

Massel v Gibbins
2018 NY Slip Op 32908(U)
November 15, 2018
Supreme Court, New York County
Docket Number: 161147/2017
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART IAS MOTION 12EFM

-----X
ALINE MASSEL,

Plaintiff,

- v -

ROBERT GIBBINS,

Defendant.

INDEX NO. 161147/2017

MOTION DATE _____

MOTION SEQ. NO. 002, 003

DECISION AND ORDER

-----X
HON. BARBARA JAFFE:

The following e-filed documents, listed by NYSCEF document number (motion 002) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 93, 94, 99, 100, 101, 102, 103

were read on this motion to dismiss

The following e-filed documents, listed by NYSCEF document number (motion 003) 87, 88, 89, 90, 91, 92, 95, 96, 97, 98

were read on this motion to strike pleadings

Plaintiff sues defendant for negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress arising from an extramarital relationship between them that ended badly. At the time plaintiff commenced this action, there pended a prior action brought against her by defendant in Britain in October 2016 (*AXB v BXA*, Queens Bench Div. [2018] EWHC 588 [QB]). On March 21, 2018, after a two-day trial held on February 12 and 16, 2018, at which plaintiff did not appear, a judgment was rendered in favor of defendant and against plaintiff.

In reliance on the British judgment, defendant now seeks, pursuant to CPLR 3211(a)(5) to bar this action and/or estop plaintiff from asserting the claims set forth in her complaint (mot.

seq. two), pursuant to CPLR 327, 3211(a)(7) and (8), for an order dismissing this action (mot. seq. two), and for an order striking plaintiff's pleadings (mot. seq. three). Plaintiff opposes.

I. BACKGROUND

A. British action (NYSCEF 56)

In the British action, defendant sought money damages and injunctive relief for plaintiff's misrepresentations and harassment. Even though plaintiff's counsel filed a defensive pleading without objection to service, venue or the court's jurisdiction, the court nonetheless addressed jurisdiction to the extent of finding that plaintiff had been living in England and that several of her alleged breaches of defendant's privacy had occurred in London.

In determining to proceed to trial in plaintiff's absence, the court found that she had received sufficient notice of the trial, had been given "every consideration" in scheduling it, and had emailed documents and witness statements for admission in evidence at trial. The court observed that although plaintiff's counsel did not participate in the litigation beyond filing the pleading on her behalf, plaintiff then hired an American lawyer who occasionally communicated with the court or with defendant's solicitors to the extent of seeking a discontinuance. While plaintiff had sought an adjournment for medical reasons, she produced no supporting evidence other than a "cursory" letter from a clinic in Munich reflecting neither a diagnosis nor a prognosis. The court found it significant that her contention that she was unfit to proceed was inconsistent with her having commenced the instant action in New York. (NYSCEF 56).

The court awarded defendant damages and enjoined plaintiff from harassing him based on the following findings, as pertinent here:

Between 2014 and 2015, defendant, a married man of "considerable wealth," commenced an extramarital relationship with plaintiff. During July and August 2014, plaintiff falsely told

him that she had been pregnant with his child and had terminated the pregnancy, which was part of “a deliberate strategy” to obtain money from defendant. In May 2015, she falsely told defendant that he had caused her to end a long-term relationship thereby resulting in her becoming homeless. Plaintiff’s representations to defendant during the summer of 2015 that she was again pregnant were “blatantly false,” and the purported photograph of a fetal scan sent by her to defendant’s office evidenced plaintiff’s fraudulent “*modus operandi*.”

In August 2015, plaintiff falsely accused defendant of having infected her with the human papillomavirus (HPV) to pressure him for money.

In February 2016, plaintiff sent private material to defendant’s office, knowing that they would be opened by members of his staff. During the summer of 2016, plaintiff became pregnant. Soon thereafter, defendant accompanied her to a doctor’s appointment and then learned, upon hearing plaintiff represent, upon the doctor’s inquiry, that she had never terminated a pregnancy. He thereupon terminated the relationship. On August 24, 2016, plaintiff threatened defendant that she would go to “the tabloids” about their relationship. Soon thereafter, she emailed fetal scans and abusive comments to defendant’s office, knowing that they would be seen by members of his staff. In September 2016, during a happenstance encounter between the parties at a London hotel, plaintiff harassed defendant by threatening to bring a claim of assault against him which she knew was false.

B. Instant action (NYSCEF 52)

In her verified amended complaint, plaintiff alleges the following:

During the summer of 2014, plaintiff and defendant commenced a sexual relationship. She was unaware that he was married until she began receiving hostile emails from his wife, who plaintiff soon learned was pregnant. Plaintiff unsuccessfully attempted to break off the

relationship with defendant. In September 2014, she accepted defendant's offer to rent a Manhattan apartment for her.

From October 2014 through December 2014, the parties saw each other almost every day. Defendant often discussed his business dealings with plaintiff and gave her many costly gifts. Harboring misgivings about defendant's refusal to use a condom when engaging in intercourse with her, she went for a routine gynecological checkup in January 2015 and learned that she was infected with HPV. She thus distanced herself from defendant the following spring.

Defendant pursued plaintiff aggressively. Reluctantly, she eventually accepted defendant's offer to pay her school tuition and support her so that she could stop working and attend school.

In May 2015, defendant described to plaintiff the life they would share following his divorce. He transferred a large sum of money to her New York bank account. Over the summer of 2015, defendant continued divulging his business dealings to her and expressed how much more important she was to him than his business.

In August 2015, plaintiff left for London to begin her studies. Defendant sent her expensive gifts and the two were in daily communication throughout the fall of 2015, meeting intermittently. In December 2015, defendant told plaintiff that he planned to divorce his wife and wanted to discuss the future with her. In January 2016, having again received harassing communications from defendant's wife, plaintiff attempted to end the relationship. Without her consent, defendant traveled to London to see her and kept calling, text messaging, and emailing her. In or around the spring of 2016, they resumed their relationship.

On July 26, 2016, plaintiff learned that she was pregnant. Defendant was elated. The following morning, however, he informed her that on counsel's advice, he had decided to stay

with his family and would not be there for her if she were to keep the baby. Having the baby, he told her, would be the “biggest mistake” of her life. Soon thereafter, defendant urged plaintiff to meet with his attorney in London. He also made an appointment for her with a doctor to discuss terminating the pregnancy. While plaintiff saw the doctor, she was unwilling to terminate the pregnancy. Defendant’s attorney spoke to plaintiff of the difficulty of raising a child alone and finding someone else to marry her, urged her to terminate the pregnancy, and told her that if she did, she would receive money. Plaintiff was surprised and repulsed. She obtained her own counsel in London to learn more about the legal rights of a single mother.

Between August and September 2016, plaintiff made several appointments to terminate the pregnancy but cancelled each. After each cancellation, defendant offered her money. Plaintiff received harassing messages from defendant’s wife and several text messages alerting her that her phone had been hacked. She later learned that defendant had hired a private investigator whose services included phone monitoring, keyword stroke, and surveillance. Defendant sought plaintiff’s cooperation in mediating their dispute through someone who plaintiff later learned had been involved in a hacking scandal.

On August 22, 2016, defendant advised plaintiff that he was withdrawing his offer of support. She refused to terminate the pregnancy. Defendant’s wife then took over all communications with plaintiff, who flew to Germany to avoid the stress. In Munich, plaintiff noticed that she was being followed. The surveillance continued for some two weeks until after she terminated the pregnancy at the beginning of September.

Defendant’s wife continued to harass plaintiff and her friends. On September 22, 2016, defendant’s wife berated her, referencing sonogram pictures that plaintiff had sent to defendant. Then, on September 27, 2016, while plaintiff was at a London hotel dining with a friend,

defendant appeared at her table and threatened to call the police. His wife continued to threaten her, telling her that she had her bank accounts. Plaintiff later discovered that her bank and phone accounts had been hacked. The two hacked bank accounts were those to which defendant had transferred money for her.

Defendant denied paternity, which shocked plaintiff. She located the baby's remains to extract DNA to confirm that defendant had fathered the baby, should an issue ever arise.

On October 2, 2016, plaintiff's friend received two emails from defendant's wife advising that she was gathering information to bring an action for extortion against plaintiff and perhaps him, alleging that plaintiff had never been pregnant. She divulged that she knew the car that the two drove. Plaintiff reported the harassment to the police. Soon thereafter, she began treatment with a psychiatrist who diagnosed her with depression and post-traumatic stress disorder, and recommended that she receive in-patient treatment; other doctors recommended that she be hospitalized to monitor her heart and blood pressure. Due to the stress, plaintiff can no longer work or attend school.

In her first cause of action, plaintiff alleges that defendant acted negligently in failing to disclose to her that he had a sexually transmittable disease and insisting on engaging in unprotected intercourse with her. In her second cause of action, she advances claims of intentional and negligent inflictions of emotional distress. In support of her claim of intentional infliction of emotional distress, she claims that defendant infected her with HPV, had her followed, hacked her phone and bank accounts, and harassed her into terminating the pregnancy. In support of her claim of negligent infliction, she alleges that defendant breached a duty of care owed to her when he engaged in the extreme and outrageous conduct of not disclosing to her that he had HPV and engaging in unprotected intercourse with her, that the transmittal of the disease

was reasonably foreseeable, and that his failure to wear a condom to prevent transmission caused her severe emotional distress, and extensive and continuing physical, emotional, and psychological injuries, including but not limited to HPV.

Plaintiff efiled the complaint on December 15, 2017 (NYSCEF 1) and the amended complaint on January 3, 2018.

II. DISCUSSION

A. The impact of the prior British judgment on plaintiff's present New York action

1. Contentions

a. Defendant (NYSCEF 49-58)

Defendant maintains not only that the British default judgment bars plaintiff's action, but that the judgment was not actually rendered on default as plaintiff had participated in the litigation by engaging British counsel who had submitted a written defense on her behalf, reviewing defendant's discovery materials for two days, conveying numerous submissions to the court during the course of the trial and after, and challenging an anonymity order issued by the court. Thus, he claims, the British action was decided on the merits. He additionally observes that plaintiff offered no challenge to the British court's jurisdiction, venue or service, refused to provide timely disclosure, produced no evidence that she had been impregnated by him, that she was infected with HPV or that he had infected her, and was precluded from offering some evidence at trial for failing to provide defendant with discovery. Instead of complying with discovery orders, on December 15, 2017, plaintiff filed this action.

In anticipation of a claim that the British proceedings were improper because she was not represented by counsel, defendant argues that in New York, proceeding without counsel does not constitute a due process violation.

b. Plaintiff (NYSCEF 60-78)

Plaintiff maintains that she had been ill-advised by British counsel not to challenge the court's jurisdiction, venue or service, and that she had been unable to defend the British action because she could not afford to bring counterclaims, was too ill to proceed, and could not represent herself given her poor English language skills. She thus argues that the default judgment cannot bar her from proceeding here, that she is entitled to discovery, and that defendant's motion is intended to prevent her from obtaining it. (NYSCEF 60).

Plaintiff offers an affidavit dated April 18, 2018, from a physician who states that he treated her at a private clinic in Germany from October 2017 to December 2017, and that he continues to treat her remotely via Skype. He diagnoses her as having suffered from "major depression, insomnia, and anxiety disorder," and reports that she had lost a significant amount of weight before coming to the clinic, had no appetite while at the clinic, and was "unable to cope with everyday life." According to the doctor, before plaintiff arrived at the clinic, she was in "dire need of full time care and supervision," as she could not "function as a regular citizen contributing to society in a meaningful way." Upon her admission, he found that she was unable to get out of bed and, absent social support and in view of her "break-in depression" and "existential fears," she could not be "stabilized." He describes her as having been unable to work, complete "basic everyday tasks" or her studies, and "maintain healthy relationships." Although she had been previously prescribed medication for obsessive-compulsive disorder, post-traumatic stress disorder, social anxiety, and panic disorder, as none was effective, he prescribed a number of antipsychotic medications and found that only ketamine relieved plaintiff of her suicidal ideations. The doctor thus opined that from October to December 2017, and in the

months before her treatment, plaintiff was unable to “protect her legal rights in any way.” (NYSCEF 77).

By affidavit dated April 24, 2018, plaintiff’s former boyfriend states, in pertinent part, that from her pregnancy in July 2016 through the fall of 2017, he was concerned about plaintiff and feared that she would commit suicide. (NYSCEF 76).

By affidavit dated April 6, 2018, plaintiff states that she remained too disabled to litigate the British action. (NYSCEF 78).

c. Defendant’s reply (NYSCEF 79-86)

Defendant contends that the British judgment bars plaintiff from proceeding here as she had failed to avail herself of the procedures offered there and cannot collaterally attack it. In any event, he maintains that having provided the court with a certificate dated November 3, 2017, stating that she was a patient at the clinic and “at the moment, . . . unable to participate in any litigation” (NYSCEF 83), plaintiff failed to provide the court with a sufficient basis for finding her unable to proceed.

Defendant offers the statement of his British counsel dated January 11, 2018 and filed in the British action, in which she sets forth plaintiff’s failure to respond to discovery notwithstanding several stipulations postponing the exchange of documents while the parties were engaged in settlement negotiations from March to November 2017. She states that although plaintiff first alerted her on October 30, 2017 of her hospitalization and that she had been advised by her doctors that engaging in the litigation was seriously detrimental to her health, by email dated November 8, 2017, plaintiff sought discovery of defendant’s list of documents to ensure that her own list was organized correctly, and by email dated November 30, advised that despite

her hospitalization, she or someone on her behalf would send her list of documents on December 1 or 4, 2017. Plaintiff never provided defendant with the required discovery. (NYSCEF 82).

Counsel additionally observes that given the approximate expense of \$207,000 for three months of residential treatment at the spa, plaintiff's claimed inability to afford British counsel is not credible. (NYSCEF 79).

2. Analysis

The procedures governing British trials have been found to comport with New York due process requirements. (*See CIBC Mellon Tr. Co. v Mora Hotel Corp.*, 100 NY2d 215, 222 [2003]; *Sebastian Holdings, Inc. v Deutsche Bank, AG*, 147 AD3d 706 [1st Dept 2017], *lv denied* 29 NY3d 910).

Here, it is undisputed that plaintiff had filed a defensive pleading and did not challenge service, venue or the court's jurisdiction. To the extent that she now claims that she was deprived of due process by her British counsel's failure to advance such challenges, she does not show that she attempted to seek appropriate relief from the British court and offers no authority for the proposition that she is entitled to relief via a collateral attack.

It is also undisputed that plaintiff had been granted liberal extensions by defendant and by the court both in providing discovery and in scheduling the trial, and that in its decision, the court considered the pleading and witness statements she had submitted. That she could not afford to continue with counsel did not preclude her from representing herself, which in and of itself, does not constitute a violation of one's due process rights, and her alleged inability to proceed in English is unsupported by any contention that she had been deprived of the services of an interpreter.

Even if the physician's affidavit that plaintiff now offers would have been sufficient to have warranted an adjournment of the trial, plaintiff does not explain why she did not offer it to the British court. Nor does she dispute the facts alleged by British counsel concerning her communications about discovery in November and December 2017. Moreover, although in a position to opine on plaintiff's ability to appear for trial in February, the physician does not address her condition in January or February 2018, thereby permitting a reasonable inference that she was not unable to provide discovery and attend the trial following her departure from the clinic. Likewise, her boyfriend's affidavit and her own contain no indication that she was unable to proceed in February.

For all of these reasons, and in light of the comity regularly accorded the judgments of British courts (*see Sebastion Holdings*, 147 AD3d 706 [recognizing British judgment based on comity]), even those resulting from a default (*see CIBC Mellon*, 100 AD2d 215 [enforcing English default judgments]), the British judgment comports with plaintiff's due process rights.

B. Res judicata

Pursuant to CPLR 3211(a)(5), a party may move for an order dismissing a cause of action against it on the ground that it is barred by a prior decision on the merits. In *Paramount Pictures Corp. v Allianz Risk Transfer AG*, the Court observed that claim preclusion, or *res judicata*, broadly bars parties from relitigating issues that were or could have been raised in a prior action. (31 NY3d 64, 72-73 [2018]). The bar extends to "claims falling within the scope of the judgment, regardless of whether or not those claims were in fact litigated" and to "any other admissible matter which might have been offered for that purpose" (*id.*, citations omitted), "even if based upon different theories or if seeking a different remedy" (*Xiao Yang Chen v Fischer*, 6 NY3d 94, 100 [2005]; *O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). That the judgment

was rendered on default does not annul its preclusive impact. (*Matter of Hunter*, 4 NY3d 260, 269 [2005]; *Lazides v P&G Enterprises*, 58 AD3d 607, 609 [2d Dept 2009], *lv denied* 13 NY3d 703; *Robbins v Growney*, 229 AD2d 356, 357 [1st Dept 1996]).

The determination of whether claims are part of the same transaction for purposes of determining whether they should be barred depends on whether the facts underlying the claims are related in time, space, origin, or motivation and form “a convenient trial unit, and whether their treatment as a unit conforms to the parties’ expectations or business understanding or usage.” (*Chen*, 6 NY3d at 100-101, citing Restatement [Second] of Judgments § 24[2]; *Smith v Russell Sage Coll.*, 54 NY2d 185, 192-193 [1981]; *Matter of Reilly*, 45 NY2d 24, 29 [1978]).

A cause of action for these purposes may also be a separately stated claim arising from the same group of facts, notwithstanding that different legal relief is sought, and even if there are variations in the facts alleged or different relief is sought, the separately stated claim “may nevertheless be ground on the same gravamen of the wrong upon which the action is brought.” (*Matter of Reilly*, 45 NY2d at 29; *Wietschner ex rel. JPMorgan Chase & Co. v Dimon*, 139 AD3d 461, 462 [1st Dept 2016], *lv denied sub nom. Wietschner v Dimon*, 28 NY3d 901; *Elias v Rothschild*, 29 AD3d 448, 448 [1st Dept 2006]).

1. Contentions

a. Defendant (NYSCEF 49-58)

Defendant asserts that plaintiff had the opportunity to present evidence concerning her claim that she was infected with HPV, that defendant infected her, and that as a result, she suffered injury, and observes that the British court found that plaintiff could have asserted counterclaims for same and for the intentional infliction of emotional distress arising from

defendant's alleged conduct in that regard. That plaintiff alleged illness and a lack of funds to prosecute her counterclaims, moreover, defendant asserts, is not legally significant.

b. Plaintiff (NYSCEF 60-78)

Plaintiff distinguishes the kinds of harm at issue in each action and observes that a New York judgment in her favor on her claims that defendant infected her with HPV and intentionally caused her emotional distress would have no bearing on the judgment rendered in favor of defendant in England. She also argues that as the British judgment was issued on her default, it does not bar her from proceeding here.

c. Defendant's reply (NYSCEF 79-86)

Defendant maintains that none of the evidence offered by plaintiff poses an obstacle to his use of the British judgment to bar the instant action and observes that she concedes all of his contentions concerning her litigation of the British action. He disagrees that there lacks an identity of issues such that a different judgment here would impair the rights or interests set out in the British action and asserts that plaintiff offers no proof that the judgment is tainted with fraud or with an offense against public policy or that it was obtained without personal or subject matter jurisdiction.

2. Analysis

It is undisputed that the British court rendered a final decision in defendant's action against plaintiff and that plaintiff has not sought to vacate it and had neither prosecuted a defense nor interposed a counterclaim based on her allegations that defendant had infected her with HPV, that he intentionally or negligently inflicted upon her emotional distress in doing so or that he engaged in the other conduct of which she now complains. And, as noted *supra*, II.A.2, she does not sufficiently demonstrate an inability to have done so.

To the extent that plaintiff's claims are based on theories that differ from those advanced in the British action, they are all predicated on the same series of transactions and occurrences that formed the basis of defendant's British action, namely, the parties' two-year relationship through to their breakup. That defendant did not interpose a cause of action based on plaintiff's false accusation of HPV transmission is legally insignificant. (*See Wietschner ex rel. JPMorgan Chase & Co. v Dimon*, 139 AD3d 461, 462 [1st Dept 2016], *lv denied sub nom. Wietschner v Dimon*, 28 NY3d 901 [that complaints set forth different theories of recovery and claims in second action not actually raised in federal actions present no impediments to application of res judicata]). Thus, the two actions are closely related in terms of time, location, origin, and motivation, and could have been tried together without being readily subject to severance. Moreover, plaintiff does not assert that she had any expectation that her claims could not have been tried by British court. That a judgment finding that defendant had infected her with HPV and intentionally caused her emotional distress would "have no bearing on the judgment rendered in favor of defendant in England," is of no moment.

For all of these reasons, plaintiff's action here is barred by the British judgment. (*See Sebastian Holdings*, 147 AD3d at 706 [motion court properly recognized English judgement based on comity and plaintiff's failure to show fraud in procurement of judgment or that recognition of judgment would do violence to, or be fundamentally offensive and inimical to, some strong New York public policy]; *Yardeny v Jordan*, 118 AD3d 985, 985 [1st Dept 2014] [that plaintiff could have, but failed to raise defense in prior action in which he defaulted, precluded affirmative claim in subsequent action]; *CIBC Mellon Trust Co. v HSBC Guyerzeller AG*, 56 AD3d 307, 308 [1st Dept 2008] [affirmative defense of unclean hands asserted by

defendants barred as defendants were parties to English proceeding and chose to default rather than litigate issue]).

III. CONCLUSION

In view of the foregoing, I need not address defendant's other contentions or his motion to strike. Accordingly, it is hereby

ORDERED, that defendant's motion to dismiss (sequence two) is granted in its entirety; and it is further

ORDERED, that defendant's motion to strike (sequence three) is denied as academic.

11/15/2018

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

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DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐

OTHER

☐

REFERENCE

BARBARA JAFFE, J.S.C.

HON. BARBARA JAFFE