IME Watchdog v Baker, McEvoy, Morrissey & Moskovits, P.C.
2019 NY Slip Op 31827(U)
June 11, 2019
Supreme Court, Kings County
Docket Number: 504427/2018
Judge: Richard Velasquez
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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 11th day of JUNE 2019.

P R E S E N T:
HON. RICHARD VELASQUEZ
Justice.

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IME WATCHDOG,

Plaintiffs,

Index No.: 504427/2018

-against-

Decision and Order

BAKER, MCEVOY, MORRISSEY & MOSKOVITS, P.C., And AMERICAN TRANSIT INSURANCE COMPANY, jointly and severally,

Defendants.

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The following *papers* numbered 84 to 105 read on this motion:

Papers	Numbered
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed	84-93, 94-95
Opposing Affidavits (Affirmations)	99-100, 101-102
Reply Affidavits (Affirmations)	103, 105

After oral argument and a review of the submissions herein, the Court finds as follows:

Both Defendants, BAKER, MCEVOY, MORRISSEY & MOSKOVITS, P.C. (hereinafter BAKER MCEVOY), and defendants AMERICAN TRANSIT INSURANCE

COMPANY, move pursuant to CPLR 3211(a)(7), dismissing complaint in its entirety. Plaintiff opposes the same.

ARGUMENTS

Defendants, BAKER MCEVOY, contend they pursued the subject litigation strategy without malice and the decision to pursue said litigation strategy is privileged from attack because it was designed to protect the legitimate legal interests of its clients. Defendant's contend the Appellate Division clearly and unequivocally held that the Defendant's practice of excluding non-attorneys from Independent Medical Examinations (IME's) was based on a good faith interpretation of then existing case law. Further, defendants contend the court held that the plaintiff failed to prove irreparable injury, fraud, collusion, malice or bad faith, and that these findings constitute the "Law of the Case" and are binding on this court. Additionally, Defendants contend plaintiff cannot establish there is a matter in controversy, or that any decision rendered in this matter, would not, effectively be an advisory opinion, and submit there is no viable claim for any of the causes of action asserted.

Defendants, American Transit, adopt all of defendant Baker MCEVOY' contentions. Defendants AMERICAN TRANSIT, also contend, they never directed any of the defendants BAKER MCEVOY's firm's litigation practices and there is no basis to find any collusion or conspiracy; there is no basis for injunctive relief since the Notices were changed in accordance with recent appellate rulings, thereby rending moot the application for injunctive relief.

Plaintiff opposes the same contending a disposition of a motion for a Preliminary Injunction does not constitute the "law of the case". Furthermore, plaintiff contends they

do plead and state several meritorious causes of action, which, at the very least, are able to withstand a motion to dismiss. Plaintiff contends defendant's conduct is wrongful, deliberately tortious, and even defiant of prevailing jurisprudence and this conduct caused plaintiff irreparable harm.

BACKGROUND

This action arises out of the Defendant's former practice of utilizing notices to preclude the attendance of non-attorney observers at defense medical examinations (DME) and independent medical examinations (IME). The complaint seeks damages for tortious interference, abuse of process, prima facie tort, civil conspiracy, and injunctive relief precluding defendants from including in its Notice for plaintiff's IME, any restriction against a non-attorney accompanying the plaintiff.

By order dated April 20, 2016, Honorable Fernando Tapia denied Defendants motion to change venue to Kings County and granted plaintiff's motion for a Preliminary Injunction, enjoining Defendant's from excluding non-attorneys from the IME's. Pursuant to this order, defendant Baker McEvoy, stopped its practice of serving the IME notices excluding non-attorneys from appearing; defendant in turn filed a Notice of Appeal.

On December 6, 2016 the Appellate Division First Department reversed the Honorable Fernando Tapia's denial of change venue motion and further found that Judge Tapia erred in granting plaintiff's preliminary injunction. The court found plaintiff failed to demonstrate the elements necessary for entitlement to injunctive relief because there was no showing that the alleged tortious conduct exceeded their professional duty to defend their clients; or was tainted by fraud, collusion, malice or bad faith. The Appellate Division

held that the proper procedure was to appeal the adverse court rulings that excluded non-attorneys, as opposed to commencing an action against the attorneys, who had secured favorable rulings on the issue.

ANALYSIS

Pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Morone v. Morone*, 50 NY2d 481, 484, 429 NYS2d 592, 413 NE2d 1154; *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 634, 389 NYS2d 314, 357 NE2d 970). **"The criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one"** (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17; *Rovello v. Orofino Realty Co.*, 40 NY2d at 636, 389 NYS2d 314, 357 NE2d 970). **"[B]are legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on such a motion"** (*Palazzolo v. Herrick, Feinstein, LLP*, 298 AD2d 372, 751 NYS2d 401). If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action (see *McGuire v. Sterling Doubleday Enters., LP*, 19 AD3d 660, 661, 799 NYS2d 65). **"Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims ... plays no part in the determination of a pre-discovery 3211[a][7] motion to dismiss"** (*Shaya B. Pac., LLC*

v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, 38 AD3d 34, 38; see *EBC I, Inc. v. Goldman Sachs & Co.*, 5 NY3d 11, 832 NE2d 26, 799 NYS2d 170 (Ct of Appeal 2005; *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275, 372 NE2d 17 (1977).

The following relevant caselaw has been established since the initial Appellate Division ruling in the present case. On January 5, 2017, the Appellate Division First Department in *Kattaria v. Rosado*, 146 AD3d 457, 43 NYS3d 758, 2017 NY Slip Op 00091, held that the trial court providently exercised its discretion in barring plaintiff's non-legal representative from IME's.

On February 15, 2017, *Kattaria v. Rosado*, was distinguished but the Appellate Division Second Department decision in *Henderson v. Ross*, 147 AD3d 915, 47 NYS3d 136, (2017 NY Slip Op 01186), which contradicts the holding in the first department that precluded non-attorney's from IME's, and held that a plaintiff is entitled to be examined in the presence of his or her attorney or other legal representative, as well as an interpreter, if necessary, so long as they do not interfere with the conduct of examination. As a result of *Henderson*, the Defendant's contend they have never resumed the practice of precluding a non-attorney or attorney during an IME in the Second Department.

On October 5, 2017 the Appellate Division in the First Department in *Santana v. Johnson,* 154 AD3d 452, 60 NYS3d 831, 2017 NY Slip Op 06997, agreed citing; *Guerra v. McBean*, 127 AD3d 462, 4 NYS3d 526 [1st Dept.2015]; *Henderson v. Ross*, 147 AD3d 915, 47 NYS3d 136 [2d Dept.2017]; *Marriott v. Cappello*, 151 AD3d 1580, 56 NYS3d 691 [4th Dept.2017]; *id.* The court in *Santana* went on to state, "To the extent that this Court has implicitly suggested that a representative can be barred from an examination if the

plaintiff fails to demonstrate special and unusual circumstances (*see Kattaria v. Rosado*, 146 AD3d 457, 43 NYS3d 758 [1st Dept.2017]), **that is not the current state of the law in either the First, Second or Fourth Departments and is inconsistent with the general principle that plaintiffs are entitled to have a representative present at their medical examinations** (*Guerra* at 462, 4 NYS3d 526; *Henderson* at 916, 47 NYS3d 136; *Marriott* at 1582, 56 NYS3d 691). *id.* As a result of *Santana*, the Defendant's contend they never resumed said practice in the First Department.

The defendant in the present case contends, the doctrine of the "law of the case" makes the Appellate Division determination binding on the parties and this court. Defendant specifically argues an Appellate Court's resolution of an issue on a prior appeal, constitutes the "law of the case" and is binding on this Supreme Court, as well as on the Appellate Court. *Madison Asquistors v. 7614 Fourth*, 134 AD3d 683,684 (2 Dep't 2015).

In opposition, the plaintiff contends, a denial of a Preliminary Injunction does not constitute law of the case and therefore the issues must be tried as if no application for a preliminary injunction or temporary restraining order was made.

In the present case, contrary to the defendants contentions, it is well settled that the granting or denial of a motion for a preliminary injunction does not constitute the law of the case or an adjudication on the merits of the claim for a permanent injunction and, therefore, the issues must be tried as if no application for a preliminary injunction had been made (*see, Walker Mem. Baptist Church v. Saunders*, 285 NY 462, 474; *Albini v. Stanco*, 61 Misc 2d 813, 822, *affd* 32 AD2d 1042; Icy *Splash Food & Beverage, Inc. v.*

Henckel, 14 AD3d 595, 780 NYS2d 505, (2nd Dep't 2005); *Peterson v Corbin*, 275 AD2d 35, 713 NYS2d 361, (2nd Dep't 2000); *quoting from Ratner v. Fountains Clove Rd.-Apartments, Inc.*, 118 AD2d 843, 843–44, 500 NYS2d 329 (1986).

Further the defendants contend, under a 3211 analysis, the facts alleged are presumed to be true and plaintiff is afforded benefit of every favorable inference and the Court is to determine only whether the facts fit within any cognizable legal theory. However, a motion for Temporary Injunction, has been deemed to open the record and gives Courts authority to consider evidence submitted in support of the preliminary injunction and temporary restraining order in deciding a 3211 motion. Additionally, defendants contend, whereas here, the moving party offers such documentary proof, the test to be applied becomes whether the plaintiff has a cause of action, not whether he has stated one in the complaint. Defendants argue this is especially so, whereas here, the documents were initially submitted in opposition to plaintiff's application for a preliminary injunction and temporary restraining order.

Plaintiff in its opposition contend that defendant's argue, erroneously, that the transcripts compromising the hearing on request for preliminary injunction, constitutes evidentiary material that is dispositive of their motion and is sufficient to warrant that this court, in deciding a 3211(a)(7) motion determine whether the plaintiff has a cause of action, instead of whether plaintiff has stated one which is the normal analysis under 3211(a)(7). Further plaintiff argues, affidavits, depositions and correspondence do not generally constitute documentary evidence.

In the present case defendants rely on *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 272, 372 N.E.2d 17 (1977), in support of their contention that this court can search the record and upon such evidence determine whether there is a cause of action, and not whether the plaintiff has stated on. In *Guggenheimer*, the court found; "It has been stated that a motion for a temporary injunction opens the record and gives the court authority to pass upon the sufficiency of the underlying pleading" (s*ee, e.g., Shapiro v City of New York*, 67 Misc 2d 1021, 1028, affd 32 NY2d 96, *app dsmd* 414 US 804, *mot for reh den* 414 US 1087; *Leonard v John Hancock Mut. Life Ins. Co.*, 118 NYS2d 170, 171, affd 281 App Div 859; *Challenger v Household Fin. Corp.,* 179 Misc 966, affd 266 App Div 844); *quoting Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 272, 372 N.E.2d 17 (1977). "However, such action is only permissible under CPLR 3211(c), as amended, which requires the court to give adequate notice to the parties, in order to treat the motion as one for summary judgment" *quoting Id.* In the present case, there has been no notice by this court, and no formal request for such treatment by the parties. As such, this court declines to convert this 3211 motion to dismiss into a 3212 motion for summary judgment motion. *See* CPLR 3211(c); (*see also Rovello v Orofino Realty Co.*, 40 NY2d 633, 636; *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 272, 372 N.E.2d 17 (1977). Therefore, the proper focus is on whether the complaint states a cause of action.

Next, the court shall address the plaintiff's first and second cause of action claims sounding in tortious interference with existing contracts and tortious interference with future contracts. Defendants contend plaintiff fails to sufficiently allege that the defendant's had knowledge of the alleged contract with IME Watchdog and plaintiff fails

to establish that defendant's conduct was without excuse or justification. Defendants further argue that its IME Notices were justified and privileged as the Appellate Division (1st Dept) clearly stated in *Martinez v. Pinard* (2018) and *IME Watchdaog 2016*. This privilege shields an attorney's action, even if such conduct/strategy is ultimately proven to be erroneous. Furthermore, the court in *Martinez* stated that the practice was based on a good faith interpretation of the existing case law and as such this action must be dismissed.

In *Martinez v. Pinard* (1st Dept 2018), involved an appeal from a pre-Santana case, which permitted exclusion of non-attorney IME's, the *Martinez* Court rejected plaintiff's claim that Defendant's waived its right to a physical, citing to *Kattaria* and *IME Watchdog (*the Appellate decision on the preliminary injunction in the present case*)*, finding that defendant's conduct in serving its Notices was supported by a good faith interpretation of the applicable case law. Upon the higher courts determining such conduct was wrong the defendants, in the present case, immediately ceased such conduct.

However, as previously stated the determination to be made on a motion to dismiss is not whether there is a claim but whether the plaintiff has stated one. The elements of tortious interference with contractual relations are "(1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff" (*Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90, 94, 595 N.Y.S.2d 931, 612 N.E.2d 289; s*ee, Guard–Life Corp. v. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 189–190, 428 N.Y.S.2d 628, 406 N.E.2d 445); quoting *M.J. & K.*

Co. v. Matthew Bender & Co., 220 A.D.2d 488, 490, 631 N.Y.S.2d 938, 940 (1995). In the present case, affording the plaintiff all favorable inferences, the plaintiff has alleged sufficient facts to satisfy each of the above elements for a cause of action for tortious interference with contractual relations..." (*see Kelly v Bank of Buffalo*, 32 AD2d 875); *quoting Guggenheimer v. Ginzburg*, 43 NY2d 268, 275, 372 NE2d 17 (1977).

Next the court shall address the plaintiff's third cause of action claim sounding in abuse of process. The defendants contend the Appellate Division in *IME Watchdog* already concluded that defendant's IME Notices were justified and served within its professional duty to defend its clients, especially in light of fact that several Supreme Court decisions were ruled in defendant's favor and the cause of action sounding abuse of power must be dismissed. The plaintiffs contend the findings in the Appellate Division case are not the law of the case and such findings are not binding on this court.

The tort of abuse of process has three essential elements, to wit, regularly issued process either civil or criminal, an intent to do harm without excuse or justification, and use of the process in a perverted manner to obtain a collateral objective (*Curiano v. Suozzi*, 63 NY2d 113, 480 NYS2d 466, 469 NE2d 1324; *Board of Educ. v. Farmingdale Classroom Teachers Assn.*, 38 NY2d 397, 380 NYS2d 397, 343 NE2d 278; *Raved v. Raved*, 105 AD2d 735, 481 NYS2d 170). "The gravamen of the tort of abuse of process is the improper use of process after it is issued" (*Williams v. Williams*, 23 NY2d 592, 298 NYS2d 473, 246 NE2d 333); *Marks v. Marks*, 113 AD2d 744, 745, 493 NYS2d 206, 207 (1985). In the present case, the plaintiff alleges the defendants conduct of causing examinations to be canceled without justification and then moving for protective orders

on a case-by-case basis, in its attempt to preclude watchdogs from IME rooms was an abuse of process. Plaintiff alleges that defendant repeatedly and improperly used the power of moving for protective orders in those actions to harass defendant and exhaust her resources. In the present case, the second and third requirements have not been satisfied. The plaintiff failed to "allege any actual intentional misuse of the notice and moving for protective orders to obtain an end outside its proper scope", nor did they successfully allege that such actions were without excuse or justification (*see Hornstein v. Wolf*, 67 N.Y.2d 721, 723, 499 N.Y.S.2d 938, 490 N.E.2d 857; H*auser v. Bartow*, 273 N.Y. 370, 374, 7 N.E.2d 268; *Berman v. Silver, Forrester & Schisano*, 156 A.D.2d 624, 549 N.Y.S.2d 125; *quoting Panish v. Steinberg*, 32 A.D.3d 383, 384, 819 N.Y.S.2d 549, 550 (2006).

Next the court shall address the plaintiff's fourth cause of action sounding in prima facie tort. "The requisite elements for a cause of action sounding in prima facie tort include (1) intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, (4) by an act or series of acts which are otherwise legal" (*see Del Vecchio v. Nelson*, 300 A.D.2d 277, 278, 751 N.Y.S.2d 290; s*ee also Curiano v. Suozzi*, 63 N.Y.2d 113, 480 N.Y.S.2d 466, 469 N.E.2d 1324; *Drago v. Buonagurio*, 46 N.Y.2d 778, 413 N.Y.S.2d 910, 386 N.E.2d 821). An element of a prima facie tort cause of action is that the complaining party suffered specific and measurable loss, which requires an allegation of special damages (*see Del Vecchio v. Nelson*, 300 A.D.2d at 278, 751 N.Y.S.2d 290). Additionally, central to a cause of action alleging prima facie tort is that the plaintiff's intent was motivated solely by malice or "disinterested malevolence" (*Simaee v. Levi*, 22 A.D.3d

559, 563, 802 N.Y.S.2d 493; *see Lancaster v. Town of E. Hampton*, 54 A.D.3d 906, 908, 864 N.Y.S.2d 537); *Diorio v. Ossining Union Free Sch. Dist.*, 96 A.D.3d 710, 712, 946 N.Y.S.2d 195, 198–99 (2012). Special damages, which are an essential element of ... prima facie tort, must be pleaded with sufficient specificity (*see, Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 490 N.Y.S.2d 735, 480 N.E.2d 349; *Nyack Hosp. v. Empire Blue Cross & Blue Shield*, 253 A.D.2d 743, 677 N.Y.S.2d 485; *Penn–Ohio Steel Corp. v. Allis–Chalmers Mfg. Co.*, 7 A.D.2d 441, 184 N.Y.S.2d 58). Because general allegations of lost sales from unidentified lost customers are insufficient (*see, Drug Research Corp. v. Curtis Publ. Co.,* 7 N.Y.2d 435, 199 N.Y.S.2d 33, 166 N.E.2d 319; *De Marco–Stone Funeral Home v. WRGB Broadcasting*, 203 A.D.2d 780, 610 N.Y.S.2d 666); q*uoting DiSanto v. Forsyth*, 258 A.D.2d 497, 498, 684 N.Y.S.2d 628, 629 (1999). In the present case, although the plaintiff's allege loss of clients and loss of future client such allegations without identifying specific lost clients is insufficient to demonstrate with sufficiency special damages. As such plaintiff has failed to state a cause of action for Prima Facie Tort.

Next, the court shall address the plaintiff's fifth cause of action sounding in civil conspiracy. Defendant contends New York Courts do not recognize an independent cause of action for conspiracy to commit a civil tort, and such claim stands or falls with the underlying tort claim. It is well settled that New York does not recognize civil conspiracy as an independent tort ...(*see, Falle v. Metalios*, 132 A.D.2d 518, 517 N.Y.S.2d 534); *quoting Fisher v. Bristol Myers, Inc.*, 224 A.D.2d 657, 658, 638 N.Y.S.2d 729, 730 (1996). In the present case, the plaintiff has successfully stated a cause of action

in tortious interference with contract and as such this court cannot at this juncture dismiss the cause of action for conspiracy to commit a civil tort because the underlying tort of tortious interference with contract remains.

Next the court shall address the plaintiff's sixth cause of action sounding in vicarious liability. "An employer is vicariously liable for the torts of its employee, even when the employee's actions are intentional, if the actions were done while the employee was acting within the scope of his employment" (*see Brancato v. Dee & Dee Purchasing*, 296 A.D.2d 518, 745 N.Y.S.2d 564; *Riviello v. Waldron*, 47 N.Y.2d 297, 302, 418 N.Y.S.2d 300, 391 N.E.2d 1278). "However, there is no vicarious liability on the part of the employer for torts committed by the employee solely for personal motives unrelated to the furtherance of the employer's business" (*see Riviello v. Waldron, supra; Vega v. Northland Mktg. Corp.*, 289 A.D.2d 565, 735 N.Y.S.2d 213); *Oliva v. City of New York*, 297 A.D.2d 789, 790, 748 N.Y.S.2d 164, 166 (2002). The allegations by the plaintiff have stated a cause of action for vicariously liability. It is undisputed that all alleged actions in question were executed during employment within the scope of employment at the time. Therefore, the plaintiff has stated a cause of actin for vicarious liability.

Finally, the court shall address the plaintiff's seventh cause of action sounding in Injunctive relief. As to plaintiff's request for an injunction, however, "Irreparable injury, for purposes of equity, has been held to mean any injury for which money damages are insufficient" (*Matter of Walsh v. Design Concepts*, 221 AD2d 454, 455, 633 NYS2d 579; *see McLaughlin, Piven, Vogel v. Nolan & Co.*, 114 AD2d 165, 174, 498 NYS2d 146). Conversely, "[e]conomic loss, which is compensable by money damages, does not

constitute irreparable harm" (*EdCia Corp. v. McCormack*, 44 AD3d 991, 994, 845 NYS2d 104; *see Neos v. Lacey*, 291 AD2d 434, 435, 737 NYS2d 394). In the present case, the plaintiff fails to allege irreparable injury not in the form of money damages. Additionally, pursuant to CPLR 6301 "A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff." CPLR 6301 (McKinney). Notably, the alleged conduct the plaintiff seeks to enjoin which is the basis for their injunctive relief has ceased. It is undisputed that the defendants have abandoned the practice of precluding non-attorneys from IME's. As such the court cannot enjoin conduct which no longer exists, and plaintiff's requests for a preliminary injunction enjoining the defendants from precluding non-attorney's from IME's must be denied, as the conduct in question is no longer happening.

Accordingly, defendants request to dismiss the plaintiff's cause of action for tortious interference with contractual relations is hereby denied; Defendant's request to dismiss the plaintiff's cause of action for abuse of process is hereby granted; Defendant's request to dismiss the plaintiff's cause of action for prima facie tort is hereby granted; Defendant's request to dismiss plaintiff's cause of action for civil conspiracy is hereby denied; Defendant's request to dismiss plaintiff's cause of action for vicarious liability is

hereby denied; defendants request to dismiss plaintiff's cause of action sounding in injunctive relief is hereby granted, for the reasons stated above

This constitutes the Decision/Order of the Court.

Date: June 11, 2019

RICHARD VELASQUEZ, J.S.C.

JUN 11 2019

So Ordered
Hon. Richard Velasquez

KINGS COUNTY CLERK
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