

**Feinberg v Lalicata**

2018 NY Slip Op 31038(U)

May 25, 2018

Supreme Court, New York County

Docket Number: 650582/2013

Judge: Kelly A. O'Neill Levy

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**KELLY O'NEILL LEVY  
JSC**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 19**

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CANDICE FEINBERG,	<b>INDEX NO.</b>	<u>650582/2013</u>
Plaintiff,		
- v -	<b>MOTION DATE</b>	<u>03/26/2018, 03/27/2018</u>
STEVEN LALICATA, DIANA FERNANDEZ, JAMES HART, BRIAN MARTINEZ, and JOHN DOE 1,	<b>MOTION SEQ. NO.</b>	<u>016, 017</u>
Defendants.		

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number (Motion 016) 142, 145, 149, 150, 151, 152  
were read on this motion to/for STRIKE PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 017) 143, 146, 147, 148  
were read on this motion to/for DISMISSAL.

HON. KELLY O'NEILL LEVY:

Motion sequence 016 and 017 are hereby consolidated for disposition.

This action arises out of an alleged fraud perpetrated against the plaintiff by the defendants.

Plaintiff Candice Feinberg moves (mot. seq. 016) for an order (1) striking the answer of defendant Diana Fernandez (hereinafter, Fernandez) for failure to appear for her deposition, failure to give responsive and meaningful answers to plaintiff's interrogatories, and noncompliance with discovery orders and (2) imposing costs, attorneys' fees, and monetary sanctions against Fernandez and/or her counsel.

Fernandez opposes and moves (mot. seq. 017) for an order, (1) pursuant to CPLR § 3211(a)(7), dismissing the fraud and malicious prosecution causes of action against Fernandez for failure to state a claim, (2) pursuant to CPLR § 3103, granting Fernandez a protective order

regarding potential deposition testimony to guard against disclosure abuse and further delay, (3) directing plaintiff's counsel to provide Fernandez with certain discovery material, and (4) granting Fernandez additional time to complete discovery.

Plaintiff opposes and cross-moves (mot. seq. 017) for an order (1) compelling Fernandez to provide plaintiff with meaningful and sworn answers to plaintiff's interrogatories, appear for a deposition, and properly respond to any post-deposition discovery demands and (2) permitting plaintiff to file a note of issue with the condition that plaintiff be allowed to receive the outstanding discovery. Fernandez opposes.

### **BACKGROUND**

At the preliminary conference in this matter on February 5, 2014, the court ordered document demands to be served by March 21, 2014 and responded to by April 12, 2014, and for interrogatories to be served by May 2, 2014. At that time, discovery was scheduled to close on August 1, 2014. Plaintiff served document demands on Fernandez on March 21, 2014 and interrogatories on Fernandez on May 2, 2014. At the June 11, 2014 compliance conference, the court granted an additional thirty days for Fernandez to respond to plaintiff's discovery requests, which Fernandez did. On September 2, 2014, plaintiff brought a motion to compel Fernandez to provide meaningful and good faith responses to its requests. At the September 24, 2014 conference, the court ordered that Fernandez respond to plaintiff's discovery requests. On May 14, 2015, plaintiff served Fernandez with post-EBT demands. On July 23, 2015, the court ordered Fernandez to respond to plaintiff's post-EBT demands within 21 days; Fernandez responded 33 days later. At the January 6, 2016 status conference, plaintiff sought to compel Fernandez to further respond to the post-EBT demands and the court ordered Fernandez to respond to those demands within 21 days; Fernandez responded 22 days later in an unsigned and

unattested letter. Plaintiff again sought court intervention to compel a proper response to its demands. On March 23, 2016, the court ordered Fernandez to respond to the demands.

On January 11, 2018, the court granted leave for plaintiff to file a second amended complaint to reflect newly-discovered facts relating to a related criminal matter and ordered a discovery schedule wherein defendants were to respond to a second amended complaint within 20 days of service and that discovery was to be complete by March 23, 2018. Plaintiff served the second amended complaint on January 12, 2018 and served interrogatories and a notice of deposition on Fernandez on February 5, 2018. The parties confirmed that the deposition would take place on March 20, 2018. On or about March 13, 2018, Fernandez requested an extension of the discovery deadline; plaintiff did not agree to the extension. On March 15, 2018, Fernandez served a late answer to the second amended complaint. The next day, Fernandez served a late response to plaintiff's interrogatories, which was unsigned and unattested. The same day, Fernandez demanded production of the transcript for the related criminal case, and plaintiff responded that she would transmit it upon receipt of a formal discovery request.<sup>1</sup>

On March 19, 2018, Fernandez notified plaintiff that the scheduled March 20, 2018 deposition of Fernandez would not proceed. Plaintiff requested that the court order the deposition to proceed, but the court denied the request, stating that an order is already in place requiring the parties to comply with discovery. Fernandez made multiple informal requests for specific documents and information from plaintiff. Plaintiff requested that Fernandez make formal discovery requests, but Fernandez declined to do so. Fernandez asserts that she is entitled to certain discovery prior to her appearance for the deposition.

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<sup>1</sup> On March 26, 2018, plaintiff served Fernandez the related criminal trial transcript and other related documents.  
650582/2013 FEINBERG, CANDICE v. LALICATA, STEVEN  
Motion No. 016, 017

## DISCUSSION

### *Motion to Strike Pleadings*

Plaintiff moves, pursuant to CPLR § 3126, for an order striking Fernandez's answer and for a default judgment against Fernandez.

CPLR § 3126 permits the court to issue orders addressing the failure or refusal of a party to obey an order for disclosure. Remedies include striking a party's pleadings and entering a default judgment against a party. CPLR § 3126 (Penalties for refusal to comply with order or to disclose). Trial courts have broad discretion in applying remedies for discovery violations under CPLR § 3126, including discretion to dismiss pleadings. *See Kihl v. Pfeffer*, 94 N.Y.2d 118, 122 (1999); *see also Zietz v. Wetanson*, 67 N.Y.2d 711, 713 (1986).

The court denies plaintiff's motion to strike Fernandez's answer. While Fernandez provided insufficient responses to plaintiff's interrogatories and failed to appear for her deposition, the court will, in its discretion, permit Fernandez time to adequately comply with plaintiff's discovery requests, as discussed below.

### *Motion for Costs, Attorneys' Fees, and Monetary Sanctions*

Plaintiff moves, pursuant to CPLR § 3126, for an order (1) for monetary sanctions against Fernandez, (2) for reasonable attorneys' fees for the time spent rescheduling Fernandez's deposition and on the instant motion, and (3) for statutory costs.

22 NYCRR § 130-1.1 (Costs; sanctions) states in relevant part:

“(a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part...”

The court denies plaintiff's motion for costs, attorneys' fees, and monetary sanctions against Fernandez and/or her counsel. Fernandez and her counsel's conduct does not warrant such remedies, as the request for the related criminal trial transcript prior to Fernandez's scheduled deposition was reasonable, despite Fernandez's informal and untimely request.

*Motion to Dismiss*

Fernandez moves, pursuant to CPLR § 3211(a)(7), for an order dismissing the fraud and malicious prosecution causes of action against her for failure to state a cause of action.

CPLR § 3211(a)(7) permits the court to dismiss a complaint that fails to state a cause of action. The complaint must be liberally construed and the plaintiff given the benefit of every favorable inference. *See Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). The court must also accept as true all of the facts alleged in the complaint and any factual submissions made in opposition to the motion. *See 511 W. 232<sup>nd</sup> Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002). If the court "determine[s] that the plaintiff [is] entitled to relief on any reasonable view of the facts stated, [its] inquiry is complete" and the complaint must be declared legally sufficient. *Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 318 (1995). While factual allegations in the complaint are deemed true, bare legal conclusions and facts flatly contradicted on the record are not entitled to the presumption of truth. *Summit Solomon & Feldesman v. Lacher*, 212 A.D.2d 487, 487 (1st Dep't 1995). The test is not whether the complaint states a cause of action but whether the pleader has, in fact, a cause of action. *Scarlett Letters, Inc. v. Compugraphic Corp.*, 61 A.D.2d 930, 930 (1st Dep't 1978).

The elements of a fraud claim are a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff, and damages. *Carlson v. American Intern. Group, Inc.*, 30 N.Y.3d 288, 310 (2017) (internal quotations omitted). CPLR §

3016(b) provides that where a cause of action is based upon fraud, the circumstances constituting the wrong shall be stated in detail. CPLR § 3016(b) (Particularity in specific actions). CPLR § 3016(b) should not be interpreted so strictly “as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud.” *Pludeman v. Northern Leasing Sys., Inc.*, 10 N.Y.3d 486, 491 (2008), quoting *Lanzi v. Brooks*, 43 N.Y.2d 778, 780 (1977). Where concrete facts are peculiarly within the knowledge of the party charged with the fraud, it would be a potentially unnecessary injustice to dismiss a case at an early stage where any pleading deficiency might be cured later in the proceedings. *Id.* at 491-492 (internal citations omitted).

Here, plaintiff pleads the fraud claim as a conspiracy. While a conspiracy to commit a tort is not itself a cause of action, allegations of conspiracy are allowed only to connect the actions of separate defendants with an otherwise actionable tort. *See Alexander & Alexander of New York, Inc. v. Fritzen*, 68 N.Y.2d 968, 969 (1986). Also, where a complaint adequately details the circumstances surrounding an alleged fraud, a reasonable inference of fraudulent intent and knowledge is permitted. *See A.N. Frieda Diamonds, Inc. v. Kaminski*, 122 A.D.3d 517, 517 (1st Dep’t 2014); *see also JP Morgan Chase Bank, N.A. v. Hall*, 122 A.D.3d 576, 579-580 (2d Dep’t 2014). Plaintiff’s second amended complaint describes the circumstances of the alleged fraud, including Fernandez’s participation in it. Plaintiff alleges that Fernandez harbored defendant Steven Lalicata (hereinafter, Lalicata) while he pretended to be on the run, that Fernandez received gifts and travel opportunities from Lalicata, that Fernandez traveled with Lalicata and defendant James Hart to Las Vegas and other destinations using plaintiff’s funds, that Fernandez lied to and harassed plaintiff when plaintiff attempted to speak with Fernandez, that Fernandez lied to law enforcement to frustrate plaintiff’s investigation and discredit plaintiff,

and that Fernandez lied to conceal the true source of the funds. Fernandez and her co-defendants' alleged actions give rise to a reasonable inference of Fernandez's knowledge, agreement, and intent as to the fraud. As the facts alleged in the complaint are legally sufficient to maintain a fraud claim, the branch of Fernandez's motion seeking to dismiss the fraud claim is denied.

A malicious prosecution claim requires evidence of (1) the initiation or continuation of legal action by the defendant against the plaintiff, (2) termination of the proceeding in favor of the accused, (3) absence of probable cause to commence the proceeding, and (4) actual malice. *See Broughton v. State of New York*, 37 N.Y.2d 451, 457, 373 N.Y.S.2d 87, 94 (1975), cert denied sub nom. New York law equates a malicious prosecution with a civil defendant's failure to make a full and complete statement of the facts to the District Attorney or the court, or to withhold information that might have affected the results. *Ramos v. City of New York*, 285 A.D.2d 284, 299-300 (1st Dep't 2001) (internal citations omitted).

Here, Fernandez asserts that the malicious prosecution claim lacks the elements of probable cause and malice. "Want of probable cause and malice are seldom established by direct evidence of an ulterior motive. They often rest upon circumstances such as the relation of the parties and the object sought or accomplished. Where malice or any improper or wrongful motive, or lack of probable cause exists, it may be inferred that the act was malicious." *Dean v. Kochendorfer*, 237 N.Y. 384, 389 (1924). The probable cause element traditionally looks to whether probable cause existed to commence the criminal proceeding, not whether there was probable cause to arrest the plaintiff. *Cardoza v. City of New York*, 139 A.D.3d 151, 162 (1st Dep't 2016). "Probable cause consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff guilty." *Colon v. City of*

*New York*, 60 N.Y.2d 78, 82 (1983) (internal citations omitted). Since the arresting officers were allegedly acting on false information provided by Fernandez, there was likely probable cause to commence the action.

The actual malice element does not require a plaintiff to prove that the defendant was motivated by spite or hatred, it may be proven by circumstantial evidence, and it depends on inferences reasonably drawn from surrounding facts and circumstances. *Cardoza*, 139 A.D.3d 151, 164. Fernandez's malice towards plaintiff may be inferred by the alleged affair Fernandez had with plaintiff's husband and Fernandez's alleged taunting of plaintiff regarding the affair. Plaintiff also alleges malicious motivations that led Fernandez to lie to law enforcement about plaintiff, specifically that Fernandez sought to have plaintiff arrested to divert official attention from the fact that plaintiff was the victim of a fraud, and in retaliation for the negative media coverage of Fernandez. These allegations of Fernandez's motivations satisfy the malice element.

Thus, the facts alleged in the complaint are legally sufficient to maintain a malicious prosecution claim and Fernandez's motion to dismiss the malicious prosecution claim is denied.

#### *Motion for a Protective Order*

Fernandez moves, pursuant to CPLR § 3103, for an order granting Fernandez a protective order regarding potential deposition testimony to guard against disclosure abuse relating to issues that are not relevant to the fraud and malicious prosecution claims. CPLR § 3103 permits the court to make a protective order denying, limiting, conditioning, or regulating the use of any disclosure device. CPLR § 3103 (Protective orders). Fernandez contends that plaintiff's counsel intends to attempt to relitigate certain issues, but Fernandez provides no explanation or elaboration of these issues. Given that the details of the related criminal action are relevant to the fraud and malicious prosecution claims, Fernandez's potential deposition testimony

regarding the related criminal matter is not a re-litigation of these issues. Therefore, the court does not find that a protective order is warranted at this time.

*Request for Disclosure and Additional Time for Discovery*

Fernandez requests that plaintiff furnish the related criminal trial transcript and other related documents, and requests an extension of time to complete discovery. Given that plaintiff provided this discovery on March 26, 2018, this issue is moot and the requests are denied.

*Motion to Compel Fernandez to Comply with Discovery Requests*

Plaintiff requests that the court compel Fernandez to (1) provide plaintiff with meaningful and sworn answers to plaintiff's interrogatories within seven days, (2) sit for a deposition, and (3) respond to any post-deposition discovery demands within 20 days of the deposition.

Given that plaintiff has complied with Fernandez's discovery requests, that Fernandez acknowledges that she is obligated to appear to be deposed regarding the new claims in the second amended complaint, and that Fernandez's previous responses to plaintiff's interrogatories are inadequate, the court grants this motion to compel Fernandez to comply with plaintiff's discovery requests. Fernandez shall respond to plaintiff's interrogatories on or before June 15, 2018. Fernandez shall sit for a deposition on or before July 6, 2018. Fernandez shall respond to any post-deposition discovery demands within 20 days of the date of the deposition.

*Motion Granting Plaintiff Leave to File a Conditional Note of Issue*

Plaintiff requests that the court permit plaintiff to file a note of issue with the condition that plaintiff be permitted to receive the above discovery. The court grants plaintiff's request for an order permitting plaintiff to file a note of issue with the condition that plaintiff be entitled to receive the outstanding discovery. Plaintiff shall file the conditional note of issue on or before August 13, 2018.

The court has considered the remainder of the arguments and finds them to be without merit.

### CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

**ORDERED** that the branch of plaintiff Candice Feinberg's motion (mot. seq. 016) for an order striking the answer of defendant Diana Fernandez is denied; and it is further

**ORDERED** that the branch of plaintiff's motion (mot. seq. 016) for an order imposing costs, attorneys' fees, and monetary sanctions against Fernandez and/or her counsel is denied; and it is further

**ORDERED** that the branch of Fernandez's motion (mot. seq. 017), pursuant to CPLR § 3211(a)(7), to dismiss the fraud and malicious prosecution causes of action against Fernandez for failure to state a claim is denied; and it is further

**ORDERED** that the branch of Fernandez's motion (mot. seq. 017), pursuant to CPLR § 3103, granting Fernandez a protective order is denied; and it is further

**ORDERED** that the branch of Fernandez's motion (mot. seq. 017) directing plaintiff's counsel to furnish Fernandez certain discovery material and requesting additional time to complete discovery is denied as the issue is moot; and it is further

**ORDERED** that the branch of plaintiff's cross-motion (mot. seq. 017) for an order compelling Fernandez to provide plaintiff with meaningful and sworn answers to plaintiff's interrogatories, appear for a deposition, and properly respond to any post-deposition discovery demands is granted; and it is further

**ORDERED** that the branch of plaintiff's cross-motion (mot. seq. 017) for an order permitting plaintiff to file a note of issue with the condition that plaintiff be permitted to receive outstanding discovery is granted.

This constitutes the decision and order of the court.

5/25/18  
DATE

Kelly O'Neill Levy  
KELLY O'NEILL LEVY, J.S.C.  
**KELLY O'NEILL LEVY**  
**JSC**

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: