

Lee v Nygaard Investigations, Inc.
2019 NY Slip Op 34174(U)
March 18, 2019
Supreme Court, Westchester County
Docket Number: 69967/2018
Judge: Charles D. Wood
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To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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JANET LEE,

Plaintiff,

- against -

DECISION AND ORDER
INDEX NO. 69967/2018
Sequence No. 1

NYGAARD INVESTIGATIONS, INC., BOB
NYGAARD, individually, BOB NYGAARD,

Defendants.

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WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 13 through 37, were read in connection with plaintiff's motion seeking a preliminary injunction. On December 7, 2018, this court executed an order to show cause with a temporary restraining order limited to enjoining defendant from tortuously interfering with any of plaintiff's business, and for slander or defaming plaintiff. All other temporary relief was denied. Defendants oppose the motion.

Now, based upon the foregoing papers, the motion is decided as follows:

Plaintiff claims to be a psychic, who provides psychic and non-psychic services involving Marriage Counseling, Addiction Therapy, Tarot Card Readings, Palm Readings and the like. Defendants are private investigators, hired by a number of plaintiff's clients to recover their property allegedly stolen by plaintiff.

Plaintiff claims that defendants have harassed her, seeking to destroy her personal and professional reputation and tortuously interfere with her present and prospective business opportunities by contacting numerous of plaintiff's clients and informing them that they have been scammed and urging them to seek refunds for psychic services; writing letters to law enforcement agencies and district attorneys urging them to file charges against, arrest and prosecute plaintiff for rendering psychic services; and standing outside court when she appears in court on matters wholly unrelated to her profession as a psychic.

Defendants charge that plaintiff is actually a convicted criminal who is currently facing multiple criminal charges in Westchester and Manhattan including Grand Larceny, Larceny, Forgery, Scheme to defraud and Identity Theft. This was denied by plaintiff who explains that while she has had previous contacts with the law, she never has been convicted of any crime related to the allegations of defendants relating to her business practices as a psychic. Plaintiff argues that defendants are harassing plaintiff's potential and actual clients in person as well as online with unsubstantiated claims regarding plaintiff. She claims that she has already lost a lucrative opportunity for a television contract with Atlantic Overseas Picture Television; and defendants' attacks on plaintiff's business and person are a bold effort to further his own business interests and reputation as a so called "psychic fraud investigator." She brought this action within days of her arrest in connection with alleged larceny and fraud committed against one of defendants' clients. Defendants believe that they have duties and obligations to those of plaintiff's victims who have hired them, and a public duty to report criminal activity and, if called, act as a witness against plaintiff in her multiple pending criminal proceedings.

It is well settled that in order to be entitled to a preliminary injunction, the moving party

must demonstrate by clear and convincing evidence, the elements of the following three prong test: (1) the likelihood of success on the merits; (2) danger of irreparable harm in the absence of an injunction; and (3) a balance of the equities in favor of granting the injunction (84-85 Gardens Owners Corp. v 84-12 35th Ave. Apt. Corp., 91 AD3d 702 [2d Dept 2012] ;(Olabi v Mayfield, 8 AD3d 459 [2d Dept 2004]; Matter of K.W.F. Realty Corp. v Kaufman, 16 AD3d 688, 690 [2d Dept 2005]). A preliminary injunction is a drastic remedy that a court should not grant unless the party seeking such relief can “establish a clear right to that relief under the law and the undisputed facts upon the moving papers” (Gagnon Bus Co. v Vallo Transportation, Ltd., 13 AD3d 334 [2d Dept 2004]). However, “all that must be shown is the likelihood of success; conclusive proof is not required” (Moy v Umeki, 10 AD3d 604 [2d Dept 2004]). Thus, “while the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that ‘subvert the plaintiff’s likelihood of success on the merits...to such a degree that it cannot be said that the plaintiff established a clear right to relief’” (Matter of Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd. 53 AD3d 612 [2d Dept 2008] quoting Milbrandt & Co. v Griffin, 1 AD3d 327, 328 [2d Dept 2003]). “Where facts are in sharp dispute, a temporary injunction will not be granted” Matter of Related Props., Inc. v Town Bd. of Town/Village of Harrison, 22 AD3d 587, 590 [2d Dept 2005]). The determination of whether to grant or deny a preliminary injunction rests in the sound discretion of the trial court (84-85 Gardens Owners Corp. v 84-12 35th Ave. Apt. Corp., 91 AD3d 702 [2d Dept 2012]). “The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual” (Kelley v Garuda, 36 AD3d 593 [2d Dept 2007]). Additionally, it must be shown that the irreparable injury to be sustained is more

burdensome to that party than the harm caused through the imposition of the injunction (citation omitted), and such injury is imminent, not remote or speculative (Copart of Connecticut, Inc. v. Long Island Auto Realty, LLC, 42 AD3d 420 [2d Dept. 2007]; Village/Town of Mount Kisco v. Rene Dubos Center for Human Environments, Inc., 12 AD3d 501 [2nd Dept. 2004]).

As is pertinent here, New York Penal Law § 165.35, provides that:

“A person is guilty of fortune telling when, for a fee or compensation which he directly or indirectly solicits or receives, he claims or pretends to tell fortunes, or holds himself out as being able, by claimed or pretended use of occult powers, to answer questions or give advice on personal matters or to exorcise, influence or affect evil spirits or curses; except that this section does not apply to a person who engages in the afore described conduct as part of a show or exhibition solely for the purpose of entertainment or amusement”

To support the complaint and this motion, plaintiff offers defendants' letter to Mount Pleasant Village Court Justices (*see* Plaintiff's Ex 7-9). This letter reflects defendants urging to prosecute plaintiff to the fullest, rather than going the route of a plea deal. Defendants mention in the letter that “while members of the Westchester County District Attorneys Office have been dillydallying, a victim listed in the Mount Pleasant Grand Larceny and Scheme to defraud court information and an elderly victim in Bedford NY were both victimized. (*See* Plaintiff Ex 7-9). Also included in plaintiff's submission is You Tube -May 29, 2018 of individual defendant Bob NyGaard posts, showing plaintiff's picture, and underneath the picture “Psychic busted for allegedly scamming woman out of \$12K”. It also continues that “The Westchester DA is sitting on at least 5 criminal complaints made against Janet Lee” (*See* Plaintiff's Ex 12). He urges any additional victims to call him, and that all calls are confidential.

As for the first prong to meet the requirements to obtain a preliminary injunction, is the

likelihood of success on the merits.

Plaintiff's First cause of action sounding in Tortious Interference, and the Fifth Cause of action (Tortious Interference with Prospective Economic Advantage) claims that defendant made false and malicious misrepresentations against plaintiff and that these reckless statements have had the cumulative effect of destroying plaintiff's once thriving psychic business. Moreover, defendant's conduct interfered with the prospective economic advantage of plaintiff by inducing prospective clients not to engage plaintiff as their psychic advisor.

Based upon this record, plaintiff's conclusory allegations without factual support are not likely to succeed on the merits. A bulk of the evidence merely show defendant reporting that plaintiff has been accused of scamming people out of thousands of dollars for psychic services. The court fails to see any significant difference from an investigative reporter for newspapers or television news networks and defendant.

The Second Cause of Action is Unjust Enrichment, in that defendant after urging plaintiff's clients pursuant to direct and often unsolicited contact, advised plaintiff's clients that they should ask plaintiff for a refund because they were scammed. Again, these conclusory allegations without factual support were not likely to succeed on the merits.

The Third Cause of Action is Intentional Infliction of Emotional Distress and Loss of Consortium. According to the complaint, defendant's actions were such an intentional and grievous nature in scope and duration as to directly result in the emotional distress of plaintiff. This great emotional distress has allegedly caused a loss of consortium with plaintiff's husband. These claims are not likely to succeed on the merits.

The Fourth Cause of Action is for Slander and Defamation. The elements of a cause of

action for defamation are (a) a false statement that tends to expose a person to public contempt, hatred, ridicule, aversion, or disgrace, (b) published without privilege or authorization to a third party, (c) amounting to fault as judged by, at a minimum, a negligence standard, and (d) either causing special harm or constituting defamation per se (Greenberg v Spitzer, 155 AD3d 27, 41 [2d Dept 2017]). Slander is a type of defamation, that term is defined as the making of a false statement which tends to “expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society” (Foster v Churchill, 87 NY2d 744, 751 [1996]). “A slanderous statement is published and therefore actionable when it is heard by some third party” (Rabushka v Marks, 256 AD2d 562, 563 [2d Dept 1998]). Words constitute “slander *per se*” if they impute the commission of a serious crime, a loathsome disease, unchaste behavior in a woman, or if they affect the plaintiff in his trade, occupation or profession (Lieberman v Gelstein, 80 NY2d 429 [1992]; Warlock Enterprises v City Center Associates, 204 AD2d 438 [2d Dept. 1994]). “Truth is an absolute defense to an action based on defamation” (Greenberg v Spitzer, 155 AD3d 27, 41 [2d Dept. 2017]).

Defendants argue that plaintiff has alleged facts that demonstrate that defendants are shielded from liability under absolute and qualified privileges. They contend that even had the letter sent by defendants to the judges in the pending Westchester criminal proceeding contained otherwise defamatory statements, defendants are entitled to immunity from any claim sounding in defamation arising from that letter.

Taking into consideration the parties’ arguments, the court finds that plaintiff has not established a likelihood of success on the defamation cause of action.

Moreover, in the context of the twitter posts, it could be said that a reasonable reader would understand the statements defendants made about plaintiff are mere allegations to be investigated rather than as facts (Brian v Richardson, 87 NY2d 46, 53 [1995]).

The court also considers that “[w]here a litigant can fully be recompensed by a monetary award, a preliminary injunction will not issue” (Neos v Lacey, 291 AD2d 434, 435 [2d Dept 2002]). Moreover, that the balance of equities does not favor a preliminary injunction.

Through her papers, plaintiff has not convinced this court that there is a likelihood that she will be successful on the merits. However, a decision on the motion for a preliminary injunction is not a final determination of the merits.

All matters not specifically addressed are herewith denied. This constitutes the decision and order of the court.

NOW, based on the stated reasons, it is hereby

ORDERED, that plaintiff’s motion for a preliminary injunction is denied, and the temporary restraining order is vacated herewith; and it is further

ORDERED, that the parties are directed to appear in the Preliminary Conference
Part on **April 8th**, 2019, at **9:30 AM** in Room 811 of the Westchester County
Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York 10601.

Dated: White Plains, New York
March 18, 2019



HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF