

Weiss v Nolan

2017 NY Slip Op 30829(U)

April 20, 2017

Supreme Court, New York County

Docket Number: 160202/2013

Judge: Carol R. Edmead

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD
J.S.C.
Justice

PART 35

Index Number : 160202/2013
WEISS, MICHAEL
vs
NOLAN, JACOB
Sequence Number : 013
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 4/5/17
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

In this action arising out of an attempted murder of plaintiff, defendant Pamela Buchbinder (“defendant”) moves pursuant to CPLR 3212 for summary judgment dismissing plaintiff’s claims for punitive damages and attorneys’ fees.

Defendant argues that there is no evidence that her alleged conduct was part of a pattern of similar conduct directed at the public at large, and in the absence of a viable punitive damage claim, the attorneys’ fees claim fails as a matter of law.

In opposition, plaintiff argues that based on the “Law of the Case” doctrine, defendant cannot now raise the same arguments previously and unsuccessfully raised in 2014 in her motion to strike these claims. The Court previously held that “Punitive damages are recoverable in all actions based upon tortious acts which involve ingredients of malice, fraud, oppression, insult, wanton or reckless disregard of one’s rights, or other circumstances of aggregation, as a punishment of the defendant and admonition to others” (*Weiss v. Nolan*, 2014 NY Slip Op 31304[U]; 2014 N.Y. Misc. LEXIS 2295, at *24). The Court also held that the “facts of the complaint, if true, adequately support an award for punitive damages and attorney’s fees.” (*Id.* at *24-25). Thus, according to plaintiff, summary dismissal of these claims are unwarranted.

In reply, defendant argues that it is undisputed that punitive damages are not recoverable under the circumstances herein where the alleged tortious conduct was not part of a pattern of similar conduct aimed at the public. Further, the law of the case doctrine does not apply to her instant motion for summary judgment.

Dated: _____, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

Discussion

At the outset, the court notes that the law of the case doctrine has no applicability to this motion for summary judgment (*Moses v. Savedoff*, 96 A.D.3d 466, 947 N.Y.S.2d 419 [1st Dept 2012] (“the law of the case doctrine does not apply when a motion to dismiss is followed by a summary judgment motion, as is the case here”); *see also*, *Tenzer, Greenblatt, Fallon & Kaplan v. Capri Jewelry, Inc.*, 128 A.D.2d 467, 513 N.Y.S.2d 157 [1st Dept 1987] (“The law of the case doctrine is, however, inapplicable herein, as a motion to dismiss under CPLR 3211(a)(7) for failure to state a cause of action, which addresses merely the sufficiency of the pleadings, is distinct from a motion for summary judgment pursuant to CPLR 3212, which searches the record and looks to the sufficiency of the underlying evidence”). Although the punitive damages and attorney’s fees issues have already been litigated, they were only litigated in the context of a motion to dismiss pursuant to CPLR 3211. Thus, contrary to plaintiff’s contention, defendant is not prohibited from raising the merits of these claims in the context of a motion for summary judgment.

Nevertheless, defendant failed to establish that, under the circumstances, the punitive damages and attorneys’ fees claims lack merit as a matter of law.

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the “cause of action . . . has no merit” (CPLR 3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Madeline D’Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also Powers ex rel. Powers v 31 E 31 LLC*, 24 NY3d 84 [2014]).

The moving party must demonstrate entitlement to judgment as a matter of law and the absence of triable issues of fact and the failure to make such a showing will result in the denial of the motion, regardless of the sufficiency of the opposing papers (*Corprew v City of New York*, 106 AD3d 524, 965 NYS2d 108 [1st Dept 2013]; *TrizecHahn, Inc. v Timbil Chiller Maintenance Corp.*, 92 AD3d 409, 937 NYS2d 586 [1st Dept 2012]; *Santos v New York City Transit Authority*, 99 AD3d 550, 952 NYS2d 179 [1st Dept 2012]).

It is undisputed that caselaw holds that the purpose of punitive damages is not to remedy private wrongs but to vindicate public rights (*see Garrity v Lyle Stuart, Inc.*, 40 NY2d 354, 358 [1976]). Further, it is undisputed that a private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he was aggrieved and which is actionable as an independent tort, but also that such conduct was part of a pattern of similar conduct directed at the public generally (*see New York University v Continental Ins. Co.*, 87 NY2d 308, 315-316 [1995]; *Rocanova v Equitable Life Assurance Society of United States*, 83 NY2d 603, 613 [1994]; *RTC Industries, Inc. v Goodtimes Home Video Corp.*, 1997 WL 35524 [SDNY 1997]).

However, defendant ignores the fact that punitive damages may be permitted in the

“singularly rare” case where the “wrong complained of is morally culpable, or is actuated by evil and reprehensible motives” (*Garrity v Lyle Stuart, Inc.*, 40 NY2d 354, 360); see *Knieriemen v Bache Halsey Stuart Shields*, 74 A.D.2d 290427 N.Y.S.2d 10 [1st Dept 1980] citing *Walker v Sheldon*, 10 NY2d 401, 404). A court only awards those damages in singularly rare cases, such as “when plaintiffs show extreme aggravating factors such as improper state of mind or malice” (*Knieriemen v. Bache Halsey Stuart Shields*, 74 AD2d 290, 294, citing *Roginsky v. Richardson-Merrell, Inc.*, 378 F2d 832, 843 [2d Cir 1967]) or wrongdoing to the public (*Karen S. "Anonymous" v Streitferdt*, 172 AD2d 440, 441, quoting *Rand & Paseka Mfg. Co. v Holmes Protection*, 130 AD2d 429, 431, *lv denied* 70 NY2d 615).

Indeed, it has been stated that punitive damages are intended “to punish the wrongdoer for his misconduct and furnish a wholesome example” (*Merrick v Four Star Stage Light*, 60 AD2d 806, 807), and “are awarded in tort actions '[w]here the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime” (*Prozeralik v Capital Cities Communications, Inc.*, 82 NY2d 466, 605 NYS2d 218, 626 NE2d 34 [1993], quoting Prosser and Keeton, Torts § 2, at 9 [5th ed. 1984]). That author teaches that: “Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton” (Prosser and Keeton, Torts § 2, at 9-10 [5th ed.1984]). “Punitive damages are available only in those limited circumstances where it is necessary to deter defendant and others like it from engaging in conduct that may be characterized as 'gross' and 'morally reprehensible' and of 'such wanton dishonesty as to imply criminal indifference to civil obligations' ” (*New York University v Continental Ins. Co.*, *supra*, at 316).

In light of the Family Court’s Order, which set forth findings of fact as to defendant’s active and malicious role in the attempted “planned” murder of her child’s father in order to recover the proceeds of an insurance policy, the plaintiff herein, defendant failed to establish that the claim for punitive damages herein does not fall within the “singularly rare” case where the “wrong complained of is morally culpable, or is actuated by evil and reprehensible motives (see e.g., *Launders v. Steinberg*, 39 A.D.3d 57, 828 N.Y.S.2d 36 [1st Dept 2007] (affirming punitive award against defendant who was convicted for the death of his daughter and stating that “As the plaintiff asserts, punitive damages are appropriate in cases where the wrong complained of is “actuated by evil and reprehensible motives”); *Guariglia v. Price Chopper Operating Co., Inc.*, 38 A.D.3d 1043, 830 N.Y.S.2d 871 [3d Dept 2007] (finding punitive damages award “appropriate to punish defendant and deter repetition of the conduct committed here” where defendant “recklessness in leaving narcotics unsecured and within easy reach of a two-year-old child led directly to the child's death”)). As such, and under the circumstances, dismissal of the punitive damages claim as a matter of law is unwarranted.

Consequently, dismissal of the attorneys’ fees claim, which is premised on the dismissal of the punitive damage claim, is unwarranted.

Conclusion

Based on the foregoing, it is hereby

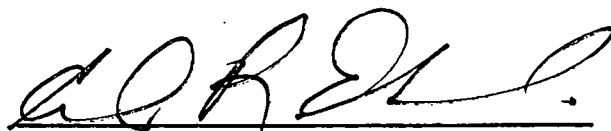
ORDERED that defendant motion pursuant to CPLR 3212 for summary judgment dismissing plaintiff's claims for punitive damages and attorneys' fees is denied; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry.

This constitutes the decision and order of the Court.

DATED:

4/20/17



HON. CAROL R. EDMED ^{J.S.C.}
J.S.C.

- 1. CHECK ONE :
- 2. CHECK AS APPROPRIATE :
- 3. CHECK IF APPROPRIATE :

DO NOT POST

CASE DISPOSED

MOTION IS: GRANTED DENIED

SETTLE ORDER

FIDUCIARY APPOINTMENT

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

SUBMIT ORDER

REFERENCE