

Balestriere PLLC v Rubin
2021 NY Slip Op 30237(U)
January 20, 2021
Supreme Court, New York County
Docket Number: 160593/2019
Judge: Verna Saunders
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT:	<u>HON. VERNA L. SAUNDERS</u>	PART	IAS MOTION 36
	<i>Justice</i>		
	-----X	INDEX NO.	<u>160593/2019</u>
	BALESTRIERE PLLC d/b/a	MOTION SEQ. NO.	<u>001</u>
	BALESTRIERE FARIELLO,		
	Plaintiff,		

- v -

HOWARD RUBIN, YIFAT V. SCHNUR,
JOHN J.D. MCFERRIN-CLANCY and
MCFERRIN-CLANCY PLLC,
Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 33, 34, 37, 39, 43, 44
were read on this motion to/for

DISMISSAL

In this action seeking damages for abuse of process and tortious interference with business relations, defendants Howard Rubin ("Rubin"), Yifat V. Schnur ("Schnur"), John J.D. McFerrin-Clancy ("McFerrin-Clancy") and McFerrin-Clancy PLLC ("McFerrin PLLC") move, pursuant to CPLR §§ 3211(a)(1) and (a)(7), for the dismissal of the claims asserted against them, as well as, costs and sanctions pursuant to 22 NYCRR 130-1.1. (NYSCEF Doc. Nos. 14-26, 39). Plaintiff Balestriere PLLC d/b/a Balestriere Fariello opposes the motion. (NYSCEF Doc. No. 32). After a review of the parties' contentions, as well as, the pertinent statutes and caselaw, the motion is decided as follows.

As relevant background, plaintiff represented several women ("the clients") in a federal action filed in the United States District Court for the Eastern District of New York, wherein they accused Rubin and his associates, as well as, Schnur, Rubin's attorney, of orchestrating a sex trafficking scheme that involved torturing and raping women in a dungeon room at a Manhattan penthouse apartment. (*see Lawson v Rubin*, 1:17-cv-06404 [EDNY 2017]) ("the

federal action”). The federal action was ultimately dismissed as against Schnur but is still pending as against the remaining defendants. (NYSCEF Doc. No. 2 ¶ 29). On October 31, 2018, Schnur, represented by McFerrin-Clancy, brought suit against various defendants, including plaintiff, several of plaintiff’s employees, and the clients, asserting, *inter alia*, defamation for their participation in the filing of the federal action. (*see Schnur v Balestriere et al.*, Index No. 160095/2018 [Sup Ct, NY County 2018]) (“the related action”).

In October 2019, plaintiff commenced this action against defendants by filing a summons and complaint, asserting abuse of process and intentional interference with business relations. (NYSCEF Doc. Nos. 1-5). Relevant to the abuse of process claim, plaintiff alleged that Rubin and Schnur, through counsel paid for by Rubin, initiated the related action to dissuade the clients in the federal action from pursuing their claims. (NYSCEF Doc. No. 2 ¶ 32-38). The complaint further states, in relevant part, that “[d]efendants intentionally interfered with the business relationship between [plaintiff] and one of the [c]lients, Stephanie Caldwell, by the use of vexatious litigation and other intimidation tactics, causing her to abandon the [federal action].” (NYSCEF Doc. No. 2 ¶ 22, 42).

Defendants contend, in relevant part, that the abuse of process claim must be dismissed because it is premised solely on the commencement of the related action. (NYSCEF Doc. No. 26 at 10-13, *Memo. of Law*). Furthermore, they argue that the claim for tortious interference with business relations should also be dismissed because documents in the federal action establish a breakdown in the attorney-client relationship between Caldwell and plaintiff that preceded the filing of the related action; plaintiff fails to allege facts to show that the related action was objectively baseless; and the sole allegation against Rubin - that he paid for Schnur’s attorneys’

fees in the related action - is insufficient to impose liability against Rubin in this action.

(NYSCEF Doc. No. 26 at 13-16).

Defendants also move for an order directing plaintiff to pay their attorneys' fees and expenses incurred in defending this lawsuit; \$10,000.00 in sanctions against plaintiff; and a litigation injunction enjoining plaintiff from asserting any claims against defendants without prior court approval. (NYSCEF Doc. No. 26 at 16-19).

In opposition, plaintiff argues, *inter alia*, that there is a valid abuse of process claim insofar as facts are pleaded to support a finding that the related action was commenced to undermine the allegations in the federal lawsuit and to harm plaintiff's reputation. (NYSCEF Doc. No. 32 at 12-17, *Memo. of Law*). Plaintiff further alleges that there is a viable tortious interference with business relations claim because, as reflected in an exhibit annexed to the summons and complaint, Rubin sent a letter to one of the clients on January 10, 2019, wherein Rubin threatened to expose the clients as "professional prostitutes" and threatened to counter-sue and seek sanctions. (NYSCEF Doc. No. 32 at 17-19).

In determining a motion to dismiss pursuant to CPLR § 3211, "the pleading is to be afforded a liberal construction. [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [internal citations omitted]). A pleading may be dismissed if a plaintiff fails to identify a claim cognizable at law or where the plaintiff has identified a cognizable cause of action but has nevertheless failed to plead a material allegation necessary to establish it. (*see* CPLR§ 3211 [a] [7]; *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 [1st Dept 2014]). Moreover, a motion to dismiss a complaint,

pursuant to CPLR § 3211(a)(1), may be granted only when the documentary evidence submitted utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law. (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Basis Yield, supra*, 115 AD3d at 134; *Ladenburg Thalmann & Co. v Tim's Amusements*, 275 AD2d 243, 246 [1st Dept 2000]).

The elements of abuse of process are (1) regularly issued process; (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. (*see Casa de Meadows Inc. [Cayman Islands] v Zaman*, 76 AD3d 917, 921 [1st Dept 2010]). Plaintiff fails to state a cause of action as against Rubin and McFerrin PLLC for abuse of process since said defendants have not appeared in the related action.¹ Assuming, *arguendo*, that this Court were to accept plaintiff's argument that Rubin's payment of Schnur's attorneys' fees amounts to participation in the related action (NYSCEF Doc. No. 32 at 19), the claim does not lie as against all defendants because "the institution of a civil action by summons and complaint is not legally considered process capable of being abused." (*Curiano v Suozzi*, 63 NY2d 113, 116 [1984]; *see Casa de Meadows Inc., supra*). The mere commencement of an action is insufficient to sustain a claim for abuse of process even when it is alleged, as it is here, that the action was commenced with a malicious intent. (*see Batbrothers LLC v Paushok*, 172 AD3d 529, 530 [1st Dept 2019]; *I.G. Second Generation Partners, L.P. v Reade*, 17 AD3d 206, 207 [1st Dept 2005]; *Walentas v Johnes*, 257 AD2d 352, 354 [1st Dept 1999], *lv dismissed* 93 NY2d 958 [1999]). Thus, the abuse of process claim is dismissed.

¹ McFerrin-Clancy affirms that, although he has practiced through McFerrin-PLLC in the past, this entity neither signed the complaint in the related action nor has appeared in the instant action. (NYSCEF Doc. No. 15 at 1). This argument is unrefuted by plaintiff.

The tortious interference claim must also be dismissed. “A claim for tortious interference with prospective business advantage must allege that: (a) the plaintiff had business relations with a third-party; (b) the defendant interfered with those business relations; (c) the defendant acted with the sole purpose of harming the plaintiff or by using unlawful means; and (d) there was resulting injury to the business relationship.” (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 107-108 [1st Dept 2009]). Additionally, said claim “requires an allegation that plaintiff would have entered into an economic relationship *but for* the defendant’s wrongful conduct.” (*Vigoda v DCA Prods. Plus Inc.*, 293 AD2d 265, 266 [1st Dept 2002] [emphasis added]).

Here, this Court is persuaded that the documentary evidence submitted by defendants conclusively establishes that Caldwell’s abandonment of the federal action was tangential to the filing of the related action. By letter dated October 2, 2018, plaintiff advised Judge Brian M. Cogan, the judge presiding in the federal action, that, due to a breakdown in its attorney-client relationship with Caldwell, it would file an *in camera* motion withdrawing as counsel. (NYSCEF Doc. No. 16). The details of this breakdown were set forth in a declaration by John Balestriere (“Balestriere”), plaintiff’s principal, which was annexed to the motion to withdraw as counsel. (NYSCEF Doc. No. 18). Therein, Balestriere averred that “[w]hile Caldwell was generally slow to respond to the [f]irm’s phone calls or e-mails from the start, her lack of urgency rapidly turned to outright functional abandonment of the case *on or about June 1, 2018.*” (NYSCEF Doc. No. 18 ¶ 4 [emphasis added]).

On October 11, 2018, McFerrin-Clancy addressed Judge Cogan in a letter, advising him that Schnur intended to file the related action and requesting that the federal court allow her to share the true names of the clients in state court. In that letter, McFerrin-Clancy represented that

he had alerted plaintiff on October 8, 2018 of his intent to file the related action. (NYSCEF Doc. No. 17). It should be noted that, in its opposition papers, plaintiff appears to concede that it cannot establish, as alleged in the complaint, that Caldwell abandoned the federal action *but for* the filing of the related action. (NYSCEF Doc. No. 32 at 18) (*see Aramid Entertainment Fund Ltd. v Wimbledon Fin. Master Fund, Ltd.*, 105 AD3d 682, 682 [1st Dept 2013]; *Carl v Cohen*, 55 AD3d 478, 478 [1st Dept 2008]; *see generally Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 294, 300 [1st Dept 1999]). Moreover, this Court rejects plaintiff's alternative argument that the January 10, 2019 letter purportedly sent by Rubin to one of its clients is sufficient to avert dismissal of the claim: plaintiff fails to allege that this letter, sent after Caldwell discontinued her federal claims, interfered with a business relationship. Therefore, that branch of the motion seeking dismissal of the claim for tortious interference with business relations is likewise granted.²

The remaining arguments are either without merit or need not be addressed given the findings above. Therefore, in accordance with the foregoing, it is hereby

ORDERED that defendants' motion is granted to the extent that summons and complaint is dismissed with costs and disbursements as taxed by the Clerk of the Court, and the branch of the motion seeking sanctions is denied; it is further

ORDERED that, within thirty (30) days after this decisions and order is uploaded to NYSCEF, counsel for defendants shall serve a copy of this order, with notice of entry, upon counsel for plaintiff, as well as on the Clerk of the Court (60 Centre Street, Room 141B) and the

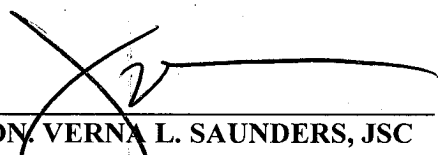
² This Court declines to impose the requested sanctions. However, given the seriousness of the factual allegations in both the related action and the federal action, and considering foremost the needs of parties involved, this Court advises counsel to focus the litigation on the underlying viable issues raised therein.

Clerk of the General Clerk's Office (60 Centre Street, Room 119), who shall enter judgment accordingly; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office 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 this constitutes the decision and order of the Court.

JANUARY 20, 2021


HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE