERED, that the defendants' separate motions to dismiss the complaint are granted; and it is further

ORDERED, that the cross-motion by Fiden & Norris for an order enjoining the plaintiff from making further motions in this action except by order to show cause is granted.

ORDERED, that all applications not specifically addressed herein are denied in all respects.

The foregoing constitutes the decision and order of this Court.

Dated: June 5, 2015

TIMOTHY J. DUFFICY, J.S.C.

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QUEENS COUNTY