Feng Li v Shih
2019 NY Slip Op 33852(U)
December 10, 2019
Supreme Court, Queens County
Docket Number: 704245/18
Judge: Timothy J. Dufficy
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.

ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice

----------x

FENG LI,

Plaintiff,

-against-

Index No.: 704245/18
Motion Date: 5/28/19

WILLARD SHIH,

Defendant.

Mot. Seq. 6

----------x

The following papers were read on this motion by defendant seeking dismissal of plaintiff's complaint, pursuant to CPLR 3211 (a) (4), (5) and (7), and for sanctions, pursuant to 22 NYCRR 130-1.1, and cross motion by plaintiff, seeking the striking of defendant's motion pursuant to CPLR 3211 (e), and, also, seeking sanctions for frivolous conduct.

	PAPERS NUMBERED
Notice of Motion - Affirmation - Exhibits	EF 49 - 63
Memorandum of Law.....	EF 64
Notice of Cross Motion.....	EF 66
Memorandum of Law in Opposition and In Support of Cross-Motion.....	EF 67
Answering Affidavit - Exhibits.....	EF 68 - 72
Reply Affidavit.....	E73
Reply Affidavit.....	E74

Upon the foregoing papers, it is ordered that the motion by defendant is granted and the cross motion by plaintiff is denied, as follows:

Plaintiff, a New York suspended attorney, commenced this action, *pro se*, against defendant, the attorney for plaintiff's former clients, in the underlying fee dispute which resulted in plaintiff's suspension. The complaint herein contains causes of action against defendant for, among other things, malicious prosecution, abuse of process, "prima facie tort," intentional infliction of emotional distress, conspiracy to commit intentional tort,

and "breach of New York attorney duty," all allegedly arising from the defendant's filing of ethics complaints against the plaintiff on behalf of his and plaintiff's former clients.

Defendant moves to dismiss the plaintiff's complaint, pursuant to CPLR 3211 (a) (4), founded upon "another action pending"; pursuant to CPLR 3211 (a) (5), based upon collateral estoppel and res judicata; and pursuant to CPLR 3211 (a) (7), for failure to state a cause of action against defendant. Plaintiff opposes and cross-moves to "strike defendant's motion," pursuant to CPLR 3211 (e), alleging a violation of the one- (or single-) motion rule of that section. Further, both movant and cross-movant seek punitive damages against the other.

Initially, plaintiff, in opposition, asserts that the defendant's motion violates the one-motion rule of CPLR 3211 (e), as a previous motion for the same relief was submitted by defendant, and denied by this Court, on February 14, 2019. Such contention is without merit.

The purpose of the one-motion rule is to prevent delay before answer, protect the pleader from harassment by repeated 3211 (a) motions, and to conserve judicial resources (*see Held v Kauffman*, 91 NY2d 425 [1998]; *Oakley v County of Nassau*, 127 AD3d 946 [2d Dept 2015]). The previous decision was based on the defendant having "failed to attach a copy of the Summons and Complaint ... to the moving papers." "The single motion rule ... has no application where defendants promptly re-filed their dismissal motion after initial denial on procedural grounds for failure to attach a copy of the amended complaint. There was no prejudice to the plaintiff, and the matter was ripe for disposition" (*767 Third Ave. LLC v Greble & Finger, LLP*, 8 AD3d 75, 75 [1st Dept 2004]; *see HSBC Bank USA v Lugo*, 169 AD3d 543 [1st Dept 2019]). The prior motion was not decided on the merits (*see Rivera v Board of Educ. of the City of N.Y.*, 82 AD3d 614 [1st Dept 2011]), and defendant "merely took its cue and supplied the documentary evidence found missing in the first motion. Rather than imposing a burden, this motion provides the Court with the opportunity to alleviate the calendar of an already overburdened court system and to remove therefrom, as will be shown, a meritless case without the unnecessary expense of ... further motion practice or a trial only 'to obtain a preordained outcome' " (*Ultramar Energy v Chase Manhattan Bank*, 191 AD2d 86, 87 [1st Dept 1993]; quoting *Foley v Roche*, 86 AD2d 887, 887 [2d Dept 1982]).

Further, the plaintiff's contention that the motion is untimely, as the defendant had filed an answer prior to the making of the instant motion, is without merit. The answer herein was filed within two weeks after the denial of the previous motion, for the sole purpose of avoiding the plaintiff's reasonably-to-be-expected default motion, and contained an affirmative defense of "failure to state a cause of action." Under these circumstances, the re-submission of the motion is not to be rendered moot due to a violation of CPLR 3211 (a).

Plaintiff's complaint asserts eight causes of action, all based upon "attorney ethic (sic) complaints" filed by defendant against plaintiff, "falsely claiming misappropriation of (a fund) ... without excuse or justification." Such ethics complaints were filed on behalf of defendant's, and plaintiff's former, clients arising from the fee dispute between them. Defendant contends that the complaint herein should be dismissed for failure to state a cause of action, due to the fact that his ethics complaints were privileged. "When compelling public policy requires that the speaker be immune from suit, the law affords an absolute privilege" (*Liberman v Gelstein*, 80 NY2d 429, 437 [1992]; *see Udeogalanya v Kiho*, 169 AD3d 957 [2d Dept 2019]). Such absolute privilege is usually reserved for statements made by individuals participating in a public function, such as, here, a judicial or quasi-judicial proceeding. Such immunity is granted "for the benefit of the public, to promote the administration of justice, and only incidentally for the protection of the participants" (*Park Knoll Assoc. v Schmidt*, 59 NY2d 205, 209 [1983]; *see Gugliotta v Wilson*, 168 AD3d 957 [2d Dept 2019]). As explained by the Court of Appeals in *Wiener v Weintraub*, 22 NY2d 330 (1968),

> "Assuredly, it is in the public interest to encourage those who have knowledge of dishonest or unethical conduct on the part of lawyers to impart that knowledge to a Grievance Committee or some other designated body for investigation. If a complainant were to be subject to a libel action by the accused attorney, the effect in many instances might well be to deter the filing of legitimate charges. We may assume that on occasion false and malicious complaints will be made. But, whatever the hardship on a particular attorney, the necessity of maintaining the high standards of our bar – indeed, the proper administration of justice – requires that there be a forum in which clients or other persons, unlearned in the law, may state their complaints, have them examined and, if necessary, judicially determined" (at 332).

Such statements are protected by an absolute privilege as long as they "are material and pertinent to the questions involved" (*Wiener v Weintraub*, 22 NY2d at 331; *see Rosenberg v MetLife, Inc.*, 8 NY3d 359 [2007]), as were the statements made in the case at bar. Further, the plaintiff has failed to demonstrate that said ethics proceedings were commenced in bad faith and motivated solely by malice "spite or a knowing or reckless disregard of a statement's falsity" (*Franco Belli Plumbing & Heating & Sons, Inc. v Dimino*, 164 AD3d 1309, 1311 [2d Dept 2018]). In fact, said claims were determined to have been true, as evidenced by the outcomes of the hearings in both New Jersey and New York. As a result, the defendant's commencing of the ethics proceedings on behalf of his clients was absolutely privileged, and the branch of defendant's motion seeking dismissal of the complaint, pursuant to CPLR 3211 (a) (7), is granted (*see Bull v Metropolitan Jewish Health System, Inc.*, 152 AD3d 639 [2d Dept 2017]).

As all of the plaintiff's causes of action derive from the privileged communications by the defendant, even had such statements not been entitled to such privilege, the plaintiff's causes of action would have been subject to dismissal for his failure to state viable causes of action, pursuant to CPLR 3211 (a) (7). The sole criterion to dismiss a complaint is whether the pleading, and the factual allegations contained within its four corners, manifests any cause of action cognizable at law (*see Gaidon v. Guardian Life Ins. Co. of America*, 94 NY2d 330 [1999]; *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]). "To withstand dismissal, the requisite elements of the cause of action must be discernable from the pleadings, and the complaint must give notice of the transactions and occurrences to be proved" (CPLR 3013; *see Dolphin Holdings, Inc. v Gander & White Shipping, Inc.*, 122 AD3d 901[2d Dept 2014]).

"When assessing the adequacy of a complaint in light of a CPLR 3211 (a) (7) motion to dismiss, the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff ... 'the benefit of every possible favorable inference' " (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005], quoting *Leon v Martinez*, 84 NY2d 83, 87 [1994]). Further, a court must "determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d at 87-88), and not whether plaintiffs can ultimately prove such facts (*see J.P.Morgan Securities, Inc. v Vigilant Ins. Co.*, 21 NY3d 324

[2013]; *People ex rel. Cuomo v Coventry First LLC*, 13 NY3d 108 [2009]; *Starr Indem. & Liab. Co. v Global Warranty Group, LLC*, 165 AD3d 1308 [2d Dept 2018]; *Webster v Sherman*, 165 AD3d 738 [2d Dept 2018]; *Murphy v Department of Educ. of the City of N. Y.*, 155 AD3d 637 [2017]). A motion to dismiss merely addresses the adequacy of a pleading, and does not reach the substantive merits of a plaintiff's cause of action (*see Kaplan v New York City Dep't. of Health and Mental Hygiene*, 142 AD3d 1050 [2d Dept 2016]; *Lieberman v Green*, 139 AD3d 815 [2d Dept 2016]).

However, a CPLR 3211 (a) (7) motion may be employed to dispose of actions in which the plaintiff has failed to state a claim cognizable at law, or an action in which plaintiff has identified a cognizable cause of action, but failed to assert a material allegation necessary to support the cause of action. In the case at bar, construing the pleadings liberally, and giving the nonmoving plaintiff the benefit of all favorable inferences (*see Leon v Martinez*, 84 NY2d 83 [1994]; *Hampshire Properties v BTA Building & Developing, Inc.*, 122 AD3d 573 [2014]; *Carillo v Stony Brook Univ.*, 119 AD3d 508 [2014]), plaintiff has failed to establish, *prima facie*, the necessary elements of such causes of action (*see Starr Indemnity & Liab. Co. v Global Warranty Group, LLC*, 165 AD3d 1308 [2d Dept 2018]; *Weinstein v CohnReznick, LLP*, 144 AD3d 1140, 1142 [2d Dept 2016]). Plaintiff's causes of action almost unanimously assert that the "ethic complaints" were filed by the defendant "falsely claiming misappropriation of (the subject) fund with an intent to do harm without excuse or justification," and that the "New Jersey judgment are (sic) without jurisdiction and void ab initio," and that said acts of defendant were "done with full knowledge of wrongdoing." Predicated upon the factual circumstances known in this matter, none of such claims by the plaintiff bore any semblance of truth. Without such a reasonable basis extant, the plaintiff was unable to credibly state the necessary elements of his various causes of action herein.

In opposition, the plaintiff has failed to adequately rebut defendant's *prima facie* entitlement to judgment. However, "[a] court is, of course, permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211(a)(7)" (*Gugliotta v Wilson*, 168 AD3d 817, 818 [2d Dept 2019], quoting *Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]; *see* CPLR 3211 [c]; *Ravix v Oligario*, 170 AD3d 763 [2d Dept 2019]). When evidentiary submissions are considered

on this type of motion, "and the motion has not been converted to one for summary judgment, the criterion is whether the plaintiff has a cause of action, not whether he or she has stated one, and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (*Belling v City of Long Beach*, 168 AD3d 900, 901 [2d Dept 2019]; see *Guggenheimer v Ginzburg*, 43 NY2d 268; *J & JT Holding Corp v Deutsche Bank Nat. Trust Co.*, 173 AD3d 704 [2d Dept 2019]; *Cukoviq v Iftikhar*, 169 AD3d 766 [2d Dept 2019]; *Unicorn Constr. Enters., Inc. v City of New York*, 166 AD3d 479 [1st Dept 2018]). Here, movant has proffered such proof. Consequently, defendant's motion to dismiss, based upon failure to state a cause of action, pursuant to CPLR 3211 (a) (7), is granted.

Based upon the foregoing evidence, arguments, and determinations, plaintiff's cross motion seeking to dismiss defendant's motion, pursuant to CPLR 3211 (e), and because the defendant had already answered the complaint, is denied. The branch of said cross motion seeking discovery is moot, having been resolved by the Court's Order, dated July 2, 2019.

Movant and cross-movant's remaining contentions and arguments, including their requests for sanctions, pursuant to 22YCRR 130-1.1, either are without merit, or need not be addressed in light of the foregoing determinations.

Accordingly, it is

ORDERED that the motion by defendant, seeking dismissal of the complaint, pursuant to CPLR 3211, is granted; and it is further

ORDERED , that the cross motion by plaintiff is denied in all respects.

Dated: December 10, 2019

TIMOTHY J. DUFFICY, J.S.C.

DEC 12 2019