

Levine v Pincus

2019 NY Slip Op 30860(U)

March 28, 2019

Supreme Court, New York County

Docket Number: 158839/2015

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
NEW YORK COUNTY**

PRESENT: HON. PAUL A. GOETZ PART IAS MOTION 47EFM

Justice

-----X

INDEX NO. 158839/2015

LAWRENCE LEVINE

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 006

- v -

HELEN PINCUS,

DECISION AND ORDER

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 006) 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 128, 129, 130, 131, 132, 133, 134, 135

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Plaintiff Lawrence Levine, Esq., pro se, commenced this action after defendant Helen Pincus, a former client of plaintiff's, filed an ethics complaint against plaintiff with the Appellate Division First Department Disciplinary Panel on May 6, 2015, allegedly based entirely on issues which were previously adjudicated and decided by the panel in plaintiff's favor on July 29, 2011. By order dated June 27, 2016, this court, in ruling on defendant's motion to dismiss the amended complaint respectively, found that plaintiff's allegations were sufficient to state a claim for malicious prosecution, prima facie tort and intentional infliction of emotional distress. Defendant now moves, pursuant to CPLR 3212, seeking dismissal of the amended complaint and for judgment on her counterclaims in which she alleges that plaintiff commenced this action for the sole purpose of harassing defendant. Defendant also moves pursuant to 22 NYCRR 130.1 for sanctions against plaintiff for filing and prosecuting an allegedly frivolous lawsuit.

In support of her motion, defendant argues primarily that plaintiff cannot meet the special damages requirement to support his claims because he has represented that he did not treat with any medical professionals for the severe emotional distress and mental anguish he allegedly

suffered and because he is not pursuing any claim for damages to his law practice as a result of defendant's actions. Affirmation of Paul M. O'Brien dated October 11, 2017, Exh. E. It is well-established that in order to prevail on his malicious prosecution claim, plaintiff must allege and prove "special injury" as a result of defendant's actions. *Wilhelmina Models, Inc. v. Fleisher*, 19 A.D.3d 267, 269 (1st Dep't 2005) (citing *Engel v. CBS, Inc.*, 93 N.Y.2d 195, 201 (1999)). That is, the plaintiff must be able to show "some concrete harm that is considerably more burdensome than the physical, psychological or financial demands of defending a lawsuit." *Engel*, 93 N.Y.2d at 205. For example, special injury has been held to encompass "a grievance akin to the effect of a provisional remedy." *Id.* Loss of business can also constitute a special injury so long as plaintiff sufficiently identifies the specific business lost as a result of the civil proceeding. *See e.g., In re Eerie World Entm't, LLC*, 2006 WL 1288578, at *8 (Bankr. S.D.N.Y. Apr. 28, 2006) (special injury when plaintiff showed a specific and verifiable loss of income by providing the names of clients that refused to do business when they learned of the pending action); *see also Zahrey v. City of New York*, 2009 WL 1024261, at *15, fn. 23 (S.D.N.Y. 2009) (discussing cases).

Here, plaintiff did not allege or show that anything akin to a provisional remedy was imposed as a result of defendant's actions. Further, plaintiff has conceded that he will not seek any claim for damages to his law practice as a result of defendant's actions. O'Brien Aff., Exh. E. Although this does not preclude plaintiff from providing testimonial evidence regarding the distress, insomnia, anxiety, and weight loss he allegedly endured as a result of defendant's actions, these allegations are insufficient to meet the special injury requirement under New York law. *Engel*, 93 N.Y.2d at 205 ("what is 'special' about special injury is that defendant must abide some concrete harm that is considerably more burdensome than the physical, psychological or

financial demands of defending a lawsuit”). Likewise, plaintiff’s cause of action for prima facie tort must be dismissed insofar as plaintiff is unable to show that he suffered special damages.

Curiano v. Suozzi, 63 N.Y.2d 113, 117-18 (1984).

With respect to plaintiff’s claim for intentional infliction of emotional distress, the court has already ruled in its June 27, 2016 order that the allegations concerning defendant’s conduct are sufficient to meet the pleading requirement of this claim. On summary judgment, defendant has presented no additional evidence to support dismissal of this claim other than the alleged insufficiency of plaintiff’s pleading and thus the court is bound by its prior determination on this issue. *Cf. Friedman v. Connecticut Gen. Life. Ins.*, 30 A.D.3d 349, 349 (1st Dep’t 2006) (the doctrine of law of the case is inapplicable where summary judgment follows a motion to dismiss). Further, unlike the plaintiff’s other claims, his cause of action for intentional infliction of emotional distress does not require a showing of “special injury.” *See Chanko v. American Broadcasting Companies*, 27 N.Y.3d 46, 56 (2016). Although the stipulation precludes plaintiff from offering certain evidence at trial, he is not precluded from offering his own testimony concerning the injuries he suffered, and defendant has not shown that such testimony would be insufficient to prove severe emotional distress. Accordingly, this claim will not be dismissed.

Given the court’s refusal to dismiss plaintiff’s claim for intentional infliction of emotional distress, as well as its prior decisions on defendant’s motion to dismiss, defendant is not entitled to summary judgment on her counterclaims as she has failed to show that the instant lawsuit is frivolous and was commenced solely to harass defendant. *See Curiano v. Suozzi*, 63 N.Y.2d 113, 116 (1984). Likewise, defendant’s request for sanctions is denied.

Accordingly, it is

ORDERED that the motion for summary judgment is granted to the extent that the first and second causes of action in the amended complaint are dismissed, and is otherwise denied.

3/28/19
DATE


PAUL A. GOETZ, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					OTHER
					REFERENCE