

Cohen v Hoschander
2018 NY Slip Op 32882(U)
November 8, 2018
Supreme Court, New York County
Docket Number: 158304/2017
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED

PART 2

Justice

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INDEX NO. 158304/2017

TOBY COHEN,

Plaintiff,

MOTION SEQ. NO. 001

- V -

ABRAHAM HOSCHANDER,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion to/for

SUMMARY JUDGMENT/DISMISSAL

Upon the foregoing documents, it is ordered that the motion and cross motion are decided as follows.

In this claim for libel per se, plaintiff Toby Cohen moves, pursuant to CPLR 3212, for summary judgment on his complaint against defendant Abraham Hoschander. Hoschander opposes the motion and cross-moves, pursuant to CPLR 3211(a)(7), to dismiss the complaint for failure to state a cause of action. After oral argument, and after a review of the parties' motion papers and the relevant statutes and case law, **the motion and cross motion are denied.**

In April 2015, plaintiff Toby Cohen (Cohen), as attorney for Ian Smith (Smith), commenced an action against Shabat Homes LLC (Shabat), Brooklyn 7 Realty Inc. (Brooklyn 7), Maor Marc Shabat, and John Doe (an attorney) under Supreme Court, Kings County Index Number 504899/15 (the Kings County action). Doc. 26.¹ Smith commenced the Kings County

¹ All references are to the documents filed with NYSCEF in connection with this matter.

action seeking to reclaim title to 398 Amboy Street in Brooklyn, as well as for monetary damages, arising from alleged fraud, misrepresentation, slander of title and conspiracy by defendants in that action. *Id.* The transfer of that property, which Smith sought to invalidate, was made to Shabat. In the Kings County action, Shabat defaulted in answering the complaint and Hoschander appeared as counsel for Brooklyn 7, which allegedly purchased the property from Shabat for value.

Smith thereafter moved for summary judgment against Brooklyn 7 in the Kings County action and the latter opposed the motion. When the motion was denied, Smith moved again for the same relief. In an affirmation filed September 1, 2017 and submitted in opposition to the second summary judgment motion (the affirmation in opposition), Hoschander asserted that Cohen:

had actually taken interests in the properties that he was representing on behalf of the original owners via his own holding company, Option One Holdings Inc. [Option One], and was in reality working for himself seeking to wrest properties from good faith buyers and enrich himself, which was at the very least a direct conflict of interest.

Doc. 7.

On September 16, 2017, Cohen commenced the captioned action alleging as his sole claim that the language in Hoschander's affirmation in opposition gave rise to a claim for libel per se since it was intended to "injure or damage Plaintiff's business, trade, or profession, as Plaintiff is an attorney whose livelihood crucially depends on [his] reputation for honesty and good character." Doc. 1, at pars. 9, 13.

Hoschander filed an answer denying the claim and asserting numerous affirmative defenses. Doc. 3.

Cohen now moves, pursuant to CPLR 3212, for summary judgment on his complaint. He argues that Hoschander's comments give rise to a claim of libel per se and are not privileged since they do not pertain to the Kings County action. He also submits an affirmation in which he attests that he never held any ownership interest in Option One, as well as proof that, as of September 21, 2016, he was relieved as counsel for Smith.

Hoschander opposes the motion and cross-moves to dismiss the complaint pursuant to CPLR 3211(a)(7) on the ground that it fails to state a cause of action. Specifically, he asserts that the statement in the affirmation in opposition was privileged insofar as it pertains to the Kings County action. In asserting that Cohen and Option One are inextricably intertwined, he highlights the fact that Cohen's law office is located at the same address as that where the New York Department of State was to serve Option One if it was served via the Secretary of State. He also submits the names of several cases in which Cohen, after the creation of Option One in 2015, commenced similar actions, purportedly on behalf of home owners, seeking to avoid prior transfers of properties. Specifically, he claims that:

Option One and its agents would approach individuals who had recently transferred their homes that were under-water, with a proposition. Simply put: it [would] invalidate the transfer by commencing a frivolous action via its counsel Cohen in exchange for a contract executed between the prior homeowner and Option One that gives Option One either an option to buy or the right to execute a short sale, depending on the case.

Doc. 10, at par. 11.

Thus, Hoschander essentially asserts that his comment in the affirmation in opposition pertains to the issues in the Kings County action since Cohen's conduct in that action was similar to that he exhibited in subsequent litigation.

In opposition to the cross motion, Cohen maintains, inter alia, that since Shabat transferred 398 Amboy Street to Brooklyn 7 in 2013 and Option One was not incorporated until 2015, Hoschander's statements do not pertain to the issues raised in the Kings County action. Cohen further asserts that Hoschander's statements do not pertain to the subject matter of the Kings County action since he (Cohen) was relieved as counsel for Smith in 2016, prior to the time the affirmation in opposition was served.

In reply, Hoschander asserts that the Kings County action was commenced in April 2015, shortly after the creation of Option One and at or about the same time Cohen was involved in commencing similar actions seeking to avoid property transfers to benefit that entity.

Plaintiff's Motion For Summary Judgment

[S]ummary judgment is a drastic remedy, to be granted only where the moving party has "tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact" (*Kebbe v City of New York*, 113 AD3d 512, 512 [1st Dept 2014], quoting *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). When the movant fails to make this prima facie showing, the motion must be denied, "regardless of the sufficiency of the opposing papers" (*id.*). When deciding a motion for summary judgment, the court's function is issue finding rather than issue determination (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82, 978 N.Y.S.2d 13 [1st Dept 2013]). Moreover, the evidence will be construed in the light most favorable to the nonmoving party (*id.*). Summary judgment must be denied "where there is any doubt as to the existence of a triable issue" (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978] [internal quotation marks omitted]) or where "the issue is arguable" (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968] [internal quotation marks omitted]).

Genesis Merchant Partners, L.P. v Gilbride, Tusa, Last & Spellane, LLC, 157 AD3d 479, 481-482 (1st Dept 2018).

Initially, as Hoschander argues, Cohen's motion is procedurally improper. "When an attorney is a party to an action, and affidavits are required to support or oppose a request for relief, that attorney may not rely upon an unnotarized affirmation in lieu of an affidavit, as the facts alleged in that affirmation would not be in admissible form." *Law Ofcs. of Neal D. Frishberg v Toman*, 105 AD3d 712, 713 (2d Dept 2013). This Court further notes that Cohen's complaint, which is not submitted in support of this motion but which was efiled, is not verified.

Additionally, as Hoschander asserts, Cohen's motion for summary judgment is premature. The motion papers clearly reveal sharp disagreement between the parties as to whether the allegedly defamatory remarks made by Hoschander pertain to the issues raised in the Kings County action. This is clearly a significant issue given that Hoschander can assert that his remarks were privileged if he can establish that they pertained to the litigation in the Kings County action. *Flomenhaft v Finkelstein*, 127 AD3d 634 (1st Dept 2015).

As of yet, no preliminary conference has been held, no depositions have been conducted, and Hoschander's motion papers suggest that Cohen may have crucial information in his possession necessary to oppose Cohen's motion for summary judgment. Thus, this issue must be explored during discovery and Cohen's motion is denied. *See* 3212 (f); *Marabyan v 511 W. 179 Realty Corp.*, ___ AD3d ___, 2018 NY Slip Op 07237 (1st Dept October 30, 2018).

Hoschander's Cross Motion to Dismiss

Although Hoschander argues that the complaint must be dismissed for failure to state a cause of action because the language in the affirmation in opposition falls within the litigation privilege, this Court disagrees.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the court must accept each and every allegation as true and liberally construe the allegations in the light most favorable to the pleading party and "determine only whether the facts as alleged fit within any cognizable legal theory". *Leon v Martinez*, 84 NY2d 83, 87-88 (1994); *see DRMAK Realty LLC v Progressive Credit Union*, 133 AD3d 401, 406 (1st Dept 2015).

Hoschander does not assert that Cohen's defamation claim was deficiently pleaded. Rather, he asserts that Cohen's claim must be dismissed solely because it is privileged due to the fact that it pertains to the issues in the Kings County action.

[A] statement that is pertinent to litigation is absolutely privileged and cannot form the basis of a defamation action. That principle of law was first stated by the Court of Appeals in *Youmans v Smith* (153 NY 214, 219 [1897]), and was recently reaffirmed by the Court in *Front, Inc. v Khalil* (24 NY3d 713 [2015]). This Court has held that, where the privilege is invoked, "any doubts are to be resolved in favor of pertinence" (*Sexter & Warmflash, P.C. v Margrabe*, 38 AD3d 163, 173 [1st Dept 2007], *abrogated on other grounds by Front, Inc. v Khalil*, 24 NY3d 713 [2015], *supra*). Further, the test to determine whether a statement is pertinent to litigation is " 'extremely liberal' " (*id.*, quoting *Black v Green Harbour Homeowners' Assn., Inc.*, 19 AD3d 962, 963, [3d Dept 2005]), such that the offending statement, to be actionable, must have been "outrageously out of context" (*id.*, quoting *Martirano v Frost*, 25 NY2d 505, 508 [1969]).

Flomenhaft v Finkelstein, 127 AD3d at 637.

Given that this Court is unable to conclude on the motion papers that Hoschander's statement was pertinent to the Kings County action, and that discovery is needed on this issue, the motion to dismiss is denied.

Therefore, in light of the foregoing, it is hereby:

ORDERED that plaintiff Toby Cohen's motion for summary judgment is denied; and it is further

ORDERED that the cross motion by defendant Abraham Hoschander to dismiss the complaint is denied; and it is further

ORDERED that plaintiff is to serve this order, with notice of entry, upon defendant within 20 days after this order is uploaded to NYSCEF; and it is further

ORDERED that the parties are to appear for a preliminary conference at 80 Centre Street, Room 280 on March 19, 2019 at 2:15 p.m.; and it is further

ORDERED that this constitutes the Decision and Order of the Court.

11/8/2018

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

☒

DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐

OTHER

☐

REFERENCE

KATHRYN E. FREED, J.S.C.