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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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DENISE RUBIN,

Plaintiff,

DECISION/ORDER
Index No. 154060/2015

-against-

NAPOLI BERN RIPKA SHKOLNIK, LLP, WORBY GRONER EDELMAN & NAPOLI BERN, LLP, NAPOLI BERN & ASSOCIATES LLP, PAUL NAPOLI

Defendants.

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HON. CYNTHIA KERN, J.:

Plaintiff Denise A. Rubin commenced the instant action alleging employment discrimination and breach of contract against her former law firms and one of the firms' managing partners. Defendant Paul J. Napoli ("Napoli") now moves for an Order pursuant to CPLR § 3025(b) granting him leave to file an amended answer. For the reasons set forth below, Napoli's motion is granted in part and denied in part.

The relevant facts and procedural history of this case are as follows. In or around April 2015, plaintiff commenced the instant action against Napoli in his individual capacity and against the law firm entities by which she was employed and at which Napoli was a partner (hereinafter referred to as the "Firms") asserting four causes of action for (1) violation of New York City Administrative Code § 8-107, for alleged sex discrimination; (2) breach of contract for failing to pay bonuses/salary increases; (3) breach of contract for failing to pay plaintiff from October 14, 2014 through November, 2014; and (4) *quantum meruit*. Thereafter, Napoli moved to dismiss the action as against him individually, which this court granted pursuant to Partnership Law § 26 on the ground that "the Firms are all limited liability partnerships and plaintiff fails to allege that Napoli personally committed a discriminatory act against her to hold him personally liable."

Thereafter, plaintiff commenced an action under a separate index number against Napoli in his individual capacity asserting one cause of action for employment discrimination. Napoli then moved to dismiss that action in its entirety or, in the alternative, for an Order consolidating the new action with the instant action. This court denied Napoli's motion to dismiss finding that "the complaint in [the new] action sufficiently corrects the defects and omissions which were fatal to the complaint in the [instant action]" but granted Napoli's motion to consolidate the new action with the instant action. On or about March 30, 2016, Napoli filed an answer to the complaint in the consolidated action but did not assert a counterclaim against plaintiff. However, also on that date, Napoli's "counterclaim counsel," Napoli Shkolnik, PLLC, filed a document entitled "Counterclaims of Napoli Bern Ripka Shkolnik, LLP, Worby Groner Edelman & Napoli Bern, LLP, Napoli Bern, LLP, Napoli Bern & Associates, LLP and Paul J. Napoli" which asserted eight separate standalone counterclaims against plaintiff. On or about April 5, 2016, Napoli Shkolnik, PLLC filed the "First Amended Counterclaim" which asserted five counterclaims solely on behalf of Napoli in his individual capacity.

Plaintiff then moved to dismiss the counterclaims and for sanctions against Napoli. In a decision dated June 15, 2016, this court granted plaintiff's motion to the extent that it dismissed Napoli's counterclaims pursuant to CPLR § 3011 on the ground that Napoli's "standalone counterclaims are procedurally improper" as they must be asserted in an answer but denied plaintiff's motion for sanctions. Napoli now moves to amend his answer to properly assert the five counterclaims against plaintiff for intentional infliction of emotional distress, negligent infliction of emotional distress, tortious interference with contractual relations, defamation and defamation per se.

Pursuant to CPLR § 3025(b), "[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit." *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 499-500 (1st Dept 2010) (internal citations omitted). On a motion for leave to amend, "the court should examine the sufficiency of the merits of the proposed amendment when considering such motions." *Heller v. Lous Provenzano, Inc.*, 303 A.D.2d 20, 25 (1st Dept 2003).

As an initial matter, Napoli's motion to amend his answer to assert a counterclaim for intentional infliction of emotional distress is denied as such counterclaim is palpably insufficient and patently devoid of merit. The Court of Appeals "has enumerated four elements of a cause of action for intentional infliction of emotional distress: '(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress.'" *Chanko v. American Broadcasting Companies Inc.*, 27 N.Y.3d 46, 56 (2016). "'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.'" *Id.*, quoting *Howell v. New York Post Co.. Inc.*, 81 N.Y.2d 115, 122 (1993)(internal citations omitted). The Court of Appeals has found such requirements to be "rigorous, and difficult to satisfy," and that "of all the intentional infliction of emotional distress claims considered[,]...every one has failed because the alleged conduct was not sufficiently outrageous." *Howell*, 81 N.Y.2d at 122.

In the present case, Napoli's motion to amend his answer to assert a claim for intentional infliction of emotional distress must be denied as the allegations constituting such claim do not sufficiently allege conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency or to be regarded as atrocious and utterly intolerable in a civilized community. Napoli alleges that plaintiff threatened violence against him while he was fighting for his life against leukemia; that she attempted to and did interfere with Napoli's partnership with Marc Bern ("Bern"), a partner at the Firms; that she attempted to oust Napoli from the Firms at a vulnerable time; and that she threatened extortion against Napoli in violation of the disciplinary rules. However, such allegations, while offensive, do not constitute conduct that is so outrageous as to sustain a claim for intentional infliction of emotional distress.

Further, Napoli's motion to amend his answer to assert a counterclaim for negligent infliction of emotional distress is denied as the court finds that such counterclaim is palpably insufficient and patently devoid of merit. "A cause of action for negligent infliction of emotional distress, which no longer requires physical injury as a necessary element, generally must be premised upon the breach of a duty owed to

plaintiff which either unreasonably endangers the plaintiff's physical safety, or causes the plaintiff to fear for his or her own safety." *Shelia C. v. Povich*, 11 A.D.3d 120, 130 (1st Dept 2004). Moreover, a claim for negligent infliction of emotional distress must be supported by allegations of conduct by the defendant 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." *Berrios v. Our Lady of Mercy Med. Ctr.*, 20 A.D.3d 361, 362 (1st Dept 2005).

In the present case, Napoli's motion to amend his answer to assert a counterclaim for negligent infliction of emotional distress must be denied as the allegations constituting such claim do not sufficiently allege conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency or to be regarded as atrocious and utterly intolerable in a civilized community. Napoli alleges that plaintiff threatened violence against him; that she interfered with Napoli's partnership agreement with Bern; and that she threatened extortion against Napoli, all of which caused Napoli emotional distress. However, as the court explained with regard to Napoli's proposed counterclaim for intentional infliction of emotional distress, such allegations, while offensive, do not constitute conduct that is so outrageous as to sustain a claim for negligent infliction of emotional distress. Moreover, Napoli fails to allege that such conduct caused him to fear for his own physical safety, which is a necessary element of a claim for negligent infliction of emotional distress.

Napoli's motion to amend his answer to assert counterclaims for defamation and defamation per se is also denied as the court finds that such counterclaims are time-barred. It is well-settled that a claim for defamation is governed by a one-year statute of limitations, *see* CPLR § 215(3), and that such claim accrues when the party against whom the claim is brought "made [the] last allegedly defamatory statement about [the aggrieved party]," *Lancaster v. Town of East Hampton*, 54 A.D.3d 906, 907 (2d Dept 2008). Further, pursuant to CPLR § 203(f), "[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." Here, Napoli seeks to amend his answer to assert counterclaims for defamation and

defamation per se based on his allegation that on April 27, 2015, plaintiff knowingly made false statements about Napoli to Law 360, a legal news service. Thus, Napoli had one year from that date to bring a claim against plaintiff for defamation and defamation per se. However, Napoli did not bring the instant motion to amend his answer to add his defamation counterclaims against plaintiff until July 2016, over two months after his time to do so had already expired. Further, such proposed claims do not "relate back" to the original answer interposed by Napoli in March 2016 as it is undisputed that Napoli's original answer did not give plaintiff notice of the transactions, occurrences, or series of transactions or occurrences constituting his defamation and defamation per se claims. Indeed, Napoli's original answer merely asserts denials and forty-one affirmative defenses, none of which relate in any way to Napoli's proposed claims for defamation and defamation per se.

However, Napoli's motion to amend his answer to assert a counterclaim for tortious interference with contractual relations is granted as the court finds that such counterclaim is not palpably insufficient or patently devoid of merit. "Tortious interference with contract requires the existence of a valid contract between plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." *Lama Holding Company v. Smith Barney*, 88 N.Y.2d 413, 424 (1996).

In the present case, Napoli's motion to amend his answer to assert a counterclaim for tortious interference with contractual relations is granted as he has sufficiently alleged the elements of such claim. Napoli alleges that he had a partnership agreement with Bern; that plaintiff knew of the existence of such agreement; that plaintiff interfered with the agreement by intentionally excluding Napoli from discussions concerning the Firms and threatening violence against Napoli; that as a result of plaintiff's attempt to interfere with the agreement, Bern breached the agreement with Napoli; and that as a result of such breach, Napoli has sustained damages in that the Firms have dissolved, costing Napoli attorneys' fees, he has lost credit, lost his reputation, lost much of his business and suffered humiliation and emotional distress.

To the extent plaintiff asserts in opposition to Napoli's motion to amend that it should be denied because he has no likelihood of success on the merits of his proposed counterclaims, such assertion is

without merit. The standard for whether to grant a motion to amend a pleading to add a claim is whether the proposed claim is palpably insufficient or patently devoid of merit and not whether the claimant will eventually be successful on the proposed claim.

Plaintiff's assertion that that she will be prejudiced if Napoli is granted leave to amend his answer to assert his counterclaims is without merit. "The type of prejudice necessary to warrant denial of [a] motion [to amend] 'requires "some indication that the [opposing party] has been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position."'" *Tri-Tec Design, Inc. v. Zatek Corp.*, 123 A.D.3d 420, 420 (1st Dept 2014)(internal citations omitted), quoting *Kocourek v. Booz Allen Hamilton Inc.*, 85 A.D.3d 502, 504 (1st Dept 2011). Plaintiff asserts that she will be prejudiced because she will "hav[e] to defend herself against these frivolous allegations by drafting opposition papers and appear[] for the second time in this matter, and for the fourth time overall." However, such assertion is without merit as merely having to bear the extra costs and time associated with litigating and defending against counterclaims is not the type of prejudice that would prevent Napoli from amending his answer to assert the counterclaims as she would have had to defend against such counterclaims even if the counterclaims were properly asserted in Napoli's initial answer. *See Tri-Tec Design, Inc.*, 123 A.D.2d at 420 ("Plaintiff has failed to demonstrate any such prejudice...Plaintiff's assertion of additional costs for discovery associated with the counterclaims is insufficient, as such costs would have been necessary even if the counterclaims were asserted with the initial answer.") Further, plaintiff cannot establish any surprise by the proposed counterclaims as she has been on notice of such counterclaims since Napoli attempted to file them as standalone counterclaims.

Accordingly, Napoli's motion to amend his answer to assert counterclaims against plaintiff is granted solely to the extent that Napoli's answer shall only be amended to assert a counterclaim for tortious interference with contractual relations. It is hereby

ORDERED that within fourteen (14) days of the date of this decision and order, Napoli shall serve a copy of this order with notice of entry upon plaintiff and the other parties who have appeared in the action; and it is further

ORDERED that within twenty (20) days of service of a copy of this order with notice of entry upon plaintiff, Napoli shall e-file an Amended Verified Answer that comports with this court's decision. This constitutes the decision and order of the court.

DATE : 9/29/16

CK

KERN, CYNTHIA S., JSC

HON. CYNTHIA S. KERN
J.S.C.