

Cosentino v Debler

2016 NY Slip Op 31834(U)

September 29, 2016

Supreme Court, Suffolk County

Docket Number: 11-2156

Judge: Daniel Martin

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INDEX No. 11-2156

CAL. No. 15-007890T

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN

MOTION DATE 9/22/15 (002)

MOTION DATE 9/30/15 (003)

MOTION DATE 10-27-15 (004)

ADJ. DATE 10-27-15

Mot. Seq. #002-MG

#003-MG

#004-MD; CASEDISP

-----X
KRISTEN COSENTINO,

Plaintiff,

- against -

KRISTA E. DEBLER and STACEY L. BISHOP,

Defendants.
-----X

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Upon the following papers numbered 1 to 46 read on these motions for dismissal and to amend the complaint; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19; 20 - 32; Notice of Cross Motion and supporting papers 44; Answering Affidavits and supporting papers 33 - 43; Replying Affidavits and supporting papers 45-46; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (002) by defendant Stacey Bishop for an order pursuant to CPLR 3211(a) (7) or CPLR 3212 dismissing the complaint is granted; and it is further

ORDERED that the motion (003) by defendant Krista Debler for an order pursuant to CPLR 3211(a) (7) or CPLR 3212 dismissing the complaint is granted; and it is further

ORDERED that the cross motion (004) by plaintiff to amend the complaint is denied.

Plaintiff commenced this action to recover for damages allegedly arising out of two separate police investigations relating to annoying and harassing telephone calls and text messages defendants allege plaintiff made in 2010 and thereafter. Defendant Krista Debler is plaintiff's ex-husband's girlfriend. Defendant Stacey Bishop is plaintiff's older sister. Plaintiff alleges slander, libel, and defamation as a first cause of action against both defendants. Plaintiff also alleges abuse of process as second cause of action, and negligent, reckless, and intentional infliction of emotional distress as a third cause of action. The fourth cause of action alleges prima facie tort. Issue has been joined and Debler asserts an affirmative defense of truth, while Bishop asserts affirmative defenses of truth, failure to state a cause of action, and a counterclaim for sanctions and attorney fees.

Plaintiff is divorced from Robert Cosentino. After the divorce was commenced, plaintiff learned that Debler was dating Robert Cosentino. Plaintiff admits during this time period she drank to excess and that she sent "nasty" text messages to her older sister, who sided with Debler and Robert Cosentino in the divorce. On September 28, 2010, Bishop alleges that plaintiff was drinking and was angry she was friends with Debler on Facebook. According to Bishop, plaintiff threatened to kill her. Plaintiff also continued to send unsolicited text messages to Bishop. Bishop resided in Southold and was advised by the Southold Police that since a September 28, 2010 telephone call was received while she was in Southampton that the Southampton Police Department would have jurisdiction. On November 10, 2010, Bishop and Debler met the Southampton police at Starbucks and Bishop requested an order of protection and that no charges be filed. Earlier that same day, Debler attempted to file charges against plaintiff with the Suffolk County Police Department at the 7th Precinct but was turned away. Plaintiff alleges that on November 10, 2010, Debler and Bishop made false statements to the Southampton police to avoid Debler's own arrest on harassment charges. Thereafter, Bishop received a temporary order of protection in the Family Court which was vacated on December 16, 2010. According to plaintiff, she was not arrested on Debler's and Bishop's complaints.

Defendants now move for an order dismissing the complaint asserted against them pursuant to CPLR 3211 (a)(7) for failure to state a cause of action, or, in the alternative, pursuant to CPLR 3212 for summary judgment dismissing the complaint. Bishop also seeks expenses and attorney fees pursuant to 22 NYCRR 130-1.1. In support of the motion (002) Bishop submits, among other things, her own affidavit, the pleadings, a domestic incident report, transcripts of the examinations before trial of herself and plaintiff, a letter dated March 2, 2010, Suffolk Community College observation and evaluations, Dr. Prill's patient progress notes, a forensic psychological evaluation, and a memorandum of law. In support of the motion (003) Debler submits, among other things, the pleadings, transcripts of the examination before trial of herself, plaintiff, and Bishop, a letter dated March 2, 2010, Dr. Prill's patient's progress notes, and a memorandum of law. In opposition to both motions and in support of the cross motion (004) plaintiff submits, among other things, the pleadings, a police domestic incident report, transcripts of examinations before trial of herself, Bishop, and Debler, an affidavit of Debler, a Southampton police department incident report, and a proposed amended complaint.

When a party moves under CPLR 3211 (a) (7) for dismissal based on the failure to state a cause of action, the test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (*Sokol v Leader*, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010]). A court must determine whether, accepting the facts as alleged in the pleading as true and according the plaintiff the benefit of

every favorable inference, those facts fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]). Affidavits may be used to remedy pleading defects, thereby preserving “inartfully pleaded, but potentially meritorious, claims” (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636, 389 NYS2d 314 [1976]). “Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 799 NYS2d 170 [2005]). However, “conclusory averments of wrongdoing are insufficient to sustain a complaint unless supported by allegations of ultimate facts” (*Muka v Greene County*, 101 AD2d 965, 965, 477 NYS2d 444 [4th Dept 1984]; see *DiMauro v Metropolitan Suburban Bus Auth.*, 105 AD2d 236, 483 NYS2d 383 [2d Dept 1984]; *Melito v Interboro-Mutual Indem. Ins. Co.*, 73 AD2d 819, 423 NYS2d 742 [4th Dept 1979]).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (see *Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *O’Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

The First Cause of Action: Libel, Slander and Defamation

“Defamation has long been recognized to arise from the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society. The elements are a false statement, published without a 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” (*Dillon v City of New York*, 261 AD2d 34, 37-38, 704 NYS2d 1 [1st Dept 1999]). Defamation is the injury to a person’s reputation, either by written expression (libel) or oral expression (slander). “In cases involving defamation per se, the law presumes that damages will result, and special damages need not be alleged or proven” (*Gatz v Otis Ford*, 274 AD2d 449, 450, 711 NYS2d 467 [2d Dept 2000]). The per se categories consist of the following statements: (1) the plaintiff committed a crime; (2) the statement tends to injure the plaintiff in his or her trade, business or profession; and (3) the plaintiff has contracted a loathsome disease among others (see *Matherson v Marchello*, 100 AD2d 233, 473 NYS2d 152 [2d Dept 1984]). When the defamatory statement falls into one of these categories, “the law presumes damage to the slandered individual’s reputation so that the cause is actionable without proof of special damages” (*60 Minute Man v Kossman*, 161 AD2d 574, 575, 555 NYS2d 152 [2d Dept 1990]).

Here, plaintiff alleges that the defendants knowingly made oral statements to the police regarding her conduct. However, she has not met the requirements of CPLR 3016[a], which provides: “In an action for libel or slander, the particular words complained of shall be set forth in the complaint.” As the complaint does not set forth “the particular words complained of,” the first cause of action is dismissed (*Sirianni v Rafaloff*, 284 AD2d 447, 727 NYS2d 452 [2d Dept 2001]; *Shapiro v Central Gen. Hosp.*

Inc., 251 AD2d 317, 673 NYS2d 724 [2d Dept 1998]; *Gill v Pathmark Stores*, 237 AD2d 563, 655 NYS2d 623 [2d Dept 1997]). Contrary to plaintiff's position, a motion based upon a failure to state a cause of action under CPLR 3211(a)(7) may be raised "at any time even if such objection [was] not raised in the answer" (*State of New York v Wolowitz*, 96 AD2d 47, 54, 468 NYS2d 131[2d Dept 1983]; see, CPLR 3211[e]; Siegel, Practice Commentaries, McKinney's Cons.Laws of N.Y., Book 7B, CPLR C3211:58, at 79). Plaintiff's reliance on *Adesso v Shemato*, 70 NY2d 689, 518 NYS2d 793 (1987), which relates to waiver of the defense of lack of personal jurisdiction, not claims of failure to state a cause of action, is misplaced.

In addition, defendants have demonstrated their prima facie entitlement to summary judgment for an order dismissing this cause of action. Debler testified in her examination before trial that plaintiff sent several harassing text messages to her. During her examination before trial plaintiff admitted to sending mean, "nasty," harassing, and "childish" text messages. Plaintiff acknowledged substantial and excessive use of alcohol during the same time period. The documentary evidence also indicates that plaintiff was referred to both inpatient and outpatient alcohol treatment programs based upon her use of alcohol. Given plaintiff's admissions, defendants have established truth, or substantial truth, as a defense (*Stepanov v Dow Jones & Co. Inc.*, 120 AD3d 28, 987 NYS2d 3742 [1st Dept 2014]). Moreover, plaintiff cannot show special damages as the crime of Aggravated Harassment in the Second Degree under Penal Law § 240.30(1) is unconstitutional (*People v Golb*, 23 NY3d 455, 991 NYS2d 792 [2014]). As to plaintiff's claimed damage of loss of promotion, the documentary evidence indicates she was not promoted in March of 2010, eight months prior to the alleged defamation, as she "did not meet the time requirements in rank for promotion to Associate Professor." She also received positive employment reviews after the police visited her place of employment. In opposition, with regard to the first cause of action, plaintiff fails to raise a triable issue of fact, and moves to amend the complaint. That application is discussed below. Accordingly, the first cause of action is dismissed as to both defendants.

The Second Cause of Action: Abuse of Process

To state a claim for abuse of process, the claimant must allege: 1) the issuance of regularly issued civil or criminal process, compelling performance or forbearance of some act; 2) the existence of an ulterior motive to do harm, without economic or social justification; 3) the seeking of some collateral advantage outside the legitimate ends of such process; and 4) actual or special damages (*Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teacher's Assn., Inc. Local 1889 AFT AFL-CIO*, 38 NY2d 397, 380 NYS2d 635 [1975]). It is settled that "[s]pecial damages contemplate the loss of something having economic or pecuniary value" (*Lieberman v Gelstein*, 80 NY2d 429, 434-435, 590 NYS2d 857 [1992]). "In pleading special damages, actual losses must be identified and causally related to the alleged tortious act" (*L.W.C. Agency, Inc. v St. Paul Fire & Marine Ins. Co.*, 125 AD2d 371, 373, 509 NYS2d 97 [2d Dept 1986]). "[T]hey must be fully and accurately identified 'with sufficient particularity to identify actual losses'" (*Matherson v Marchello*, 100 AD2d 233, 235, 473 NYS2d 998 [2d Dept 1984] [internal citation omitted]). In that the complaint fails to allege special damages, it fails to state a cause of action with regard to abuse of process (CPLR 3211[a][7]). Accordingly, the second cause of action is dismissed as to both defendants.

The Third Cause of Action: Infliction of Emotional Distress

It is well settled that a cause of action for negligent infliction of emotional distress, like an action for intentional infliction of emotional distress, must be supported by allegations of conduct 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 (*Tartaro v Allstate Indem. Co.*, 56 AD3d 758, 868 NYS2d 281 [2d Dept 2008]; *Deak v Bach Farms, LLC*, 34 AD3d 1212, 825 NYS2d 852 [4th Dept 2006]; *Sheila C. v Povich*, 11 AD3d 120, 781 NYS2d 342 [1st Dept 2004]; *Dillon v City of New York*, 261 AD2d 34, 704 NYS2d 1 [1st Dept 1999]; *Stanley v Smith*, 183 AD2d 675, 584 NYS2d 60 [1st Dept 1992]). The Appellate Division, First Department, has held that such cause of action, “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” (*Bernstein v East 51st Street Development Co., LLC*, 78 AD3d 590, 591, 914 NYS2d 3 [1st Dept 2010]). More recently, the Second Department clarified that, notwithstanding case law to the contrary, extreme and outrageous conduct is not an essential element of a cause of action to recover damages for negligent infliction of emotional distress (*Taggart v Costabile*, 131 AD3d 243, 14 NYS3d 388 [2d Dept 2015]). That conclusion is consistent with the Court of Appeals’ formulation of the cause of action alleging negligent infliction of emotional distress, which makes no mention of extreme and outrageous conduct. Further, a claim for negligent infliction of emotional distress must sufficiently set forth a duty owed by the defendant, to the plaintiff (see *Losquadro v Winthrop Uni. Hosp.*, 216 AD2d 533, 534, 628 NYS2d 770 [2d Dept 1995]; *O’Reilly v NYNEX Corp.*, 262 AD2d 207, 208, 693 NYS2d 13 [1st Dept 1999]). Here, plaintiff’s allegations of defendant’s false statements to the police are not so extreme in nature as to go beyond all possible bounds of decency, and to be regarded as atrocious even though plaintiff’s liberty was at stake (see *Levine v Gurney*, 149 AD2d 473, 539 NYS2d 967 [2d Dept 1989]). Therefore, plaintiff has not properly pled negligent infliction of emotional distress. Significantly, plaintiff now admits that she did send “nasty” texts. Plaintiff has also not shown that a duty existed between the parties.

A cause of action for intentional infliction of emotional distress “predicates liability on the basis of extreme and outrageous conduct, which so transcends the bounds of decency as to be regarded as atrocious and intolerable in a civilized society” (*Freihofer v Hearst Corp.*, 65 NY2d 135, 143, 490 NYS2d 735 [1985]). The conduct alleged by plaintiff is that both defendants filed false oral reports with the police department. This conduct may rise to the level of atrocity or outrageousness necessary to sustain a claim of this nature (see *Howell v New York Post Co.*, 81 NY2d 115, 596 NYS2d 350 [1993]), as it involves plaintiff’s liberty. However, the claim in the third cause of action for the negligent or intentional infliction of emotion distress must be dismissed, as it merely restates plaintiff’s cause of action for defamation (see *Curren v Carbonic Sys., Inc.*, 58 AD3d 1104, 872 NYS2d 240 [3d Dept 2009]; *Demas v Levitsky*, 291 AD2d 653, 738 NYS2d 402 [3d Dept 2002]). Plaintiff’s cause of action for the negligent and intentional infliction of emotional distress fall well within the ambit of her defamation claim, which also provide for recovery of damages based upon emotional harm (see *Di Orio v Utica City School Dist. Bd. of Educ.*, 305 AD2d 1114, 758 NYS2d 743 [4th Dept 2003]; *Demas v Levitsky*, *supra*; *Como v Riley*, 287 AD2d 416, 731 NYS2d 731 [1st Dept 2001]; *DEC v Auburn Enlarged School Dist.*, 249 AD2d 907, 672 NYS2d 591 [4th Dept 1998]; *Butler v Delaware Otsego Corp.*, 203 AD2d 783, 610 NYS2d 664 [3d Dept 1994]). Moreover, as plaintiff has admitted to sending

“nasty” texts, defendants have established their prima facie entitlement to dismissal of this cause of action based on truth.

As to the claim defendants are liable for the reckless infliction of emotional distress, reckless conduct is encompassed within the tort of intentional infliction of emotional distress and does not constitute a separate and distinct cause of action (*see Freihofer v Hearst Corp.*, 65 NY2d 135, 143, 490 NYS2d 735 [1985]; *Dana v Oak Park Marina*, 230 AD2d 204, 209, 660 NYS2d 906 [1997]; Restatement [Second] of Torts § 46; *see also Olmstead v Federated Dept. Stores*, 208 AD2d 979, 981, 617 NYS2d 225 [1994], *lv. denied* 85 NY2d 811, 631 NYS2d 287 [1995]).

Accordingly, defendants’ motion for summary judgment dismissing the third cause of action is granted.

The Fourth Cause of Action: Prima Facie Tort

Prima facie tort affords a remedy for “ ‘the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or a series of acts which would otherwise be lawful’ ” (*ATI, Inc. v Ruder & Finn*, 42 NY2d 454, 458, 398 NYS2d 864 [1977]; *see also Advance Music Corp. v American Tobacco Co.*, 296 NY 79, 70 NE2d 401[1949]; *Opera on Tour v Weber*, 285 NY 348, 34 NE2d 349 [1941]; *Wehringer v Helmsley-Spear, Inc.*, 59 NY2d 688, 463 NYS2d 417 [1983], *affg.* 91 AD2d 585, 457 NYS2d 78 [1982]). The requisite elements of a cause of action for prima facie tort are (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful (*Curiano v Suozzi*, 63 NY2d 113, 117, 480 NYS2d 466 [1984]; *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 332, 464 NYS2d 712 [1983]). A critical element of the cause of action is that plaintiff suffered specific and measurable loss, which requires an allegation of special damages (*see Curiano v Suozzi, supra*, 63 NY2d at p. 117, 480 NYS2d 466; *ATI, Inc. v Ruder & Finn, supra*, 42 NY2d at p. 458, 398 NYS2d 864; *Morrison v National Broadcasting Co.*, 19 NY2d 453, 458, 280 NYS2d 641 [1967]; *Nichols v Item Publishers*, 309 NY 596, 602, 132 NE2d 860 [1956]; *Susskind v Ipco Hosp. Supply Corp.*, 49 AD2d 915, 373 NYS2d 627 [2d Dept 1988]). Here, no special damages are alleged.

Moreover, it has been observed that “[p]rima facie tort should not become a ‘catch-all’ alternative for every cause of action which cannot stand on its own legs.” (*Belsky v Lowenthal*, 62 AD2d 319, 323, 405 NYS2d 62, *affd* 47 NY2d 820, 418 NYS2d 573[1979]; *Burns Jackson Miller Summit & Spitzer v Lindner, supra*, 59 NY2d at p. 333, 464 NYS2d 712). Where relief may be afforded under traditional tort concepts, prima facie tort may not be invoked as a basis to sustain a pleading which otherwise fails to state a cause of action in conventional tort (*see Ruza v Ruza*, 286 AD 767, 146 NYS2d 808 [1st Dept 1955]; *Porterfield v Saffan*, 7 AD2d 987, 183 NYS2d 896 [1st Dept 1959]; *Susskind v Ipco Hosp. Supply Corp., supra*; *Springer v Viking Press*, 90 AD2d 315, 457 NYS2d 246 [1st Dept 1982]). However, where a traditional tort remedy exists, a party will not be foreclosed from pleading, as alternative relief, a cause of action for prima facie tort (*see Board of Educ. v Farmingdale Classroom Teachers Assn.*, 38 NY2d 397, 380 NYS2d 635 [1975]). Accordingly, the fourth cause of action is dismissed.

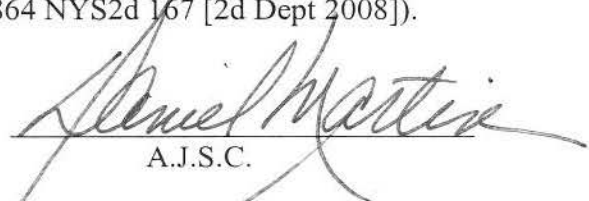
Turning to the cross motion for leave to amend the complaint, generally, leave to amend or supplement a pleading “shall be freely given” (CPLR 3025 [b]), unless the proposed amendment is palpably insufficient as a matter of law, patently devoid of merit, or would prejudice or surprise the opposing party (see *Maldonado v Newport Gardens, Inc.*, 91 AD3d 731, 937 NYS2d 260 [2d Dept 2012]; *Lariviere v New York City Tr. Auth.*, 82 AD3d 1165, 920 NYS2d 231 [2d Dept 2011]; *Gitlin v Chirinkin*, 60 AD3d 901, 875 NYS2d 585 [2d Dept 2009]; *Lucido v Mancuso*, 49 AD3d 220, 851 NYS2d 238 [2d Dept 2008]). However, when an amendment to a complaint is sought on the eve of trial, “judicial discretion in allowing such amendments should be ‘discreet, circumspect, prudent and cautious’ . . . and should be exercised sparingly” (*Morris v Queens Long Is. Med. Group, P.C.*, 49 AD3d 827, 828, 854 NYS2d 222 [2d Dept 2008]; see *Comsewogue Union Free School Dist. v Allied-Trent Roofing Sys., Inc.*, 15 AD3d 523, 790 NYS2d 220 [2d Dept 2005]). Further, when presented with an application for leave to amend made long after the case has been certified as ready for trial, the court should consider how long the party seeking the amendment was aware of the facts upon which the motion is predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted from such delay (see *Alrose Oceanside, LLC v Mueller*, 81 AD3d 574, 915 NYS2d 643 [2d Dept 2011]; *American Cleaners, Inc. v American Intl. Specialty Lines Ins. Co.*, 68 AD3d 792, 891 NYS2d 127 [2d Dept 2009]; *Sewkarran v DeBellis*, 11 AD3d 445, 782 NYS2d 758 [2d Dept 2004]).

Here, the proposed amended complaint is palpably insufficient and patently devoid of merit. Plaintiff seeks to add to the first cause of action an allegation that “DEBLER defamed, slandered and libeled the Plaintiff when she stated that COSENTINO threatened to kill DEBLER and her children.” The proposed amendment does not satisfy CPLR 3016 (a), which requires the complaint to state *in haec verba*, the particular defamatory words claimed to have been uttered by Debler to the police. Moreover, the proposed amended complaint does not assert a claim for special damages.

Sanctions

The branch of the defendants’ motions for imposition of sanctions and an award of attorneys’ fees is considered under 22 NYCRR 130-1.1, and is denied. The court finds that plaintiff did not engage in litigation which constitutes frivolous conduct as that term is defined in 22 NYCRR 130-1.1 (c) (see *McGee v J. Dunn Constr. Corp.*, 54 AD3d 1009, 864 NYS2d 167 [2d Dept 2008]).

Dated: SEPTEMBER 29, 2016


A.J.S.C.

X FINAL DISPOSITION NON-FINAL DISPOSITION