

Sapienza v Notaro

2019 NY Slip Op 31886(U)

May 28, 2019

Supreme Court, Queens County

Docket Number: 700060/2016

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD

Justice

- - - - - x

RICHARD SAPIENZA, JR., Index No.: 700060/2016

Plaintiff, Motion Date: 5/16/19

- against - Motion No.: 36

PHILIP NOTARO, JR.; THE LAW OFFICE OF Motion Seq.: 8

MICHAEL A. KOFSKY, PLLC, a New York
professional service limited liability
company; and MICHAEL A. KOFSKY,

Defendants.

- - - - - x

The following electronically filed documents read on this motion
by defendant PHILIP NOTARO, JR. for an Order pursuant to CPLR
3211(a)(5) & (7), dismissing the second amended complaint; and on
this cross-motion by plaintiff for an Order denying the motion to
dismiss, dismissing defendant Philip Notaro, Jr.'s first and
second affirmative defenses, and sanctioning defendant Philip
Notaro, Jr. under 22 NYCRR 130-1.1:

Notice of Motion-Affidavit-Exhibits.....EF 210
Notice of Cross-Motion-Memo. of Law-Exhibits.....EF 229 - 233
Memo. Of Law in Support of Motion..... 1¹
Papers
Numbered

The Second Amended Complaint alleges that this action arises
out of a campaign by defendant Philip Notaro, Jr. (Notaro) and
his attorneys to pursue meritless claims against plaintiff in at
least three different forums for the purpose of extorting a
settlement from plaintiff. Plaintiff seeks to recover damages for
malicious prosecution, tortious interference with advantageous
business relationship, and intentional infliction of emotional
distress.

¹ Pro se defendant Philip Notaro, Jr.'s Reply Memorandum of Law in
Support of His Motion to Dismiss Plaintiff's Second Amended Complaint was not
e-filed. A hard copy was submitted and accepted by the Court on the return
date.

Previously, defendants The Law Office of Michael A. Kofsky, PLLC, a New York professional service limited liability company and Michael A. Kofsky (hereinafter the Kofsky defendants) moved to dismiss the Amended Complaint on the grounds that plaintiff's claims are time-barred and the Amended Complaint fails to state a cause of action. Plaintiff cross-moved for leave to file a second amended complaint. By Short Form Order dated November 14, 2016, this Court granted the Kofsky defendants's motion to dismiss to the extent that the causes of action for malicious prosecution of the New Jersey Action and intentional infliction of emotional distress were dismissed as against the Kofsky defendants. The causes of action for malicious prosecution of the Queens County Action and tortious interference with advantageous business relationship were not dismissed. Additionally, this Court granted plaintiff's motion for leave to file a second amended complaint. This Court notes that it is undisputed that the Second Amended Complaint is virtually identical to the Amended Complaint except for the removal of the Malicious Prosecution of the New Jersey Action cause of action and additional allegations pertaining to the IDS Indemnification Action and defendants's additional willful and malicious actions in connection with the litigations.

Malicious Prosecution of the Queens County Action:

Notaro seeks to dismiss the cause of action for Malicious Prosecution of the Queens County Action on the grounds that it fails to state a cause of action as plaintiff failed to sufficiently plead malice or allege a special injury. Notaro's claims are now barred by the law of the case doctrine.

The law of the case doctrine "is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned" (Martin v City of Cohoes, 37 NY2d 162, 165 [1975]). The doctrine "applies only to legal determinations that were necessarily resolved on the merits in the prior decision" and to the same questions presented in the same case (Gilligan v Reers, 255 AD2d 486 [2d Dept. 1998]; see People v Evans, 94 NY2d 499, 502 [2000]; RPG Consulting, Inc. v Zormati, 82 AD3d 739 [2d Dept. 2011]; Castle v Gaseteria Oil Corp., 263 AD2d 523 [2d Dept. 1999]; Baldasano v Bank of N.Y., 199 AD2d 184 [1st Dept. 1993]).

In the prior Order dated November 14, 2016, this Court found that plaintiff sufficiently plead malice and a specific special injury. Accordingly, plaintiff sufficiently pled a cause of action for Malicious Prosecution of the Queens County Action against Notaro.

Tortious Interference with Advantageous Business Relationship:

Notaro seeks to dismiss the cause of action for Tortious Interference with Advantageous Business Relationship on the grounds that it is barred by the three year statute of limitations. Notaro's claims pertaining to the expiration of the statute of limitations are also barred by the law of the case doctrine as this Court has already found this cause of action to be timely.

Intentional Infliction of Emotional Distress:

Notaro seeks to dismiss the cause of action for Intentional Infliction of Emotional Distress on the grounds that it is barred by the one year statute of limitations. In the prior Order, this Court dismissed this cause of action as against the Kofsky defendants.

Here, the Second Amended Complaint refers to specific incidents that occurred on January 10, 2010, on September 25, 2009, from December 2007 through July 2013, on May 11, 2011, on April 20, 2012, and on September 18, 2012. Accordingly, these specific incidents alleged as a basis for the intentional infliction of emotional distress cause of action are time-barred (see CPLR 215; Weisman v Weisman, 108 AD2d 853 [2d Dept. 1985] [finding that a claim for intentional infliction of emotional distress can only be maintained with respect to the incidents occurring within the one-year statute of limitations period]; Kwarren v Am. Airlines, 303 AD2d 722 [2d Dept. 2003]; Campbell v Chabot, 189 AD2d 746 [2d Dept. 1993]).

The Second Amended Complaint also alleges that Kofsky sent two threatening e-mails to plaintiff's counsel on September 14, 2015 and September 24, 2015. Previously, this Court held that these specific e-mails were sent to plaintiff's counsel in the context of adversarial litigation, and thus, the e-mails do not provide a foundation for a claim of intentional infliction of emotional distress (see Lazich v Vittoria & Parker, 189 AD2d 753 [2d Dept. 1993]; Yalkowsky v Century Apts. Assoc., 215 AD2d 214 [1st Dept. 1995]).

Accordingly, and based on the law of the case, the Intentional Infliction of Emotional Distress cause of action shall be dismissed as it fails to state a cause of action and is barred by the applicable statute of limitations.

Regarding the cross-motion, and as this Court is granting part of the motion, this Court finds that the affirmative

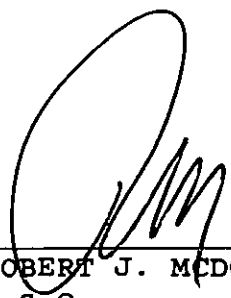
defenses shall not be dismissed. Additionally, plaintiff's request for sanctions pursuant to 22 NYCRR 130-1.1 for frivolous conduct is denied as Notaro's motion was not completely without merit.

Accordingly, for all of the above stated reasons, it is hereby,

ORDERED, that defendant PHILIP NOTARO, JR.'s motion to dismiss is granted to the extent that the cause of action for Intentional Infliction of Emotional Distress is hereby dismissed as against defendant PHILIP NOTARO, JR. The causes of action for Malicious Prosecution of the Queens County Action and Tortious Interference with Advantageous Business Relationship remain; and it is further

ORDERED, that plaintiff's cross-motion is denied.

Dated: May 28, 2019
Long Island City, N.Y.



ROBERT J. McDONALD
J.S.C.

FILED
JUN -6 2019
COUNTY CLERK
QUEENS COUNTY