Petty v Wender
2020 NY Slip Op 35737(U)
July 30, 2020
Supreme Court, New York County
Docket Number: Index No. 153285/2018
Judge: W. Franc Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

Justice

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SARA PETTY, SARA PETTY

Plaintiff,

- v -

JOHN WENDER,

Defendant.

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INDEX NO. 153285/2018

MOTION DATE 01/23/2020

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 37, 39, 43, 44, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 38, 40, 45

were read on this motion to/for SEAL.

This action arises out of Defendant John Wender's reporting Plaintiff Sara Petty to the New York City Police Department for stalking in April of 2017. Plaintiff Sara Petty now brings this action, individually, and as mother of M.W.,[1] a male infant, alleging false arrest, malicious prosecution, and 11 other claims. Defendant has filed a motion to dismiss. The motion has been fully submitted.

BACKGROUND

The parties stipulate to most of the relevant facts in this case. (NYSCEF Doc No. 46 at 2 ["The facts and dates of salient events are set forth in Wender's moving papers and need not be repeated here at length."].) Defendant seeks dismissal of the complaint on the basis of

[1] Defendant is the father of M.W.

documentary evidence that he contends demonstrates convincingly, that he had a reasonable basis to report Plaintiff to the authorities for stalking.

On May 3, 2017, Plaintiff was arrested at her home and in front of her children. The crux of Plaintiff's allegations is that Defendant reported her for stalking without any probable cause or justification, and that this "false report caused the police to falsely charge" her with stalking in the fourth degree. (NYSCEF Doc No. 1 at ¶ 3.) Plaintiff alleges that the criminal proceedings were eventually dismissed in her favor. She filed her complaint on October 11, 2018, setting forth the following claims: 1) false arrest; 2) malicious prosecution; 3) abuse of process; 4) false imprisonment; 5) defamation, on behalf of both Plaintiffs; 6) libel, on behalf of both Plaintiffs; 7) slander, on behalf of both Plaintiffs; 8) tortious interference with parent-child relations; 9) intentional infliction of emotional distress; 10) prima facie tort, on behalf of both Plaintiffs; 11) negligent infliction of emotional distress; 12) negligent infliction of emotional distress, on behalf of Plaintiff M.W.; and 13) willful misconduct, negligence, and gross negligence, on behalf of both Plaintiffs.

Defendant moves to dismiss, pursuant to CPLR 3211 [a] [1] and [7], on the basis that documentary evidence utterly refutes Plaintiff's factual allegations and that Plaintiff fails to state a claim. In support, Defendant submits the text messages and emails he received from Plaintiff which formed the basis for the stalking report. (NYSCEF Doc Nos. 17-24.) These are the same documents referenced by Detective Carl Roadarmel in an affidavit filed against Plaintiff in the criminal action for the alleged stalking offense. (NYSCEF Doc No. 2.)

These documents include: cellular screenshots of text messages containing a picture of Defendant on a train; an email containing a video showing Defendant through a restaurant window having dinner with a female individual; cellular screenshots of text messages containing a picture

of Defendant standing on the street with the same female individual; and cellular screenshots of a screenshot of a notification from Wordpress reading "Your stats are booming! The Sad Truth AbOUT JOHN WENDER [the "Blog"] is getting lots of traffic." (NYSCEF Doc Nos. 17, 18, 20, 23; collectively, the "Evidence".) Defendant argues that these documents collectively demonstrate that Defendant did not file a false report.

Plaintiff opposes the motion on the grounds that the proffered documentary evidence is not enough to constitute a "course of conduct" necessary for a stalking offense.[2] (NYSCEF Doc No. 46 at 2-3.) Additionally, Plaintiff argues that the text messages and emails fail to qualify as documentary evidence because they are not of undisputed authenticity. Plaintiff also submits her own affidavit with 14 exhibits demonstrating that the Plaintiff and Defendant were engaged in email correspondence primarily regarding M.W. from the period of April 3, 2017 up until May 2, 2017, the day before Plaintiff's arrest.

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[2] Plaintiff's opposition was originally due on January 15, 2019. However, Plaintiff received four extensions via stipulations, with the last stipulation ordered by the court directing that the opposition was to be served by August 16, 2019. Despite this, Plaintiff did not file the opposition until September 10, 2019. Defendant urges the court to reject plaintiff's untimely opposition, based on the court's rules and because plaintiff has failed to offer a valid excuse for her delay, thus requiring rejection of her opposition papers and the granting of defendants' motions to dismiss. (*See Nakollofski v Kingsway Properties, LLC*, 157 AD3d 960 [2d Dept 2018] ["The Supreme Court providently exercised its discretion in declining to consider the plaintiff's opposition to [defendant's] motion to vacate the default, despite no showing of prejudice to [defendant], as the plaintiff failed to provide a valid excuse for the late service of its opposition papers."]; *Leser v Penido*, 2013 NY Slip Op 30352[U], *4 [Sup Ct, NY County 2013] [denying untimely cross-motion pursuant to CPLR 2214(b) where "[n]o excuse, let alone a valid one, has been offered here."].)

