

Haffner v Lester

2016 NY Slip Op 32244(U)

October 31, 2016

Supreme Court, Queens County

Docket Number: 702863/2013

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS Part 14
Justice

STEVEN R. HAFFNER and
GORDON & HAFFNER, LLP.,

Plaintiffs,
-against-

ROY J. LESTER, et al.,

Defendants.

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The following papers read on this motion by defendants Roy J. Lester and Lester & Associates, P.C., for an order granting them summary judgment dismissing the amended complaint (complaint) against them; and on this cross motion by defendants Paul Bibbo and Nadine Lugo for, inter alia, an order vacating the note of issue and certificate of readiness.

Papers
Numbered

Notice of Motion - Affidavits - Exhibits..... EF92-116, 127-128
Notice of Cross Motion - Affidavits - Exhibits EF117-126
Answering Affidavits - Exhibits..... EF138, 151-155
Reply Affidavits..... EF147-150, 159-163

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

Defendants Roy J. Lester (Lester) and Lester & Associates, P.C. (collectively the Lester defendants), make the following allegations concerning the background to this action for, inter alia, defamation. Brandon Lisi and Katerina Arvanitakis represented Paul Bibbo and Nadine Lugo in various legal matters, including real estate transactions and investments.

In or about June 2011, Lisi proposed that Bibbo invest \$500,000.00 in connection with a catering hall that was in foreclosure. Plaintiff Steven R. Haffner (Haffner), an attorney and a partner in plaintiff Gordon and Haffner, LLP, drafted an agreement between Bibbo's company, CSH Ventures, LLC (CSH), and JAX Ventures (JAX), which required the former to make a \$500,000.00 down payment, of which \$450,000.00 would be held in escrow by the plaintiffs. The deal fell through, and plaintiffs, on behalf of CSH, began an action in the New York State Supreme Court, County of Nassau, to obtain the release of its down payment (*CSH Ventures, LLC v JAX Ventures, LLC*, Index No. 2437/12). Thereafter, apparently unsatisfied with plaintiffs' efforts, Bibbo retained the Lester defendants in connection with the lawsuit. The Lester defendants unsuccessfully negotiated with the plaintiffs for the release of the portion of the down payment held in escrow and, on August 20, 2012, the Lester defendants, at the request of Bibbo, began an action against the plaintiffs in the New York State Supreme Court, County of Nassau, asserting causes of action for, inter alia, conversion and breach of fiduciary duty (*CSH Ventures, LLC v Haffner*, Index No. 10642/12). The Lester defendants further assert that there are other actions involving other transactions which are relevant to the instant lawsuit.

Plaintiffs began the instant action on July 22, 2013. Their first through fourth, tenth, and eleventh causes of action, asserted against the Lester defendants, are for defamation. The thirteenth cause of action, also asserted against the Lester defendants, is for tortious interference with prospective business relations, and the cause of action rests on defamatory statements alleged to have been made by Lester. The complaint alleges, for example, that Lester stated about Haffner: (1) "Haffner has lost his mind, what is wrong with him, he's going to get disbarred"; (2) he's "mentally ill"; (3) "Every day that goes by without returning the money he has a better chance of being arrested even though at this point it is so far gone he has already committed a crime"; (4) "Arvanitakis and Haffner are criminals and Haffner might not be practicing by the time the date to perfect the appeal comes around"; (5) "I am one phone call away from calling the FBI"; (6) "Haffner, along with Arvanitakis, stole \$450,000 of Bibbo's money out of an escrow account"; and (7) "Haffner stole \$530,000 of Bibbo's and Lugo's money."

Preliminarily, that branch of the Lester defendants' motion for an order granting them summary judgment dismissing plaintiffs' fourteenth cause of action for civil conspiracy is denied as moot, inasmuch as plaintiffs have withdrawn same (*see* Affidavit of David Gordon in Opposition to Motion at ¶ 6 n 1).

As to the branch of the motion seeking an order granting them summary judgment dismissing the causes of action for slander as asserted against them, the Lester defendants contend that the statements, which they deny making, were privileged even if made and, thus, are not actionable. The Lester defendants argue that the alleged statements are protected by:

(1) an absolute privilege applicable to communications by an attorney relevant to an actual, pending lawsuit; or (2) a qualified privilege applicable to communications relevant to future litigation anticipated in good faith.

“The law is well settled that oral or written statements made in the course of a judicial proceeding, that are material or pertinent to the litigation, are absolutely privileged and protected from liability for defamation” (*Baratta v Hubbard*, 136 AD2d 467, 468 [1st Dept 1988]; see *Front, Inc. v Khalil*, 24 NY3d 713 [2015]; *Brady v Gaudelli*, 137 AD3d 951 [2d Dept 2016]; *Sinrod v Stone*, 20 AD3d 560 [2d Dept 2005]; *Impallomeni v Meiselman, Farber, Packman & Eberz*, 272 AD2d 579 [2d Dept 2000]). “The privilege ‘embraces anything that may possibly be pertinent or which has enough appearance of connection with the case’ ” (*Pomerance v McTiernan*, 51 AD3d 526 [1st Dept 2008], quoting *Seltzer v Fields*, 20 AD2d 60, 63 [1st Dept 1963], *affd* 14 NY2d 624 [1964]; *Dachowitz v Kranis*, 61 AD2d 783 [2d Dept 1978]). “The privilege attaches not only at the trial or hearing phase, but to every step of the proceeding in question, even if it is preliminary and/or investigatory” (14 NY Prac, New York Law of Torts § 1:50; see *Zapata v Tufenkjian*, 123 AD3d 814 [2d Dept 2014]; *El Jamal v Weil*, 116 AD3d 732 [2d Dept 2014]). If pertinent to the case, communications among the parties, witnesses, counsel, and the court are shielded by an absolute privilege which “applies to statements made in or out of court, on or off the record, and regardless of the motive with which they were made” (see *El Jamal*, 116 AD3d at 734).

Where litigation is only prospective, statements made by an attorney on behalf of his or her client in anticipation of litigation are also protected, but only by a qualified privilege (*Front, Inc.*, 24 NY3d at 715). “[S]tatements made prior to the commencement of an anticipated litigation are privileged, [but] the privilege is lost where a defendant [sic: plaintiff] proves that the statements were not pertinent to a good faith anticipated litigation” (*id.* at 720).

Plaintiffs oppose the instant motion for summary judgment on the ground that, inter alia, discovery has not been completed. They state that defendants have not complied with the plaintiffs’ demands for documents, the defendants have not appeared for their depositions, and the deposition of a non-party witness has not been taken. Plaintiffs filed a note of issue on March 11, 2016 subject to an “Affirmation of Outstanding Pre-Note Discovery” at the direction of the Compliance Conference Order. The outstanding discovery consisted of depositions of the defendants (the parties had agreed on a schedule for taking those depositions) and documentary discovery.

The Lester defendants have failed to meet their prima facie burden of establishing that the statements alleged to have been made by them are protected by either an absolute or a qualified privilege. Defendant Roy J. Lester, who – by his affidavit – simply ratifies the

affirmation of his counsel, has failed to specifically address each statement and how it was material or pertinent to the litigation for purposes of establishing absolute privilege. Nowhere in their motion do the Lester defendants explain how any of the statements made – which statements include charges of theft, crime, professional incompetence, and mental illness – were material and pertinent to, for example the lawsuit they commenced on Bibbo’s behalf alleging causes of action against plaintiffs for conversion and breach of fiduciary duty. Rather, these defendants declare, in a conclusory manner, that, since statements were alleged to have been made during the course of “Litigations,” they are, ipso facto, privileged. Further, and for the same reasons, the Lester defendants detail no circumstances or facts which would subject the statements alleged to have been made in plaintiffs’ first two causes of action to a qualified privilege.

The Lester defendants have also failed to meet their prima facie burden of establishing their entitlement to judgment dismissing plaintiffs’ thirteenth cause of action for tortious interference with prospective business relations. The Lester defendants state that plaintiffs have not properly made out the claim. However, the Lester defendants cannot meet their burden simply by pointing to gaps in plaintiffs’ case (*see Fields v Village of Sag Harbor*, 92 AD3d 718 [2d Dept 2012]; *Velasquez v Gomez*, 44 AD3d 649 [2d Dept 2007]; *Calderone v Town of Cortlandt*, 15 AD3d 602 [2d Dept 2005]).

In any event, and even assuming the Lester defendants have met their prima facie burden, it is clear from the lack of discovery, as pointed out by plaintiffs in opposition (and as further evidenced by the cross motion), that issues of fact exist concerning, inter alia, the circumstances under which the alleged defamatory statements were made. The lack of opportunity given to plaintiff to, for example, depose any of the defendants herein, warrants denial of the summary judgment motion.

Turning to the cross motion by defendants Bibbo and Lugo, initially, same will be considered despite plaintiffs’ opposition, which points out that the cross motion is procedurally defective, since it would appear that: (1) there is no prejudice; (2) plaintiffs had an opportunity to oppose it; and (3) plaintiff concedes that there is discovery outstanding. Turning to the merits of the cross motion, an order pursuant to CPLR 3126 precluding the plaintiffs from offering any testimony or evidence is not warranted. Preclusion may be imposed where “the offending party’s lack of cooperation with disclosure was willful, deliberate, and contumacious” (*Assael v Metro. Tr. Auth.*, 4 AD3d 443 [2d Dept 2004] [internal quotation marks omitted]; *see Arpino v F.J.F. & Sons Elec. Co.*, 102 AD3d 201 [2d Dept 2012]). “The willful and contumacious character of a party’s conduct can be inferred from the party’s repeated failure to comply with discovery demands or orders without a reasonable excuse” (*Commisso v Orshan*, 85 AD3d 845 [2d Dept 2011]; *Arpino*, 102 AD3d

at 210). The defendants did not show that the plaintiffs engaged in conduct reaching the required level of fault.

Notwithstanding the fact that significant discovery remains outstanding, under the circumstances of this case, the court declines to vacate the note of issue and instead exercises its discretion by directing all discovery to be completed within a certain period, delineated, *infra* (see *Encarnacion v Monier*, 81 AD3d 875 [2d Dept 2011]; *Rampersant v Nationwide Mut. Fire Ins. Co.*, 71 AD3d 972 [2d Dept 2010]).

Accordingly, the branch of the motion for an order granting the Lester defendants summary judgment dismissing the complaint is denied, and denied as moot with respect to the fourteenth cause of action alleging conspiracy. The branch of the cross motion by defendants Bibbo and Lugo for an order of preclusion is denied. The branch of the cross motion for an order vacating the note of issue is denied without prejudice and with leave to renew if necessary. Given the clear lack of discovery having taken place in this action, the remaining branches of the cross motion are granted to the extent that it is hereby

ORDERED that plaintiffs, within 30 days after service of a copy of this order together with notice of entry, to be served by defendants Bibbo and Lugo within 30 days of the entry date of this order, shall respond to the latter's post-EBT notice for discovery and inspection dated December 15, 2015, and it is further

ORDERED that the defendants shall appear for examinations before trial in caption order as follows: defendants Roy J. Lester and Lester & Associates, P.C., shall appear for examination before trial, at a place, date, and time to be agreed upon by counsel, on or before, but no later than, January 9, 2017, and defendants Bibbo and Lugo shall appear for examination before trial, at a place, date, and time to be agreed upon by counsel, on or before, but no later than January 17, 2017; and it is further

ORDERED that Arvanitakis' deposition shall be held within 30 days after the completion of Lugo's deposition, on a date to be stipulated by her and the parties, at the place and time designated in the judicial subpoena, and it is further

ORDERED that post-deposition demands are to be served within 30 days of the taking of said deposition and to be responded to within 30 days thereafter; and it is further

ORDERED that the failure to adhere to the deadlines noted above may result, upon motion, in the imposition of sanctions, which may include the striking of pleadings.

Any branch of either the motion or cross motion not otherwise specifically addressed herein is denied.

Dated: October 31, 2016

J.S.C.