Swedin v Russo
2017 NY Slip Op 30223(U)
January 18, 2017
Supreme Court, New York County
Docket Number: 160788/2015
Judge: Nancy M. Bannon

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42
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SUSANNA B. SWEDIN

Plaintiff

Index No. 160788/2015

v

DECISION AND ORDER

ETIENNE RUSSO

Defendant. MOT SEQ 001

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action, inter alia, to recover damages for assault and battery, the defendant moves pursuant to CPLR 3211(a) to dismiss the complaint on the grounds that the court lacks subject matter jurisdiction over the second cause of action (CPLR 3211[a][2]), the complaint fails to state a cause of action (CPLR 3211[a][7]), and the court lacks personal jurisdiction over him (CPLR 3211[a][8]). The defendant also moves pursuant to CPLR 3024(b) to strike allegedly scandalous matter from the second cause of action, and for an award of sanctions. The plaintiff opposes the motion. That branch of the motion which is to dismiss the complaint is granted, and the motion is otherwise denied.

II. BACKGROUND

The plaintiff, a resident of Spain, commenced this action against the defendant, a resident of Belgium, asserting that he

assaulted and battered her in a Manhattan hotel on October 24, 2014 (first cause of action), sexually assaulted and battered her in Paris, France, on January 24, 2015 (second cause of action), and intentionally inflicted emotional distress upon her by virtue of that conduct (third cause of action), thus entitling her to an award of punitive damages (fourth cause of action).

After filing the summons and complaint on October 21, 2015, the plaintiff moved pursuant to CPLR 308(5), ex parte, for leave to serve process upon the defendant by e-mail at his last known e-mail address. In support of that motion, the plaintiff's attorney asserted that the defendant owned a fashion production services company, and frequently traveled from Belgium to Italy, China, Japan, and the United States, particularly to New York and Miami, where, according to the company's website, it maintained a permanent office. According to the affidavit of the plaintiff's Florida process server, when the server traveled to the Miami address on December 3, 2015, it turned out to be an apartment that the defendant used as a residence when he was in Miami and that, according to neighbors, the defendant was scheduled to be in Miami from December 3-5, 2015. The defendant was not there on December 3, and the process server averred in his affidavit that he made additional unsuccessful attempts personally to deliver the summons and complaint to the defendant at the Miami address on December 4 and December 5.

In her ex parte motion, the plaintiff argued that the defendant's travel schedule made service upon the defendant pursuant to CPLR 308(2), (3), and (4) impracticable, and that e-mail service was most likely to apprise the defendant of the commencement of the action against him. By order dated February 22, 2016, the Supreme Court (Cooper, J.) granted the ex parte motion and permitted the plaintiff to serve process upon the defendant by transmitting copies of the summons and complaint to him at several e-mail addresses over two consecutive days and mailing a copy to the defendant at the Miami address by certified mail, return receipt requested. There is no dispute that the plaintiff complied with the directives in that order.

The defendant now moves pursuant to CPLR 3211(a)(2), (7), and (8) to dismiss the complaint. In connection with the second cause of action, he argues that New York courts do not have subject matter jurisdiction (see CPLR 3211[a][2]) over a cause of action sounding in tort asserted by one nondomiciliary against another nondomiciliary where the tort did not occur in New York. Alternatively, he contends that the court lacks personal longarm jurisdiction over him in connection with that cause of action. See CPLR 3211(a)(8). The defendant further argues that the complaint does not state a cause of action (see CPLR 3211[a][7]), inasmuch as it does not set forth any factual allegations supporting the assault, battery, or intentional infliction of

emotional distress causes of action, or articulate any of the elements thereof, but instead simply asserts, without more, that he committed an assault and battery and intentionally inflicted emotional distress upon the plaintiff. He also contends that service of process was improperly effected upon him. See CPLR 3211(a)(8). Specifically, he argues that the order directing the manner of service was secured by misrepresentation, inasmuch as the plaintiff's attorney falsely suggested that he had moved away from Belgium, despite his status as a permanent resident of that country, and that the plaintiff made no attempts to serve him in Belgium in accordance with the Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters (the Hague Convention) (20 UST 361, 658 UNTS 163, TIAS 10072), to which Belgium is a signatory. The defendant also argues, in an attorney's affirmation, that he does not reside at the Miami address, and that "Plaintiff's suggestion that the Miami apartment is suitable for establishing Defendant's residence in the United States for service of process is misleading and improper." Counsel suggests that the website of the defendant's company that was referenced in the plaintiff's ex parte motion does not identify the Miami apartment as a place where the company did or transacted business.

In opposition to the motion, the plaintiff's attorney disputes the defendant's contention that this court lacks subject

matter jurisdiction over the second cause of action, contending that, since the tortious conduct underpinning the first cause of action occurred in New York, and CPLR 601(a) permits the joinder of all claims against a defendant, the court has jurisdiction over any claim asserted by the plaintiff against the defendant. He further argues that the CPLR's liberal pleading standards relieve him of the need to particularize or specify the conduct that constituted an assault, a battery, or the intentional infliction of emotional distress upon the plaintiff. He further contends that he made no misrepresentations whatsoever in his prior submissions, and that alternative service upon the defendant by e-mail was warranted here. He submits his process server's affidavit of due diligence and a printout of the Florida Department of State Division of Corporations, which reveals that the defendant's company is registered as a domestic Florida corporation, its principal place of business and mailing address are at the Miami location visited by the process server, and that the defendant is the principal officer/director of the company, whose address is that same location.

III. DISCUSSION

A. PERSONAL JURISDICITON-ALTERNATIVE SERVICE OF PROCESS

Since the order directing service of process by e-mail was issued ex parte, the defendant, to challenge it, could have

either moved to vacate the order on the ground that it was secured by the plaintiff's misconduct (see CPLR 5015[a][3]) or moved the Appellate Division to vacate or modify it. See CPLR 5704(a). He elected neither alternative, but instead challenges the ex parte order collaterally by moving pursuant to CPLR 3211(a)(8) to dismiss the complaint for lack of personal jurisdiction, arguing that service by e-mail did not confer jurisdiction over him despite being ordered by the court.

This court perceives no basis for deviating from the duly issued order of the Supreme Court permitting alternative e-mail service pursuant to CPLR 308(5). See Alfred E. Mann Living Trust v ETIRC Aviation S.A.R.L., 78 AD3d 137, 141-142 (1st Dept. 2010); State St. Bank & Trust Co. v. Coakley, 16 AD3d 403, 403 (2nd Dept. 2005) Home Fed. Sav. Bank v Versace, 252 AD2d 480, 480 (2nd Dept. 1998). Moreover, there is no merit to the defendant's contention that he was deprived of due process. See Harkness v Doe, 261 AD2d 846 (4th Dept. 1999); see also Henderson-Jones v City of New York, 87 AD3d 498, 506 (1st Dept. 2011).

B. PERSONAL LONGARM JURISDICTION

While, contrary to the defendant's contention, the court has subject matter jurisdiction over a cause of action alleging assault and battery regardless of the identity of the parties, the court lacks personal longarm jurisdiction over the defendant

under CPLR 301 and 302 in connection with the alleged assault and battery that occurred in Paris. This conclusion is warranted since neither party is a New York domiciliary, the second cause of action did not arise in New York, and the defendant did not transact business within the state, commit that allegedly tortious act within the state, or commit a tortious act without the state that gave rise to injury within the state. The plaintiff raises no serious opposition to the defendant's showing in this regard. It is well settled that the inquiry into whether a New York court may exercise longarm jurisdiction over a defendant must be made on a claim-by-claim basis. See Fantis Foods v Standard Importing Co., 49 NY2d 317 (1980). Thus, although the court has longarm jurisdiction over the defendant in connection with the first and third causes of action by virtue of his alleged commission of a tort within the state (see CPLR 302[a][2]), it may not automatically exercise longarm jurisdiction over him in connection with the second cause of action, which does not fall within the ambit of CPLR 301 or 302. Hence, the second cause of action, which alleges that the defendant committed a tortious act in France, must be dismissed for lack of personal longarm jurisdiction.

In light of this determination, that branch of the defendant's motion which is to strike allegedly scandalous material from the second cause of action must be denied as

academic. The court notes that, in any event, the allegations of sexual misconduct in the second cause of action would have been integral to the viability of that claim and, thus, denial of that branch of the motion would have been warranted had the cause of action not been dismissed. See Irving v Four Seasons Nursing & Rehabilitation Ctr., 121 AD3d 1046, 1047-1048 (2nd Dept. 2014).

C. FAILURE TO STATE A CAUSE OF ACTION

Contrary to the plaintiff's contentions, the factual allegations in the first and third causes of action are insufficient to state a cause of action to recover for assault and battery and intentional infliction of emotional distress, respectively. In order to sustain a cause of action to recover damages for assault, there must be proof of physical conduct placing the plaintiff in imminent apprehension of harmful contact. See Timothy Mc. v Beacon City Sch. Dist., 127 AD3d 826, 829 (2nd Dept. 2015); Gabriel v Scheriff, 115 AD3d 791, 792 (2nd Dept. 2014). The elements of a cause of action to recover damages for battery are intentional bodily contact that is offensive in nature. See Timothy Mc. v Beacon City Sch. Dist., supra; Cerilli v Kezis, 16 AD3d 363, 364 (2nd Dept. 2005). Intentional infliction of emotional distress requires "'(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 Cos. Inc., 27 NY3d 46, 56 (2016), quoting Howell v New York Post Co., 81 NY2d 115, 121 (1993).

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the pleading should be construed liberally, and the facts as alleged in the complaint are presumed to be true and accorded the benefit of every possible favorable inference. See Siegmund Strauss, Inc. v East 149th Realty Corp., 104 AD3d 401, 403 (1st Dept. 2013); Scott v Bell Atlantic Corp., 282 AD2d 180, 183 (1st Dept. 2001). The standard "is whether, within the four corners of the complaint, any cognizable cause of action has been stated." Scott v Bell Atlantic Corp, supra, at 183; see Siegmund Strauss, Inc. v East 149th Realty Corp., supra, at 403. Nonetheless, "even under the liberal 'notice pleading' requirements of CPLR 3013, a complaint still must allege, inter alia, 'the material elements of each cause of action' asserted." East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc., 66 AD3d 122, 127 (2nd Dept. 2009). Thus, allegations consisting of bare legal conclusions devoid of any factual allegations are not entitled to any favorable presumption. See Kamhi v Tay, 244 AD2d 266, 266 (1st Dept. 1997); Stuart Lipsky, P.C. v Price, 215 AD2d 102, 103 (1st Dept. 1995).

Here, the allegations in the first and third causes of

action do not set forth facts necessary to support the substantive causes of action asserted by the plaintiff therein. Claims for assault, battery, and intentional infliction of emotional distress arising from a battery are serious in nature, but, in order to state a cause of action, a plaintiff must do more than simply refer to the names by which these causes of action are known. The first cause of action alleges only that the plaintiff and defendant were staying together at The Mercer Hotel at 147 Mercer Street in Manhattan on October 24, 2014, and that, at that place and time, the defendant assaulted and battered the plaintiff, thus inflicting physical injuries upon her and causing her to incur expenses for medical treatment. The third cause of action alleges only that the defendant knowingly and intentionally committed the assault and battery, as alleged in the first cause of action, along with concomitant abuse and harassment, without regard to the plaintiff's emotional state, thus causing emotional damages to the plaintiff.

Although the plaintiff need not provide, at this stage of the litigation, every detail of the defendant's alleged conduct, such as what he allegedly employed to make physical contact with the plaintiff or how many times he made such contact, there are no allegations whatsoever describing the actual conduct he purportedly engaged in or how that conduct satisfies the elements of the various torts that were asserted. Thus, there is no

allegation that the defendant engaged in physical conduct that placed the plaintiff in imminent apprehension of harmful contact so as to make out a cause of action sounding in assault, let alone the nature of that conduct. See Gould v Rempel, 99 AD3d 759, 760 (2nd Dept. 2012). There no express allegations, conclusory or otherwise (see Soumayah v Minnelli, 41 AD3d 390, 392 [1st Dept. 2007]), regarding the conduct allegedly constituting the intentional, unwanted, and offensive bodily contact necessary to state a cause of action sounding in battery. The complaint also sets forth no facts, other than those related to the dismissed second cause of action, supporting the conclusory allegation that the defendant harassed and abused the plaintiff in connection with or in addition to the assault and battery allegedly committed in New York so as to intentionally inflict emotional distress upon her. See Gilewicz v Buffalo Gen. Psychiatric Unit, 118 AD3d 1298, 1300 (4th Dept. 2014); Klein v Metropolitan Child Servs., Inc., 100 AD3d 708, 711 (2nd Dept. 2012).

Consequently, the first and third causes of action must be dismissed for failure to state a cause of action, albeit without prejudice to a motion for leave to amend the complaint. See CPLR 3025(b); Janssen v Incorporated Vil. of Rockville Ctr., 59 AD3d 15, 27-28 (2nd Dept. 2008).

Since the second cause of action must be dismissed for lack

of personal longarm jurisdiction, the request for dismissal of that cause of action for failure to state a cause of action has been rendered academic.

The defendant correctly argues that New York does not recognize a separate cause of action for punitive damages. See Rivera v City of New York, 40 AD3d 334, 344 (1st Dept. 2007). Hence, the fourth cause of action must be dismissed for failure to state a cause of action.

There is no basis for an award of sanctions against the plaintiff, as the plaintiff's attorney made no misrepresentation in connection with the application for leave to effect service of process by alternative service.

IV. CONCLUSION

Accordingly, in light of the foregoing, it is

ORDERED that those branches of the defendant's motion which are to dismiss the first and third causes of action are granted, those causes of action are thereupon dismissed without prejudice, those branches of the defendant's motion which are to dismiss the second and fourth causes of action are granted, those causes of action are thereupon dismissed with prejudice, and the motion is otherwise denied; and it is further,

ORDERED that the Clerk of the court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the court.

Dated: 1-18-17

ENTER:

J.S.C.

HON. NANCY M. BANNON