

Berkowitz v Wallach
2020 NY Slip Op 30480(U)
February 11, 2020
Supreme Court, Kings County
Docket Number: 505124/2019
Judge: Richard J. Montelione
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART DJMP

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MARTIN BERKOWITZ,

Plaintiff,

-against-

DAVID WALLACH and
LEBA WALLACH,

Defendant(s).

-----X

Decision and Order

Index No. 505124/2019

Submitted: 12/10/19

Mot. Seq.: 1 & 2

The following papers were read on this motion pursuant to CPLR 2219(a):

<u>Papers</u>	<u>Numbered</u>
Defendants' Notice of Motion for Default Judgment dated October 7, 2019; Attorney Affirmation in Support of Harry Katz, Esq., affirmed on October 7, 2019; and Exhibits A-C.....	1
Plaintiff's Notice of Cross-Motion to Dismiss dated December 1, 2019; Attorney Affirmation of Peter Agulnick, Esq., affirmed on December 1, 2019...	2
Defendants' Attorney Affirmation in Opposition of Harry Katz, Esq., affirmed on December 4, 2019; Affidavit of Mendel Rochlitz, sworn to on September 11, 2019 (Exhibit A); Affidavit of Yitzhok Swerdloft, sworn to on September 20, 2019 (Exhibit B); Affidavit of Eddie Borukhov, sworn to on September 12, 2019 (Exhibit C).....	3
Plaintiff's Attorney Affirmation in Opposition of Robert Blossner, Esq., affirmed on December 2, 2019; Exhibit A.....	4
Defendants' Attorney Affirmation in Reply of Harry Katz, Esq., affirmed on December 4, 2019; and Exhibit A.....	5

MONTELIONE, RICHARD J., J.

In this personal injury action, defendants David Wallach and Leba Wallach move to enter a default judgment against plaintiff Martin Berkowitz based upon his failure to interpose an

answer to defendants' counterclaims. Plaintiff Martin Berkowitz opposes and cross-moves for dismissal of the counterclaims against him for failure to state a cause of action.

Plaintiff argues, *inter alia*, that defendants, who were previously proceeding *pro se* filed an answer with two counterclaims, fail to state any type of cause of action available.

Specifically, defendants' first counterclaim states that "[d]efendants should be compensated for the stress and aggravation that his frivolous lawsuit has caused the defendants and their family" and plaintiff argues that the same is meritless as there is no allegation that plaintiff did anything tortious. Plaintiff surmises that defendants' second counterclaim may be the tort of abuse of process and such tort is meritless as "the institution of a civil action by summons and complaint is not legally considered process capable of being abused," citing *Curiano v. Suozzi*, 63 N.Y.2d 113 (2nd Dept. 1984).

Defendants argues, *inter alia*, that although their initial *pro se* pleadings were inartfully drawn, the allegations support cognizable legal theories of abuse of process, frivolous litigation, intentional infliction of emotional distress and prima facie tort.

In a motion for default judgment, movants are required to demonstrate with at least "enough facts to enable [the] court to determine that a viable cause of action exists (*Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 71, 760 N.Y.S.2d 727, 790 N.E.2d 1156, citing 7 Weinstein-Korn-Miller, N.Y. Civ. Prac. ¶ 3215.24, at 32-326)" (*see Resnick v. Lebovitz*, 28 A.D.3d 533, 813 N.Y.S.2d 480 [2nd Dept. 2006]). "In determining whether the plaintiff has a viable cause of action, the court may consider the complaint, affidavits, and affirmations submitted by the plaintiff" (*Litvinskiy v. May Entertainment Group, Inc.*, 44 A.D.3d 627, 841 N.Y.S.2d 882 [2nd Dept.]).

Upon review of defendants' counterclaims of abuse of process and frivolous litigation, defendants' allegations do not give rise to a cause of action for the same as there is no contention that the summons "issued by [plaintiff] was improperly used after it was issued but only that [plaintiff] acted maliciously in bringing the action." (*Curiano v. Suozzi*, 63 N.Y.2D 113 [1984]). Simply put, "[a] malicious motive alone ... does not give rise to a cause of action for abuse of process (internal citations omitted)(*Curiano v. Suozzi*, 63 N.Y.2D 113 [1984]; see *Aluminum Mill Supply Corp. v. Larkin*, 129 A.D.2d 542 [1987]).

As to defendants' claim of prima facie tort, defendants have not alleged any of the four required elements of the tort. A prima facie tort must plead (1) intentional infliction of harm, (2) causing special damages, (3) without excuse or justification, (4) by an act or series of acts that would otherwise be lawful (*Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 332, 464 N.Y.S.2d 712, 451 N.E.2d 459 [1983]; *ATI, Inc. v. Ruder & Finn*, 42 N.Y.2d 454, 458, 398 N.Y.S.2d 864, 368 N.E.2d 1230 [1977]). As such, defendants have not demonstrated entitlement to judgment for the same.

Lastly, in order to state a claim for intentional infliction of emotional distress, conduct must be alleged which is "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 N.Y.2d 293, 303, 461 N.Y.S.2d 232 [1983]). In this matter, defendants' likewise have not sufficiently pleaded a cause of action for intentional infliction of emotional distress.

On the other hand, plaintiff's cross-motion to dismiss was not made prior to the time by which plaintiff was required to serve a reply to defendants' counterclaim and as plaintiff's cross-motion fails to request an extension of time to answer or appear, or set forth a reasonable excuse

for the default, the court declines to consider plaintiff's untimely motion to dismiss the counterclaims (*McGee v. Dunn*, 75 A.D.3d 624, 906 N.Y.S.2d 74 [2nd Dept. 2010]).

Therefore, based on the foregoing, defendants' motion for default judgment and plaintiff's cross-motion to dismiss defendants' counterclaims are denied.

This constitutes the decision and order of the court.

Dated: FEB 11 2020


Richard J. Montelione, A.J.S.C.

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