

**Ginarte Gallardo Gonzalez & Winograd, LLP v
Schwitzer**

2020 NY Slip Op 33770(U)

November 13, 2020

Supreme Court, New York County

Docket Number: 159991/2018

Judge: James E. d'Auguste

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: I.A.S. PART 55

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 GINARTE GALLARDO GONZALEZ & WINOGRAD, LLP,

AMENDED DECISION AND
 ORDER

Plaintiffs,

Index No. 159991/2018

- against -

WILLIAM SCHWITZER, WILLIAM SCHWITZER &
 ASSOCIATES, P.C., GIOVANNI C. MERLINO, BARRY
 AARON SEMEL-WEINSTEIN, BETH MICHELLE
 DIAMOND, RENE G. GARCIA, THE GARCIA LAW FIRM,
 P.C., MIGNOLIA PENA, AND JANILDA GOMEZ,

Defendants.

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JAMES E. D'AUGUSTE, J.:

Motion sequence nos. 005, 007, and 008 are consolidated for disposition herein.

In motion sequence no. 005, defendants William Schwitzer, William Schwitzer & Associates, P.C., Giovanni C. Merlino, Barry Aaron Semel-Weinstein and Beth Michelle Diamond (collectively, the Schwitzer Defendants) move, pursuant to CPLR 2221, for leave to reargue that part of the Court's decision and order dated November 4, 2019 (the November 4 Order)¹ denying the Schwitzer Defendants' motion to dismiss the third cause of action for defamation and the seventh cause of action for civil conspiracy, and for leave to renew and reargue the portion of the November 4 Order denying the Schwitzer Defendants' motion to dismiss the first cause of action for tortious interference with contract. In motion sequence no. 007, defendants Rene G. Garcia and the Garcia Law Firm (together, the Garcia Defendants), join the Schwitzer Defendants' application for leave to reargue that part of the November 4 Order denying the Garcia Defendants' motion to dismiss the third cause of action for defamation and the seventh cause of action for civil

¹ The Court presumes familiarity with the November 4 Order and will not repeat facts except as necessary for this decision.

conspiracy. In motion sequence no. 008, plaintiff moves for leave to renew the same motions to dismiss and, upon renewal, reinstating the eighth cause of action for a permanent injunction and for a preliminary injunction pendente lite barring defendants and their agents from communicating with plaintiff's clients. For the reasons set forth below, the motions to renew and reargue are granted and upon reconsideration defendants' motions are granted in part and plaintiff's motion is denied.

Discussion

CPLR 2221 (d) (2) provides that a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." A motion to reargue "is addressed to the sound discretion of the court" (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992], *lv dismissed in part, denied in part* 80 NY2d 1005 [1992], *rearg denied* 81 NY2d 782 [1993]). "Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided ... or to present arguments different from those originally asserted" (*id.* at 27 [citations omitted]; *accord Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]).

A motion for leave to renew must be based upon new facts not offered on the prior motion that would change the determination (*see* CPLR 2221 [e] [2]). The moving party must demonstrate a reasonable justification for failing to present the new facts on the earlier motion (*see* CPLR 2221 [e] [3]; *Altschuler v Jobman 478/480 LLC*, 135 AD3d 439, 441 [1st Dept 2016], *lv dismissed* 28 NY3d 945 [2016], *lv denied* 29 NY3d 903 [2017]), as "[r]enewal is not available as a 'second chance' for parties who have not exercised due diligence in making their first factual presentation" (*Galisia v Espinal*, 149 AD3d 544, 545 [1st Dept 2017] [internal quotation marks and citation

omitted]). The Court has discretion to relax this last requirement in the interest of justice (*see Mejia v Nanni*, 307 AD2d 870, 871 [1st Dept 2003]), and grant the motion “so as not to defeat substantive fairness” (*see Corporan v Dennis*, 117 AD3d 601, 601 [1st Dept 2014] [internal quotation marks and citation omitted]).

Pursuant to CPLR 2221 (f), “[a] combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought.”

Defendants’ Motions

As applied herein, defendants have not demonstrated that the Court misapprehended or overlooked relevant law or fact relating to the third cause of action for defamation. Defendants contend that a cause of action for defamation per se requires a plaintiff to prove it suffered actual harm, citing *Nolan v State of New York* (158 AD3d 186 [1st Dept 2018]) as support. As an initial matter, *Nolan* involved a motion for summary judgment brought by a plaintiff, who pled claims for defamation and defamation per se, among other causes of action (*id.* at 189). A motion to dismiss brought under CPLR 3211 addresses the sufficiency of a pleading (*see Aristy-Farer v State of New York*, 29 NY3d 501, 509 [2017]), whereas a motion for summary judgment concerns whether “the movant [has] establish[ed] his [or her] cause of action or defense ‘sufficiently to warrant the court as a matter of law in directing judgment’ in his [or her] favor” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980], quoting CPLR 3212 [b]). In this action, the November 4 Order concerned two motions to dismiss brought under CPLR 3211. Thus, the procedural posture in *Nolan* is different than the one presented here.

Additionally, the *Nolan* court dismissed the plaintiff’s “standard” defamation cause of action (158 AD3d at 199), as the plaintiff could not demonstrate that she had sustained special damages, which that court defined as “the loss of something having economic or pecuniary value,

which must flow directly from the injury to reputation caused by the defamation and not from the effects of the defamation” (*id.* at 191 [internal quotation marks and citation omitted]). It is well settled that a plaintiff must plead it suffered “special damages directly resulting from the injury to [his or] her reputation caused by the alleged defamation” (*Bowes v Magna Concepts*, 245 AD2d 33, 34 [1st Dept 1997]), unless the claim falls into one of four specific per se categories (*see Liberman v Gelstein*, 80 NY2d 429, 434-435 [1992]). In that instance, the plaintiff’s damages are presumed (*id.*; *Meer Enters., LLC v Kocak*, 173 AD3d 629, 631 [1st Dept 2019] [stating that a plaintiff “need not allege special damages” on a cause of action for defamation per se]). In the present action, plaintiff has pled sufficient facts alleging that the claimed defamatory statements impugned its business reputation and were sufficient to infer its “ineptitude” in the legal profession (*see e.g. Ferguson v Sherman Sq. Realty Corp.*, 30 AD3d 288, 289 [1st Dept 2006]). Therefore, because plaintiff has pled a claim for defamation per se (*see Glazier v Harris*, 99 AD3d 403, 404 [1st Dept 2012]; *Grinaldo v Meusburger*, 34 AD2d 586, 587 [3d Dept 1970], *appeal dismissed* 27 NY2d 598 [1970]), it did not need prove that it sustained damages in the complaint.

Moreover, the *Nolan* court assessed the quantum of proof the plaintiff presented with respect to her damages on the defamation per se claim. First, in affirming the grant of partial summary judgment to plaintiff on the defamation per se claim, the *Nolan* court stated that the plaintiff “need not establish special damages” (158 AD3d at 191). However, the *Nolan* court then engaged in a discussion as to the type of injury that the plaintiff had to sustain in order to prevail on a defamation per se claim. While the plaintiff in *Nolan* failed to prove she suffered reputational harm, she established that she suffered from emotional distress, which was a type of injury for which she could recover (*id.* at 193-194, citing *Gertz v Robert Welch, Inc.*, 418 US 323, 350 [1974] and *Hogan v Herald Co.*, 84 AD2d 470, 480-481 [4th Dept 1982], *affd* 58 NY2d 630 [1982]).

Thus, because the plaintiff demonstrated that she suffered from emotional distress as a result of the defamatory statements, she was awarded summary judgment on liability on her defamation per se claim (158 AD3d at 199). In contrast, as discussed above, the November 4 Order concerned defendants' motions to dismiss. Whether plaintiff in this action can prove it sustained a compensable injury cannot be determined at this stage. Indeed, "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]). Thus, defendants have not demonstrated their entitlement to dismissal on the third cause of action for defamation.

Nor have defendants demonstrated that the Court misapprehended relevant law with respect to the individual defendants' liability. "Under the doctrine of respondeat superior, a corporation, including a professional services corporation, is liable for a tort committed by its employee" (*Yaniv v Taub*, 256 AD2d 273, 274 [1st Dept 1998]). "[T]he doctrine does not apply to impose vicarious liability upon supervisors" (*id.* [internal quotation marks and citation omitted]). That said, while "a supervisor may not be liable for the injuries caused by the conduct of one of his subordinates," liability may be imposed where that supervisor is involved in directing his or her subordinate's conduct (*Connell v Hayden*, 83 AD2d 30, 50-51 [2d Dept 1981], citing Restatement [Second] of Agency §§ 344, 351 and 358; *accord Moller v Taliuaga*, 255 AD2d 563, 564 [2d Dept 1998]). Here, plaintiff alleges that defendants actively participated in, supervised and employed the two "case runners," Mignolia Pena and Janilda Gomez (Gomez), who attempted to persuade plaintiff's clients to change their representation. In addition, the Garcia Defendants argue that Gomez's failure to reference them in her affidavit is demonstrative of their lack of involvement in the alleged scheme. However, this argument is unpersuasive at this juncture, especially in the absence of any discovery from Gomez on this issue.

Similarly, the Schwitzer Defendants have not demonstrated their entitlement to dismissal of the first cause of action for tortious interference with contract.² In support of renewal, the Schwitzer Defendants submit an affidavit from nonparty Jose Federico Cerda Rodriguez (Rodriguez), one of plaintiff's former clients. Rodriguez avers that he retained plaintiff to represent him in two separate actions captioned *Rodriguez v 11 Hoyt Property Owner, L.P., et al.*, Sup Ct, Bronx County, Index No. 25546/2018E, and *Rodriguez, et ano. v 11 Hoyt Property Owner, L.P., et al.*, Sup Ct, Bronx County, Index No. 25958/2018E (NYSCEF Doc No. 145, Randy M. Mastro [Mastro] letter dated October 31, 2019, exhibit 1 [Rodriguez aff], ¶¶ 1-2). Rodriguez states that at physical therapy, he met nonparty Levi Espinal, who recommended the attorneys at defendant William Schwitzer & Associates, P.C. (the Schwitzer Firm) (*id.*, ¶ 4). Rodriguez states he "started to become dissatisfied with Ginarte's representation of [him]" (*id.*, ¶ 3), and after meeting with defendant Barry Semel-Weinstein in October 2018, chose to substitute the Schwitzer Firm for plaintiff (*id.*, ¶¶ 6-7). Rodriguez further states that he has no knowledge or recollection of ever meeting Dr. X, who was the physician at the medical facility identified in the complaint, Pena, Gomez, or the Garcia Defendants (*id.*, ¶¶ 10-12).

Rodriguez's affidavit attempts to refute the tortious interference with contract claim, the elements of which are the existence of a valid contract, the defendant's knowledge of that contract, the intentional and improper procurement of a breach, and damages (*see White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]). However, Rodriguez signed his affidavit on November 30, 2018, two months before the Schwitzer Defendants moved for dismissal (NYSCEF Doc No. 7). The Schwitzer Defendants have not set forth a reasonable justification why

² The Schwitzer Defendants have not advanced any arguments for leave to reargue the first cause of action, although they sought reargument on this cause of action, as well (NYSCEF Doc No. 176, Schwitzer Defendants' memorandum of law at 5).

Rodriguez's affidavit was not offered on the prior motion (*see Jones v City of New York*, 146 AD3d 690, 691 [1st Dept 2017]). They argue that plaintiff, in opposition to the prior motions, filed redacted information regarding four client substitutions. Moreover, plaintiff had submitted only one letter of substitution in which the Schwitzer Firm's name appeared as counsel (NYSCEF Doc No. 63 at 10). Based on these redactions, the Schwitzer Defendants maintain that they could not confirm their "strong suspicion that the redacted client was ... Rodriguez" until oral argument was held on October 15, 2019 (NYSCEF Doc No. 176 at 17). This argument, though, lacks merit. Assuming that Rodriguez is the only former client of plaintiff's who changed counsel in the time frame alleged in the complaint, then Rodriguez's affidavit would have been germane to the Schwitzer Defendants' motion in chief. In point of fact, the Schwitzer Defendants secured the Rodriguez's affidavit approximately one month after plaintiff brought this action on October 29, 2018 (NYSCEF Doc No. 1). The Schwitzer Defendants, though, did not submit the affidavit in support of their prior motion.

Even if this affidavit was considered, dismissal of the tortious interference claim would not be warranted. The complaint referenced three other clients of plaintiff's who changed counsel to the Schwitzer Firm or The Garcia Law Firm. Plaintiff, in response, has identified these clients as Ramon Palaguachi (Palaguachi), Santos S. Sanchez Fuentes (Fuentes) and Segundo Guaman (Guaman) (NYSCEF Doc No. 212, plaintiff's memorandum of law at 5-6). Although the Schwitzer Defendants, in reply, argue that the notices designating the Schwitzer Firm as trial counsel for Fuentes and Guaman were filed well after plaintiff commenced this action, the Schwitzer Firm noted its appearance as Palaguachi's trial counsel in a stipulation of substitution dated July 24, 2018 (NYSCEF Doc No. 230, Mastro affirmation, exhibit F at 1). Therefore, Rodriguez's affidavit does not conclusively demonstrate that he was the "only" client who changed

counsel to the Schwitzer Firm.³ Thus, that part of the Schwitzer Defendants' motion relating to the first cause of action for tortious interference is denied.

Insofar as defendants seek leave to reargue the seventh cause of action for civil conspiracy, that facet of both motions is granted. The seventh cause of action for civil conspiracy is dismissed, but only to the extent that it is asserted as an independent tort (*see Errant Gene Therapeutics, LLC v Sloan-Kettering Inst. for Cancer Research*, 174 AD3d 473, 474 [1st Dept 2019]; *accord Matter of Schleifer v Yellen*, 158 AD3d 512, 513 [1st Dept 2018]).

“To establish a claim of civil conspiracy, the plaintiff ‘must demonstrate the primary tort, plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties’ intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury’” (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474 [1st Dept 2010] [internal citation omitted]). The Schwitzer Defendants first contend that plaintiff must plead that each defendant committed an overt act in furtherance of their agreement. However, this argument is unpersuasive as “the liability of a defendant as a conspirator for co-conspirators’ wrongful acts ‘does not necessarily depend upon his active participation in the particular overt acts’” (*Errant Gene Therapeutics, LLC*, 174 AD3d at 475, quoting *Nederlandsche Handel-Maatschappij N.V. v Schreiber*, 17 AD2d 783, 783 [1st Dept 1962]). Plaintiff’s allegation that “[u]sing a coordinated scheme of classic ambulance-chasing tactics and false statements Defendants and their unnamed co-conspirators engaged in a conspiracy to improperly solicit

³ The Court already ruled during oral argument that it would not consider the belated affidavits attached to the letter dated June 26, 2020 from counsel for the Schwitzer Defendants (NYSCEF Doc. No. 243). In any event, even if considered, this motion was not converted to one for summary judgment and, as such, “received on an unconverted motion to dismiss for failure to state a cause of action are not to be examined for the purpose of determining whether there is evidentiary support for the pleading” (*Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 635-36 [1976]; *see id.* [noting that “affidavits may be received for a limited purpose only, serving normally to remedy defects in the complaint” and “affidavits submitted by the defendant will seldom if ever warrant the relief he seeks”]).

Ginarte’s clients” (NYSCEF Doc No. 2 [complaint], ¶ 85) is sufficient to plead a conspiracy (*see Cohen Bros. Realty Corp. v Mapes*, 181 AD3d 401, 404 [1st Dept 2020]).

Nevertheless, defendants correctly state that civil conspiracy is not an independent tort (*see Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 85 AD3d 457, 458 [1st Dept 2011]). “Allegations of conspiracy are permitted ... to connect the actions of separate defendants with an otherwise actionable tort” (*Abacus Fed. Sav. Bank*, 75 AD3d at 474 [internal quotation marks and citation omitted]; *see Sepenuk v Marshall*, 98 CIV. 1569 (RCC), 2000 WL 1808977, at *6 [SDNY Dec. 8, 2000] [“If an underlying, actionable tort is established, . . . plaintiff may plead the existence of a conspiracy in order to demonstrate that each defendant’s conduct was part of a common scheme”]). “In this way, the defendants may be held jointly and severally liable for any compensatory and punitive damages awarded for the underlying torts, although damages may not be awarded on the conspiracy count itself” (*Sepenuk*, 2000 WL 1808977 at *6).

Thus, in granting leave to reargue this point, the Court clarifies its original decision that the “allegations in the complaint ... charging conspiracy” may stand, as they “are deemed part of the remaining causes of action to which they are relevant” (*Errant Gene Therapeutics, LLC*, 174 AD3d at 474, quoting *Hoag v Chancellor, Inc.*, 246 AD2d 224, 230 [1st Dept 1998]). As both the defamation and tortious interference claims have not been dismissed, the civil conspiracy allegations shall remain part of those predicate torts (*see Errant Gene Therapeutics, LLC*, 174 AD3d at 474).

Plaintiff’s Motion

In support of its motion to renew, plaintiff submits an affidavit from a client dated February 18, 2020 stating that, on three separate occasions, men have approached him and asked him questions about his personal injury lawsuit, and offered him an interest-free loan (see NYSCEF

Doc. No. 220). They also told him that he should not testify against lawyers because it might delay his case and he will lose (*see id.*). The Court grants leave to renew and, upon renewal, adheres to its original determination. The affidavit has not convinced this Court that plaintiff's eight cause of action, seeking to permanently enjoin defendants and their representatives from communicating with plaintiff's clients, should not be reinstated. This is, in no small part, because monetary damages are available to plaintiff if it is determined at the conclusion of this matter that defendants are legally liable to plaintiff for the alleged wrongs asserted in this litigation (see NYSCEF Doc. No. 216 at 32-33). To the extent court intervention is warranted to address an allegation of witness intimidation then the appropriate application is one for a protective order rather than seeking to reinstate a cause of action for a permanent injunction.

Accordingly, it is

ORDERED that motion of defendants William Schwitzer, William Schwitzer & Associates, P.C., Giovanni C. Merlino, Barry Aaron Semel-Weinstein and Beth Michelle Diamond for leave to reargue and renew the decision and order of the undersigned dated November 4, 2019 (motion sequence no. 005) is granted to the extent of granting reargument on the seventh cause of action for civil conspiracy, and upon reargument, the seventh cause of action for civil conspiracy, asserted as an independent tort, against said defendants is dismissed, and the motion otherwise denied; and it is further

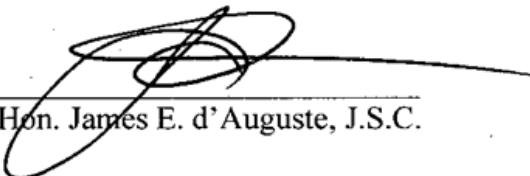
ORDERED that motion of defendants Rene G. Garcia and the Garcia Law Firm for leave to reargue the decision and order of the undersigned dated November 4, 2019 (motion sequence no. 007) is granted to the extent of granting reargument on the seventh cause of action for civil conspiracy, and upon reargument, the seventh cause of action for civil conspiracy asserted as an

independent tort against said defendants is dismissed, and the motion otherwise denied; and it is further

ORDERED that the motion of plaintiff to renew the decision and order of the undersigned dated November 4, 2009 and for a preliminary injunction pendente lite (motion sequence no. 008) is denied.

Dated: November 13, 2020

ENTER:



Hon. James E. d'Auguste, J.S.C.