While it is clear that plaintiff has plainly ignored the court ordered deadline for submission of opposition, due to the court's preference to resolve issues on the merits, the court will consider the untimely submission.

Additionally, Defendant has filed a motion to seal. Plaintiff does not oppose and requests that an affidavit and accompanying exhibits submitted by Plaintiff also be filed under seal. (NYSCEF Doc No. 46 at 7, fn 1.) Accordingly, the court will grant the motion.

DISCUSSION

It is well established that "[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction." (*Leon v Martinez*, 84 NY2d 83, 87 [1994].)

Where dismissal of an action is sought, pursuant to CPLR 3211 [a] [1], on the ground that it is barred by documentary evidence, such relief may be warranted only where the documentary evidence "'utterly refutes plaintiffs factual allegations'" and "'conclusively establishes a defense to the asserted claims as a matter of law.'" (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 433 [1st Dept. 2014] [internal citations omitted].) The court is "not required to accept at face value every conclusory, patently unsupportable assertion of fact found in the complaint" and can "consider documentary evidence proved or conceded to be authentic." (*West 64th Street, LLC v Axis U.S. Ins.*, 63 AD3d 471, 471 [1st Dept. 2009], quoting *Four Seasons Hotels v Vinnik*, 127 AD2d 310, 318 [1st Dept. 1987] [internal quotation marks omitted].) "A [submission] will qualify as documentary evidence only if it satisfies the following criteria: (1) it is unambiguous; (2) it is of undisputed authenticity; and (3) its contents are essentially undeniable." (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 A.D.3d 189, 193 [1st Dept 2019].)

On a pre-answer motion to dismiss a complaint for failure to state a cause of action, pursuant to CPLR 3211 [a] [7], "the court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory." (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 121 [1st Dept 2002].) However, the court is not required to accept factual allegations that are

plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts. (*See Bishop v Maurer*, 33 AD3d 497 [1st Dept 2006]; *Igarashi v Higashi*, 289 AD2d 128 [1st Dept 2001].)

False Arrest, False Imprisonment, and Malicious Prosecution

To establish a cause of action for false imprisonment, a plaintiff must show that "(1) the defendant intended to confine him, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement and (4) the confinement was not otherwise privileged." (*Broughton v State*, 37 NY2d 451, 456 [1975].) New York law does not recognize false imprisonment and false arrest as separate torts. (*Jacquez v Sears, Roebuck & Co., Inc.*, 30 NY2d 466, 473 [1972].)

Similarly, to prevail on a claim for malicious prosecution, a plaintiff must establish the following four elements: "(1) the initiation of a criminal proceeding by the defendant against the plaintiff, (2) termination of the proceeding in favor of the accused, (3) lack of probable cause, and (4) malice." (*Moorhouse v Standard, New York*, 124 AD3d 1, 7 [1st Dept 2014].) "To establish the element of initiation of a criminal proceeding, it typically must be shown that the defendant did something 'more than merely report a crime to the police and cooperate in its prosecution.'" (*Id.*, quoting *Maskantz v Hayes*, 39 AD3d 211, 213 [1st Dept 2007].) Rather, a plaintiff must demonstrate that the defendant "must have affirmatively induced the officer to act, such as taking an active part in the arrest and procuring it to be made or showing active, officious and undue zeal, to the point where the officer is not acting of his own volition." (*Id.*, quoting *Mesiti v Wegman*, 307 AD2d 339, 340 [2d Dept 2003].) "A person can also be said to have initiated a criminal proceeding by knowingly providing false evidence to law enforcement authorities or withholding

critical evidence that might affect law enforcement's determination to make an arrest." (*Id*. at 8, citing *Maskantz*, 39 AD3d at 213.)

Further, "[i]t is well settled in this State's jurisprudence that a civilian complainant, by merely seeking police assistance or furnishing information to law enforcement authorities who are then free to exercise their own judgment as to whether an arrest should be made and criminal charges filed, will not be held liable for false arrest or malicious prosecution." (*Du Chateau v Metro-N. Commuter R. Co.*, 253 AD2d 128, 131 [1st Dept 1999].)

Here, the record demonstrates that Defendant provided the Evidence to the police. In his affidavit relating to the criminal proceeding, Detective Roadarmel stated his conclusion that Petty committed the chargeable offense of stalking in the fourth degree and cited to the Evidence as the factual basis for the charge. The record does not demonstrate any evidence of Defendant's further participation in either the arrest or the subsequent prosecution. Accordingly, the claims for false arrest, false imprisonment, and malicious prosecution are hereby dismissed.

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 [1984].)

> "The 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].) Rather, "[t]he gist of the action for abuse of process lies in the improper use of process after it is issued." (*Dean v Kochendorfer*, 237 NY 384, 390 [1924].) Thus, for example, if a party were to commence an action and then threaten the other party that the action would continue unless he/she pays to end it, a cause of action for abuse of process will lie. (*See Hauser v Bartow*, 273 NY 370 [1937].)

(*Abrazi v Kotlyarsky*, 2017 WL 5046345, at *2 [Sup Ct, NY County 2017].)

Here, the Complaint contains no facts alleging that Defendant abused the process in a perverted manner to obtain a collateral objective. Rather, "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." (*Id.*) Accordingly, the claim for abuse of process is hereby dismissed.

Defamation, Libel, Slander

"Defamation is the injury to one's reputation, either by written expression (libel) or oral expression (slander)." (*Intellect Art Multimedia, Inc. v Milewski*, 24 Misc3d 1248[A], *3 [Sup Ct, NY County 2009], citing *Morrison v. National Broadcasting Co.*, 19 NY2d 453 [1967].) "To prove a claim for defamation, a plaintiff must show: (1) a false statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm, unless the statement is one of the types of publications actionable regardless of harm [defamation per se]." (*Stepanov v Dow Jones & Co.*, 120 AD3d 28, 34 [2014].) "Because the falsity of the statement is an element of the defamation claim, the statement's truth or substantial truth is an absolute defense." (*Id.*, citing *Konrad v Brown*, 91 AD3d 545, 546 [1st Dept 2012].)

"Defamation must be pled with sufficient particularity to withstand a motion to dismiss. CPLR 3016 (a) expressly requires that '[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally.'" (*McKesson v Pirro*, 2019 WL 1330910, *6 [Sup Ct, NY County].)

Additionally, communications to a police officer regarding a potential crime are protected by a qualified privilege requiring plaintiff to plead and show that the communications were motivated solely by malice. (*Levy v Grandone*, 14 AD3d 660, 662 [2d Dept 2005], citing *Toker v Pollak*, 44 NY2d 211, 218 [1978]; *see also Solomon v Jageswar*, 2015 WL 13748891, *5 [Sup Ct, Westchester County 2015].)

Defendant argues that these claims must be dismissed because the statements he made to the police were true and are entitled to a qualified privilege. (NYSCEF Doc No. 13 at 27-29.) Plaintiff responds that Defendant defamed her by falsely alleging stalking in the fourth degree, constituting defamation per se. Further, Plaintiff argues that the Evidence does "not amount" to stalking as a matter of law. (NYSCEF Doc No. 46 at 16-17.)

Initially, the court dismisses all three claims as alleged on behalf of M.W. because the Complaint fails to include any statements Defendant allegedly made about M.W. that harmed his reputation.

Plaintiff's individual claims also fail. Because the communications Defendant made to the police are protected by a qualified privilege, Plaintiff must plead and show that Defendant was motivated solely by malice, which she has failed to do. Further, Plaintiff does not argue that the information relayed to the police was false, but instead argues that the information relayed does "not amount to stalking as a matter of law." This legal conclusion, even if it were true, does not give rise to a cause of action for defamation. Accordingly, Plaintiffs' claims for defamation, libel, and slander are all dismissed.

Infliction of Emotional Distress

The tort of 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." (*Howell v New York Post Co.*, 81 NY2d 115, 121 [1993].) "A cause of action for either intentional or negligent infliction of emotional distress must be supported by allegations of conduct by a defendant 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." (*Dillon v City of New York*, 261 AD2d 34, 41 [1st Dept 1999].)

Defendant's furnishing of the Evidence to the police falls far short of sufficiently outrageous conduct to give rise to a claim for infliction of emotional distress. Further, "[t]o the extent that the statements complained of are true, plaintiffs can hardly claim sufficient distress; thus, dismissal is required in this case." (*Id.*) Accordingly, claims 9, 11, and 12 are hereby dismissed.

Prima Facie Tort

> Prima facie tort affords a remedy for the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or a series of acts which would otherwise be lawful. The requisite elements of a cause of action for prima facie tort are (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful. A critical element of the cause of action is that plaintiff suffered specific and measurable loss, which requires an allegation of special damages.

(*Freihofer v Hearst Corp.*, 65 NY2d 135, 142-43 [1985] [internal citations omitted.)

Plaintiff's cause of action for prima facie tort fails because the Complaint fails to include a "particularized statement of the reasonable, identifiable, and measurable special damages" attributable to Defendant's conduct. (*Sanko v Roth*, 2016 WL 2919322, *6-7 [Sup Ct, NY County 2016].) Although Plaintiff states that the "Defendant intentionally inflicted harm upon plaintiffs which resulted in special damages" [NYSCEF Doc No. 10 at ¶ 82], "this general allegation fails to fully and accurately state the alleged damages with sufficient particularity as to identify and causally relate the actual losses to the allegedly tortious acts[.]" (*9th & 10th Street LLC v Bloomberg*, 2008 WL 5375238 [Sup Ct, NY County 2008].)

Willful Misconduct, Negligence, and Gross Negligence

"To state a cause of action for negligence, plaintiff must allege the existence of a duty, breach of that duty, injury to plaintiff resulting therefrom and damages." (*Degangi v Regus Business Management, LLC*, 2013 WL 2154889 [Sup Ct, NY County 2013].) "The definition and scope of an alleged tortfeasor's duty owed to a plaintiff is a question of law." (*Pasternack v Lab. Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016].) Courts "fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability." (*532 Madison Ave. Gourmet Foods, Inc. v Finlandia Ctr., Inc.*, 96 NY2d 280, 288 [2001].)

Defendant did not owe "a duty to cause no harm to Plaintiff." (NYSCEF Doc No. 1 at ¶ 101.) In any event, Defendant cannot be said to have breached a duty by providing the Evidence to the police. Lastly, "the damages plaintiff seeks arose from her arrest and detention, and she may not recover under general negligence principles." (*Ferguson v Dollar Rent A Car, Inc.*, 102 AD3d 600, 601 [2013].) Plaintiffs also concede that there is no cause of action for "willful misconduct." Accordingly, these causes of action are dismissed.

Finally, as noted, in motion sequence number 002, Defendant seeks to seal certain exhibits and documents submitted to the court in this action, which Plaintiff does not oppose. Upon review of the record and the documents requested to be sealed, the court, having determined, in accordance with Part 216 of the Uniform Rules for the Trial Courts, that good cause exists for the sealing in part of the file in this action and the grounds therefor having been specified, the motion to seal is granted.

CONCLUSION

Based on the above, it is hereby

ORDERED that Defendant's motion sequence 002 to seal is granted on consent, and the Clerk of the Court is directed, upon service on him (60 Centre Street, Room 141B) of a copy of this order with notice of entry, to seal the Exhibits A, B, B-1, C, D, E, F, and G, annexed to Defendant Wender's Affidavit in Support of Defendant's Motion to Dismiss the Complaint, dated November 15, 2018 (NYSCEF Doc Nos. 17-24); and, in addition, the Clerk of Court is directed to seal the Affidavit of Sara Petty in Opposition to the Motion to Dismiss and its 14 accompanying exhibits; and it is further

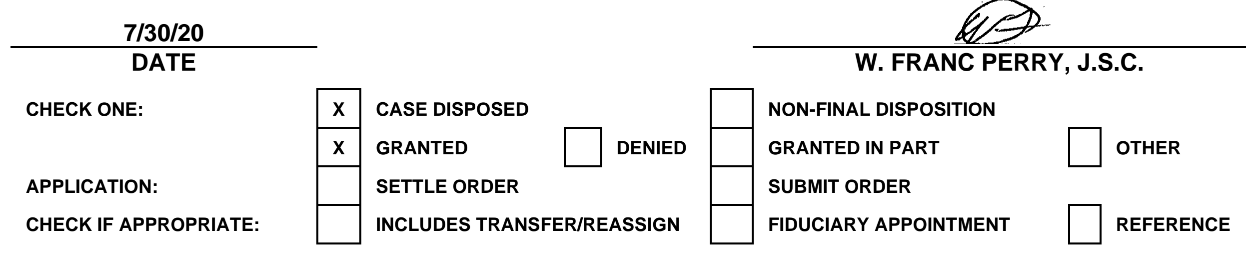
ORDERED that thereafter, or until further order of the court, the Clerk of the Court shall deny access to the said sealed documents to anyone (other than the staff of the Clerk or the court) except for counsel of record for any party to this case and any party; and it is further

ORDERED that service upon the Clerk of the Court 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); and it is further

ORDERED that Defendant's motion sequence 001 to dismiss the Complaint is granted and the Complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.



7/30/20			W. FRANC PERRY, J.S.C.		
DATE					
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