

**Practice Ctr. Concord Rusam, Inc. v Bavrovska**

2019 NY Slip Op 34624(U)

October 29, 2019

Supreme Court, Westchester County

Docket Number: Index No. 56810/2019

Judge: Terry Jane Ruderman

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This opinion is uncorrected and not selected for official publication.

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  
PRACTICE CENTER CONCORD RUSAM, INC.,

Plaintiff,

Index No.: 56810/2019  
Motion Sequence No. 1

-against-

DECISION and ORDER

MARTA BAVROVSKA,

Defendant.

-----X  
RUDERMAN, J.

The following papers were considered in connection with the motion by plaintiff to dismiss the counterclaims pursuant to CPLR 3211 (a) (1) and (7):

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation, Affidavit, Exhibits 1 - 9	1
Affirmation in Opposition	2
Reply Affirmation	3

Plaintiff Practice Center Concord Rusam, Inc. ("Practice Center") is a New York business corporation with its principal place of business in the City of Yonkers, Westchester County, New York. It asserts that it provides administrative coordination for a distance learning program conducted by an entity called the Obninsk Center, which provides professional retraining for individuals with prior medical training from Russia who are seeking to obtain qualifications for employment in this country, such as retraining to become registered nurses.

Plaintiff's complaint asserts that defendant Marta Bavrovska submitted an application to the Obninsk Center through Practice Center staff in early 2016. Plaintiff claims that Bavrovska

knew of, but ignored, the program requirement for clinical training.

According to plaintiff, defendant has told Obninsk Center applicants, students, graduates, staff members, community members and government officials, that the Practice Center, its staff, and the Obninsk Center are "frauds," "liars," "cheats," or "criminals," and that the Obninsk Center "does not exist," and that an Obninsk Center diploma is "useless." It is asserted that defendant has falsely stated to these persons that she was never informed of the clinical retraining requirement and that plaintiff failed to provide her with any opportunity to complete the clinical retraining requirement; in addition, defendant is said to have falsely stated that Practice Center staff told her and other students to lie to State Education Department officials about completing the clinical retraining requirement. According to the complaint, defendant has threatened to assert claims against plaintiff for fraud and other purported misconduct, and to continue making her false statements against plaintiff, its owners, and related businesses, unless plaintiff provides her with cash payment of \$100,000.

The complaint seeks a declaratory judgment stating, in effect, that it has acted properly, in addition to seeking compensatory and punitive damages based on such causes of action as tortious interference with business relations and defamation.

Defendant's answer includes a counterclaims for breach of contract, negligence, deceptive business practice, intentional infliction of emotional distress, harassment, and attorneys' fees. She alleges that in January 2017 she enrolled at Practice Center Concord Rusam, Inc. (which she calls "Concord Rusam"), with the goal of qualifying for the nursing licensing exam. She states that Concord Rusam advertised that upon completion of its program students would be eligible to take the National Council Licensure Exam ("NCLEX") nursing exam, did

not advise defendant that additional clinical practice/training was required in order to qualify for the NCLEX nursing exam, and did not provide such practice/training as part of its educational program. She asserts that she paid \$12,500 to Concord Rusam, completed the program, and was issued a diploma in January 2018, which document stated that she had completed 1,018 hours of clinical nursing. Further, she alleges that on or about December 8, 2018, she received a telephone call from the Director of Concord Rusam, Ms. Zinaida Freink, who told defendant that if any person or agency asks about the clinical portion of the Concord Rusam program, defendant should falsely claim that clinicals had been completed in Russia. Further, if any person inquiring wanted to confirm the claimed travel to Russia, defendant was told to respond that her passport was lost or stolen. Defendant responded to Freink that she would not lie. On or about May 6, 2019, her diploma was revoked. In addition, defendant claims, members of Concord Rusam, owners, employees and agents began a campaign of harassment and intimidation against her.

In moving to dismiss the counterclaims, plaintiff submits the affidavit of Yuri Kurashvili, who identifies himself as a consultant for the Practice Center. Kurashvili asserts that defendant's application, which he says occurred in early 2016, was to the Obninsk Center "through Practice Center staff," and that "applicants are notified at the time of their application to the Obninsk Center program of the clinical training requirement needed in order to be eligible to take the NCLEX. The documents he submits in support contain somewhat different information: Exhibit 5 is a Practice Center Concord Rusam Inc. application form – which contains no reference to the Obninsk Center – signed by defendant on January 23, 2017, and reflecting defendant's installment payments totaling \$12,500 from January 23, 2017 through November 6, 2017, at which time it was marked "paid in full." Kurashvili also submits as Exhibit 6 a brochure in the

name of "Private Career School Concord Rusam, Inc.," which indicates that it is an educational program licensed by the New York State Education Department and describing various offered programs.

In reliance on the Kurashvili affidavit and documentation, plaintiff argues that defendant's factual assertions have been conclusively disproved.

#### Discussion

To the extent that plaintiff seeks dismissal of defendant's counterclaims based on the documentary evidence it submitted, its argument is rejected. "To succeed on a motion to dismiss based upon documentary evidence pursuant to CPLR 3211 (a) (1), the documentary evidence must utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Tyree v Castrovinci*, 164 A.D.3d 1399, 1399-1400 [2d Dept 2018]). None of the submitted documents, including the brochure, serves to conclusively disprove defendant's factual claims. Rather, they merely serve to establish the existence of disagreement between the parties as to the truth of defendant's claims regarding the information plaintiff's representatives provided to her and to other students, and its educational practices regarding its students' qualifications to take the NCLEX. Nor do plaintiff's submissions conclusively establish that its staff completely and accurately informed defendant of the clinical training requirement needed to take the NCLEX.

Dismissal of defendant's counterclaims for breach of contract, negligence, and a violation of General Business Law § 349 must therefore be denied. More specifically with respect to the General Business Law § 349 claim, the allegations are sufficient to satisfy the pleading requirements, namely, that the challenged act or practice was consumer-oriented; that it was

misleading in a material way; and that the plaintiff suffered injury as a result of the deceptive act (see *Stutman v Chemical Bank*, 95 NY2d 24, 26 [2000]).

The branch of plaintiff's motion seeking dismissal of defendant's counterclaims for failure to state a cause of action (CPLR 3211 [a] [7]) is granted in part and denied in part.

The counterclaim sounding in intentional infliction of emotional distress is sufficient to survive plaintiff's dismissal motion. "The tort has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress" (*Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]). "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 [1983]). However, although the elements of the tort have been characterized as "difficult to satisfy" (see *Howell v New York Post*, *supra*), a "deliberate and malicious campaign of harassment or intimidation" may be "sufficiently 'extreme and outrageous' so as to constitute intentional infliction of emotional distress" (see *Eves v Ray*, 42 AD3d 481, 483 [2d Dept 2007], quoting *Nader v General Motors Corp.*, 25 NY2d 560, 569 [1970]), and claims of "menacing phone calls" and "personal threats to [the claimant's] physical safety were found sufficient to state such a cause of action (see *Gray v Schenectady City School Dist.*, 86 AD3d 771, 772 [3d Dept 2011]).

Defendant alleges, in support of the tort, that "[b]eginning on or about January 2018 and continuing thereafter, Concord Rusam through its owners, employees and agents engaged in a campaign of harassment and intimidation including but not limited to contacting the Defendant's

father in the Ukraine and making threats in an attempt to coercive [sic] the Defendant into admitting she was the only person who did not complete clinicals and her claims against Concord Rusam fraudulent.” The pleading goes on to state that “[t]he threats . . . included but were not limited to threatening [sic] the Defendant’s family, verbal, physical threats and harassment placing the Defendant in fear of her and her family’s physical safety” (see NYSCEF Doc. No. 5 ¶¶ 61 and 62). Claims of verbal and physical threats and harassment directed at defendant’s family, placing her in fear of her and her family’s physical safety, causing her severe emotional distress, are sufficient to withstand a motion to dismiss under CPLR 3211 (a) (7).

However, defendant’s counterclaim for harassment must be dismissed. “New York does not recognize a common-law cause of action alleging harassment” (*Scialdone v Stepping Stones Assoc., L.P.*, 148 AD3d 953, 955 [2d Dept 2017]). Not only does defendant incorrectly cite the Penal Law harassment provision, but the Penal Law does not provide for a private right of action for the claimed violation (see *Cablevision Sys. Corp. v Communications Workers of Am. Dist. 1*, 131 A.D.3d 1087, 1088 [2d Dept 2015]).

The counterclaim for attorneys’ fees must also be dismissed. “Under the general rule, attorneys’ fees and disbursements are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule” (*Mount Vernon City School Dist. v Nova Cas. Co.*, 19 NY3d 28, 39 [2012], quoting *Matter of A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 [1986]). Defendant has not suggested that any applicable contractual provision, statute or court rule exists.

Accordingly, it is hereby

ORDERED that plaintiff’s motion is granted only to the extent that the counterclaims

sounding in harassment and for attorneys' fees are dismissed, and is otherwise denied; and it is further

ORDERED that the parties are directed to appear on Monday, December 9, 2019 at 9:30 a.m. in the Preliminary Conference Part of the Westchester Supreme Court Courthouse located at 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York, 10601.

This constitutes the decision and order of the Court.

Dated: White Plains, New York  
October 29, 2019

  
HON. TERRY JANE RUDERMAN, J.S.C.