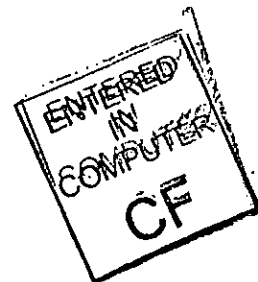


Thomasson v Demarco
2020 NY Slip Op 35126(U)
March 9, 2020
Supreme Court, Nassau County
Docket Number: Index No. 607158/19
Judge: Denise L. Sher
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**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

HARRY R. THOMASSON,

Plaintiff,

- against -

ANTHONY P. DEMARCO, SR. and
ANTHONY P. DEMARCO, JR.,

Defendants.

TRIAL/IAS PART 33
NASSAU COUNTY

Index No.: 607158/19
Motion Seq. Nos.: 01, 02^{MG}
Motion Dates: 09/06/19
11/04/19

XXX

The following papers have been read on this motion:

	Papers Numbered
<u>Notice of Motion (Seq. No. 01), Pro Se Affidavit and Exhibits</u>	1
<u>Notice of Cross-Motion (Seq. No. 02), Affirmation and Exhibits</u>	2
<u>Memorandum of Law in Opposition to Cross-Motion (Seq. No. 02) and in Reply to Motion (Seq. No. 01), Affirmation in Opposition to Cross-Motion (Seq. No. 02) and in Reply to Motion (Seq. No. 01) and Exhibits</u>	
<u>Affirmation in Reply to Motion (Seq. No. 01) and Exhibit</u>	3
<u>Reply Affirmation to Cross-Motion (Seq. No. 02), Affidavits and Exhibits</u>	4

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Pro se plaintiff moves (Seq. No. 01), pursuant to CPLR § 3211(a)(7), for an order dismissing defendants' Counterclaims.

Defendants oppose the motion (Seq. No. 01) and cross-move (Seq. No. 02) for an order dismissing *pro se* plaintiff's Verified Complaint. *Pro se* plaintiff opposes the cross-motion.

In support of the motion (Seq. No. 01), *pro se* plaintiff submits, in pertinent part, that, "[d]efendants' (*sic*) make three (3) Counterclaims to undersigned's pending Verified Complaint:

1) violation of New York Judiciary Law section 487; 2) Intentional Infliction of Emotional Distress; and 3) Negligent Infliction of Emotional Distress.... The First Cause of Action, violation of Judiciary Law section 487, should be dismissed because 1) it is governed by a one year statute of limitation (*sic*) for intentional torts, and each and every allegation made against (*sic*) undersigned in the First Cause of Action (except for the filing of the instant action) is more than one year old; 2) the Defendants suggest (at paragraph 64 of the Counterclaim) that the intentional nature of the Defendants' underlying actions precludes the filing of a complaint for negligence by the undersigned, but provide no citation for their argument and (*sic*) conclusory statement disguised under the heading 'Preliminary Statement'; and 3) alleged breaches of Judiciary Law section 487 necessarily constitutes (*sic*) an allegation of fraud, which requires pleadings with particularity under CPLR section 3016(b), and the allegations made are insufficiently plead (*sic*) with respect to particularity: Indeed, there are no citations with any particularity to the criminal allegations or to the civil Complaint at issue that the Defendants suggest in any way are false; they merely make broad brush strokes that are insufficient under the common law and provide insufficient particularity to support the First Cause of Action. Relief under Section 487 of the Judiciary Law is reserved for a chronic, extreme pattern of legal delinquency [citations omitted], or for misconduct that is chronic. [citation omitted].

Furthermore, to recover under Section 487, the counterclaiming defendants must plead and prove both actual deceit by the attorney and causation, that is, that the deceit or collusion actually caused the defendants damages. [citations omitted]. Thus, even egregious misconduct will not rise to the level of a violation of Section 487 if there is no pattern of intentional deceit or wrongdoing. Here, defendants failed to state a cause of action for (*sic*) violation of Judiciary Law §487 as they did not allege the requisite pattern of wrongdoing or deceit necessary to sustain such

a claim. [citations omitted]. In addition, a cause of action alleging a violation of Judiciary Law § 487 must do so with specificity. [citations omitted]. Judiciary Law § 487 ‘focuses on the attorney’s intent to deceive, not the deceit’s success.’ [citation omitted]. Simply put, (*sic*) undersigned had no intention to deceive anyone about anything, and there are no specific references set forth in the Counterclaims with specificity as to what it is that I supposedly intended to deceive anyone about, just conclusory, self-serving allegations without any specificity at all.” *See Pro Se Plaintiff’s Affidavit in Support Exhibit B.*

Pro se plaintiff further asserts, in pertinent part, that, “[t]he Second Cause of Action in Defendants’ Counterclaims, for intentional infliction of emotional distress, should also be dismissed because 1) it is governed by a one year statute of limitation (*sic*) for intentional torts, and each and every allegation made against (*sic*) undersigned in the Second Cause of Action (except for filing of the instant action) is more than one year old; 2) the filing of the instant action is insufficient to constitute intentional infliction of emotional distress, and it is not even alleged that the instant Complaint from (*sic*) undersigned constitutes a tort; and 3) the Second Cause of Action does not allege nor suffice the necessary elements of intentional infliction of emotional distress. Under New York law, a cause of action alleging 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’ [citations omitted].... Again, the Defendants (*sic*) Counterclaims do not set forth any specific allegations from your Affirmant that violate any of the required elements of the tort; nor have the Counterclaims even set forth the necessary elements of the tort let alone compared the elements with specificity to anything (*sic*) undersigned said that purportedly violates the alleged tort in the Second Counterclaim; it is

merely broad brush strokes absent any particularity. These defendants have pursued me for years, unsuccessfully, in other actions This is just their latest attempts (*sic*) to embarrass and/or harass me wit unfounded and unsupported allegations.” *See Pro Se Plaintiff’s Affidavit in Support Exhibits A-C.*

Pro se plaintiff also contends, in pertinent part, that, “[t]he Third Cause of Action in Defendants’ Counterclaims, for negligent infliction of emotional distress, should also be dismissed because 1) the filing of the instant action is insufficient to constitute negligent infliction of emotional distress, and it is not even alleged that the instant Complaint from (*sic*) undersigned constitutes a tort; 2) there is no specificity in the allegations as to what it is that was alleged by (*sic*) undersigned that was negligent infliction of emotional distress upon the Defendants with respect to the underlying criminal charges; and 3) the Third Cause of Action does not allege nor suffice the necessary elements of negligent infliction of emotional distress.... As with all three Counterclaims, Defendants have broad brushstrokes (*sic*) but no specificity with regard to their allegations in the Third Counterclaim; they also completely fail to meet the requirements of pleading the elements of the tort against (*sic*) undersigned. Moreover, Defendants fail to point out to this Court that their criminal dismissals, despite their alleged, unsupported hearsay in the Counterclaims at issue, were made pursuant to Criminal Procedure Law 170.30(1)(f), specifically that the dismissal was because ‘there exists some other jurisdictional or legal impediment to conviction of the defendant for the offense charged’.” *See Pro Se Plaintiff’s Affiavit in Support Exhibits B and D-E.*

In opposition to the motion (Seq. No. 01) and in support of the cross-motion (Seq. No. 02), counsel for defendants argues, in pertinent part, that, “[a]n Attorney should not be able to use his status as an Officer of the Court to attempt to ruin other people’s lives. This is exactly what Plaintiff Harry Thomasson (‘Attorney Plaintiff’) is and has attempted to do to the

Demarco's (*sic*). But more importantly, the Attorney Plaintiff herein is well aware of the fact that this entire case is a sham and the statute of limitations on the alleged intentional torts that occurred herein ran over a year and a half ago and his entire case is time-barred and should be dismissed. The Attorney Plaintiff cannot have it both ways whereby he swears out a criminal complaint for assault (an intentional tort) and now allege (*sic*) that this entire case sounds in Negligence. The Attorney Plaintiff's actions belie his statements and cannot be tolerated. A referral to the Bar and the proper disciplinary committee is in order."

Counsel for defendants also asserts, in pertinent part, that, "Demarco Sr. filed a grievance with the Nassau County Bar Association and in retaliation Attorney Plaintiff swore out a criminal complaint, under the penalty of perjury, against both Demarco Sr. and Demarco Jr. alleging that (*sic*) amongst other things that they individually and jointly assaulted him, destroyed his personal property and acted in lewd manner. These are all intentional torts that carry a one (1) year statute of limitations. Like the case herein, his entire fabricated criminal claim was made in retaliation for an attorney-client relationship that soured and, in an attempt, to try to embarrass the Demarco's (*sic*) in open court.... After prosecuting the criminal matter for eight (8) months the District Attorney's Office determined that Attorney Plaintiff had lied about the entire incident and they summarily dismissed all of the charges." *See* Defendants' Affirmation in Opposition Exhibits A and B.

Counsel for defendants further contends, in pertinent part, that, "the arguments that Plaintiff erroneously proffers in his in his moving papers, are the exact grounds to dismiss his own action. The Plaintiff contents (*sic*) that the counterclaims that have been interposed by Defendants are all 'Intentional Tort' (*sic*) and are time barred since the statute of limitations for an alleged 'Intentional Tort' is one year. The Defendants concur that an action for an 'Intentional Tort' must be brought within one year is accurate. However, unlike the Plaintiff Attorneys (*sic*)

who commenced this lawsuit in May 2019, way beyond the one year statute of limitations for 'Intentional Torts,' the Defendants (*sic*) meritorious counterclaims were brought within one year of the Plaintiff Attorneys (*sic*) action of commencing this litigation. Even though Plaintiff Attorney entitles his sole cause of action in his complaint as Negligence and Gross Negligence they (*sic*) unequivocally are not. Plaintiff attorney (*sic*) readily admits in all of the documents that have been submitted to this Court that this action stems from the alleged criminal actions of the DeMarcos, an alleged assault, which as he states has a one-year statute of limitations. While the Defendants (*sic*) counterclaims, which were commenced timely are all meritorious and must be adjudicated on the merits."

Counsel for defendants also asserts, in pertinent part, that, "[t]he Plaintiff Attorney fabricated criminal proceedings (an alleged assault an intentional tort) and thereafter knowing that the statute of limitations for his alleged bogus claims had long expired commenced this frivolous action. This is exactly the egregious conduct and type of action that would allow relief under Judiciary Law §487. In addition, since the within action was commenced in 2019, the Defendants (*sic*) counterclaims are clearly timely since the wrongdoing alleged is a pattern and practice that culminated with the commencement of this action. Furthermore, Plaintiff Attorney in paragraph 4 of his affirmation states that, 'simply put the undersigned had no intention to deceive anyone about anything.' The Plaintiff's actions belie his statements, and by bringing this frivolous claim he is attempting to deceive the Court, the Defendants and the public at large. This again is the exact actions (*sic*) that Judiciary law (*sic*) §487 was promulgated to protect against. Moreover, the Plaintiff Attorney's contention that the second cause of action for Intentional Infliction of Emotional Distress should be dismissed is again misguided. The Plaintiff Attorney purposely brought this action after he was sued in small claims court for legal fees that the Defendants herein were required to expend (*sic*) \$5,000.00 each in defending the criminal action

commenced by the People on behalf of the Plaintiff Attorney. As previously stated, the action was summarily dismissed against both Defendants after the Nassau County District Attorney's office did a thorough investigation and interviewed witnesses. The commencement of this action is completely retaliatory and as previously stated is not only frivolous and untimely but was done purposely to inflict emotional stress against Defendants. The Plaintiff Attorneys (*sic*) actions herein are extreme and outrageous.... The Plaintiff Attorney owed a duty to Defendants and by coming across the street and attacking the Defendant's (*sic*), it was absolutely foreseeable that the Plaintiff Attorneys (*sic*) negligent conduct caused the Defendant's (*sic*) emotional harm. Moreover, the Plaintiff Attorneys (*sic*) brazen actions of having the Defendants arrested, placed in custody (taking away their freedoms with the threat of additional incarceration if convicted) and thereafter commencing this frivolous law suit clearly indicated that the Plaintiff Attorneys (*sic*) actions warrant a cause of action for negligent infliction of emotional distress."

The Court will first address defendants' cross-motion (Seq. No. 02).

The law of negligence, which is central to the law of torts, provides a remedy for ***unintended injuries*** caused to person or property as a result of conduct judged to be unreasonably dangerous under the circumstances (emphasis added). Claims seeking damages for intended wrongs do not fall under the law of negligence. See N.Y.P.R.A.C., NEW YORK LAW OF TORTS §6:1. "Negligence is distinguished from assault and battery by the absence of that intent which is a necessary ingredient of the latter," *Borrerro v. Haks Group, Inc.*, 165 A.D.3d 1216, 87 N.Y.S.3d 618 (2d Dept. 2018) quoting *Jones v. Kent*, 35 A.D.2d 622, 312 N.Y.S.2d 728 (3d Dept. 1970). "New York does not recognize a cause of action to recover for negligent assault or battery." *Borrerro v. Haks Group, Inc.*, *supra*. See also *Wrase v. Bosco*, 271 A.D.2d 440, 706 N.Y.S.2d 434 (2d Dept. 2000).

In the instant matter, despite the fact that *pro se* plaintiff alleges that “[d]efendants negligently and grossly negligently” inflicted the detailed injuries upon him, the conduct attributed to defendants constituted intentional, rather than negligent, conduct. *See Pro Se Plaintiff’s Affidavit in Support Exhibit A; Borrerro v. Haks Group, Inc., supra*. This is especially true given the fact that *pro se* plaintiff had criminal charges brought against defendants for the exact same conduct that is alleged in the instant Verified Complaint.

As *pro se* plaintiff’s cause of action should be treated as one seeking to recover for intentional assault, it is, therefore, barred by the one-year statute of limitations. *See CPLR § 215; Wrase v. Bosco, supra*.

Accordingly, based upon the above, defendants’ cross-motion (Seq. No. 02) for an order dismissing *pro se* plaintiff’s Verified Complaint, is hereby **GRANTED**.

The Court will now address *pro se* plaintiff’s motion to dismiss defendants’ Counterclaims.

In determining a motion to dismiss pursuant to CPLR § 3211(a)(7) for a defendant’s alleged failure to state a cause of action with respect to asserted counterclaims, the Court will afford the counterclaims a liberal construction, accept the facts contained therein as true, accord defendant every favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory. *See Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); *Fay Estates v. Toys “R” Us, Inc.*, 22 A.D.3d 712, 803 N.Y.S.2d 135 (2d Dept. 2005); *Collins v. Telcoa, International Corp.*, 283 A.D.2d 128, 726 N.Y.S.2d 679 (2d Dept. 2001); *Mills v. Gardner, Tompkins, Terrace, Inc.*, 106 A.D.3d 885, 965 N.Y.S.2d 580 (2d Dept. 2013) quoting *Matter of Walton v. New York State Dept. of Correctional Servs.*, 13 N.Y.3d 475, 893 N.Y.S.2d 453 (2009) quoting *Nonnon v. City of New York*, 9 N.Y.3d 825, 842 N.Y.S.2d 756 (2007); *ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 N.Y.3d 208, 928 N.Y.S.2d 647 (2011). Bare legal

conclusions, however, are not presumed to be true. *See Goel v. Ramachandran*, 111 A.D.3d 783, 975 N.Y.S.2d 428 (2d Dept. 2013); *Felix v. Thomas R. Stachecki Gen. Contr., LLC*, 107 A.D.3d 664, 966 N.Y.S.2d 494 (2d Dept. 2013). The test to be applied is whether the counterclaims give sufficient notice of the transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from the factual averments. *See Treeline 990 Stewart Partners, LLC v. RAIT Atria, LLC*, 107 A.D.3d 788, 967 N.Y.S.2d 119 (2d Dept. 2013).

New York Judiciary Law § 487(1) reads, “[a]n attorney or counselor who: 1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party;... Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.”

The elements for a claim of intentional infliction of emotional distress are: extreme and outrageous conduct; intent to cause, or disregard of a substantial probability of causing severe emotional distress; a causal connection between the conduct and the injury; and severe emotional distress. *See Howell v. New York Post Co.*, 81 N.Y.2d 115, 596 N.Y.S.2d 350 (1993).

Here, none of the allegations in the Counterclaim can serve as a basis for a claim of intentional infliction of emotional distress. The conduct alleged is not so extreme, outrageous, utterly reprehensible and intolerable (*see Fischer v. Maloney*, 43 N.Y.2d 553, 402 N.Y.S.2d 991 (1978)) in society so as to sustain a cause of action for intentional infliction of emotional distress.

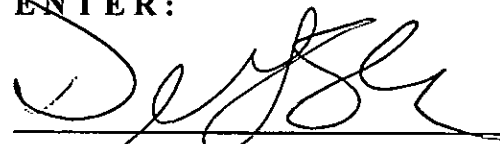
Recovery of damages for negligent infliction of emotional distress must generally be premised upon conduct which unreasonably endangers the plaintiff’s physical safety. *See Gledora v. Gallicano*, 206 A.D. 2d 456, 615 N.Y.S.2d 45 (2d Dept. 1994).

When viewing defendants’ counterclaims in light of the criteria set forth above, the Court finds that defendants have failed to state valid causes of action in said Counterclaims.

Accordingly, *pro se* plaintiff's motion (Seq. No. 01), pursuant to CPLR § 3211(a)(7), for an order dismissing defendants' Counterclaims, is hereby **GRANTED**.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.
XXX

Dated: Mineola, New York
March 9, 2020

ENTERED
MAR 11 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE