

Fay v Fay

2020 NY Slip Op 34930(U)

November 5, 2020

Supreme Court, Dutchess County

Docket Number: Index No. 51306/18

Judge: Maria G. Rosa

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa, Justice

INA FAY, by her guardian, PATRICK FAY, and
PATRICK FAY, Individually,

Plaintiffs,

DECISION AND ORDER

Index No. 51306/18

-against-

CHRISTINA FAY,

Defendant.

The following papers were read on Plaintiff's motion to dismiss and Defendant's motion for summary judgment.

NOTICE OF MOTION
AFFIRMATION IN SUPPORT
MEMORANDUM OF LAW IN SUPPORT
EXHIBITS A - J

NOTICE OF MOTION
AFFIRMATION IN SUPPORT
MEMORANDUM OF LAW
EXHIBITS A - G

AFFIRMATION IN OPPOSITION
EXHIBIT A

Plaintiffs commenced this action seeking damages for assault and the intentional infliction of emotional distress. Defendant's answer included counterclaims for intentional infliction of emotional distress and defamation. The counterclaims further asserted that Plaintiffs' claims were frivolous and that they commenced the action in bad faith. Plaintiffs now move to dismiss the counterclaims pursuant to CPLR 3211(a)(7) and 3212. Defendant moves for summary judgment dismissing Plaintiffs' claims.

On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must accept the facts as alleged in the complaint as true, accord the pleadings the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory. Beraunsoller v. Dahan, 173 AD3d 803 (2nd Dept 2019). The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986). If a movant has met this threshold burden, to defeat the motion the opposing party must present the existence of a triable issue of fact. See Zuckerman v. New York,

49 NY2d 557, 562 (1980). In deciding a motion for summary judgment, “the trial court must afford the party opposing the motion every inference which may be properly drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant.” Szczerbiak v. Pilat, 90 NY2d 553 (1997).

The elements of a cause of action for intentional infliction of emotional distress are: (1) extreme and outrageous conduct; (2) the intent to cause, or the disregard of a substantial likelihood of causing, severe emotional distress; (3) causation; and (4) severe emotional distress. Petkewicz v. Dutchess County Dept. of Community & Family Services, 137 AD3d 990 (2nd Dept 2016). The subject 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.” Klein v. Metro. Child Scrvs., Inc., 100 AD2d 708, 710-11 (2nd Dept 2012).

Defendant’s first counterclaim alleges that Plaintiffs’ filing of the complaint in this action was intended to and inflicted great emotional harm. The claim states that the filing caused her pain, suffering and medical expenses. The foregoing fails to state a cause of action for the intentional infliction of emotional distress. The mere act of commencing a legal action is not so outrageous in character or extreme in degree as to go beyond all possible bounds of decency as measured in a civilized community. While Defendant may dispute the veracity of the allegations set forth in the complaint and find them hurtful, other remedies are available to her to address what she views as frivolous litigation. She fails, however, to state a viable legal claim that the act of bringing this action constitutes the intentional infliction of emotional distress. Based on the foregoing, it is

ORDERED that Plaintiffs’ motion to dismiss Defendant’s first counterclaim for the intentional infliction of emotional distress is granted.

The elements of a cause of action for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by at least a negligence standard, and it must either cause special harm or constitute defamation *per se*. Restatement of Torts, Second § 558; Arvanitakis v. Lester, 145 AD3d 650, 651 (2nd Dept 2016). To state a defamation cause of action, the complaint must also set forth the particular words allegedly constituting defamation, the time, place, and manner of the false statement and specify to whom it was made. Id.; CPLR 3016(a).

Defendant’s second counterclaim alleges that Plaintiffs’ act of filing their complaint “contains false, inflammatory and defamatory allegations....” The foregoing is insufficient to state a defamation claim. There is a “deep-rooted, long-standing public policy in favor of a person’s right to make statements during the course of a court proceeding without penalty.” Denson v. Donald J. Trump for President, Inc., 180 AD3d 446, 453-54 (1st Dept 2020). Accordingly, statements uttered in the course of a judicial proceeding are absolutely privileged provided they are material and pertinent to the issues raised therein “regardless of the motive with which they are made.” Id. at 454. Based on the foregoing, Defendant’s defamation counterclaim may not stand. Moreover, her blanket reference to the summons and complaint and the allegations set forth therein fails to satisfy the heightened pleading requirements of CPLR 3016(a). The five page complaint makes numerous factual allegations and Defendant fails to specify which of these she is alleging are defamatory. Wherefore, it is

ORDERED that Plaintiff s’ motion to dismiss Defendant’s second and fifth counterclaims

sounding in defamation is granted.

