

ERL Partners LLC v Pelletier
2018 NY Slip Op 33954(U)
March 6, 2018
Supreme Court, Nassau County
Docket Number: 602710/17
Judge: John M. Galasso
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SHORT FORM ORDER

ORIGINAL

SUPREME COURT: STATE OF NEW YORK - COUNTY OF NASSAU
Present: HONORABLE JOHN M. GALASSO, J.S.C.

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ERL PARTNERS LLC and ERIC LEARNER,

Index No.: 602710/17
Sequence No.: 007

Plaintiffs,

- against -

Part 18
Motion Return Date: 1/8/18

JESSICA PELLETIER,

Defendant.

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The omnibus motion brought by the defendant, in the above captioned action, for an order of this court “. . . pursuant to CPLR § 3211(a)(4) dismissing plaintiffs’ verified complaint in its entirety . . . ”¹ is denied in all respects.

Rule 3211(a)(4) provides:

(a) Motion to dismiss cause of action. A party may move for one or more causes of action asserted against him on the ground that:

* * *

4. there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires.

The plaintiffs’ verified complaint sets forth seven (7) causes of action for: Libel, Slander, Tortious Interference with Contractual/Prospective Contractual Relations, Prima

¹Initially, the court takes note that Rule 2214(a) of the CPLR states:
“A notice of motion shall specify . . . the relief demanded and the grounds therefor.”

Facie Tort, Intentional Inflection of Emotional Distress, Declaratory Relief and Injunctive Relief.²

In support of the instant motion, the moving defendant posits:

Mr. Lerner's complaint fails for two principle reasons: (1) Mr. Lerner may not assert legal claims against Ms. Pelletier premised upon Ms. Pelletier's previously filed lawsuit. Ms. Pelletier's legal action and her representations concerning the prior action, filed in New York County, is protected by an absolute judicial privilege; and (2) Mr. Lerner may not assert tortious interference claims against Ms. Pelletier, his co-employee, if her actions were carried out during the course of her employment and involved no improper means.

To determine a motion brought pursuant to Rule 3211(a) of the CPLR, this court is guided by the principles set forth in the seminal decision of the Appellate Division, First Department, *Foley v D'Agostino*, 21 AD2d 60 (1964) wherein the court stated at page 64:

Looseness, verbosity and excursiveness, must be overlooked on such a motion if any cause of action can be spelled out from the four corners of the pleading. (*see* Siegel, 38 St. John's Law Review, ... , p. 205).

It is well settled and still is, of course, the rule that a pleading will not be dismissed for insufficiency merely because it is inartistically drawn. Where a pleading is attacked for alleged inadequacy in its statements, our inquiry should be limited to 'whether it states in some recognizable form any cause of action known to our law' (*Dulberg v Mock*, 1 NY2d 54, 56, 150 N.Y.S. 2d 180, 181, 133 N.E.2d 695, 696). 'However imperfectly, informally or even illogically the facts may be stated, a complaint, attacked for insufficiency, is deemed to allege 'whatever can be implied from its statements by fair and reasonable intendment.' *Kain v Larkin*, 141 NY144, 151, 36 N.E. 9[10]. The question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts 'can be

²A typographical error exists in the verified complaint in that the separate causes of action for Prima Facie Tort and Intentional Inflection of Emotional Distress are separately set forth "as and for a fourth cause of action."

fairly gathered from all the averments.” (*Condon v Associated Hospital Service of New York*, 287 NY 411, 414, 40 N.E.2d 230, 231).

Finally, every pleading question should be approached in the light of the CPLR enactment that pleadings ‘shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced.’ (CPLR 3026).

Furthermore, the court must accept the facts as alleged in the complaint as true and accord the plaintiff the benefit of every possible favorable inference and determine only whether the facts alleged fit within any cognizable legal theory (*see Faison v Lewis*, 25 NY3d 220 [2015]).

The unrelated predecessor to the instant action is a certain action brought in the Supreme Court County of New York entitled *Jessica Pelletier, Plaintiff, v T.O. Global d/b/a Tikun Olan and/or Tikun Olam, Inc., Eric Lerner, Barry Farkas, Glen Larner, Bernard Sucher and Harold Markowitz*, Defendants, Index No. 158407/2016.

In the aforesaid action, the plaintiff alleged causes of action for, *inter alia*, sexual harassment, gender, disability and religious discrimination against the named defendants therein.

As alleged, in the instant action before this court, a fair reading of the complaint in the New York action, giving the plaintiff herein the benefit of every favorable inference (*see Simkin v Blank*, 19 NY3d 46 [2012]), finds the allegations set forth in the complaint in the New York action and the alleged statements made by the plaintiff in that action to the media lose their privilege and absolute immunity by virtue of their impertinent and inflammatory personal attacks on the plaintiff herein which were not in some way pertinent to the issue in that proceeding (*see Weinstock v Sanders*, 144 AD3d 1019 [Second Dept. 2016]).

Therefore, the plaintiffs’ causes of action for Libel, Slander and Declaratory Relief as set forth in the complaint herein withstand the defendant’s Rule 3211(a) of the CPLR motion to dismiss.

With respect to the defendant's instant motion seeking dismissal of the plaintiffs' cause of action for Tortious Interference with Contractual/Prospective Contractual Relations, this Court has previously determined in its Decision and Order dated September 13, 2017 and entered October 2, 2017 in this action:

Specifically, the employment agreement in the instant action is Eric Lerner's alleged employment with TO Holding Group LLC while the employment in the New York County action involves Jessica Palletier's alleged at-will employment with T.O. Global LLC which is not a party in the instant action.

* * *

... [T]he claims of the plaintiffs in the Nassau County action relate solely to allegations of Jessica N. Pelletier's tortious interference with Eric Lerner's employment with non-party TO Holding Group LLC. ...

Based upon all the papers submitted for this court's consideration, the court finds no dispute that the defendant, Jessica N. Pelletier, was not an employee or subordinate of the plaintiffs, ERL Partners LLC and/or Eric Learner. Furthermore, the plaintiffs' complaint does not allege any employment relationship between the plaintiffs and the defendant herein.

Therefore, this court finds that the cases cited by the defendant in support of her motion all relate to an employer-employee scenario and are not dispositive of the issues framed in the plaintiffs' cause of action for Tortious Interference with Contractual/Prospective Relations.

With respect to the plaintiffs' causes of action for Prima Facie Tort and Intentional Infliction of Emotional Distress, this court's review of the plaintiffs' complaint finds that malice and special damages are factually and evidentially plead to sufficiently establish causes of action for Prima Facie Tort and Intentional Infliction of Emotional Distress (see, *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

The defendant's instant motion does not address the plaintiffs' causes of action for Declaratory Relief and Injunctive Relief. Accordingly, relief with respect to these causes

of action is moot.

Finally, Rule 3211(a)(4) of the CPLR provides for dismissal of a complaint upon the ground that "there is another action pending between same parties for the same cause of action. . . ."

Although not identified in the defendant's moving papers, it is obvious to this court that the defendant is referencing the hereinabove referred to New York County Supreme Court action.

This court in its September 13, 2017 Decision and Order Herein found at page 3 thereof:

Initially, the court must note that plaintiff, ERL Partners LLC, in the instant action, is not a party in the New York County action and the defendants, T.O. Global d/b/a Tikun Olan and/or Tikun Olam, Inc., Barry Farkas, Glen Lerner, Bernard Sucher and Harold Markowitz, in the New York County action are not a party in the instant action.

Prima facie, there is no unity of the aforesaid parties with ERL Partners LLC, one of the plaintiffs in the instant action.


* * *

Additionally, on further review, this court finds that the principle legal and equitable claims in both actions rely on different legal principles.

Specifically, the employment agreement in the instant action is Eric Lerner's alleged employment with TO Holding Group LLC while the employment in the New York County action involves Jessica Pelletier's alleged at-will employment with T.O. Global LLC which is not a party in the instant action.

Therefore, the defendant's motion is denied in all respects.

Dated: 3/6/18



JOHN M. GALASSO
J. S. C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE