O'Neill v Deutsche Bank Sec., Inc.
2019 NY Slip Op 30398(U)
February 20, 2019
Supreme Court, New York County
Docket Number: 100334/18
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C. PART 8

MAURA O'NEILL INDEX NO. 100334/18

MOT. DATE

- v -

DEUTSCHE BANK SECURITIES, INC. MOT. SEQ. NO. 001 and 002

The following papers were read on this motion to/for _____

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s).____

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s).____

Replying Affidavits NYSCEF DOC No(s).____

In motion sequence number 001, defendant moves to dismiss plaintiff's complaint (CPLR § 3211). Defendant further seeks an order enjoining plaintiff from filing any other pleadings in this court without leave. Plaintiff *pro se* opposes the motion and cross-moves for leave to serve and file an amended complaint. Defendant opposes the cross-motion.

In motion sequence number 002, plaintiff moved for an adjournment of the return date of defendant's motion to dismiss, which was originally returnable September 20, 2018 and ultimately adjourned to November 7, 2018 prior to plaintiff's filing of the OSC. Defendant did not oppose the motion to the extent of "a reasonable, 2-3 week extension of the return date on its motion to dismiss for the specific purpose of allowing O'Neill a legitimate time to obtain counsel." The court made motion sequence number 002 returnable on November 20, 2018 and also put motion sequence number 001 on for oral argument on November 20, 2018.

On November 20, 2018, plaintiff stated on the record that she sought an adjournment of the motion to dismiss "[s]o that [she] can have time ... to hire an attorney." Plaintiff further explained that since she filed the complaint, she has "contacted nine attorneys" but "unfortunately, what [she] has been told... is that no attorney will take [her] case because they've been threatened that, if they help [plaintiff] their careers will be destroyed like the prosecutor of the Duke lacrosse teams career was destroyed."

Ultimately, the court adjourned both motions to December 18, 2018 for oral argument. Further, while motion sequence number 001 was fully briefed, the court gave plaintiff permission to submit papers in further support of her cross motion before the adjourn date, and plaintiff filed a memorandum of law accordingly. Therefore, at this juncture, motion sequence number 002 is granted only to the extent that motion sequence number 001 was adjourned to December 18, 2018 and plaintiff was granted permission to submit papers on or before that date. Motion sequence number 002 is otherwise denied.

At the outset, the court will grant the cross-motion to amend, since leave to amend is freely given and plaintiff has filed a proposed amended complaint. Further, defendant has had an opportunity to supplement its motion to dismiss in light of the proposed amended complaint.

Dated: 2/20/19

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER

3. Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

The court now turns to the motion to dismiss. Defendant argues that the motion should be granted because: [1] the complaint is vague and speculative; [2] plaintiff failed to allege a theory of recovery based upon *respondeat superior*; and [3] plaintiff's claims are untimely.

Plaintiff is a former employee of the defendant, and there is no dispute that plaintiff ceased working for defendant in May 2007. Plaintiff's amended complaint asserts in pertinent part the following:

> This lawsuit arose from Defendant's campaign to sabotage Plaintiff's reputation, career, personal life, medical care, and ability to seek police protection in order to destroy Plaintiff's credibility to cover-up for (1) the fact Mr. Wilder, a former Managing Director at the Bank, sexually harassed Ms. O'Neill, (2) DB's flagrant violations of U.S. labor and penal laws, (3) Mr. Wilder's stalking and threat to drug and rape Ms. O'Neill, (4) the termination of at least fourteen senior DB employees as a result of the sexual harassment and rape scandal caused by Mr. Wilder, (5) the Defendant's conspiracy to cover-up for the fact Mr. Wilder repeatedly stalked, drugged and raped Ms. O'Neill starting on January 6, 2017, and (6) Deutsche Bank's various other criminal acts including the Bank's use of Plaintiff purloined and altered medical records, starting in February of 2018, to make false claims about Ms. O'Neill, including, but not limited to, the spurious claim Ms. O'Neill suffers from "bi-polar disorder" and was in a "domestic violence" "love-hate" relationship with Mr. Wilder, who, according to Plaintiff's forged medical records, had "known access" to her "place of living."

Plaintiff has asserted the following causes of action: [1] fraud; [2] nine separate claims for intentional infliction of emotional distress; [3] libel *per se*; [4] libel; [5] defamation *per se*; [6] tortious interference; and [7] a claim for injunctive relief. As for the last claim, plaintiff seeks an order enjoining defendant from

> a. Surveilling and monitoring the Plaintiff in any manner;
>
> b. Contacting or threatening any lawyer Ms. O'Neill speaks to about legal services or representation, including the Pro Se office of the New York Supreme Court;
>
> c. Contacting any healthcare provider to share any information about Ms. O'Neill or interfering in Ms. O'Neill's medical care in any way;
>
> d. Tampering with or bribing any potential witnesses in any of the numerous lawsuits the Plaintiff has initiated due to the conduct of Deutsche Bank and its agents and coconspirators;
>
> e. Contacting any prospective or current employer of Ms. O'Neill to share any information about Plaintiff;
>
> f. Speaking to any family member, friend, or member of Ms. O'Neill's professional or social network to make false and malicious statements about Plaintiff.

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). The court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*id.* citing *Morone v. Morone*, 50 NY2d 481 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]).

Under CPLR § 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v. Martinez, supra* at 88).

Fraud and intentional infliction of emotional distress

"The essential elements of a cause of action for fraud are 'representation of a material existing fact, falsity, scienter, deception and injury' " (*New York Univ. v. Continental Ins. Co.*, 87 NY2d 308 [1995], quoting *Channel Master Corp. v. Aluminum Ltd. Sales*, 4 NY2d 403 [1958]). Fraud is subject a statute of limitations which is the greater of six years from accrual or two years from when the claim was discovered or should have been discovered (CPLR § 213[8]). Finally, fraud must be pled with specificity (CPLR §§ 213, 3016[b]).

There are four elements of a cause of action for intentional infliction of emotional distress: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress (*Howell v. New York Post Co., Inc.*, 81 N.Y.2d 115 [1993]). This claim is subject to a one-year statute of limitations (CPLR § 215[3]).

In "everything but the kitchen sink" form, plaintiff's confusing and obtuse amended complaint is 138 pages long and contains 798 paragraphs. Yet, her claims against the defendant here are conclusory and speculative; aside from rank inuendo, plaintiff has failed to provide enough facts to support any cause of action. As defendant correctly points out, most of plaintiff's specific allegations against it in support of her fraud and tort claims occurred during and/or about the time of her employment with defendant, which is beyond the applicable limitations period.

Fatal to both the fraud and intentional infliction of emotional distress claims, it is unclear based upon plaintiff's factual allegations what role, if any, any individual employee of defendant had with respect to these claims. Certainly, there are no specific claims that any employee engaged in fraudulent conduct within six years of the commencement of this action.

For example, plaintiff alleges in support of the fraud cause of action that she learned in October 2017 from Ms. Craven that defendant "settled other lawsuits with other women in her group who sued [defendant] after Mr. Wilder was terminated due to his rape threat because [defendant] had a corporate policy of protecting repeat sexual offenders like Mr. Wilder. Plaintiff maintains that had she "known about Mr. Wilder's rape threat to Mr. Rabel while she was a Lehman employee, the vendetta of [defendant's] former employees, and [defendant's] decision to collude in the vendetta by collecting 'hundreds of pages,' [plaintiff] would have sued [defendant] in 2007."

These allegations do not save plaintiff's fraud claim because they are not pled with specificity insofar as they fail to assert a specific representation or omission made by the defendant and/or its employees (CPLR 3016[b]). Further, such a claim would nonetheless be untimely because plaintiff has failed to allege any facts which would establish that she could not have reasonably uncovered the alleged fraudulent plot by defendant to settle with other women who sued Mr. Wilder in the exercise of due diligence.

Nor are there any facts which would demonstrate that any employee of the defendant engaged in extreme and outrageous conduct within the one-year period preceding this action.

Plaintiff only otherwise generally claims without any factual support, that defendant interfered with a police investigation, contacted her medical providers and interfered with her medical records, threatened her attorneys, ostracized her in her social networks, and created a false document about her. The issue with these general claims is that plaintiff has failed to affirmatively plead that any of these acts occurred within the applicable statute of limitations period. Absent such an allegation, even if these claims

were pled with specificity, they are unavailing because plaintiff has failed to establish that the complained-of acts occurred within the applicable limitations period.

Accordingly, the first through tenth causes of action are severed and dismissed.

Libel and defamation

Plaintiff's causes of action for libel *per se* and libel are based upon alleged published statements by Pete Rose about plaintiff. Plaintiff alleges at paragraphs 83-87 that Pete Rose sent emails about her while she worked for defendant and thereafter. Plaintiff further alleges in pertinent part:

> 748. At the time Pete Rose published statements about the Plaintiff, Defendant Deutsche Bank knew Mr. Rose was continuing to use Ms. O'Neill as a form of entertainment on the trading floor, and knew Mr. Rose's commentary would cause information about the Plaintiff to be published to every level of employee of Defendant Deutsche Bank as well as external clients of the Bank.
>
> 749.Mr. Rose's emails and Bloomberg header contained statements that exposed the Plaintiff to public ridicule, shame, contempt and continued ostracization. Mr. Rose's claims were repeated, day in and day out.

Defamation can either be in writing (libel) or verbal (slander). The elements of a defamation claim are: [1] a false statement; [2] publication of the statement without privilege or authorization to a third party; [3] constituting fault as judged by, at a minimum, a negligence standard; and [4] the statement must either cause special harm or constitute defamation *per se* (*Dillon v. City of New York*, 261 AD2d 34 [1st Dept 1999] citing Restatement of Torts, Second § 558). A defamation claim must be pled with particularity, so that a plaintiff must allege the particular words complained of as well as the time, place and manner of the statement and to whom the statement was made (CPLR 3016[a]; *Dillon*, *supra* at 38).

In evaluating the viability of a defamation claim, the words must be construed in the context of the entire statement before an ordinary audience, and if the statement is not reasonably susceptible to a defamatory meaning, the claim is not actionable (*Silsdorf v. Levine*, 59 NY2d 8 [1983] *cert denied* 464 US 831). "Courts will not strain to find defamation where none exists" (*Dillon, supra* at 38 [internal quotation omitted]).

Defamation is subject to a one-year statute of limitations (CPLR § 215[3]). Here, defendant has established that plaintiff's claims arose outside the statute of limitations and in turn, plaintiff has failed to allege any facts which would support a timely defamation claim. Merely stating that Pete Rose continued to chronicle plaintiff after she no longer worked for defendant, without setting forth the actual words complained of, is too conclusory and speculative to support a timely defamation claim, which must be pled with particularity.

Accordingly, the eleventh and twelfth causes of action are severed and dismissed.

Plaintiff's defamation *per se* claim is based upon statements made by defendant about plaintiff to the Equal Employment Opportunity Commission ("EEOC") that plaintiff "told lies" was "dishonest" and was "traumatized". Plaintiff claims that these statements were made by defendant to the EEOC "to ensure the [defendant] was able to cover-up for its on-going campaign to undermine and discredit [plaintiff], and [the defendant] would not be investigated."

Plaintiff's defamation claims must also be dismissed for at least the following reasons. First, the statements are opinion and are not actionable. Further, plaintiff has failed to allege the claim with sufficient particularity in that she failed to describe who made the statements and to whom the statements were made. Finally, that the statements were allegedly made by defendant to the EEOC raises the is-

sue of whether the statements were protected by qualified privilege (see i.e. Herlihy v. Metropolitan Museum of Art, 214 AD2d 250 [1st Dept 1995]). However, given the paucity of facts concerning these allegations, this issue cannot be explored.

Accordingly, the thirteenth cause of action is severed and dismissed.

Tortious interference

Finally, plaintiff claims that defendant contacted a company called Client Command and convinced it to "concoct[] a false story that [plaintiff] 'failed to protect confidential information" which served as "pretext to terminate [plaintiff's] contract in March of 2018." "Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom (*Lama Holding Co. v. Smith Barney Inc.*, 88 NY2d 413 [1996]). Like plaintiff's other claims, this claim is wholly lacking in any facts which would support the allegation that defendant and/or its employee(s) procured Client Command's breach of contract. Accordingly, the fourteenth cause of action is severed and dismissed.

Remaining issues

Since plaintiff's substantive claims have been dismissed, there is no basis for injunctive relief. Accordingly, the fifteenth cause of action is also severed and dismissed.

Finally, defendant seeks an order enjoining plaintiff from filing any further actions. Plaintiff opposes that portion of the motion, arguing that it is unwarranted. The court agrees. Public policy generally mandates free access to the courts, however, courts should not permit "the use of the legal system as a tool of harassment" [*Sassower v. Signorelli*, 99 A.D.2d 358, 359 (2d Dep't 1984); see also *Capograsso v. Kansas*, 60 AD3d 522 [1st Dept 2009]; see also *Abe v. New York University*, -- NYS3d ----, 2019 WL 469719 [1st Dept, February 7, 2019]. Here, this is the first case that plaintiff has brought against the defendant. Further, while plaintiff has not prevailed in this action, the court cannot say that she has engaged in malicious prosecution or otherwise misused the judicial system. Accordingly, that portion of the motion is denied.

CONCLUSION

Accordingly, it is hereby **ORDERED** that motion sequence number 002 is granted only to the extent that motion sequence number 001 was adjourned to December 18, 2018 and plaintiff was granted permission to submit papers on or before that date; and it is further

ORDERED that motion sequence number 002 is otherwise denied; and it is further

ORDERED that motion sequence number 001 is decided as follows: [1] plaintiff's cross-motion to amend her complaint is granted; and [2] defendant's motion to dismiss is granted to the extent that the amended complaint is dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that motion sequence number 001 is otherwise denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order and Judgment of the court.

Dated: 2/20/19
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.