

Fishman v Kids in Common, Inc.
2021 NY Slip Op 30991(U)
March 29, 2021
Supreme Court, New York County
Docket Number: 154606/2020
Judge: David Benjamin Cohen
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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 NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM

Justice

-----X

INDEX NO. 154606/2020

TOBY FISHMAN,

Plaintiff,

MOTION SEQ. NO. 001

- v -

KIDS IN COMMON, INC. and JOHN/JANE DOES 1-5,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for

DISMISSAL

In this action commenced by plaintiff Toby Fishman sounding, inter alia, in defamation, defendant Kids in Common, Inc. ("KIC") moves, pursuant to CPLR 3211(a)(7), to dismiss the complaint for failure to state a claim. Plaintiff opposes the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Toby Fishman is a defendant in a matrimonial action styled *Tzvi Fishman v Toby Fishman*, pending under Supreme Court, Rockland County Index Number 1022/13 ("the matrimonial action") and, by order dated February 13, 2019 ("the 2/13/19 order"), the court (Eisenpress, J.) ordered "that the parties shall utilize the services of [KIC] . . . for purposes of therapeutic visits" by Tzvi Fishman ("Mr. Fishman") with his and plaintiff's two children. Doc. 10.

Lillian Rodriguez-Magliaro, LMSW (“Rodriguez-Magliaro”), a licensed social worker then employed by KIC, thereafter met with Mr. Fishman and his two children and reported her findings to Justice Eisenpress by correspondence dated September 17, 2019 (“the 9/17/19 letter”). Doc. 9.¹

On June 24, 2020, plaintiff commenced the captioned action against KIC by filing a summons with notice alleging defamation and prima facie tort. Doc. 1. Plaintiff also sought punitive damages and attorneys’ fees. Id.

In August 2020, KIC filed a notice of appearance and demand for a complaint. Doc. 3.

Plaintiff thereafter filed a complaint against KIC alleging defamation as a first cause of action. Doc. 4. Specifically, plaintiff asserted that certain representations made by Rodriguez-Magliaro in the 9/17/19 letter were false and made with malice and/or “reckless disregard for the truth.” Id. Plaintiff claimed compensatory damages on the first cause of action in amount no less than \$250,000, plus punitive damages of no less than \$100,000. Id.

As a second cause of action, plaintiff asserts, in effect, a claim for intentional infliction of emotional distress (“IIED”), claiming that, as a result of KIC’s intentional, reckless, and/or malicious publication of the 9/17/19 letter, she was damaged in an amount no less than \$250,000 and was also entitled to punitive damages of no less than \$100,000. Id.

As a third cause of action, plaintiff alleged that she was entitled to recover costs and attorneys’ fees she incurred as a result of having to commence this action. Id.

In lieu of answering, KIC filed the instant motion seeking to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), along with such other relief as this

¹ In the 9/17/19 letter, Ms. Rodriguez’s name is spelled “Lillian”, an apparent typographical error. In his opposition papers, plaintiff’s counsel refers to Ms. Rodriguez as Ms. “Rodriguez-Magliaro”, and KIC refers to her by this name as well.

Court deems just and proper. Doc. 6. In support of the motion, KIC argues that the complaint must be dismissed because KIC is immune from a claim for defamation on the ground that it performed a quasi-judicial function in assisting the Supreme Court, Rockland County in the matrimonial action. Doc. 11. It further asserts that plaintiff's second cause of action, sounding in IIED, also fails to state a claim. Id.²

In opposition to the motion, plaintiff's attorney argues, inter alia, that: KIC should not be immune from liability arising from the 9/17/19 letter because Justice Eisenpress never requested a report from KIC in the matrimonial action; Rodriguez-Magliaro was not employed by KIC at the time the 9/17/19 letter was sent to Justice Eisenpress, having left its employ in June 2019; the fact that the 9/17/19 letter was not signed and that Ms. Rodriguez-Magliaro's name was misspelled therein suggest that the document was forged; and a question of fact exists regarding whether KIC was "an intended witness/expert" in the matrimonial action. Doc. 14.