Defendant's third counterclaim alleges that the complaint is frivolous and caused her severe emotional harm. Her fourth counterclaim asserts that Plaintiffs filed the complaint in bad faith. Defendant's contentions that Plaintiffs filed the action in bad faith and that it is frivolous fail to state a cause of action. While this court has authority to award attorney's fees and sanctions pursuant to 22 NYCRR 130.1(d) and CPLR §8303-a, request for such relief may not be pled as a distinct cause of action. A claim that a plaintiff's entire pleading is frivolous may be tested in a summary judgment motion, but the mere assertion of a counterclaim for attorney's fees and damages based on allegations that the action is frivolous is improper. See Couch v. Schmidt, 204 AD2d 951 (3rd Dept 1994). Accordingly, it is

ORDERED that Plaintiffs' motion to dismiss Defendant's third and fourth counterclaims is granted.

Plaintiffs' complaint asserts four causes of action. The first cause of action alleges both negligence and intentional conduct based on claims of physical and mental abuse. The second cause of action is for the intentional infliction of emotional distress. The third cause of action is for the negligent infliction of emotional distress. The fourth cause of action, the only one asserted on behalf of Plaintiff Patrick Fay, is derivative and seeks damages for medical and other expenses related to Plaintiff Ina Fay's care and treatment.

Defendant's motion for summary judgment asserts that Plaintiffs' claims are barred by the applicable statute of limitations, the doctrine of *res judicata* and cannot be established by competent evidence. The causes of action for intentional infliction of emotional distress and assault are governed by a one-year statute of limitations. See CPLR §215; Kwarren v. American Airlines, 303 AD2d 722 (2nd Dept 2003); Dykstra v. Partridge, 144 AD2d 337 (2nd Dept 1998). Negligent infliction of emotional distress and claims sounding in negligence are governed by a three-year statute of limitations. CPLR §214; Yongwen Mo v. Chan, 17 AD3d 356 (2nd Dept 2005).

The only factual allegation Defendant makes in furtherance of her statute of limitations defense is that the causes of action for intentional and negligent infliction of emotional distress and physical harm occurred between 2004 to 2013. Thus, Defendant maintains that the applicable statute of limitations governing such claims had already expired when Plaintiffs commenced this action on May 7, 2018. With respect to Plaintiff Ina Fay, Defendant's contentions ignore the tolling provisions of CPLR §208. The allegations underlying Plaintiff's complaint are alleged to have occurred while Ina Fay was a minor. In such cases, the statute of limitations begins to run on the infant's 18th birthday. See CPLR §208(a); Yang v. Oceanside Union Free School Dist., 90 AD3d 649 (2nd Dept 2011). Plaintiffs make undisputed allegations of fact that Ina Fay turned 18 in 2018 and after this action was commenced. Based on the foregoing, it is

ORDERED that Defendant's motion to dismiss Plaintiffs' first three causes of action as time barred is denied. It is further

ORDERED that Defendant's motion for summary judgment on Plaintiff Patrick Fay's derivative claim is granted to the extent it is based on conduct that occurred prior to May 8, 2015. The allegations set forth in this cause of action seek damages based on alleged negligent conduct which is governed by a three-year statute of limitations. Patrick Fay may not benefit from the tolling

provisions of CPLR §208. An infancy toll does not apply to a parent's derivative claim. See Blackburn v. Three Village Cent. School Dist., 270 AD2d 298 (2nd Dept 2000). The motion is denied as to claims based on conduct that occurred from May 8, 2015 and thereafter. It is further

ORDERED that Defendant's motion for summary judgment to dismiss Plaintiffs' complaint based on the doctrine of *res judicata* is denied. That doctrine bars litigation of a claim previously litigated in a court of competent jurisdiction to a final judgment on the merits by a party to that prior action. Defendant's motion is premised on a divorce action that concluded in 2017. The parties to that action were Plaintiff Patrick Fay and Defendant. As Ina Fay was not a party to that action, the doctrine of *res judicata* would not apply to bar her claims in this action. Moreover, Defendant fails to meet her burden of demonstrating that the derivative cause of action asserted by Patrick Fay in this action could have or was litigated in the divorce action. To the contrary, the verified complaint from that action reflects that the issue was not litigated. It is further

ORDERED that Defendant's motion for summary judgment dismissing Plaintiffs' claims based on allegations that they are not supported by competent evidence is denied. Defendant's contentions merely address issues of credibility that go to the weight of Plaintiffs' claims. This court cannot assess credibility or the reliability of such evidence on a motion for summary judgment.

The foregoing constitutes the decision and order of the Court. A pre-trial conference of this action will be held on January 11, 2021 at 10:00 a.m. for the purpose of discussing settlement and setting a trial date.

Dated: November 5, 2020
Poughkeepsie, New York

ENTER:



MARIA G. ROSA, J.S.C.

Scanned to the E-File System only

Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

Worby Vecchio Edelman, LLP
11 Martine Avenue
White Plains, NY 10606

Gary Lane, Esq.
219 Church Street
Poughkeepsie, NY 12601

Ahmuty, Demers & McManus, Esqs.
634 Plank Road, Suite 203A
Clifton Park, NY 12065

Pinkus & Pinkus, LLC
7002 Graham Road, Suite #100
Indianapolis, IN 46220