

Thomas v Suggs

2018 NY Slip Op 31635(U)

March 6, 2018

Supreme Court, New York County

Docket Number: 159483/2017

Judge: Paul A. Goetz

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Jeffrey Thomas,

Index No.: 159483/2017

Plaintiffs,

DECISION/ORDER

-against-

Motion Sequence 001

James Suggs (p/k/a James Hall), Rev. Kevin Bond,
Edison Bond and Citadel of Praise and Worship, Inc.

Defendants.

PAUL A. GOETZ, J.S.C.:

This action arises from the dissolution of an alleged romantic relationship between plaintiff Jeffrey Thomas and James Suggs p/k/a James Hall (“Hall”), who sits on the board of directors of defendant Citadel of Praise and Worship, Inc. (“Citadel”). Defendants move, pursuant to CPLR 3211(a)(7), to dismiss the complaint for failure to state a cause of action, or in the alternative, pursuant to CPLR 3024(b) to strike paragraphs 2 through 50 of the complaint on the grounds that those allegations are irrelevant to the causes of action asserted by plaintiff and are prejudicial to defendants.

The first through third causes of action arise from defendant Hall’s alleged negligent, deliberate and fraudulent conduct in transmitting syphilis to plaintiff during the course of their alleged sexual relationship from December 2014 to approximately December 2016. Defendants argue that plaintiff cannot recover under either a negligence or fraud theory because he cannot possibly prove that he contracted syphilis from defendant Hall or that Hall either knew or should have known that he had syphilis. These facts, however, are specifically alleged in the complaint, along with allegations that plaintiff remained monogamous during the course of the relationship while defendant Hall allegedly had sexual relations with other men. Such allegations, which on a

motion to dismiss must be taken as true, are sufficient to withstand a motion to dismiss (*Plaza v. Estate of Wisser*, 211 A.D.2d 111, 118-119 [1st Dep't 1995] [denying motion to dismiss negligence and fraud claims based on alleged transmission of HIV]).

With respect to the second cause of action for battery, defendants argue that this claim should be dismissed because plaintiff admits in his complaint that he consented to have sexual contact with defendant Hall. However, New York courts recognize a cause of action for battery based on transmission of a sexually transmitted disease through consensual sex, thus implicitly supporting the holding that consent can be vitiated by one partner's fraudulent concealment of the risk of infection (*Plaza v. Estate of Wisser*, 211 A.D.2d 111, 118 [1st Dep't 1995]; *Petri v. Bank of New York*, 153 Misc.2d 426, 432 [Sup. Ct. N.Y. Co. 1992]; see also Restatement (Second) of Torts § 892B(2), cmt. E, illus. 5 [1979]; *Leleux v. U.S.*, 178 F.3d 750, 755 [5th Cir. 1999] [defendant's fraudulent concealment of the fact that he had venereal diseases from plaintiff with whom he engaged in sexual intercourse constituted battery]); *Johnson v. Jones*, 269 Or.App. 12, 17 [Or. Ct. App., 2015]; *Kathleen K. v. Robert B.*, 150 Cal.App.3d 992 [Ca. Ct. App. 2d Dist., 1984]). Accordingly, plaintiff has sufficiently stated a claim for battery.

Defendant Hall also argues that plaintiff's battery claim is time-barred by CPLR 215(3), which requires plaintiff to bring his battery claim within one year of the date of the non-consensual physical contact (*Plaza*, 211 A.D.2d at 118 [holding that discovery rule does not apply to claims for intentional torts]). Here, plaintiff alleges that he had sexual contact with defendant Hall in December 2016, when they traveled to Italy together. Since plaintiff may have contracted syphilis from Hall as late as December 2016 and this action was commenced in October 2017, plaintiff's battery claim cannot be dismissed as untimely.

Although defendants seek dismissal of the complaint in its entirety, defendants do not assert any arguments in support of dismissing the fourth cause of action for assault and battery against defendant Kevin Bond. Accordingly, this cause of action will not be dismissed.

The fifth and eighth causes of action for malicious prosecution and abuse of process are predicated on a prior lawsuit brought by defendants Hall, Kevin Bond and the Citadel against plaintiff Thomas for defamation, slander, intentional and negligent infliction of emotional distress and a permanent injunction (Affirmation of Carmen Giordano dated November 27, 2017, Exh. B [Summons and Complaint in the action captioned *Bond et al. v. Thomas*, New York State Supreme Court, New York County, Index No. 155440/2017]). On July 28, 2017, this Court granted the plaintiffs in the prior action a preliminary injunction prohibiting Thomas from, among other things, publishing any photographs of plaintiffs and posting any derogatory comments about plaintiffs (Affirmation of Carmen Giordano dated November 27, 2017, Exh. C). On September 14, 2017, defendant Thomas filed a stipulation to discontinue the prior action with prejudice.

Plaintiff Thomas argues that the prior action was commenced by defendants maliciously to prevent Thomas from exposing his sexual relationship with defendant Hall and that defendants had no probable cause to initiate the prior action. In order to state a claim for malicious prosecution based upon a prior civil action, plaintiff must show (1) the commencement or continuation of a prior proceeding by the defendant; (2) the termination of the prior proceeding in favor of the plaintiff; (3) the absence of probable cause for initiating the prior proceeding; (4) actual malice and (5) special injury, which means that the prior action interfered with plaintiff's person or property, including but not requiring the issuance of provisional remedies, such as arrest, attachment or an injunction (*Cantalino v. Danner*, 96 N.Y.2d 391 [2001]; *Engel v. CBS*,

Inc., 93 N.Y.2d 195 [1999]; *Purdue Fredrick Co. v. Steadfast Ins. Co.*, 40 A.D.3d 285 [1st Dep't 2007]). Further, "when the underlying action is civil in nature the want of probable cause must be patent" (*Fink v. Shawangunk Conservancy Inc.*, 15 A.D.3d 754, 755 [3d Dep't 2005]).

By granting a preliminary injunction against Thomas in the prior action, this Court found that the plaintiffs in that proceeding had demonstrated a likelihood of success on the merits of their claims. Thus, plaintiff Thomas cannot demonstrate that probable cause was entirely lacking from defendants' underlying defamation action against him (*Hornstein v. Wolf*, 67 N.Y.2d 721, 723 [1986] [upholding dismissal of malicious prosecution claim where plaintiff failed to plead facts sufficient to overcome the presumption of probable cause based on the temporary restraining orders issued in the prior action]; *I.G. Second Generation Partners v. Duane Reade*, 17 A.D. 206, 207 [1st Dep't 2007] [holding that a judgment rendered in prior action was prima facie evidence that prior action was based on probable cause]; *Fink*, 15 A.D.3d at 754-55 [holding that defendant had probable cause to commence underlying quiet title action where plaintiff's deed was ambiguous and there were questions of fact surrounding defendant's adverse possession claim]; *Wilderhomes, LLC v. Zautner*, 23 Misc.3d 1112(A) [Sup. Ct. Albany Cty., 2009] [holding that denial of motion to dismiss in prior action constitutes judicial recognition of the existence of probable cause for the action]). Accordingly, plaintiff's cause of action for malicious prosecution must be dismissed.

The abuse of process claim similarly does not survive. "Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective" (*Curiano v. Suozzi*, 63 N.Y.2d 113, 116 [1984]). Further, "the gist of the action for abuse of process lies in the improper use of process after it is issued" (*Williams v.*

Williams, 23 N.Y.2d 592, 569 [1969] [internal citations and quotations omitted]). Here, plaintiff does not allege that after this Court issued the preliminary injunction in the prior action, defendants used that injunction “to gain an advantage collateral to its legitimate ends”, which was to prevent plaintiff from publishing photographs or derogatory comments about defendants (*Bonarco, Ltd. v. Cossington Overseas*, 269 A.D.2d 158, 158-59 [1st Dep’t 2000] [holding that Russian court’s restraining order on plaintiff’s sale of stock was insufficient to support abuse of process claim]; *I.G. Second Generation*, 17 A.D. at 207-08 [stating that there was no indication that “process” was perversely utilized by defendants where defendants in prior action sought declaration that they were entitled to possession of the subject premises which relief was entirely appropriate and not collateral to defendants’ objective of securing an exclusive right to the premises]). Moreover, the allegation that defendants were motivated by malice and hatred in bringing the prior action is insufficient to give rise to a cause of action for abuse of process (*I.G. Second Generation*, 17 A.D.3d at 207). Accordingly, this cause of action must also be dismissed.

Defendants also seek to dismiss the sixth cause of action in the complaint for defamation, slander, and libel per se, arguing that plaintiff has failed to set forth with sufficient particularity the words allegedly used by defendants. Under CPLR 3016, in an action for libel, slander or defamation, a plaintiff must set forth “the particular words complained of” in the complaint and must also allege the time, manner and persons to whom the publication was made (*BCRE 230 Riverside LLC v. Fuchs*, 59 A.D.3d 282 [1st Dep’t 2009]; *Simpson v. Cook Pony Farm Real Estate*, 12 A.D.3d 496 [2d Dep’t 2004]). Here, plaintiff alleges that defendant Hall posted on Facebook and told others, including Elithea Sparks, Lawrence W. and members of the Citadel, that Thomas was a liar, that he was delusional, and that he and Thomas were not lovers. Such allegations are deficient because they fail to allege *in haec verba* the particular defamatory words

used by defendants (*BCRE 230 Riverside LLC*, 59 A.D.3d at 283 [holding that “words to the effect” that defendant had been tossing urine and other fluids and objects from the terrace of his apartment were insufficient to satisfy the particularity requirements of CPLR 3016]; *Simpson*, 12 A.D.3d at 497 [holding that statements to colleagues regarding defendant’s dissatisfaction with plaintiff’s software and indicating that plaintiff stole listings from defendant were insufficient because plaintiffs “did not set forth actual words complained of”]; *Wadsworth v. Beaudet*, 267 A.D.2d 727, 729 [3d Dep’t 1999] [holding that allegations that defendant told pizzeria customers that plaintiff had stolen money from them fails to comply with CPLR 3016 that “the defamatory words be set forth *in haec verba*”]). Accordingly, plaintiff’s cause of action for libel, slander and defamation must be dismissed.

In the seventh cause of action, plaintiff asserts a cause of action for intentional infliction of emotional distress based on the defendants’ alleged campaign of harassment and intimidation against plaintiff, including filing a lawsuit against Thomas in an effort to silence him and publishing defamatory statements against Thomas accusing him of being a delusional liar. Plaintiff also alleges that defendant Edison Bond threatened to kill him if he disclosed their sexual relationship and that defendant Kevin Bond chased him out of the Citadel church, following Lawrence W., one of defendants’ friends, who was wielding a baseball bat, causing Thomas to fear for his safety. Taken together, these allegations establish “extreme and outrageous conduct” sufficient to withstand a motion to dismiss (*Dennis v. Napoli*, 148 A.D.3d 446, 446 [1st Dep’t 2017] [holding that plaintiff stated claim for intentional infliction of emotional distress where plaintiff alleged that after defendant wife discovered that plaintiff was having an affair with her husband, defendant husband authorized the wife’s access to plaintiff’s work e-mail account and social media file account in an effort to harass and defame plaintiff];

Eves v. Ray, 42 A.D.3d 481, 483 [2d Dep't 2007] [holding that evidence established that plaintiff engaged in campaign of harassment and intimidation sufficient to support claim where plaintiff threatened the defendant both physically and financially and stalked him in an effort to intimidate defendant during his legal representation of the plaintiff's former wife]; *Mitchell v. Giambruno*, 35 A.D.3d 1040 [3d Dep't 2006] [holding that there was sufficient evidence to support plaintiffs' claim where neighbors conducted a campaign of lewd comments and intimidation against same-sex couple, including constructing two mock grave sites]; *Cavallaro v. Pozzi*, 28 A.D.3d 1075, 1078 [4th Dep't 2006] [holding that defendant's campaign of harassment and intimidation, including threatening to kill plaintiff and his children, met the requisite level of outrageousness]). However, plaintiff has not set forth any allegations against defendant Citadel which would make it liable for the acts of the individual defendants and so plaintiff's intentional infliction of emotional distress cause of action must be dismissed as against Citadel.

Finally, defendants move pursuant to CPLR 3024 to strike allegations 2 through 50 of the complaint as prejudicial to defendants. However, defendants have failed to show that these allegations are entirely irrelevant to plaintiff's claims (*New York City Health and Hospitals Corp. v. St. Barnabas Comm. Health Plan*, 22 A.D.3d 391 [1st Dep't 2005] [stating that "[a] motion to strike scandalous or prejudicial material from a pleading will be denied if the allegations are relevant to a cause of action"]). Indeed, even a cursory review of these allegations shows that they are relevant. For example, paragraphs 2 through 22 describe the details of the alleged romantic relationship between plaintiff and defendant Hall, including Hall's alleged sexual encounters with other men. Such allegations are relevant to the first through third causes of action based on defendant Hall's alleged transmission of syphilis to plaintiff. Likewise, paragraphs 34 through 41 describe the actions of the other individual defendants, Kevin and

Edison Bond, who, together with defendant Hall, engaged in a campaign of harassment and intimidation against Thomas that is the basis of his cause of action for intentional infliction of emotional distress and his battery and assault claim against defendant Kevin Bond. Thus, it cannot be said that these allegations are irrelevant to plaintiff's claims and the motion to strike must be denied.

Accordingly, it is

ORDERED that defendants' motion to dismiss is granted in part; and it is further

ORDERED that the fifth, sixth, and eighth causes of action are hereby dismissed as against all defendants; and it is further

ORDERED that the seventh cause of action is dismissed as against defendant Citadel; and it is further

ORDERED that defendant Citadel is hereby dismissed from this action and the action shall bear an amended caption, as follows:

Jeffrey Thomas,

Plaintiff,

v.

James Suggs (p/k/a James Hall), Rev. Kevin Bond, and Edison Bond,

Defendants.

ORDERED that counsel for the moving party shall e-file a "Notice to County Clerk" form (form EF-22, available on NYSCEF) attached to a copy of this order with notice of entry for the County Clerk who shall mark the records to reflect the amended caption; and it is further

ORDERED that defendants shall file an answer to the complaint within thirty days of entry of this order; and it is further

ORDERED that the motion to strike is denied.

Dated: March 6, 2018



HON. PAUL A. GOETZ