Kovler v Kovler
2020 NY Slip Op 31616(U)
April 30, 2020
Supreme Court, Kings County
Docket Number: 500071/2020
Judge: Loren Baily-Schiffman

At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 30 day of April, 2020.

PRESENT: HON. LOREN BAILY-SCHIFFMAN
JUSTICE

BORIS KOVLER,
Plaintiff,
- against -
YANINA KOVLER,
Defendant.

Index No.: 500071/2020

Motion Seq. # 1 & 2

DECISION & ORDER

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

	PAPERS NUMBERED
Notice of Motion, Affidavits, Affirmation and Exhibits	1
Affirmation in Opposition to Cross-Motion	2
Plaintiff's Reply Affirmation, Affidavit and Exhibits	3

Upon the foregoing papers Defendant, Yanina Kovler, moves this Court for an order dismissing this action pursuant to CPLR § 3211 (a) (7) for failing to state a cause of action. Plaintiff, Boris Kovler, cross-moves to amend the complaint pursuant to CPLR § 3025(b).

Background

Plaintiff commenced an action for divorce against Defendant sometime in 2017 that is still pending in Supreme Court, Kings County. Plaintiff alleges that Defendant sought an Order of Protection against him on or about August 9, 2019. While a Temporary Order of Protection was issued pending the hearing, on or about August 12, 2019, the Court denied Defendant's motion and vacated the Temporary Order of Protection. On or about December 3, 2019 Defendant filed a criminal complaint against Plaintiff for harassment. Plaintiff was arrested and charged with one count of Penal Law § 240.30 (2) and a

Temporary Order of Protection was issued. On or about December 25, 2019, Defendant was arrested and charged with 2 counts of violating the Order of Protection pursuant to Penal Law §§ 215.50 and 215.51.

Defendant's Motion to Dismiss

Plaintiff's complaint alleges Abuse of Process as the first cause of action. The three essential elements of the tort of abuse of process are "(1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective." ***Tenore v Kantrowitz, Goldhamer & Graifman, P.C., 76 AD3d 556, 557 (2d Dept 2010), citing Curiano v. Suozzi, 63 N.Y.2d 113, 116 (1984).*** However, the mere commencement of a civil action by summons and complaint does not by itself constitute abuse of process. ***Schwartz v. Sayah, 72 A.D.3d 790, (2d Dept 2010).*** The gist of the tort is "the improper use of process after it is issued." ***Williams v. Williams, 23 N.Y.2d 592, 596 (1969)***. Here, although Plaintiff alleges that the Defendant made criminal complaints against him with the collateral objective of inflicting economic harm and obtaining a tactical advantage in a pending divorce action, a malicious motive alone does not give rise to a cause of action to recover damages for abuse of process. ***Tenore v Kantrowitz, supra at 557***. Plaintiff's complaint has not set forth the elements necessary to sustain a cause of action for Abuse of Process.

The second cause of action, Intentional Infliction of Emotional Distress. requires the following elements to be established: (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." ***Taggart v Costabile, 131 AD3d 243, 249 (2d Dept 2015), citing Howell v. New York Post Co., 81 N.Y.2d 115, 121 (1993)***. The element of outrageous conduct has been described as "rigorous, and difficult to satisfy." ***Id at 122.*** To meet this standard the conduct must be 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 (1983).*** Plaintiff has failed to set forth the necessary elements to sustain a cause of action for Intentional Infliction of Emotional Distress.

The Court of Appeals has recently set forth the requirements to sustain a cause of action for the third cause of action alleged by Plaintiff, negligent infliction of emotional distress. While no physical injury is required, the mental injury must be a direct, rather than a consequential, result of the breach of a duty of care owed to plaintiff. ***Ornstein v. New York City Health & Hosps. Corp., 10 N.Y.3d 1, 6, (2008)***. Moreover, the Court of Appeals further held that the claim must possess some guarantee of genuineness. ***Id. at 6***. There must be a breach of a duty owed to plaintiff which either unreasonably endangers the plaintiff's physical safety or causes the plaintiff to fear for his or her own safety." ***Santana v Leith, 117 AD3d 711, 712 (2d Dept 2014).*** "Such a claim must fail, where, as here, 'no allegations of negligence appear in the pleadings." ***Daluise v. Sottile, 40 A.D.3d 801, 803 (2d Dept 2007)***.

Upon a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all

facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory." ***Santana v Leith, supra at 712, citing Leon v. Martinez, 84 N.Y.2d 83, 87 (1994).*** Plaintiff failed entirely to submit any evidentiary proof to support the alleged facts in the complaint or sufficiently refute Defendant's arguments in the motion to dismiss the complaint. The law is clearly established that upon a motion to dismiss pursuant to CPLR 3211(a)(7), the court must determine whether the plaintiff has a cause of action, not whether he or she has stated one. ***Lomeli v Falkirk Mgt. Corp., 179 AD3d 660, 662 (2d Dept 2020).*** Applying these standards to the case at bar the Court finds that the complaint fails to state a cause of action and is therefore dismissed.

Plaintiff's Cross-Motion to Amend the Complaint

Courts have consistently held that motions to amend a complaint should be freely given unless there is resulting prejudice or surprise to the defendant or "...the amendment is insufficient or patently devoid of merit." ***Lucido v. Mancuso, 49 A.D.3d 220, 222 (2d Dept 2008)***. A determination whether to grant such leave is within the Supreme Court's broad discretion, and the exercise of that discretion will not be lightly disturbed. ***McIntosh v Ronit Realty, LLC, 181 AD3d 579 (2d Dept 2020)***. In any event, to the extent that the proposed amended complaint is nearly identical to the original complaint, as it is here except for separate causes of action for punitive damages, this Court finds that the amendment is clearly insufficient and devoid of merit. Therefore, leave to amend is denied. ***Bryant v City of New York, 188 AD2d 446, 447 (2d Dept 1992); 1 Carmody–Wait 2d, N.Y.Prac. §§ 2:64, 2:67).***

The parties' remaining contentions are without merit.. Accordingly, Defendant's motion (sequence #1) is granted in its entirety and the complaint is dismissed and Plaintiff's cross-motion (sequence # 2) is denied in its entirety. This is the Decision and Order of the Court.

ENTER

LOREN BAILY-SCHIFFMAN, JSC