In an affidavit in opposition to the motion, plaintiff argues that:

Purposefully omitted from the [2/13/19 order] in regard to the [t]herapy, was any request, need or requirement for the [d]efendant KIC to provide a report or testimony to [Justice Eisenpress] for the simple reason that there was neither an on-going or expected proceeding or hearing related to custody, visitation or mental health issues as to myself, [Mr. Fishman] and/or the [c]hildren as those issues had long been decided prior to the trial in [matrimonial action] taking place in late 2014/mid 2015, with a resulting decision being issued on June 6, 2016 [which] reconfirm[ed] the custody and visitation issues that were already decided prior to the [t]rial.

Doc. 15 at 6. Alternatively, plaintiff requests that, if this Court deems her first and second causes of action insufficiently pleaded, then she should be permitted to amend the same.³

² KIC's attorney asserts that, although the second cause of action is inartfully pleaded, it sounds in IIED (Doc. 11 at 11). Since plaintiff does not dispute this contention (Doc. 14), this Court will treat the second cause of action as one for IIED.

³ This Court notes, however, that plaintiff did not cross-move for permission to amend the complaint.

In reply, KIC's attorney argues that the 9/17/19 letter is not defamatory and that, in any event, no claim lies against it for defamation given that Rodriguez-Magliaro acted with quasi-judicial authority in writing the same. Doc. 18. In a separate reply affidavit, Meg Sayers, Executive Director of KIC, represents that Ms. Rodriguez-Magliaro authored the 9/17/19 letter and did so at KIC's request. Doc. 19.

LEGAL CONCLUSIONS

CPLR 3211 (a) (7) provides:

“(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
7. the pleading fails to state a cause of action”

“In assessing the adequacy of a complaint under CPLR 3211 (a) (7), the court must give the pleading a liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff the benefit of every possible favorable inference” (*J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334 [2013] [internal quotation marks and citation omitted]). This Court need only “determine only whether the facts as alleged fit within any cognizable legal theory.” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Defamation

It is well established that an attorney, party, or witness in a judicial or quasi-judicial proceeding enjoys immunity from a defamation action for his or her spoken or written statement, if that statement is pertinent to the litigation. Included within those groups of persons who enjoy immunity for statements uttered in a judicial proceeding are court-appointed experts who are ordered to conduct psychiatric examinations.

(*Finkelstein v Bodek*, 131 AD2d 337, 338 [1st Dept 1987], *lv denied* 70 NY2d 612 [1987]).

In *Finkelstein*, the Appellate Division, First Department held that there could be no cause of action for libel against the defendant, a certified social worker, “whose statements were made

in furtherance of defendant's quasi-judicial duties in rendering a complete mental evaluation of plaintiff's son and the son's family background" pursuant to a court order (131 AD2d at 338).

Similarly, in *Braverman v Halpern*, 259 AD2d 306, 306 (1st Dept 1999), the First Department, relying on *Finkelstein*, held, in denying plaintiff's motion to vacate a default, that allegedly defamatory statements were nonactionable where they were "contained in reports concerning plaintiff's psychological and emotional problems that were prepared by defendant as an expert witness in a judicial proceeding involving child custody and visitation in which plaintiff's mental condition was pertinent."

Since Justice Eisenpress ordered KIC to work with Mr. Fishman regarding therapeutic visits with his children, any statements made by KIC or its employees are clearly protected from a defamation claim in light of *Braverman* and *Finkelstein* and, thus, the said claim must be dismissed.

In opposing the motion, plaintiff relies on *Pietra v. State*, 71 NY2d 792 (1988) for the proposition that, when an official has stepped outside of the scope of his authority and acted in the clear absence of all jurisdiction or without a colorable claim of authority, there is no entitlement to immunity, even if the underlying acts are quasi-judicial. However, that case is clearly distinguishable, since it held that, where organized crime task force agents illegally seized plaintiff's business records, the state had no immunity claim for damages caused plaintiff by the raid. Here, there is no allegation in the complaint that KIC acted in an illegal fashion. Nor does plaintiff submit any authority supporting its contention that KIC acted without a colorable claim of authority by authoring a report despite the fact that Justice Eisenpress did not expressly direct it to do so in the 2/13/19 order. It also contrary to basis logic to suggest that Justice Eisenpress directed KIC to supervise Mr. Fishman's visits with his daughters in the

matrimonial action, without expecting that KIC would prepare and provide the judge with a written report of the social worker's observations and assessments of the parental interactions that occurred during the supervised visitation.

Intentional Infliction of Emotional Distress

As noted previously, plaintiff does not specifically label her second cause of action, which is considered by KIC to be one sounding in IIED.

The tort of intentional infliction of emotional distress consists of 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]). The standard of outrageous conduct is "strict," "rigorous" and "difficult to satisfy" (*id.* at 122 [internal quotation marks and citation omitted]).

(*Scollar v City of New York*, 160 AD3d 140, 145-146 [1st Dept 2018]).

Here, plaintiff merely alleges in her complaint that she sustained "extreme . . . emotional and reputation[al] hardships" as a result of KIC's actions. Doc. 4 at par. 13. However, since she does not allege that KIC engaged in extreme and outrageous conduct, that KIC intended to cause her severe emotional distress, or that it disregarded the substantial probability of causing her such distress, she clearly does not meet the strict standard necessary to plead this cause of action.

As noted previously, plaintiff alleges prima facie tort in her summons with notice. Assuming, arguendo, that this is actually the claim plaintiff seeks to plead as her second cause of action, it must be dismissed as well. Prima facie tort is not designed to "provide a catch-all alternative for every cause of action which cannot stand on its legs" (*Britt v City of New York*, 151 AD3d 606, 606 [1st Dept 2017] [citations omitted]).

The requisite elements for a cause of action sounding in prima facie tort are (1) the intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, (4) by an act or series of acts which are otherwise legal (see *DeMicco Bros., Inc. v Consolidated Edison Co. of N.Y., Inc.*, 8 AD3d 99 [1st

Dept 2004]). The "plaintiff[] [must] allege that disinterested malevolence was the sole motivation for the conduct of which [he or she] complain[s]" (*Epifani v Johnson*, 65 AD3d 224, 232 [2d Dept 2009] [internal quotation marks and citation omitted]).

(*AREP Fifty-Seventh, LLC v PMGP Assoc., L.P.*, 115 AD3d 402, 403 [1st Dept 2014]).

Since the plaintiff did not allege that disinterested malevolence was the sole motivation for KIC's conduct, she clearly has failed to plead this cause of action as well (*Britt*, 151 AD3d at 607; *Arep Fifty-Seventh*, 115 AD3d at 403).

Attorneys' Fees

As her third cause of action, plaintiff alleges that she is entitled to recover costs and attorneys' fees. However, "it is axiomatic that New York does not recognize a request for attorneys' fees as an independent, separately-styled cause of action." (*Faver v 12 E. 97th St. Owners, Inc.*, 2014 NY Slip Op 33357[U], *7 [Sup Ct, NY County 2014]). Additionally, "[a]ttorneys' fees are not usually compensable in the absence of specific statutory authority, or contractual obligation or incident to recovery for certain torts involving malice" (*Flaks, Zaslow & Co. v Bank Computer Network Corp.*, 66 AD2d 363, 365 [1st Dept 1979], *appeal dismissed* 47 NY2d 951 [1979]). Since plaintiff fails to establish that she is entitled to attorneys' fees based on any of the foregoing grounds, this claim is dismissed as well.

Punitive Damages

"Absent any underlying substantive causes of action to which [it] may attach, plaintiff's request[] for . . . punitive damages must be dismissed (*see Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 616-617 [1994])." (*Offor v Mercy Med. Ctr.*, 171 AD3d 502, 504 [1st Dept 2019]).

The parties' remaining contentions are either without merit or need not be addressed in the light of the findings above.

Accordingly, it is hereby:

ORDERED that the motion of defendant Kids in Common, Inc. to dismiss the complaint herein is granted and the complaint is dismissed in its entirety, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); 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).

3/29/2021

DATE

CHECK ONE:

☒

CASE DISPOSED

☒

GRANTED

☐

DENIED

APPLICATION:

☐

SETTLE ORDER

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☐

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

OTHER

☐

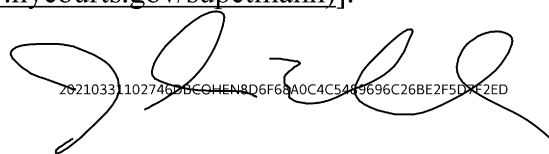
SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE



2021033110274606COHEN8D6F68A0C4C5483696C26BE2F5D8F2ED

DAVID BENJAMIN COHEN, J.S.C.