

M & M Evt. v Myrick
2021 NY Slip Op 30121(U)
January 15, 2021
Supreme Court, New York County
Docket Number: 155467/2020
Judge: Paul A. Goetz
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PAUL A. GOETZ PART IAS MOTION 47EFM

Justice

-----X

M & M ENVIRONMENTAL,

Plaintiff,

- v -

BARRY MYRICK,

Defendant.

-----X

INDEX NO. 155467/2020

MOTION DATE _____

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159

were read on this motion to/for DISMISS.

In this action for defamation and to recover a bedbug sniffing dog with related claims plaintiff, a pest control company, moves to dismiss pursuant to CPLR 3211 (a) (1) & (7) and CPLR 3211 (b) and CPLR 3013 all of defendant’s counter claims and affirmative defenses. Defendant has counterclaims for: false arrest and imprisonment (first counterclaim); malicious prosecution (second counterclaim); frivolous causes of action (third counterclaim); abuse of process (fourth counterclaim); and defamation (fifth counterclaim). Defendant, plaintiff’s former employee, cross moves to dismiss plaintiff’s causes of action for: breach of fiduciary duty (tenth cause of action); defamation (eleventh cause of action); and defamation by implication (twelfth cause of action). Defendant also cross moves to amend his answer to assert additional causes of action against plaintiff’s president. By decision and order dated December 7, 2020, plaintiff’s order to show cause seeking immediate turnover of Roxy, the bedbug sniffing dog at issue in this case, and an order directing that certain online posts be removed was denied (NYSCEF Doc No 160).

Plaintiff's motion to dismiss

Counterclaims

“A CPLR 3211 (a) (1) motion to dismiss will be granted where the “documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*La Scoula D'Italia Guglielmo Marconi v Gates Capital Corp*, 187 AD3d 581 [1st Dept 2020] quoting *Spoleta Constr, LLC v Aspen Ins, UK Ltd.*, 27 NY3d 933, 936 [2016]). “To qualify as documentary evidence, the evidence must be unambiguous and of undisputed authenticity” (*Matter of Koegel*, 160 AD3d 11, 20 - 21 [2nd Dept]; *lv dismissed* 32 NY3d 948 [2018] [internal quotation marks omitted]). Here there is no affidavit authenticating the documentary evidence submitted, merely an attorney affirmation which is insufficient to establish authenticity (*Wells Fargo bank, NA v Sesev*, 183 AD3d 780, 782 [2nd Dept May, 2020]; *Qureshi v Vital Trans., Inc.*, 173 AD3d 1076, 1078 [2nd Dept 2019]). Accordingly, that branch of plaintiff's motion seeking dismissal of defendants' counterclaims pursuant to CPLR 3211 (a) (1) must be denied.

As to that branch of plaintiff's motion seeking dismissal pursuant to CPLR 3211 (a) (7), defendant's pleading must be afforded a liberal construction, the allegations in it taken as true and defendant must be afforded the benefit of every possible favorable inference (*Charles Schwab Corp. v Goldman Sachs Grp., Inc.*, 186 AD3d 431, 435 [1st Dept 2020]).

Defendant alleges in his pleading that plaintiff made false statements to the authorities leading to his arrest, detainment and the initiation of criminal charges being filed against him. These allegations go beyond showing that plaintiff merely provided information to law enforcement authorities who then exercised their own judgement whether to arrest defendant and initiate criminal charges as argued by plaintiff. (*compare Holmes v NYC*, 178 AD3d 496 [1st Dept 2019]). By alleging that plaintiff lied to the authorities about defendant, defendant

sufficiently infers actual malice on the part of plaintiff, a necessary element to false arrest (*Matthaus v Hadjedj*, 148 AD3d 425, 426 [1st Dept 2017]) and malicious prosecution (*Pellegrinin v Duane Reade Inc.*, 137 AD3d 651, 652 [1st Dept 2016]) claims. Accordingly, defendants false arrest and malicious prosecution counterclaims will not be dismissed.

Plaintiff correctly argues that “New York does not recognize a separate cause of action for frivolous litigation” (*Apple A.C. & Appliance Serv., Inc. v Apple Home Heating Corp.*, 164 AD3d 461, 462 [2nd Dept 2018]). Accordingly, defendant’s third counterclaim for frivolous causes of action, will be dismissed.

Plaintiff argues defendant fails to establish the elements required to assert a claim for abuse of process. A claim “for 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” (*Matthews v NYC Dept. of Social Servs., Child Welfare Admin.*, 217 AD2d 413, 415 [1st Dept 1995]; *Goldman v Citicore I, LLC*, 149 AD3d 1042, 1044 [2nd Dept 2017]). Plaintiff’s initiation of this civil action is an insufficient basis on which to ground an abuse of process claim (*id.*). However, drawing every possible inference from defendant’s pleading, he alleges that plaintiff initiated false criminal charges against him with an intent to harm him, suggesting an improper use of the criminal process for the collateral purpose doing defendant harm. (*compare Shilt v Matherson*, 104 AD3d 668, 669 [2nd Dept 2013]). These same inferences are sufficient to establish defendant’s counterclaim for defamation since they include a false statement published to another without privilege or authorization that caused defendant harm (*3P-733, LLC v Davis*, 187 AD3d 626, 628 [1st Dept 2020]). Damages are “presumed for statements that charge a person with committing a serious crime . . .” (*Geraci v. Probst*, 15 N.Y.3d 336, 344 [2010]; *see also Pezhman v. City of*

New York, 29 A.D.3d 164, 167 [1st Dep't 2006]). Accordingly, defendant's fourth counterclaim for abuse of process and fifth counterclaim for defamation will not be dismissed.

Affirmative defenses

Plaintiff argues that defendant's two separate first affirmative defenses, and his second and third affirmative defenses do not support a claim of ownership of Roxy and as such they should be viewed as general denials with unnecessary details requiring that they be stricken. However, as the court previously stated in the decision denying plaintiff's order to show cause seeking immediate turnover of Roxy, "[w]hile plaintiff may have purchased Roxy, and there is no dispute that plaintiff did, the question is not whether plaintiff holds 'title' to her but rather whether plaintiff or defendant has the superior right to custody of Roxy taking into account that she falls within a 'special category of property'. When resolving competing claims of who owns a dog, application of the best for all concerned standard is appropriate because it takes into account the special nature of dogs - their needs and well-being - as well as the competing claims by the parties." (NYSCEF Doc No 160 p 6). The allegations in defendant's two separate first and second and third affirmative defenses are necessary because otherwise facts in the complaint, if admitted, would defeat these defenses that defendant should retain custody of Roxy (*Bulova v E.L. Barnett*, 193 AD 161, 165 – 166 [1st Dept 1920]). Accordingly, defendant's two separate first and second and third affirmative defenses will not be dismissed.

Plaintiff argues that defendant's fourth affirmative defense, that plaintiff terminated any contract with defendant and defendant had no duty to return to work, has nothing to do with defendant's refusal to turn Roxy over to plaintiff. However, the affirmative defense avers that the parties conduct shows that they considered Roxy to be defendant's dog and that it was not until defendant refused to return to work that plaintiff took civil and criminal action against

him. Therefore, defendant's fourth affirmative defense that plaintiff terminated any contract the parties had and that defendant had no duty to return to work are necessary because otherwise facts in the complaint, if admitted, would defeat defendant's defenses to plaintiff's claims for, inter alia, unjust enrichment, conversion, implied contract and breach of fiduciary duty (*id.*). Accordingly, defendant's fourth affirmative defense will not be dismissed.

Finally, plaintiff argues that defendant's fifth affirmative defense, no defamation, must be dismissed because a party cannot assert "innocence" by stating only some aspects of plaintiff's claim are not viable. However, in his fifth affirmative defense, in somewhat awkward syntax, defendant asserts that he has not published or caused to be published the various on-line posts, and that some are opinion and others, that are not opinion are true. Therefore, defendant's assertions that he did not publish the alleged defamatory statements, that some of the statements were opinion statements and that other statements were truthful statements of fact are necessary because otherwise facts in the complaint, if admitted, would defeat these defenses (*id.*). Accordingly, defendant's fifth affirmative defense will not be dismissed.

Defendant's cross motion to dismiss

Although defendant does not cite to CPLR 3211 (a) (7), based on his arguments that certain claims of plaintiff are without merit it appears that is the section of the CPLR he is moving under. Defendant argues that plaintiff's breach of fiduciary duty cause of action must be dismissed because plaintiff retrieved its property from defendant (except for Roxy) before he was laid off and because plaintiff stopped paying defendant and he started collecting unemployment benefits thereby vitiating any duty defendant had to plaintiff. "In order to state a claim for breach of fiduciary duty, a plaintiff must allege a fiduciary relationship, misconduct by

the other party, and damages caused by the party's misconduct" (*Kasowitz Benson Torres LLP v United States Ambassador Cesar B. Cabrera*, 188 AD3d 602 [1st Dept 2020]).

A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon within the scope of the relation. Such a relationship, necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions. . . . If the parties do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them.

(*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY 3d 11, 19 [2005] [internal quotation marks omitted]).

Here, plaintiff fails to allege a higher level of trust between plaintiff and defendant than normally present between an employer and its employee in the pest control industry. Accordingly, plaintiff's tenth cause of action for breach of fiduciary duty must be dismissed.

Defendant next argues that plaintiff's defamation claim must be dismissed because the statements alleged are arguably true and statements about court proceedings fall within the fair reporting privilege of NY Civ Rights Law section 74¹. Plaintiff alleges that defendant falsely asserted in online postings and a Youtube video that he was terminated from his position, that the plaintiff took everything but abandoned Roxy and that plaintiff did not care for Roxy. Plaintiff also alleges defendant falsely stated that plaintiff failed to seek Roxy's turnover for three months (Amended complaint ¶ 25, NYSCEF Doc No 4).

Defamation is the making of a false statement which tends to expose the plaintiff to public contempt ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society. 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 har. Because the falsity of the statement is an element of the defamation claim, the statement's truth or substantial truth is an absolute defense. On a motion to dismiss a defamation claim, the court must decide whether the statements, considered in the context of the entire publication, are reasonably susceptible of a defamatory connotation, such that the issue is worthy of submission to a jury.

¹ Section 74 provides in pertinent part that "[a] civil action cannot be maintained against any person . . . for the publication of a fair and true report of any judicial proceeding . . ."

(*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014] [internal quotation marks and citations omitted). Considering the context of the on-line posts and video the statements are reasonably susceptible of the defamatory connotation that plaintiff abandoned and did not care for Roxy. Whether or not this is true must be determined by a jury or on a subsequent motion for summary judgment. Likewise, whether or not NY Civ Rights Law section 74 is applicable must also be determined by a jury or subsequent motion for summary judgment. Accordingly, plaintiff's eleventh cause of action for defamation will not be dismissed.

Defendant next argues that plaintiff's implied defamation claim should be dismissed because there is one instance of one of plaintiff's customers deducing that the statements alleged refer to plaintiff and that this is insufficient to satisfy the elements of the claim, particularly its truthfulness. "Defamation by implication is premised not on direct statements but on false suggestions, impressions and implications arising from otherwise truthful statements" (*id.* at 35). "To survive a motion to dismiss a claim for defamation by implication where the factual statements at issue are substantially true, the plaintiff must make a rigorous showing that the language of the communication as a whole can be reasonably read both to impart a defamatory inference and to affirmatively suggest that the author intended or endorsed that inference" (*id.* 37 - 38). Reading the alleged on-line statements and the statements in the video as whole, plaintiff has shown at this stage of the litigation that a defamatory inference may be drawn from the statements and that defendant endorsed that inference. To the extent that this contradicts plaintiff's claim that the statements are false, pleading in the alternative is permitted under the CPLR (CPLR 3014, 3027; *Two Queens, Inc. v Scoza*, 296 AD2d 302, 303 [1st Dept 2002]).

Accordingly, plaintiff's twelfth cause of action for defamation by implication will not be dismissed.

Defendant's cross motion to amend

Defendant seeks to add causes of action against plaintiff's president. CPLR 3019 (a) allows a defendant to assert a counter claim against a plaintiff but as plaintiff correctly argues it does not allow claims against an individual non-party such as plaintiff's president. In other words, "a counterclaim must assert a cause of action against the plaintiff" (*Mutual Benefits Offshore Fund v Zeltser*, 140 AD3d 444, 445 [1st Dept 2016]; accord *Ruzicka v Rager*, 305 NY 191 [1953] [holding under the precursor to the CPLR "the counterclaim must assert a cause of action against the party plaintiff and that if the counterclaim be not properly interposed against the plaintiff, it is not proper as to the others"). "While a counterclaim may be made against 'a person whom a plaintiff represents' [CPLR 3019 (a)] plaintiff is not a representative, executor, or administrator" of the president of plaintiff (*Zeltser*, 140 AD3d at 445). Accordingly, that branch of defendant's motion seeking to assert counter claims against plaintiff's president must be denied.

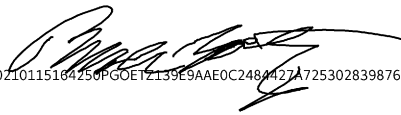
Accordingly, based on the foregoing it is

ORDERED that branch of plaintiff's motion seeking to dismiss defendant's counterclaims is granted solely to the extent that defendant's third counterclaim for frivolous causes of action is dismissed and is otherwise denied; and it is further

ORDERED that branch of plaintiff's motion seeking to dismiss defendant's affirmative defenses is denied; and it is further

ORDERED that branch of defendant’s cross motion seeking to dismiss is granted solely to the extent that plaintiff’s tenth cause of action for breach of fiduciary duty is dismissed and is otherwise denied; and it is further

ORDERED that branch of defendant’s cross motion seeking to amend his answer to add counterclaims is denied.


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1/15/2021
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE