

Lee v Nygaard Investigations, Inc.
2019 NY Slip Op 34175(U)
August 14, 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

-----X
JANET LEE,

Plaintiff,

- against -

DECISION AND ORDER
INDEX NO. 69967/2018
SEQUENCE NO. 2

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

Defendants.

-----X
WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 41-64, were read in connection with defendants' motion pursuant to CPLR 3211(a)(7), to dismiss each of plaintiff's claims in their entirety for failure to state a claim; and to impose sanctions on plaintiff and her attorney under 8308-a, 22 NYCRR 130-1.1.

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.

According to the complaint, defendants have harassed plaintiff, seeking to destroy her personal and professional reputation and tortiously interfered with her business opportunities by contacting 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 prosecute plaintiff for rendering psychic services; and standing outside court when she appears on cases wholly unrelated to her profession as a psychic. Plaintiff claims that since about 2013, she has been targeted by defendant Bob Nygaard, who has defamed her reputation and character in order to ruin her credibility with her clients. She was once known as a well respected astrologist/certified life coach/psychic adviser in Connecticut, but due to defendants' behavior, she is now considered a gypsy con artist, thief psychic, and she lost her office in Connecticut, and a tv series deal.

Another example of defendant's intrusive conduct according to plaintiff occurred when she was providing spiritual work to a client, and the client paid her \$9,000. Nygaard insinuated himself into plaintiff's business relationship, and told her client that plaintiff was a fraud, liar and a psychic con artist, and then the client demanded her money back. Plaintiff also gives other examples of other clients being contacted by Nygaard, and after speaking with him, those clients asked plaintiff for a refund as well. She accuses Nygaard of going on a fishing expedition waged to bring her to justice, and she feels threatened by him. Defendants even contacted the police station of the Town of Greenburgh several times to have her arrested for fraud.

In response, defendants charge that plaintiff is 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. Plaintiff 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. 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, and seek to dismiss plaintiff's complaint for failure to state a cause of action.

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

It is well settled that pursuant to CPLR 3211 (a)(7) "upon a motion to dismiss [for failure to state a cause of action], the sole criterion is whether the subject pleading states a cause of action, and if, from the four corners of the complaint, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, then the motion will fail. The court must afford the pleading a liberal construction, accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory"¹ (Esposito v Noto, 90 AD3d 825 [2d Dept 2011]; (Sokol v. Leader, 74 A.D.3d 1180, [2d Dept 2010]); (Bua v Purcell & Ingrao, P.C., 99 AD3d 843, 845 [2d Dept 2012] lv to appeal denied, 20 NY3d 857, 984 NE2d 324 [2013])). However, this does not apply to legal conclusions or factual claims which were either inherently incredible or flatly contradicted by documentary evidence (West Branch Conservation Assn. v County of Rockland, 227 AD2d 547 [2d Dept 1996])). Moreover, if the court considers evidence submitted by a defendant in support of a motion to dismiss under CPLR 3211 (a) (7), "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint," and if the court does so, "the criterion is whether the proponent of the pleading has a cause of action, not

¹Internal citations omitted.

whether he has stated one” (Leon v. Martinez, 84 NY2d 83, 88 [1994]; Uzzle v. Nunzie Ct. Homeowners Ass'n, Inc., 70 AD3d 928, 930 [2d Dept 2010]). Thus, affidavits and other evidentiary material may also be considered to “establish conclusively that plaintiff has no cause of action” (Simmons v Edelstein, 32 AD3d 464, 465 [2d Dept 2006]). The court may also consider further affidavits where a meritorious claim lies within inartful pleadings (Lucia v Goldman, 68 AD3d 1064, 1065 [2d Dept 2009]).

More succinctly, under CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, but if the court considers evidentiary material, the criterion then becomes “whether the proponent of the pleading has a cause of action” (Sokol v Leader, 74 AD3d 1180, 1181-82 [2010]; Marist College v Chazen Envtl. Serv. 84 AD3d 11181 [2d Dept 2011]). Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus (Dee v. Rakower, 112 AD3d 204 [2d Dept 2013]).

In support of their motion, defendants claim that plaintiff comes to this court with defective and frivolous claims. After reading the parties’ submissions, as part of its examination under CPLR 3211, the court considers whether plaintiff stated viable causes of action relative to Nygaard’s conduct during the course of his investigating plaintiff. Private investigators cannot run amuck. A private investigator such as Nygaard, is mandated to conduct investigations and render reports, in good faith and reasonable care as part of the continuation of a private investigator’s license. In New York, pursuant to General Business Law §70, vests authority in the Department of State to oversee the licensing of private investigators. In that regard, Nygaard attests that he is licensed as a private investigator in New York, of which he produced a copy.

To determine if plaintiff’s claims are indeed frivolous, the court reviews the articles and

documents submitted by plaintiff. First, an article from the Greenwich Time dated October 31, 2016 (NYSCEF Doc No. 2), and another article entitled Greenwich Psychic: Helping People know their Spiritual Selves, (NYSCEF Doc No. 3) both articles are blurry, hard to read, but appear to tout plaintiff's work as a psychic.

The Wall Street Journal published an article entitled "In Greenwich, Where Money is no Object" (NYSCEF Doc No. 4)- plaintiff is featured as charging \$75 for a tarot reading and \$150 for psychic consultation, which plaintiff acknowledged is three times the going rate, "but, I pay three times the rent". The article notes that plaintiff set up in town 18 years ago, and says "she's earned enough to buy her own estate on Riversville Road; her main income comes from clients who pay \$2,000 to \$9,000 a month for round the clock coaching on issues ranging from choosing a nanny to portfolio allocation and timing a company sale".

On November 15, 2015, the Greenwich Free Press wrote an article entitled "Meet the Greenwich Psychic: What makes Janet Lee tick?" (NYSCEF Doc No. 5), which revealed that plaintiff had celebrity clients and people who work on Wall Street; and plaintiff stated that "if she wasn't truly gifted, which would not have made it, and says that there are others in her profession who take advantage of their gift and other who don't have the fit and are simply phonies, "You can't just give to a charity for your social life. I teach them about karma and doing the right thing, helping people in need and not being arrogant." The Article also talked about plaintiff's clients who have standing appointments, some paying by the month for two or three visits a week, and some walk-ins.

In further support of her complaint, she attaches a Wikipedia article (NYSCEF Doc No. 6) on defendant Bob Nygaard, which recites that in August 2018, Nygaard appeared as himself in

episode "The Psychic Didn't See Him Coming" of the CBS true-crime show Pink Collar Crimes, which portrays his investigations of the crimes committed by psychic and convicted fraudster Gina Marie Marks. "He is also an outspoken critic of the inconsistent prosecution of this type of crime across the United States, and advocates for prison terms for convicted psychics, rather than merely forced restitution to their victims." The article highlighted that Nygaard started advocating for prosecution of psychics, when a women in a bar informed him that she was scammed by a local psychic (plaintiff).

Also included with plaintiff's complaint was a copy of letters dated October 31, 2018 (NYSCEF Doc No., 7), from Nygaard to Mt. Pleasant Village Court justices, stating that Nygaard believes that various members of the Westchester County DA's office that have prosecuted plaintiff, have acted dubiously regarding handling of additional complaints that were made against plaintiff and Nygaard fears that prosecutors may withhold the disclosure of additional five complaints to the court prior to the court approving a plea deal in order to cover up for alleged past transgressions by various member of the DA's office. Nygaard accuses the DA's office of dragging its feet with the case against plaintiff, causing additional victims of plaintiff.

Another attachment to the complaint was an article from The New York Post dated November 30, 2018, (NYSCEF Doc No. 8), reporting that plaintiff had been arrested for the third time in fewer than two years-this time for allegedly bilking a woman out of her life savings by convincing the client that she had been cursed in a past life as mute Egyptian healer. The article referred to plaintiff as "the Accused serial Scarsdale scamster". "The woman had sought out Lee's services in June after growing "despondent" that she'd never achieved her dream of a career in writing or filmmaking, according to a statement provided to the Post by Bob Nygaard, a private

investigator she recruited to help bring the psychic to justice. Nygaard said the statement also was submitted to authorities". The article recounts that plaintiff arrested in Manhattan in June 2017, on identity theft and forgery raps for posting as another woman to rent a luxury Soho paid apartment. She later pled guilty in exchange for three years' probation. She was arrested again in June, 2018 and charged with grand larceny and scheme to defraud for an allegedly fortune-telling scam in Mount Pleasant. She pleaded not guilty. She was also sued in Connecticut last year by a Greenwich woman who said Lee conned her out of \$32,900 by telling her that she had found a terrible darkness around her during a tarot card reading in 2015. The court found in favor of McKiver and ordered Lee to pay her \$30,000. Nygaard says he has been trying to get authorities to arrest Lee for years.

Another of plaintiff's exhibits includes an article from LA Now (NYSCEF Doc No. 9), reporting Nancy Reagan's death, and citing that an astrologer may have participated in determining President Reagan's schedule. NYSCEF Doc. No. 10, submitted by plaintiff, is an article dated August 1, 2016, "Meet the Psychic who uses gift to solve FBI cold cases", and does not mention plaintiff or defendants.

Plaintiff also submits a copy of a May 29, 2018 (NYSCEF Do No. 11) Tweet from Bob Nygaard urging victims to contact the authorities, that included an arrest photo of plaintiff.

Now taking into consideration the above articles and documents, plaintiff's causes of actions will be addressed. Her First Cause of Action sounds in Tortious Interference, which claims that defendants 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, defendants' conduct interfered with the prospective economic advantage of

plaintiff by inducing prospective clients not to engage plaintiff as their psychic advisor. Some people view psychics as being illegitimate, but many law enforcement agencies solicit the assistance of psychics in missing persons cases, citing that even the First Lady Nancy Regan routinely employed an astrologer to guide President Reagan in decision making. Plaintiff continues that the conduct of Nygaard is extreme and outrageous, as he is obsessed with plaintiff; he has been relentless in his desire to have criminal charges against plaintiff by the Westchester County DA and Fairfield County DA; he has stalked plaintiff at her Bedford Office; and he has taken at least one picture of her at her office.

Causes of Action sounding in Tortious Interference is met “where the interference with prospective business relations was accomplished by wrongful means or where the offending party acted for the sole purpose of harming the other party” (Law Offices of Ira H. Leibowitz v. Landmark Ventures, Inc., 131 AD3d 583, 585 [2d Dept 2015]). Even giving plaintiff every benefit, as the court must do, plaintiff failed to show that defendants interfered with her business relations including her former clients, as well as a contract with a production company for a television series about her. Nothing in the record shows that defendants were aware of this contract or that any of defendants’ conduct was directed at procuring the breach of this contract. The conclusory facts alleged in the complaint fail to establish that the defendants’ alleged actions were motivated by self-interest and other economic considerations, and for the sole purpose of harming plaintiff.

The Second Cause of Action is Unjust Enrichment, in that defendant, often unsolicited, contacted plaintiff’s clients, and urged them that they should ask plaintiff for a refund because they were scammed. In order to prevail on a claim of unjust enrichment, it must be shown that the

other party was enriched, at that party's expense, and that it is against equity and good conscience to permit the other party to retain what is sought to be recovered (Old Republic Natl. Tit. Ins. Co. v. Luft, 52 AD3d 491 [2d Dept 2008]). The existence of a valid and enforceable written contract covering a particular subject matter ordinarily precludes recovery in quasi-contract for events arising out of the same subject matter (Hamlet at Willow Creek Dev. Co., LLC v. Ne. Land Dev. Corp., 64 AD3d 85, 102 [2d Dept 2009]).

Plaintiff has not alleged facts demonstrating any of the required elements. Nothing in the record supports that defendants have been enriched by receiving a portion of fees that plaintiff purported refunded to her clients/victims. The same cannot be said about plaintiff who may have been unjustly enriched by her clients. In fact, 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 exercise, influence or affect evil spirits or curses; except that this section does not apply to a person who engages in the aforescribed conduct as part of a show or exhibition solely for the purpose of entertainment or amusement. Fortune telling is a class B misdemeanor" (Penal Law §165.35). The Second Department has commented that the services such as plaintiff offers is an example of "a prevalent species of fraud whereby its practitioners, professing occult powers of prognostication, annually bilk a gullible public of many millions of dollars" (People v Ballard, 143 AD2d 919 [2d Dept 1988]).

Turning next to the Third Cause of Action for Intentional Infliction of Emotional Distress. To state a cause of action to recover damages for the intentional infliction of emotional distress, the conduct alleged must be so outrageous in character and extreme in degree as to surpass the

limits of decency so “as to be regarded as atrocious and intolerable in a civilized society”

(Leonard v Reinhardt, 20 AD3d 510, 510 [2005]).

Plaintiff claims that the conduct of Nygaard is extreme and outrageous, as he has been relentless in his desire to have criminal charges filed against plaintiff by the DA’s office, and that he has stalked plaintiff at her Bedford office; has taken at least one picture of standing in the doorway of her office in Bedford; stalked her at a family wedding. It is not normal behavior for a private investigator to be so obsessed in accomplishing the arrest and conviction whom he believes has scammed people of their money.

Upon review of the complaint, it fails to allege extreme or outrageous conduct necessary to support such a claim (Leonard v Reinhardt, 20 AD3d 510 (2005)). Also, plaintiff’s conclusory assertions are insufficient to set forth a cause of action sounding in the intentional infliction of emotional distress (Klein v Metro. Child Servs., Inc., 100 AD3d 708, 711 [2d Dept 2012]).

Even taking plaintiff’s allegations as true, she has alleged the obvious, that a licensed private investigator was fulfilling his lawful duties to his clients, the victims of plaintiff’s alleged crimes. Making statements to the police causing arrests and conviction is not extreme and outrageous behavior. Regarding the derivative loss of consortium claim, plaintiff has failed to allege facts making out such a claim.

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]).

Here, defendants argue that plaintiff’s defamation claims failed to plea particulars, insofar as the complaint speaks in vague and conclusory allegations claiming that defendants made purportedly false statements but failed to: identify particular statements or words, alleged facts setting forth the circumstances (time, place, manner). In addition, there was nothing purportedly said by any of defendants which were actually false.

In opposition, plaintiff’s counsel, lists the particulars of offending defamatory statements by defendants:

- a psychic con artist, a liar
- Accused serial Scarsdale scamster Janet Lee
- Bob Nygaard is America’s psychic crime fighter “fighting to bring heartless self-proclaimed psychics who prey upon the vulnerable to justice;
- Have info, about former Greenwich self-proclaimed psychic Janet Lee? Call me at 561-596-3443.
- Self-proclaimed fortuneteller and convicted felon Janet Lee has been operating at

"Bedford Psychic" while on probation. Having any information concerning her? Give me a call at 561-596-3443

-The idols speak deceitfully, diviners see visions that lie; they tell dreams that are false, they give comfort in vain. Therefore the people wander like sheep oppressed for lack of a shepherd."

-Do not turn to mediums or necromancers, do not seek them out, and make yourself unclean by them-God Channeling
Leviticus 19:31

-“Do not turn to mediums or seek out spirits, for you will be defiled by them. I am the LORD your God Leviticus 20:6.

-I will set my face against the person who turns to mediums and spirits to prostitute himself by following them, and I will cut him off from his people
Witch of Endor (Nikolay Ge)

-Beware of false prophets, which come to you in sheeps clothing but inwardly they are ravening wolves (Matthew 7:15) Why we fall for It...Every Time. The Confidence Game".

Pursuant to CPLR 3016 (a), in an action for slander or libel, "the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally." Interpreting such statute, the courts require both "that the defamatory words be set forth *in haec verba*" (Conley v Gravitt, 133 AD2d 966, 968), and that the time, place and manner, as well as the person or persons to whom such publication was made, be set forth in the complaint. Here, despite plaintiff's now coming forward with specific quotes (most of which do not mention the plaintiff by name), the cause of action alleging defamation failed to comply with the pleading requirements of CPLR 3016(a) does not set forth any alleged defamatory statements with the required particularity (Lemieux v Fox, 135 AD3d 715, 716, [2d Dept 2016]).

In any event, defendants also demonstrated, *prima facie*, that the allegedly defamatory statements enjoyed a qualified privilege. Protection from defamation is afforded where the person making the statements does so fairly "in the discharge of some public or private duty, legal or moral, or in the conduct of his [or her] own affairs, in a matter where his [or her] interest is

concerned” (Toker v Pollak, 44 NY2d 211, 218 [1978]).

Accordingly, under the facts of this case, any alleged defamatory statements the defendants may have made to prosecutors and judges were privileged, and thus, non-actionable (Zapata v. Tufenkjian, 123 AD3d 814, 816 [2d Dept 2014]). Defendants merely furnished information to government officials, who were then free to exercise their own judgment as to whether and how to act, and the defendants' alleged conduct did not rise to the level of “undue zeal” (Zapata v Tufenkjian, 123 AD3d 814, 816 [2014]). A fair and substantially accurate report of an official, judicial, or legislative proceeding cannot be the basis for a defamation action (Sassower v New York Times Co., 48 AD3d 440, 441 [2d Dept 2008]). In addition, expressions of an opinion “false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions” (Sassower v New York Times Co., 48 AD3d 440, 442 [2d Dept 2008]).

In order for the offending words to qualify for defamation they must come within the categories of an actionable communication (Davis v Boenheim, 24 NY3d 262, 268 [2014]). On a motion to dismiss, the court considers whether any reading of the complaint supports the defamation claim. Thus, although “[i]t may well be that [the challenged statements] are subject to defendants' interpretation ... the motion to dismiss must be denied if the communication at issue, taking the words in their ordinary meaning and in context, is also susceptible to a defamatory connotation” (Davis v Boenheim, 24 NY3d at 272 [2014]). Here, the accusations of defamation are not sufficiently specific, and the alleged offending words are not actionable, many of the statements clearly express opinions, or talk about psychics in general. Certainly, the bible quotes are not actionable as well. The court finds that plaintiff's complaint fails to meet the minimum pleading requirement and plaintiff has no cause of action against defendants to recover damages

for defamation.

In light of the foregoing, accepting the allegations in the complaint as true, affording the plaintiff the benefit of every favorable inference, and considering the evidentiary material submitted by the parties, the court dismisses the complaint.

Lastly, upon due consideration, the court finds that defendants have not sufficiently demonstrated entitlement to sanctions in the form of legal fees or court costs for frivolous conduct under 22NYCRR 130-1.1(c). There is no basis for the imposition of a sanction against the plaintiffs (Leonard v Reinhardt, 20 AD3d 510, 511 [2d Dept 2005]).

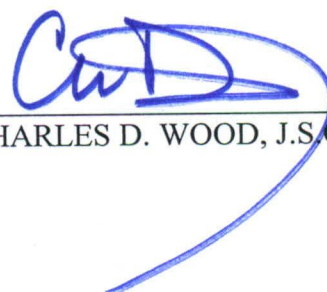
All matters not specifically addressed are herewith denied.

This constitutes the decision and order of the court.

NOW, based on the stated reasons, it is hereby

ORDERED, that defendants' motion to dismiss the complaint is granted.

The Clerk mark his records accordingly.



CHARLES D. WOOD, J.S.C.

Dated: August 14, 2019
White Plains, New York

To: All Parties by NYSCEF