

**York v Marsella**

2017 NY Slip Op 32760(U)

November 9, 2017

Supreme Court, Queens County

Docket Number: 2601/17

Judge: Carmen R. Velasquez

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38  
Justice

-----x  
ESTHER YORK,

Index No. 2601/17

Plaintiff,

Motion

Date: June 7, 2017

-against-

M# 2

CELESTE MARSELLA and CHARLES  
FEINSTEIN,

Defendants.  
-----x

The following papers numbered 1 - 11 read on this motion by the defendant Charles Feinstein for an order dismissing the complaint insofar as asserted against him; and cross motion by the plaintiff for an order directing the recusal of the Hon. Pam Jackman Brown from this matter.

PAPERS  
NUMBERED

Notice of Motion - Affidavits - Exhibits.....	1 - 4
Notice of Cross Motion - Affidavits - Exhibits....	5 - 8
Replying Affirmation.....	9 -11

Upon the foregoing papers it is ordered that this motion by the defendant Charles Feinstein for an order dismissing the complaint insofar as asserted against him and cross motion by the plaintiff are decided as follows:

At the outset, the court notes that pursuant to an order dated October 30, 2017, the complaint as against defendant Celeste Marsella was dismissed.

The cross motion by the plaintiff for an order directing the recusal of the Hon. Pam Jackman Brown from this matter is denied as moot. Pursuant to an order dated April 26, 2017, Justice Jackman Brown recused herself from this action. The matter was thereafter reassigned to this Part by order of the Honorable Jeremy S. Weinstein, Administrative Judge, on May 17, 2017.

The complaint alleges that the plaintiff was represented by Donald O'Sullivan in various legal actions, including a

matrimonial case. Mr. O'Sullivan died on February 4, 2017. Mr. O'Sullivan rented office space at 61 Broadway in New York City, and was the sub-tenant of defendant Feinstein.

Plaintiff asserts that defendant Feinstein refused to allow plaintiff access to her legal files following Mr. O'Sullivan's death. Plaintiff asserts that when she and a friend arrived at Mr. O'Sullivan's office on February 14, 2017 to retrieve her files, defendant Feinstein impeded their exit and screamed profanities and vile language at them. Plaintiff alleges that the refusal to turn over the files caused a delay in the legal proceedings, which resulted in prejudice to her. Defendant Feinstein, in support of the motion to dismiss, asserts that he did not have permission or consent to release Mr. O'Sullivan's files to the plaintiff. However, pursuant to a stipulation dated May 17, 2017 in an action pending under index number 700938/17 before the Hon. Diccia Pineda-Kirwan, plaintiff was to retrieve all of her legal files on June 12, 2017 at 2:00 P.M.

The cross motion by the plaintiff for an order directing the recusal of the Hon. Pam Jackman Brown from this matter is denied as moot. Pursuant to an order dated April 26, 2017, Justice Jackman Brown recused herself from this action. The matter was thereafter reassigned to this Part by order of the Honorable Jeremy S. Weinstein, Administrative Judge, on May 17, 2017.

The first cause of action of the complaint seeking to compel defendant to return plaintiff's legal files is moot. As noted above, under the May 17, 2017 stipulation, plaintiff would pick up all of her matrimonial and other files, including malpractice files, from the office of Mr. O'Sullivan, on June 12, 2017. There is no allegation that the parties have failed to comply with the stipulation. Thus, it appears that the relevant files were returned to the plaintiff, and therefore, the first cause of action is dismissed.

The second cause of action alleges that defendant's conduct caused the plaintiff to suffer extreme emotional distress. To the extent plaintiff is alleging intentional infliction of emotional distress, this cause of action is without merit.

It is well settled that liability for damages as a result of intentional infliction of emotional distress arises only where the conduct alleged 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." (*Howell v New York Post Co.*, 81 NY2d 115, 122 [1993] [quoting *Murphy v American Home Prods. Corp.*, 58

NY2d 293, 303 [1983]; *Tartaro v Allstate Indem. Co.*, 56 AD3d 758, 759 [2d Dept 2008].) Accepting the allegations of the complaint as true, the conduct alleged therein does not rise to the level of behavior so extreme and outrageous that warrants a finding of intentional infliction of emotional distress. (see *Murray v 600 East 21<sup>st</sup> St., LLC*, 55 AD3d 805, 806 [2d Dept 2008]; *Simon v 160 West End Ave. Corp.*, 7 AD3d 318, 320 [1st Dept 2004].) Plaintiff's contention that defendant Feinstein, the landlord of her deceased attorney, refused to allow plaintiff access to her legal files following the death of the attorney, is not extreme and outrageous conduct, particularly where it was unclear to the landlord what his obligation was, if any, following Mr. O'Sullivan's death.

Similarly, plaintiff's assertion that defendant Feinstein screamed profanities and used vile language towards the plaintiff does not constitute extreme and outrageous conduct. Indeed, insults and indignities are not sufficient to sustain a cause of action for intentional infliction of emotional distress. (see *Poliah v Westchester County Country Club, Inc.*, 14 AD3d 601, 601 [2d Dept 2005]; *164 Mulberry St. Corp. v Columbia Univ.*, 4 AD3d 49, 56 [1st Dept 2004].)

The third cause of action alleges that the defendant wrongfully and intentionally interfered with plaintiff's contractual relations with her deceased attorney, Mr. O'Sullivan. "Tortious interference with a contract requires the existence of a valid contract between the 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 Co. v Smith Barney*, 88 NY2d 413, 424 [1996]; *Foster v Churchill*, 87 NY2d 744, 749 [1996]; *Miller v Theodore-Tassy*, 92 AD3d 650, 651 [2d Dept 2012]; *Monex Fin. Servs., Ltd., v Dynamic Currency Conversion, Inc.*, 76 AD3d 515, 515 [2d Dept 2010].) Here, at the time the defendant Feinstein allegedly prevented the plaintiff from retrieving her legal files, she no longer had a contract with Mr. O'Sullivan due to his death. (see CPLR 321[c].)

The fourth cause of action asserts that the defendant has wrongfully interfered with the plaintiff's business relations, which have prevented her from proceeding with pending civil matters in the New York State Courts. In order to state a valid cause of action for tortious interference with business relations, the plaintiff must establish evidence of malice or unlawful means by the defendant. (*NRT Metals v Larabee Wire, Inc.*, 102 AD2d 705, 706 [1st Dept 1984].) The allegations set

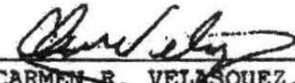
forth in the complaint do not satisfy the requirements for this tort. At worst, plaintiff has suffered a delay in her litigation, which still would have occurred following the death of Mr. O'Sullivan.

The fifth cause of action alleges that defendants are liable for prima facie tort. The elements of a cause of action for prima facie tort are (i) intentional infliction of harm; (ii) resulting in special damages; (iii) without excuse or justification (iv) by an act or series of acts that are otherwise legal. (*Diorio v Ossining Union Free School Dist.*, 96 AD3d 710, 712 [2d Dept 2012].) An element of prima facie tort is that the complaining party suffered specific and measurable loss, which requires an allegation of special damages. (*Del Vecchio v Nelson*, 300 AD2d 277, 278 [2d Dept 2002].) In addition, central to the allegation of prima facie tort is that the defendant's intent was motivated solely by malice or "disinterested malevolence." (*Simae v Levi*, 22 AD3d 559, 563 [2d Dept 2005].) Here, plaintiff fails to plead special damages. She merely states that she has suffered prejudice as a result of the delay in her legal proceedings but does not specify how she has been prejudiced. As noted above, her action would have been delayed in any event as a result of the death of her attorney.

Accordingly, this motion by the defendant is granted, and the action is dismissed.

The cross motion by the plaintiff is denied as moot.

Dated: November 9<sup>th</sup>, 2017

  
CARMEN R. VELASQUEZ, J.S.C.