

**Guillen v Bober**

2020 NY Slip Op 32761(U)

August 13, 2020

Supreme Court, New York County

Docket Number: 150356/2019

Judge: Verna Saunders

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. VERNA L. SAUNDERS PART IAS MOTION 36

Justice

-----X INDEX NO. 150356/2019

PAOLA GUILLLEN, Plaintiff, MOTION SEQ. NO. 002

- against -

FRANKLIN BOBER, Defendant. DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 002)26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68,69,70, 71, 72, 73, 74, 75, 76, 77, 78

were read on this motion to/for DISMISSAL

Defendant Franklin Bober moves, pursuant to CPLR § 3211(a) (1) and (7), to dismiss plaintiff's amended complaint and pursuant to 22 NYCRR § 130-1.1, for an award of costs and an order imposing sanctions upon plaintiff and her counsel.

After careful review of the record, dismissal is granted, and costs and sanctions are denied.

Plaintiff commenced this action to recover damages arising from her more than ten-year "on again and off again" romantic relationship with defendant. Plaintiff asserts causes of actions for fraudulent misrepresentation; negligence; negligent infliction of emotional distress; and trespass to chattel. Defendant now moves for dismissal on the grounds that plaintiff failed to state a claim and documentary evidence contradicts the allegations made by plaintiff.1 Additionally, defendant seeks costs and sanctions as against the plaintiff and/or her counsel asserting that the amended complaint is frivolous.

Defendant alleges the following facts: Plaintiff and defendant met in August of 2006 at which time plaintiff was a "call girl" who advertised her services on Craigslist. Plaintiff was 22 years old and defendant was 61 years old. The parties then commenced a ten-year, on and off relationship. At various points in time, defendant leased and paid rent for multiple living spaces for plaintiff, including, in 2007, an apartment on West 10th Street; in 2009, a house in Water Mill (Suffolk County); in 2014, an apartment in the West Village; and in 2014, a three bedroom apartment at 668 President Street, Brooklyn. Additionally, defendant guaranteed a lease for plaintiff's mother in April of 2014. Over the course of the ten-year entanglement between the parties, defendant "loaned" plaintiff tens of thousands of dollars and supported plaintiff, plaintiff's family, and plaintiff's various business ventures.

Ultimately, the relationship reached its end when defendant refused plaintiff's request for money after the plaintiff defaulted on her Brooklyn lease, despite defendant's rental assistance, leaving defendant obligated for arrears in the amount of \$37,883.00. Additionally, plaintiff requested that defendant pay \$15,000.00 to surrender the lease along with moving costs, which defendant paid as outlined in the fully

1 Defendant previously moved for dismissal under Motion Sequence 001, but the relief was denied, without prejudice on the ground that plaintiff filed an amended complaint.

executed escrow agreement.<sup>2</sup> Upon leaving the Brooklyn apartment, plaintiff asked defendant to lease yet another apartment (see Movant's *Exhibit J*) and appeared at defendant's residence requesting money which defendant declined to give. Approximately two weeks later, plaintiff commenced the instant action.

Plaintiff disputes the facts as alleged by defendant, alleging that she met the defendant through his son, with whom she had a prior relationship. Plaintiff asserts thereafter she moved in with defendant who was initially a father figure and later, romantic interest. Plaintiff asserts that over the decade-long affair, defendant physically and emotionally abused her and caused her to develop stress-related alopecia. She asserts that defendant had a history of having unprotected sex with prostitutes. In 2017, after a hiatus, plaintiff and defendant resumed their relationship. Plaintiff asked whether the defendant had any sexually transmitted diseases/infections and defendant told her she had "nothing to worry about." The parties engaged in unprotected sexual intercourse and plaintiff later found Herpes Simplex medication in the defendant's medicine cabinet. Soon thereafter, plaintiff was diagnosed with Herpes Simplex 2 (HSV-2). In 2018, plaintiff ended the relationship and moved out of the defendant's apartment. Defendant offered to lease plaintiff an apartment in Brooklyn which she accepted to operate her businesses as a producer, musician, and art dealer. In or about August of 2018, defendant insisted that plaintiff reside with him. Subsequently, plaintiff allowed defendant to hire a moving company to transport her belongings to his residence including, art she held on consignment and recording equipment which plaintiff claims she found destroyed and damaged beyond repair after the move.

In reply, defendant denies all of the allegations made by plaintiff.

When considering a motion to dismiss plaintiff's complaint for failure to state a cause of action pursuant to CPLR § 3211(a)(7), 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. (*Leon v Martinez*, 84 NY2d 83 [1994]). A court may freely consider affidavits submitted by a plaintiff to remedy any defects in the complaint, but the court should not consider whether the plaintiff has simply stated a cause of action, but rather whether the plaintiff actually has one. (*Amaro v Gani Realty Corp.*, 60 AD3d 491 [1st Dept 2009].)

The first three causes of action arise out of plaintiff's allegation that she contracted HSV-2 from defendant. To establish a claim for fraudulent misrepresentation a plaintiff must show that (1) the defendant made a material false representation, (2) the defendant intended to defraud the plaintiffs thereby, (3) the plaintiff reasonably relied upon the representation, and (4) the plaintiff suffered damage as a result of his or her reliance. (See *Swersky v Dreyer and Traub*, 219 AD2d 321, 326 [1st Dept 1996]). Assuming that a materially false representation was made, which defendant denies, there are no facts to suggest that defendant intended to defraud the plaintiff. Plaintiff contends that when she asked the defendant whether he had any sexually transmitted diseases or infections, defendant responded that plaintiff had "nothing to worry about it." This statement, without any further evidence is insufficient to establish intent, as some carriers of the herpes virus are asymptomatic<sup>3</sup> and consequently, would not know or have reason to know of their status. Plaintiff contends that she found herpes medication, which defendant denies, but it is unclear how plaintiff knew the medication was herpes medication or why plaintiff did not confront the defendant contemporaneously concerning her discovery. Additionally,

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<sup>2</sup> See Movant's *Exhibit I*.

<sup>3</sup> See Web MD at <https://www.webmd.com/genital-herpes/ss/slideshow-genital-herpes> and Center for Disease Control at <https://www.cdc.gov/std/herpes/default.htm>.

plaintiff maintains that defendant had a history of engaging in unprotected sex with prostitutes and that plaintiff was manipulative and abusive which suggests that plaintiff's reliance on defendant's purported statement that she had "nothing to worry about" was unreasonable. Thus, the court finds that plaintiff failed to establish a *prima facie* claim of fraudulent representation and dismissal of this claim is warranted.

As to plaintiff's cause of action for negligence, to establish a *prima facie* case of negligence under New York law, a plaintiff must demonstrate that the defendant owed him or her a duty of reasonable care, a breach of that duty, and a resulting injury proximately caused by the breach. (See *Elmaliach v Bank of China Ltd.*, 110 AD3d 192 [1st Dept 2013]). Similarly, a cause of action for negligent infliction of emotional distress must be premised upon 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. (See *Xenias v Roosevelt Hosp.*, 180 AD3d 588 [1st Dept 2020]).

Based on the record before the court, plaintiff fails to meet the element of causation as it is unclear from whom the plaintiff contracted HSV-2 and plaintiff's own actions may have caused unreasonable endangerment to herself, as well as, defendant. To illustrate, plaintiff asserts that she met defendant through his son, with whom she had a prior relationship. Ironically, plaintiff also asserts that defendant had a history of having unprotected sex with prostitutes but fails to address or deny defendant's contention that she worked as "call girl" advertising her services on Craigslist and agreed to have unprotected sex with defendant, despite his purported sexual habits. Moreover, plaintiff does not address whether she had sexual relations with other persons, while she was living with defendant, or during the intervals when they were not living together.

Conversely, defendant represents, and plaintiff does not deny, that plaintiff made her living as a "call girl" and that plaintiff became pregnant by another man, during her on and off relationship with defendant which suggests that plaintiff may have had other sexual partners during the time she was involved with defendant. Further, plaintiff's contention that she displayed no symptoms of herpes prior to her relationship with defendant is unavailing as persons infected with the herpes virus may not exhibit any symptoms of infection. Likewise, plaintiff's assertion that she "never tested positive for the virus" prior to that relationship is also unavailing in and of itself as there are no records of prior testing or even allegations that plaintiff was previously tested. With the admittedly convoluted nature and length of the parties' relationship, it is unclear from the record who the plaintiff may have contracted the virus from, if it all.<sup>4</sup> Accordingly, plaintiff's causes of action for negligence and negligent infliction of emotional distress are likewise dismissed.

With regard to the fourth cause of action for trespass to chattel, plaintiff alleges the that in August 2018, when the parties were living apart, plaintiff permitted defendant to hire a moving company to pack all her belongings, which she planned to store.<sup>5</sup> In late August, plaintiff found her belongings destroyed and damaged beyond repair.<sup>6</sup> Plaintiff alleges that "upon information and belief," defendant went to plaintiff's apartment and destroyed her belongings before the movers arrived.<sup>7</sup> The court finds this argument equally without merit as plaintiff's allegations are inconsistent with her prior account of events as outlined in the e-mail messages from the plaintiff to defendant wherein plaintiff stated that the movers damaged her property. (See *Defendant's Exhibits K and L*). Normally, a court should not be concerned

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<sup>4</sup> As defendant correctly points out, plaintiff does not assert any facts as to when she was tested for HSV-2 or records of same to support her contention that she contracted the disease.

<sup>5</sup> See Plaintiff's Complaint ¶¶ 31-32.

<sup>6</sup> *Id.* at 33.

<sup>7</sup> *Id.* at 35.

with the ultimate merits of the case (see *Anguita v Koch*, 179 AD2d 454, 457 [1<sup>st</sup> Dept 1992]) however, these considerations do not apply to allegations consisting of bare legal conclusions, as well as, factual claims which are flatly contradicted by documentary evidence. (See *Simkin v Blank*, 19 NY3d 46, 52 [2012]). Here, plaintiff's original account of events, as documented in her e-mail message to the defendant, contradict the allegations set forth in the amended complaint. This significant contradiction, along with the seemingly baseless<sup>8</sup> nature of the accusation made against defendant, likewise warrants dismissal of this cause of action.

Plaintiff contends that the e-mail messages in question are not properly authenticated but the testimony of a "witness with knowledge that a matter is what it is claimed to be is sufficient to satisfy the standard for authentication." (See *People v Agudelo*, 96 AD3d 611 [1st Dept 2012]). Defendant is a recipient of the messages and thus, has first-hand knowledge to authenticate the e-mails which he attests in his sworn affidavit that the plaintiff stated, the "movers broke everything." Even, assuming *arguendo*, that the e-mail messages were fabricated by defendant, there is no evidence proffered in the record to support plaintiff's contention that the defendant concocted and carried out a seemingly Machiavellian plot, which included evading the moving company and any potential surveillance, to enter the subject apartment and destroy plaintiff's property before the move. To the contrary, the record suggests that even after covering plaintiff's rental arrears, moving costs, and providing her with an additional \$15,000.00, plaintiff sought even more funds from defendant and when he declined, plaintiff brought action. Ultimately, outside of plaintiff's assertion that "upon information and belief" defendant destroyed her property there is no evidence in the record to support this contention.

Finally, while the complaint may lack merit, it cannot be said to be frivolous. As such, defendant's application for sanctions against plaintiff, or plaintiff's counsel is denied. Based on the foregoing, it is hereby

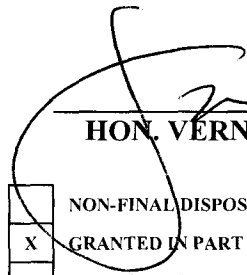
ORDERED that the motion of defendant Franklin Bober to dismiss the complaint is granted and the Clerk is directed to enter judgment in favor of the defendant dismissing this action; and it is further

ORDERED that defendant's application for costs and sanctions is denied; and it is further

ORDERED that any relief not expressly addressed herein has nonetheless been considered and is denied.

This constitutes the final decision and order of the court.

August 13, 2020

  
HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED			<input type="checkbox"/>	GRANTED IN PART		
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

<sup>8</sup> The court notes that in the same e-mail correspondence, after detailing the damage purportedly inflicted by the movers, plaintiff advises defendant to dispute or refuse payment for the moving services which further supports defendant's contention that he did not damage the items as alleged. (See *Defendant's Exhibits K*).