Purple Eagle Entertainment, Inc. v Bray
2018 NY Slip Op 30538(U)
March 27, 2018
Supreme Court, New York County
Docket Number: 160022/16
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C.

PART 8

PURPLE EAGLE ENTERTAINMENT, INC.

INDEX NO. 160022/16

MOT. DATE

- v -

MOT. SEQ. NO. 004-007

DAVID BRAY and REBECCA BRAY

The following papers were read on this motion to/for 004 (stay/compel), 005 (amend), 006 (dismiss) and 007 (contempt)

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s).__________

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s).__________

Replying Affidavits NYSCEF DOC No(s).__________

There are four motions before the court. The first motion, motion sequence number 004, was brought by plaintiff and sought an order adjourning the JHO's hearing as to defendants' damages until the parties complete mediation and compelling mediation between the parties "pertaining to any and all matters arising from or related to the events and relationships surrounding the claims in plaintiff's complaint [] and defendants' counterclaims []..." Defendants oppose that motion.

In motion sequence number 005, plaintiff moves to amend its complaint. That motion was submitted without opposition.

In motion sequence number 006, plaintiff moves to dismiss defendants' counter and cross claims except breach of contract against it and "counter-claim defendant" Richard Mgrdechian ("Mgrdechian"). Defendants opposes that motion.

Finally, in motion sequence number 007, plaintiff moves for an order holding the defendants in contempt for violation of a court order dated January 24, 2017. Defendants oppose that motion as well.

Since the motions are interrelated, they are hereby consolidated for the court's consideration and disposition in this single decision/order. The court's decision follows.

Contempt

At the outset, the motion for contempt must be denied as procedurally improper. Judiciary Law § 756 provides that a motion to punish for contempt "must contain on its face a notice that the purpose of the hearing is to punish the accused for a contempt of court, and that such punishment may consist of fine or imprisonment, or both, according to law" together with specific warning language in certain format. Since the motion does not comply with the Section 756, it is denied without prejudice to renew.

Dated: 3|27|18

HON. LYNN R. KOTLER, J.S.C.

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

Motion to stay/compel

The court will next consider the motion to stay/compel. By way of background, plaintiff alleges that it is the owner of a patriotic rock band called Madison Rising (the "band'), which was created and managed by plaintiff's principal, Mgrdechian. Plaintiff further alleges that defendant David Bray ("Mr. Bray") was a former singer in the band. In motion sequence number 001, plaintiff moved for a preliminary injunction against the defendants enjoining them from using plaintiff's property, "Facebook page, brand equity, business relationships or other tangible and intangible items, concepts or relationships..." In an order dated January 24, 2017, the Honorable Joan Kenney granted the motion to the extent of, *inter alia*, referring this action to a referee for the purposes of hearing and determining defendants' counterclaim for money damages" and directing that defendants "shall not do business with Madison Rising's past and present contract partners doing business with Madison Rising or plaintiff for a period of one year starting on the date of this order" and defendants were "free to assume responsibility for the Facebook page."

The motion to adjourn the JHO hearing and compel mediation is granted only to the extent set forth in the parties' stipulation dated January 16, 2018 and so-ordered by this court. That motion is otherwise denied. It is undisputed that at some point during the course of this litigation, settlement negotiations between the parties broke down. Plaintiff has failed to demonstrate any basis in law to compel the defendants to proceed with a previously planned mediation. Therefore, the balance of the motion must be denied.

Amend

Next, plaintiff's motion to amend is granted without opposition. Plaintiff seeks to assert additional causes of action for (1) breach of contract, (2) tortious interference with a contract, (3) tortious interference with a prospective economic advantage, (4) conversion, and (5) violation of the faithless servant doctrine. Since there is no opposition to the motion, the motion is granted on default.

Motion to dismiss

Finally, plaintiff and Mgrdechian move to dismiss certain causes of action asserted in defendants' answer with counterclaims. In their answer, defendants assert the following allegations. On May 31, 2011, plaintiff offered Mr. Bray employment as the lead singer of the band, which was then formerly known as Authors of Liberty. Plaintiff and Mr. Bray entered into a written contract entitled "Band Member Agreement" (the "contract"). Defendants maintain that while Mr. Bray fully performed under the contract, but plaintiff failed to do so by: [1] failing to pay his base rate of $6,500; [2] failing to pay all traveling expense; and [3] failing to provide reasonable accident insurance. Defendants further allege that plaintiff failed to pay Mr. Bray royalties for music that he wrote and composed and that plaintiff fraudulently misrepresented itself as the owner of Mr. Bray's "original works of authorship." The contract ultimately expired on June 1, 2014 and defendants maintain that Mr. Bray and plaintiff agreed that "Mr. Bray would continue to perform as the lead singer of [the band] in exchange for a monthly payment of $6,500."

Defendants also allege that Mr. Bray's wife, defendant Rebecca Bray ("Mrs. Bray"), provided services to plaintiff and was not compensated for her services from 2011 until August 2014. Ultimately, defendants maintain that offers by plaintiff to Mrs. Bray for her employment were made and rejected by the parties, but plaintiff began paying Mrs. Bray $2,000 per month in September 2014.

On or about February 29, 2016, defendants allege that MR. Bray received an email from plaintiff "demanding that Mr. Bray execute a new agreement with [plaintiff] within eight (8) days or Mr. Bray would no longer be allowed to serve as lead singer for [the band]." Mr. Bray did not execute a new agreement, and in or about March 2016, plaintiff "involuntarily terminated" both defendants. Defendants claim that plaintiff withheld a portion of Mr. Bray's January 2016 wages and his wages for February 2016.

Otherwise, defendants assert that plaintiff "maliciously instituted these judicial proceedings for the purpose of alleging false and defamatory charges against Mr. Bray." Defendants further claim that plaintiff and Mgrdechian "circulated multiple press releases" containing defamatory statements about Mr. Bray.

Defendants have asserted the following counterclaims: [1] breach of contract against plaintiff by David Bray ("Mr. Bray"); [2] violation of GBL § 349 against plaintiff by Mr. Bray; [3] violation of Labor Law § 190 *et seq* against plaintiff by Mr. Bray; [4] defamation against plaintiff and Mgrdechian by Mr. Bray; [5] negligence against plaintiff and Mgrdechian by Mr. Bray; and [6] "Pennsylvania Common Law Tort – Publicity Given to Private Life" against plaintiff and Mgrdechian by both defendants. Plaintiff and Mgrdechian move to dismiss all claims except the breach of contract claim.

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). The court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*id.* citing *Morone v. Morone*, 50 NY2d 481 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]).

Under CPLR§ 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*Leon v. Martinez, supra* at 88).

GBL § 349

Movants argue that the GBL § 349 claim is defective because defendants have not alleged consumer-oriented conduct nor have they alleged a deceptive or misleading act. Movants next contend that the labor law claim is defective because documentary evidence reveals that Mr. Bray was an independent contractor and not an employee. Finally, movants argue that defendants remaining claims must be dismissed because they are based upon allegations "protected by the litigation privilege and/or such allegations fail to state a cause of action."

In turn, defendants contend that their GBL § 349 claim is properly pled, but they "expect[] to withdraw this claim in the near future, as the conduct alleged will likely be more properly litigated as part of the federal copyright action currently being prepared for filing" against plaintiff and Mgrdechian. Defendants maintain that the labor law claim should not be dismissed because movants have waived their opportunity to make such a motion. Defendants further argue that movants arguments merely raise "disputed issues of fact as to whether Mr. Bray was an independent contractor or an employee." As for the remaining claims, defendants contend that New York law should not be applied and therefore movant's arguments "about the litigation privilege are inapplicable and can be rejected."

GBL § 349(a) declares unlawful any "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." In order to establish a *prima facie* case under Section 349, defendants must allege sufficient facts to support three elements: [1] that the challenged act or practice was consumer-oriented; [2] that it was misleading in a material way; and [3] third, that the plaintiff suffered injury as a result of the deceptive act (*Stutman v. Chemical Bank*, 95 NY2d 24 [2000]).

The GBL § 349 claim must be dismissed as a matter of law because the complaint of conduct was not consumer-oriented, since the statute applies only to matters which affect the consumer public at large (see i.e. *Kirk v. Heppt*, 532 FSupp2d 586 [SDNY 2008]). Indeed, private contract disputes that are unique to the parties, such as the one at issue here, do not fall within the ambit of the statute (see i.e. *Silverman v. Household Finance Realty Corp. of New York*, 979 FSupp2d 313 [EDNY 2013] citing *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 NY2d 20 [1995]). Accordingly, the GBL § 349 claim is dismissed.

Labor Law § 190 *et seq.*

As for the labor law claim, defendants allege that Mr. Bray was an employee and that plaintiff failed to pay Mr. Bray's wages. Therefore, defendants seek unpaid wages, liquidated damages, reasonable attorneys' fees and costs of the action together with interest. In support of the motion, movants argue that documentary evidence establishes that Mr. Bray was not an employee, but rather, an independent contractor. This documentary evidence includes proof that defendants were paid by plaintiff through Mr. Bray's company, Brave Day, LLC ("BD LLC"), so that plaintiff did not withhold any taxes. Movants have provided IRS Form 1099-Misc in support. Movants further argue that defendants' direction that plaintiff pay them through BD LLC "evidences their bargaining power, and more so their relationship with plaintiff, which was that of an independent contractor..."

Movants have also provided emails between the parties which they maintain shows that Mr. Bray's monthly compensation varied based upon the amount of income he generated during each payment period from the sale of merchandise at the band's events. Movants also point to defendants' schedules, the fact that Mr. Bray was free to engage in other employment, so long as he did not violate non-competition and non-disclosure provisions of the contract, and the fact that Mr. Bray did not receive any fringe benefits.

Meanwhile, defendants argue that a motion to dismiss based upon documentary evidence is expressly waived unless raised in a pre-answer motion to dismiss. CPLR 3211[e] provides in pertinent part that "[a]ny objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading." Defendants answer was filed January 17, 2017. The court's file does not contain movant's response to defendant's counterclaims, nor did movant annex same to its motion papers. The court will consider the motion a pre-answer motion to dismiss, and therefore extend movants' time to answer whatever claims survive, given the procedural morass in this action.

Indeed, defendants were seemingly given a judgment on default on their breach of contract counterclaim before movants' time to respond to same had expired (see decision/order dated January 24, 2017). Moreover, it is undisputed that the parties had engaged in settlement negotiations for a significant period of time, further stalling this litigation. Since defendants will not be prejudiced by the court's consideration of the motion as a pre-answer motion to dismiss, *nunc pro tunc*, the court will consider the parties' substantive arguments.

Defendants argue that the substantive arguments cannot be resolved on a motion to dismiss based upon documentary evidence. The court disagrees. Here, movants have come forward with defendants' IRS Form 1099-Misc, which clearly state that the monies plaintiff paid to both defendants was "nonemployee compensation." This documentary evidence, coupled with the emails directing plaintiffs to pay defendants through the BD LLC, is sufficient to establish that defendants were not employees, but rather, independent contractors. In turn, defendants have failed to come forward with any facts or other documentary evidence to refute movants' showing. Since wages are expressly defined as the earnings of an employee for labor or services provided under Labor Law § 190, and plaintiff has conclusively shown that defendants were not plaintiff's employees, the motion to dismiss this claim is also granted.

Defamation

Defendants allege that plaintiff, and Mgrdechian acting in his individual capacity, published to the general public through online website "www.prweb.com" and other websites and traditional media outlets the following defamatory statements:

> Mr. Bray sometimes brags about his violent history. Among other stories, he claims to have 'choked out' his superior officer while in the Navy. He has also bragged about single-handedly beating up two police offices (sic) in Pennsylva-

> nia approximately 15 years ago when he and his wife were pulled over after a party.
>
> Mr. Bray physically assaulted Mr. Mgrdechian because Mr. Bray was infuriated that the Band had not been invited to perform at the Super Bowl.
>
> BRAY's behaviors led to numerous verbal and physical conflicts within the organization, culminating in a vicious and unprovoked attack against me after the Band's August 8, 2013 performance at the Sturgis Motorcycle Rally in Strugis, South Dakota. On that day, BRAY (a) was thrown out of the VIP party for harassing several women; (b) flew into a drunken rage because the Band had not been invited to perform at the Super Bowl; and (c) physically pulled me from my seat, dragged me across the Band's trailer, and tried to pull me down several metal steps to further assault me.
>
> Your behaviors, your lies, your deceit – and the ease at which you've done all these things, how you've bragged about getting away with them for so long, and how you have shown no remorse whatsoever – gives all of us serious cause to question your motives, your honesty, your integrity and your intentions on any and all fronts.
>
> When I first met Dave, he seemed like a decent person. However, over the past two years he has made me feel increasingly uncomfortable, uneasy, and at times, unsafe. The most recent instance of his dangerous behavior was when he threatened to break my nose in my sleep. He said I should keep one eye open while sleeping.

The elements of a defamation claim are: [1] a false statement; [2] publication of the statement without privilege or authorization to a third party; [3] constituting fault as judged by, at a minimum, a negligence standard; and [4] the statement must either cause special harm or constitute defamation *per se* (*Dillon v. City of New York*, 261 AD2d 34 [1st Dept 1999] citing Restatement of Torts, Second § 558). A defamation claim must be pled with particularity, so that a plaintiff must allege the particular words complained of as well as the time, place and manner of the statement and to whom the statement was made (CPLR 3016[a]; *Dillon*, *supra* at 38).

In evaluating the viability of a defamation claim, the words must be construed in the context of the entire statement before an ordinary audience, and if the statement is not reasonably susceptible to a defamatory meaning, the claim is not actionable (*Silsdorf v. Levine*, 59 NY2d 8 [1983] *cert denied* 464 US 831). "Courts will not strain to find defamation where none exists" (*Dillon, supra* at 38 [internal quotation omitted]).

Movants argue that the statements were made in the context of this litigation and are therefore protected by the litigation privilege. Movants further argue that the statements are true and/or opinion. These arguments are unavailing. On a motion to dismiss their counterclaims, defendants need only plead a *prima facie* cause of action to survive the motion. Movants' arguments go beyond the sufficiency of the allegations, and are appropriately raised after joinder and on a dispositive motion. Therefore, the motion to dismiss the fourth counterclaim is denied.

Negligence

In support of this claim, defendants allege that movants "owed a duty to Mr. Bray not to disclose his Social Security Number to the public without his authorization" and did so. The issue of whether movants owe a duty of care to defendants "is entirely one of law to be determined by the courts" (*Donohue v. Copiague Union Free School District*, 64 AD2d 29 [2d Dept 1978]; see also *Gerdowsky v. Crain's New York Business*, 188 AD2d 93 [1st Dept 1993]).

Defendant's negligence counterclaim must be dismissed, because movants did not owe such a duty to defendants (*Valeriano v. Rome Sentinel Co.*, 43 AD6d 468 [4th Dept 2007] ["Defendant is not a government or private entity with a statutory, contractual or fiduciary duty to protect the confidentiality of plaintiff's personal information, and plaintiff's purported negligence cause of action is thus "the functional equivalent of a common-law privacy tort"]). Accordingly, the fifth counterclaim is severed and dismissed.

Pennsylvania common law tort

In support of the claim for "publicity given to private life", defendants allege that movants "gave publicity to the private fact that Mr. Bray conducted an extra-marital affair." New York does not recognize such a cause of action, but Pennsylvania does. Therefore, the court must first determine whether New York or Pennsylvania law should be applied to this case. Movants are domiciled in New York and defendants are domiciled in Pennsylvania. Under New York's choice of law rules, where the parties are domiciled in different states, the state's law to be applied in a civil action asserting tort claims is where the injury arose (see *Locke v. Aston*, 31 AD3d 33 [2006]; see also *Edwards v. Erie Coach Lines Co.*, 17 NY3d 306 [2011]).

Here, the court finds that New York law applies to the facts alleged in defendants' pleading. Defendants have not asserted sufficient facts in their complaint from which the court could conclude that Pennsylvania is the situs of injury. Moreover, defendants' argument on this point, that they are Pennsylvania residents and therefore Pennsylvania law should apply because they are asserting a claim sounding in defamation, is rejected (*Locke* at 38; see i.e. *Mazzella v. Philadelphia Newspapers, Inc.*, 479 FSupp 523 [EDNY 1979]). Indeed, defendants' pleading does not make reference to their domicile in Pennsylvania or otherwise demonstrate why Pennsylvania would have any interest in this subject litigation, let alone "the most significant relationship to the case" (*Lee v. Bankers Trust Co.*, 166 F3d 540, 545 [2d Cir 1999]). Therefore, the cases relied upon by defendants are inapposite. Accordingly, upon the application of New York law to this claim, the sixth counterclaim is severed and dismissed.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that motion sequence number 004, to adjourn the JHO hearing and compel mediation, is granted only to the extent set forth in the parties' stipulation dated January 16, 2018 and so-ordered by this court; and it is further

ORDERED that motion sequence number 004 is otherwise denied; and it is further

ORDERED that motion sequence number 005, to amend, is granted on default; and it is further

ORDERED that plaintiff is directed to file and serve its amended complaint in the form annexed to its motion papers upon defendants within 10 days from the date of service of this order with notice of entry, and defendants to answer as per the CPLR; and it is further

ORDERED that motion sequence number 006, to dismiss, is granted only to the extent that the claims for violation of Labor Law § 190 *et seq.* (third counterclaim), negligence (fifth counterclaim) and publicity given to private life (sixth counterclaim) are severed and dismissed; and it is further

ORDERED that motion sequence number 006 is otherwise denied.

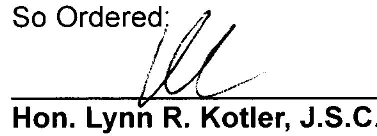
ORDERED that motion sequence number 007, for contempt, is denied without prejudice to renew; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on May 22, 2017 at 9:30am in Part 8, 80 Centre Street, Room 278.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 3/27/18
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.