Landow v Bronte SPV, LLC
2020 NY Slip Op 33441(U)
October 15, 2020
Supreme Court, New York County
Docket Number: 151413/2020
Judge: Shawn T. Kelly
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 57

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TRACY LANDOW,

Plaintiff,

- v -

BRONTE SPV, LLC, SANFORD F. YOUNG, PC

Defendant.

INDEX NO. 151413/2020

MOTION DATE 09/28/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

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HON. SHAWN TIMOTHY KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 77, 78, 79, 80, 91, 92, 93, 94, 95, 96, 97

were read on this motion to/for DISMISS

Upon the foregoing documents, it is

Defendant Sandford F. Young, LLC moves to dismiss Plaintiff Tracy Landow's complaint pursuant to CPLR §3211(a)(7) and CPLR §3211(a)(5). The present case is the latest in a web of legal actions emanating from Plaintiff Tracy Landow's and non-party Jonathan Landow's acrimonious divorce proceeding in Nassau County involving the distribution of millions of dollars in marital property (*Landow v Landow*, Index No. 202698/2011 [S. Ct. Nassau County]. For the following reasons, Defendant's motion to dismiss is granted and the complaint is dismissed.

Defendant Young is the former attorney of Jonathan Landow. Sanford Young was retained to appeal the Divorce Judgment and has an alleged charging lien in the amount of two

hundred twenty thousand five hundred eighty dollars and seventy-two cents ($220,580.72) for services rendered.

Analysis

Defendant moves to dismiss pursuant to CPLR §3211(a)(7), adopting arguments raised in Motion Sequence 001 by Co-defendant Bronte SPV LLC. On a CPLR §3211(a)(7) motion to dismiss for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true" (*Alden Global Value Recovery Master Fund, L.P. v KeyBank National Association*, 159 AD3d 618, 621-22 [2018]). In addition, "on such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff" (*Id.* at 622). However, vague and conclusory allegations cannot survive a motion to dismiss (*see, Kaplan v Conway and Conway*, 173 AD3d 452, 452-53 [2019]; *D. Penguin Brothers Ltd. v City National Bank*, 270 NYS3d 192, 192 [2018] [noting that "conclusory allegations fail"]; *R & R Capital LLC, et al., v Linda Merritt*, 68 AD3d 436, 437 [2010]).

The criterion for establishing whether a Complaint should be dismissed pursuant to §3211(a)(7) is "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Foley v D'Agostino*, 21 AD2d 60, 64-65 [1964]). Whether the pleader will ultimately be able to establish the allegations in the pleading is irrelevant to the determination of a motion to dismiss pursuant to CPLR §3211(a)(7) (*see EBC I, Inc., v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]; *Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001][motion must be denied if "from [the] four corners [of the

pleadings] factual allegations are discerned which taken together manifest any cause of action cognizable at law"]).

Abuse of Process

Abuse of process has three essential elements: (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 (*Curiano v Suozzi*, 63 NY2d 113, 116, 469 NE2d 1324, 1326 [1984]). "A malicious motive alone ... does not give rise to a cause of action for abuse of process" (*Curiano*, 63 NY2d at 117). Likewise, "[t]he mere commencement of a lawsuit cannot serve as a basis for a cause of action alleging abuse of process" (*Lynn v McCormick*, 153 AD3d 688, 688 [2d Dept 2017]; also *Abrazi v Kotlyarsky*, No. 153597/17, 2017 WL 5046345, at *2 [NY Sup Ct 2017]). The gist of an action for abuse of process lies in "the improper use of process after it is issued" (*see Dean v Kochendorfer*, 237 NY.384, 390 [1924]; *Hauser v Bartow*, 273 NY 370 [1937]).

As to damages, to sustain a cause of action for abuse of process, the plaintiff must also allege special damages with sufficient particularity (*Jaroslawicz v Cohen*, 12 AD3d 160, 160 [1st Dept 2004]). Furthermore, "the expense arising from the defense of a lawsuit is an insufficient injury to sustain [a] cause of action [for abuse of process.]" (*Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590, 591 [1st Dept 1990]).

Specifically, Plaintiff argues that regularly issued process occurred as the Defendant sought to intervene in the matrimonial action of the Landows, requested a stay of the distribution of the money held in escrow, and opposed the lifting of said stay. Plaintiff further contends that Defendant did not use the process for the purpose for which it was designed and intended, as it has no legal justification for litigating against lifting a stay over monies it admittedly has no

rights over and which are in excess of what it claims to be owed. Plaintiff claims that Defendant has the intent to harm, and has indeed harmed Plaintiff, by preventing her from earning interest on the funds that have been frozen.

As to Plaintiff's allegation that Defendant's commencement of litigation serves a basis for an abuse of process claim, to the contrary, it fits squarely within the long line of decisions dating back to *Curiano* holding that the commencement of the civil lawsuit cannot form the basis of an abuse of process claim, even if the action was commenced with malicious intent (*see e.g., Perini v Leo*, 147 AD3d 877, 879 [2d Dept 2017]; *Matthews v New York City Dep't of Social Servs., Child Welfare Admin.*, 217 AD2d 413, 415 [1st Dept 1996]; *Abrazi v Kotlyarsky*, No. 153597/17, 2017 WL 5046345, at *2 [NY Sup Ct 2017]).

Further, taking all the allegations as true, the Defendant appears to have been trying to collect on its valid Judgment as against Jonathan Landow. Defendant's appeal before the Second Department and motion for a stay under CPLR §5519(c), which was granted by the Second Department, are not sufficient to sustain an abuse of process claim (*see Batbrothers LLC v Paushok*, 60 Misc 3d 1205[A], 109 NYS3d 837 [NY Sup Ct 2018], *aff'd*, 172 AD3d 529, 101 NYS3d 297 [2019], *leave to appeal denied*, 35 NY3d 902 [2020]). Accordingly, the claim for abuse of process is dismissed.

Intentional Infliction of Emotional Distress

The tort of intentional infliction of emotional distress 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 (*see Howell v NY Post Co.*, 81 NY2d 115, 121 [1993]). A cause of action for intentional infliction of emotional distress must be supported by allegations of conduct

"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, 461 NYS2d 232 [1983] [quoting Restatement [Second] of Torts § 46, Comment d]). Further, "such extreme and outrageous conduct must be clearly alleged in order for the complaint to survive a motion to dismiss" (*Sheila C. v Povich*, 11 AD3d 120, [2004]; *see also McRedmond v Sutton Place Rest. & Bar, Inc.*, 48 AD3d 258, 259 [2008]).

Plaintiff's complaint alleges that Defendant's conduct in affecting and staying the disbursement of her private funds is so outrageous in character as to be intolerable by a civilized community. Specifically, Plaintiff contends that Defendant has repeatedly and intentionally sought to prevent plaintiff from accessing her uncontested share of funds by requesting the stay of their disbursement and that Defendant's baseless opposition to the release of such funds for a period of over two years amounts to intentional or negligent infliction of emotional distress. Plaintiff fails to allege facts sufficient to state a cause of action for intentional infliction of emotional distress. The complained of conduct as alleged, "is neither sufficiently extreme nor outrageous to support a claim for intentional infliction of emotional distress" (*see Como v Riley*, 287 AD 2d 416, 416-17 [1st Dept 2001]; *Gregorio v MTA Metro-North R.R.*, No. 159638/2013, 2014 WL 3381980, at *1 [NY Sup Ct 2014]).

Negligent Infliction of Emotional Distress

To recover for negligent infliction of emotional harm there must be a duty owed by defendant to plaintiff and breach of that duty resulting directly in emotional harm, even if no physical injury occurred (*see Taggart v Costabile*, 131 AD3d 243, 252–53, 14 NYS3d 388, 396 ([2015]). The Court of Appeals has stated that, "[a] breach of the duty of care resulting directly

in emotional harm is compensable even though no physical injury occurred when the mental injury is a direct, rather than a consequential, result of the breach and when the claim possesses some guarantee of genuineness" (*Ornstein v New York City Health & Hosps. Corp.*, 10 NY3d 1, 6, 852 NYS2d 1 [2008] [internal quotation marks and citations omitted]).

Claims of negligent infliction of emotional distress are properly dismissed if the allegations do not set forth the breach of a duty of care owed to plaintiff (*see DeCintio v Lawrence Hosp.*, 299 AD2d 165, 166, 753 NYS2d 26 [1st Dept. 2002], *lv denied* 100 NY2d 549 [2003]), or that defendant's actions caused plaintiff to fear for her safety (*see Nainan v 715–723 Sixth Ave. Owners Corp.*, 177 AD3d 489, 491 [1st Dept. 2019]).

Recently, the First Department held that extreme and outrageous conduct continues to be an essential element of a cause of action alleging negligent infliction of emotional distress (*see Xenias v Roosevelt Hosp.*, 180 AD3d 588, 589, 120 NYS3d 298, 299–300 [2020]; *also Holmes v City of New York*, 178 AD3d 496 [1st Dept 2019]*; Melendez v City of New York*, 171 AD3d 566, 567 [1st Dept 2019], *lv denied* 33 NY3d 914, 2019 WL 4383502 [2019]; *contra Taggart v Costabile*, 131 AD3d 243 [2d Dept 2015]).

Plaintiff's complaint alleges that Defendant's conduct in affecting and staying the disbursement of her private funds is so outrageous in character as to be intolerable by a civilized community. Specifically, Plaintiff contends that Defendant has repeatedly and intentionally sought to prevent plaintiff from accessing her uncontested share of funds by requesting the stay of their disbursement and that Defendant's baseless oppositions to the release of such funds for a period of over two years amounts to intentional or negligent infliction of emotional distress. Plaintiff's allegations fail to identify any duty owed by Defendant to her, nor does she describe conduct that is extreme or outrageous enough to support a claim for negligent infliction of

emotional distress. Accordingly, Defendant's motion to dismiss is granted as to Plaintiff's intentional and negligent inflictions of emotional distress claims.

Punitive Damages

In order to recover punitive damages there must be sufficient allegations that defendant's actions were aimed at the public or "evinc[ed] a high degree of moral turpitude and demonstrat[ed] such wanton dishonesty as to imply a criminal indifference to civil obligations" (*see Linkable Networks, Inc. v Mastercard Inc.*, 184 AD3d 418, 419, 125 NYS3d 92, 94 [2020]; *Rocanova v Equitable Life Assurance Society of the USA et. al.*, 83 NY2d 603, 613 [1994] [internal citations omitted]; *Errant Gene Therapeutics LLC v Sloan–Kettering Institute for Cancer Research*, 174 AD3d 473, 475–76 [1st Dept 2019] [dismissal of demand of punitive damages on a motion to dismiss]). Viewing the pleadings in a light most favorable to plaintiff, the allegations of the complaint fall far short of demonstrating actual malice and that defendant acted with disinterested malevolence, intentionally seeking to inflict economic injury on plaintiff by forcing her to engage legal counsel. Accordingly, Defendant's motion to dismiss is granted as to punitive damages.

Statute of Limitations

Defendant moves to dismiss under CPLR §3211(a)(5), contending that Plaintiff's action is barred by the Statute of Limitations. However, defenses under CPLR §3211(a)(5), must be raised in the responsive pleading before being alleged as grounds for a motion to dismiss.

Sanctions

Defendant further moves for sanctions and to be awarded reasonable attorney's fees and costs and disbursements. Pursuant to 22 NYCRR §130.1.1(a), a court in a civil action is authorized to award the reasonable attorney's fees and expenses incurred by a party as a result of

the opposing party's frivolous conduct. Conduct is frivolous for the purposes of a motion for sanctions if: (1) it is completely meritless; (2) it is done to delay or prolong the litigation or to harass or injure another party; or (3) it asserts false material statements of fact (*see* 22 NYCRR §130.1.1[c]).

The remedy of sanctions is to be one reserved for situations of "extreme behavior" (*Hunts Point Term. Produce Coop. Ass'n v New York City Econ. Dev. Corp.*, 54 AD3d 296, 296 [1st Dept 2008]). Indeed, in order to avoid a chilling effect, even arguments "lacking in legal merit" must have something even more "egregious" in order to rise to the level of frivolous conduct warranting sanctions (*see Parametric Capital Mgmt., LLC v Lacher*, 26 AD3d 175, 175 [1st Dept 2006]). Sanctions must "not be imposed in such a manner as to restrict ultimately unpersuasive, yet good-faith, arguments" (*Levy v Carol Mgmt. Corp.*, 260 AD2d 27, 35 [1st Dept 1999]). In evaluating frivolousness, a "court must consider the circumstances under which the conduct took place and whether or not the conduct was continued when its lack of legal or factual basis was apparent or should have been apparent" (*Matter of Kover*, 134 AD3d 64, 74 [1st Dept 2015]).

Defendant has failed to sufficiently demonstrate that the circumstances of this action are egregious or extreme enough to warrant sanctions. Accordingly, Defendant's motion for sanctions is denied.

Motion to Extend Time to Answer

Defendant moves to extend his time to answer, *nunc pro tunc*. In opposition, Plaintiff contends that Defendant's motion is untimely and that a defaulting party cannot move for affirmative relief pursuant to CPLR §3211. However, Plaintiff never moved for a default judgment against Defendant Young. Under CPLR §3211(e), Defendant's motion to dismiss is

deemed timely as to its CPLR §3211(a)(7) arguments. A motion to dismiss for failure to state a cause of action may be entertained at any time (*see* CPLR §3211[e]; *Herman v Greenberg*, 221 AD2d 251, 251, 634 NYS2d 99, 100 [1st Dept 1995]).

Plaintiff's Cross Motion

Plaintiff cross moves for an Order requiring Defendants to enter into a stipulation releasing Plaintiff's private share of the escrowed funds, in excess, of what Defendants Bronte SPV, LLC and Young claim that they are owed by Johnathan Landow and/or allowing the release of plaintiff's private share of the escrowed funds, in excess, of what Defendants claim they are owed by Johnathan Landow.

On November 14, 2018, the Appellate Division, Second Department granted Bronte's stay, thereby extending the interim stay granted earlier, pending determination of the appeal. Tracy Landow moved in the Second Department to intervene and for relief from the stay, which was denied on March 2, 2020. At present, the appeal is still pending.

Plaintiff's cross motion seeks an injunction from this Court that would compel the parties to enter into a stipulation in violation of the stay granted by the Appellate Division, Second Department. Plaintiff has not shown extraordinary circumstances, that would convince this court to issue an order contrary to the Second Department stay (*see Spectrum Stamford*, LLC v 400 Atlantic Title, LLC, 162 AD3d 615, 617 [1st Dept 2018]). Accordingly, Plaintiff's cross motion is denied.

Accordingly, it is hereby

ORDERED that the motion of defendant Sandford F. Young P.C. to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs

and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible* at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)].

10/15/2020
DATE

SHAWN TIMOTHY KELLY, J.S.C.

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE