COPY

Index No.: 7400-14

SUPREME COURT - STATE OF NEW YORK
I.A.S. Part 39 - SUFFOLK COUNTY

PRESENT:
Hon. **DENISE F. MOLIA,**
Justice

DAVID M. SPERLING,

Plaintiff,

- against -

ALA AMOACHI and AMOACHI & JOHNSON, ATTORNEYS AT LAW, P.L.L.C.,

Defendants.

CASE DISPOSED: YES
MOTION R/D: 12/1/17
SUBMISSION DATE: 12/14/18
MOTION SEQUENCE NO.: 005 MG

ATTORNEY FOR PLAINTIFF
Jakubowski Robertson Maffei
969 Jericho Turnpike
Saint James, New York 11780

ATTORNEYS FOR DEFENDANT
Certilman Balin Adler & Hyman LLP
100 Motor Parkway, Suite 156
Hauppauge, New York 11788

Upon the following papers filed and considered relative to this matter:

Notice of Motion dated October 23, 2017; Affirmation in Support dated October 23, 2017; Exhibits A through FF annexed thereto; Affirmation in Opposition dated November 20, 2017; Reply Affirmation dated January 10, 2018; Defendants' Memorandum of Law; and upon due deliberation; it is

ORDERED, that the motion by defendants, pursuant to CPLR 3212, for an Order directing the entry of summary judgment in favor of defendants and dismissing the Complaint, is granted.

In late 2010 the plaintiff, David Sperling, hired Ala Amoachi as an associate attorney with his law firm David M. Sperling & Associates ("DMSA"), a firm concentrating in immigration law. A few months later, Sperling also hired Bryan Johnson as an associate attorney.

In February 2011, the married, 58 year old Sperling commenced a sexual relationship with the single, 27 year old Amoachi. After approximately four weeks, Amoachi ended the romantic relationship and informed Sperling that she wanted to maintain a professional working relationship only. Sperling maintains that he retained strong romantic feelings for Amoachi and repeatedly attempted to recommence a sexual relationship. Throughout the remainder of her employment with DMSA, Sperling sent numerous emails regarding his romantic intentions,

RJT

which advances were consistently rejected by Amoachi.

In October 2011, Ala Amoachi resigned from DMSA, citing plaintiff's creation of a hostile work environment. On or about October 18, 2011Bryan Johnson also resigned from DMSA. Thereafter, Amoachi and Johnson formed the defendant law firm, Amoachi & Johnson, PLLC, ("A&J"). Pursuant to their legal and ethical obligations, Amoachi and Johnson notified DMSA immigration clients they had been representing that they were leaving DMSA.

Although Amoachi blocked several Sperling e-mail accounts, the record reveals that Sperling opened new e-mail accounts and continued to send messages to Amoachi. On October 28, 2011 and again on October 29, 2011, Amoachi filed an incident report with the Suffolk County Police Department concerning her receipt of unwanted email communications from Sperling. After the police contacted Sperling and directed him to cease further efforts to contact Amoachi, Sperling continued to send Amoachi email messages from different email accounts. At his deposition, Sperling claimed not to specifically recall if he had been contacted by the police, but did concede that the police may have contacted him. Nonetheless, he continued his attempts to contact Amoachi. In mid-December of 2011, Sperling appeared at Amoachi's residence and knocked on her door at approximately 8:30 p.m. When Amoachi refused to answer the door, Sperling left a handwritten note on her car which read "Ala, What happened to you? I can help you, if you want. You know how to reach me. Sorry for invading your privacy, will never come here again. David."

On March 12, 2012 in conjunction with her Family Court Act, Article 8 proceeding against plaintiff, Amoachi obtained an Order of Protection against Sperling. After a hearing held in the Suffolk County Family Court on April 23, 2012, the judge directed Sperling not to contact Amoachi further. Despite this admonition, Sperling nonetheless sent an e-mail to Amoachi from a different e-mail account on May 10, 2012. On May 16, 2012, Sperling, Amoachi and Johnson were all in attendance at a Long Island Hispanic Bar Association event in Farmingdale, New York. Despite all prior warnings, Sperling approached Amoachi in an attempt to engage her in conversation. Based on that event and the preceding history between the parties, on May 21, 2012 Amoachi obtained an Order of Protection against Sperling from the Nassau County District Court.

Amoachi subsequently had charges filed against Sperling for stalking in both Nassau and Suffolk counties. The charges against Sperling in the Nassau County matter were subsequently dismissed by Order dated April 11, 2013 based upon facial insufficiency of the accusatory instrument. The charges preferred in Suffolk County were also ultimately dismissed for facial insufficiency of the accusatory instrument by Order dated September 16, 2014.

On May 13, 2014, Sperling commenced the instant action. On April 11, 2016, the plaintiff filed a Verified Amended Complaint comprised of two causes of action sounding in malicious prosecution, one sounding in abuse of process against Amoachi only, and a fourth cause of action sounding in tortious interference with business relations against both defendants. The defendants served an Answer on May 4, 2016.

With regard to a motion for summary judgment, the movant bears the initial burden of making a *prima facie* showing of entitlement to summary judgment (see, Computer Strategies, Inc. v. Commodore Business Machines, Inc., 105 A.D.2d 167, 483 N.Y.lS.2d 716). The burden then shifts to the opposing party to submit proof in evidentiary form demonstrating the existence of an issue of fact (see, Burton v. Ertel, 107 A.D.2d 909, 910, 483 N.Y.S.2d 854, 855. "'[A] shadowy semblance of an issue or bald conclusory assertions, even if believable, are not enough' to defeat a motion for summary judgment." Mayer v. McBrunigan Construction Corp., 105 A.D.2d 774, 481 N.Y.S.2d 719, 720.

The first two causes of action set forth in the Complaint sound in malicious prosecution. The First cause of action concerns a criminal proceeding venued in the District Court of Nassau County, while the Second cause of action concerns a criminal proceeding venued in the District Court of Suffolk County.

To establish a claim sounding in malicious prosecution, a plaintiff must demonstrate "(1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the accused, (3) the absence of probable cause for the criminal proceeding and (4) actual malice." Smith-Hunter v. Harvey, 95 N.Y.2d 191, 195, 712 N.Y.S.2d 438, 440.

"A criminal proceeding terminates favorable to the accused, for purposes of a malicious prosecution claim, when the final disposition of the proceeding involves the merits and indicates the accused's innocence." MacFawn v. Kresler, 88 N.Y.2d 859, 860. The Second Department has held that a dismissal based upon the facial insufficiency of the criminal information is not on the merits (see, Semmig v. Charlack, 143 A.D.3d 802; see also, Russell v. The Journal News, 672 Fed. App'x. 76, 78-79).

The Nassau County criminal proceeding against the plaintiff, which is the subject of the First cause of action, was commenced by the filing of a misdemeanor information prepared by a Nassau County Police Detective on May 20, 2012, and was based in part on the statement of Ala Amoachi, sworn to on May 17, 2012. The charge contained within the misdemeanor information was Stalking in the Fourth degree in violation of Penal Law section 120.45(1). On or about September 10, 2012, Sperling, as the criminal defendant, moved for dismissal of the misdemeanor information as "facially deficient" pursuant to Criminal Procedure Law §§100.40 and 170.30. That motion was granted by Order dated April 11, 2013. While the People could have amended the information against Sperling and refiled the charge, they chose not to do so (see, People v. Nuccio, 78 N.Y.2d 102, 571 N.Y.S.2d 693).

The Suffolk County criminal proceeding against the plaintiff, which is the subject of the Second cause of action, involved a misdemeanor information for a charge of Stalking in the Fourth Degree in violation of Penal Law section 120.45(2). On October 10, 2012, Sperling moved for dismissal on the grounds of facial insufficiency. By Order dated October 23, 2012, the motion was denied, with the Suffolk County District Court finding that the information demonstrated "a *prima facie* case." Sperling did not appeal the Order which established that there was a probable cause for the commencement of the criminal proceeding (see, Graham v. Buffalo

General Laundries Corp., 261 N.Y. 165; see also, Landsman v. Moss, 133 A.D.2d 359, 519 N.Y.S.2d 262. On September 16, 2014, Sperling moved for dismissal based upon the interests of justice. While the Court did dismiss the proceeding, the dismissal was on the grounds of facial insufficiency.

Inasmuch as the principle that facial insufficiency dismissals are not final or favorable terminations on the merits for purposes of malicious prosecution claims (see, *e.g.*, MacFawn v. Kresler, 88 N.Y.2d 859, 644 N.Y.S.2d 486; Smith-Hunter v. Harvey, 95 N.Y.2d 191, 712 N.Y.S.2d 438) a dismissal of the First and Second causes of action asserted in the Complaint is warranted under the circumstances presented.

The Third cause of action set forth in the Complaint sounds in abuse of process. The elements required to sustain a cause of action for abuse of process are: (1) regularly issued process, either civil or criminal; (2) an intent to do harm without excuse or justification; and (3) use of the process in a perverted manner to obtain a collateral objective (see, Curiano v. Suozzi, 63 N.Y.2d 113, 116, 480 N.Y.S.2d 466, 468).

Plaintiff's contentions to the contrary, the transcripts of his depositions and the exhibits annexed thereto, demonstrate ongoing attempts by Sperling to contact Amoachi over a fifteen month period, despite her numerous repeated requests and demands to cease such contact. During that time Sperling received direction from both the Suffolk County Police and a Judge of the Suffolk Family Court to refrain from contacting Amoachi. Nonetheless, it is undisputed that Sperling continued to e-mail Amoachi on a regular basis; changed his email address to continue to send emails to Amoachi after she had blocked his prior addresses; appeared at Amoachi's residence at night; left a note on Amoachi's car; and approached and spoke with Amoachi at a Bar Association function. It would not be unusual or unreasonable for a person subjected to continuing unwanted contact to seek relief through judicial or criminal justice alternatives. Based on the foregoing, Sperling is unable to credibly maintain that process was without excuse or justification, or that the use of process by Amoachi was utilized in a perverted manner. As such, the Third cause of action is dismissed.

To support the Fourth cause of action sounding in tortious interference with business relations, the plaintiff must demonstrate (1) business relations with a third party; (2) the defendant's interference with those business relations; (3) that the defendant acted with the sole purpose of harming the plaintiff or using wrongful means; and (4) injury to the business relationship (see, Guard-Life Corp. v. S. Parker Hardware Mfg. Corp., 50 N.Y.2d 183, 438 N.Y.S.2d 628).

"The unqualified right to terminate the attorney client relationship at any time has been assiduously protected by the courts." In Re Cooperman, 83 N.Y.2d 465, 473, 611 N.Y.S.2d 465, 468. "In order to state a cause of action based upon tortious interference with a contract terminable at will [such as an attorney retainer statement] there must be a showing of wrongful interference such as fraudulent representations or threats." Koeppel v. Schroder, 122 A.D.2d 780, 782, 505 N.Y.S.2d 667, 669. The conduct required to support this type of claim must be "a crime" or "egregious wrongdoing" by the defendant. Carvel Corp., 3 N.Y.3d 182, 189-190, 785

N.Y.S.2d 359, 361-362.

Here, the defendants contend that they merely fulfilled their ethical obligation by advising clients they had represented at DMSA that they would no longer be employed by that firm, and that they would be opening their own firm. The choice to continue representation with DMSA or another firm was a decision of the client in the exercise of the right to seek legal representation by an attorney of the client's choosing. There is no evidence that the defendants defamed the plaintiff, issued a threat, or made fraudulent representations in their notification to the clients that they had previously represented. In fact, Sperling did not specifically identify any clients solicited by the defendants who subsequently left DMSA to seek representation with Amoachi & Johnson, Attorneys at Law, P.L.L.C. Nor has the plaintiff provided documentation or other credible evidence to support an injury to his business or his claim for damages. The Fourth cause of action is therefor dismissed.

The foregoing constitutes the Order of this Court.

Dated: April 11, 2019

Hon. Denise F. Molia

HON. DENISE F. MOLIA A.J.S.C.