

Shane v Rosenwaks
2021 NY Slip Op 31141(U)
March 31, 2021
Supreme Court, New York County
Docket Number: 152545/2019
Judge: Verna L. Saunders
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. VERNA L. SAUNDERS PART IAS MOTION 36

Justice

INDEX NO. 152545/2019

BARRI SHANE, Plaintiff,

MOTION SEQ. NO. 002

- v -

STACY ROSENWAKS and ZEV ROSENWAKS, Defendants.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 52, 53, 112, 113, 114, 115, 116, 117, 118, 119, 120, 122, 123, 124, 125, 126, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142

were read on this motion to/for

DISMISSAL

Plaintiff commenced this action alleging defamation, defamation per se, and intentional infliction of emotional distress based on statements allegedly made by defendants causing her to be in jeopardy of her parents disinherit her. Plaintiff asserts that the statements have caused emotional damage, damage to her personal reputation within her family, and the destruction of her relationship with her mother. Here, defendants move to dismiss the amended complaint pursuant to CPLR 3211(a)(1), (7) and CPLR 3016(a).

Plaintiff opposes the motion.

Plaintiff, Barri Shane ("Barri"), and defendant, Stacy Rosenwaks ("Stacy"), are the daughters of Dr. Stanley Knapp and Marilyn Knapp ("the Knapps"). Stacy is the elder daughter. Co-defendant, Zen Rosenwaks, is the husband of Stacy Rosenwaks. Barri Shane is married to Michael Shane ("Michael") who, though referred to in the complaint, is not a party to this action. Dr. Stanley Knapp passed away on January 24, 2019 and is survived by his wife Marilyn Knapp ("Marilyn") who is currently 90 years of age and resides in West Palm Beach, Florida.

Plaintiff alleges, in sum and substance, she "learned that [d]efendants, with the sole objective of harming [her]" made "false and defamatory statements to Marilyn" alleging she tricked her father into loaning her and her husband money; wired funds from Marilyn's estate to herself; wrote checks to herself from Marilyn's bank accounts; stole Marilyn's jewelry and used it as collateral for a loan; and stole other jewelry belonging to Marilyn. (Shane amended complaint at 10). Plaintiff asserts

1 This motion was deemed fully submitted on October 24, 2019 with the filing of the defendant's memorandum of law in reply. Nine months later, plaintiff, then appearing pro se, filed a sur-reply and memorandum of law in reply. These documents are procedurally defective, belated, and were filed without leave of court. As such, any document submitted as to this motion after the October 24, 2019 memorandum of law in reply, NYSCEF Doc No 49, will not be considered.

2 While this court traditionally does not refer to parties by their first names, here as the complaint and the papers submitted with respect to this motion have done so, for ease and clarity the court's decision and order will be styled in an identical fashion.

3 While Michael Shane is not named as a plaintiff, he is a signatory to promissory notes detailing monies borrowed from Dr. Knapp. Defendants assert that requests for money were made by Michael Shane, as well as, by plaintiff.

that she never misappropriated any funds and that the loans from her father are reflected in his estate plan. Barri maintains she has never stolen Marilyn's jewelry but claims that her sister Stacy admitted to taking Marilyn's jewelry. Plaintiff further asserts that defendants have made false accusations to Marilyn's Wells Fargo Bank account manager, John Hooker, to Marilyn's home health care workers, and to other members of their family. Plaintiff alleges that the statements were outrageous, wholly fabricated, and meant to result in her being disinherited and alienated from her family.

In support of the relief sought, defendants make the following claims: Barri commenced this action as an attempt to deflect attention from the suit defendants intended to initiate against her in Florida state court, to wit; a Petition for Protection Against Exploitation of a Vulnerable Adult, after becoming aware that Barri and Michael had obtained over \$3.8 million of the Knapps' assets over the last several years. Defendants assert that in 2017, Dr. Knapp asked Barri and Michael to sign a promissory note outlining the sums of money given to them from 2009 through 2017. In 2018, Dr. Knapp informed Stacy that he was working to equalize his estate which was to be divided between daughters Stacy and Barri. (Dr. Knapp later executed a second amended trust, which referenced a new promissory note inclusive of monies provided to Barri and Michael through 2018.) Barri and Michael did not sign the 2018 promissory note.

In 2019, Dr. Knapp was hospitalized due to a decline in his health. Defendants allege that during this time, Stacy and Barri disagreed about how to handle the cost of Dr. Knapp's healthcare bills as Barri recommended securing less expensive caretakers. According to defendants, Barri also directed Dr. Knapp to call his banker and transfer \$100,000.00 to her checking account. Dr. Knapp's banker refused to transfer the funds as Marilyn confirmed that the banker should decline to execute the transfer. In addition, Dr. Knapp directed that Stacy review the 2018 promissory note he wanted Barri and Michael to sign. Upon reviewing the note, Stacy became aware of the \$3.8 million already provided to Barri and Michael by Dr. Knapp.

Dr. Knapp passed away on January 24, 2019 and on that date, Barri and Michael signed a new promissory note ("2019 Note") containing repayment terms which differed from those in the second --2018-- promissory note. After Dr. Knapp's funeral, lawyers for the Knapp estate met with the family and a discussion ensued about the monies provided to Barri and Michael. Stacy's attorneys commenced an investigation, after which they decided to draft a Petition of Protection Against Exploitation of a Vulnerable Adult. The intent to file the petition was disclosed. Barri commenced this proceeding shortly thereafter.

In moving the court for dismissal, defendants argue that the amended complaint as against Zev Rosenwaks should be dismissed pursuant to CPLR 3211(a)(7) as same fails to make any substantive allegations against him. Defendants submit that while Zev is named in the complaint there are no allegations contained therein asserting that he made any specific defamatory statement against plaintiff.

Additionally, defendants argue that the causes of action for defamation and defamation *per se* must be dismissed 1) pursuant to CPLR 3016(a) as the amended complaint fails to meet the particularity requirement; 2) pursuant to CPLR 3211(a)(1) and (7) as the alleged statements are entitled to qualified privilege and are supported by documentary evidence; and 3) that the amended complaint fails to allege special damages. With respect to plaintiff's cause of action for intentional infliction of emotional distress, defendants aver that as plaintiff's assertions do not satisfy the

“extreme and outrageous conduct” requirement and is duplicative of the defamation claim, this cause of action must also be dismissed.

In opposition, plaintiff argues that to find in favor of defendants would be to determine disputed facts and that on a CPLR 3211 motion, the court must accept the allegations in the complaint as true. Plaintiff also argues that defendants are not entitled to qualified privilege as the statements made were knowingly false and motivated by malice; the allegations are pleaded with sufficient particularity; and special damages have been asserted. Additionally, plaintiff argues that in the event the amended complaint requires more detail, plaintiff be permitted to replead and/or conform the allegations in the amended complaint to the proof.

As an initial matter, to the extent plaintiff’s opposition includes an application for leave to file a second amended complaint, the application is denied. Plaintiff is expected to comply with CPLR 2215, which requires a non-moving party to seek affirmative relief in a cross-motion, not in opposition papers.

Second, as to the CPLR 3211(a)(1) claim for dismissal based on documentary evidence, such is warranted only where such evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law. (*see* CPLR 3211[a][1]; *Leon v Martinez*, 84 NY2d 83, 88 [1994].) Dismissal is proper where the documents relied upon definitively disposed of a plaintiff’s claim. (*see Bronxville Knolls v Webster Town Ctr. Pshp.*, 634 NYS2d 62, 63 [1995].) In the case at bar, defendants argue that plaintiff and Michael executed the 2017 promissory note detailing several transactions totaling approximately \$3,441,333.00, as of December 26, 2017, to be repaid to Dr. Stanley Knapp. (*Defendants’ exhibit E*). Also, on January 24, 2019, plaintiff and Michael signed a 2019 promissory note acknowledging a debt owed to the Knapps in the amount of \$3,800,003.00. (*Defendants’ exhibit G*). As such, defendants contend that statements made with respect to monies provided to plaintiff and Michael are supported by documentary evidence, to wit: the 2017 and 2019 fully executed promissory notes. While there is no dispute that the monies are owed, the means -- whether deceitful or unscrupulous -- by which Barri obtained the monies remains at issue rendering CPLR 3211(a)(1) inapplicable here.

Turning to defendants’ motion to dismiss plaintiff’s complaint for failure to state a cause of action, pursuant to CPLR 3211(a)(7), the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory. (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Specific to defamation claims, to be successful, a plaintiff must prove that defendant made “a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation *per se*.” (*Epifani v Johnson*, 65 AD3d 224, 233 [2009] [internal quotations and citations omitted].) The complaint must set forth the particular words allegedly constituting defamation, the time, place and manner in which the false statement was made, and specify to whom it was made. (*id.*; *see* CPLR 3016[a]; *Dillon v City of New York*, 261 AD2d 34, 38 [1999].) A defamatory statement is libelous *per se* “if the statement 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.” (*Matovcik v Times Beacon Record Newspapers*, 46 AD3d 636, 637 [2007] [internal quotations and citations omitted].)

Here, Zev is named as Stacy's husband and alleged to be "acting in concert with" Stacy but without further details or allegations such as, which exact statement or accusation he uttered, at what time, or to whom, this is insufficient. Thus, the amended complaint fails to provide any substantive allegations against Zev. On this point, the court concurs with defendants that the allegations in the complaint, as to both defendants, are not pleaded with the specificity required under CPLR 3016(a). Plaintiff argues that by providing statements, even without quotations, along with approximate dates, that defendants are on notice of the defamatory conduct alleged. Plaintiff's argument is misguided. Plaintiff, in a conclusory fashion, lists generalized accusations she purportedly "learned" were made by defendants to Marilyn and other persons. Plaintiff's amended complaint is devoid of specific details, including what particular words were spoken, at what time, what location, and by which defendant. Further, plaintiff claims that the false statements were published to Marilyn, Mr. Hooker, and health care aides, as well as, other family members, yet no particulars are alleged as to what exact defamatory words were spoken, when, where, by whom, or to whom. Instead, plaintiff summarizes conversations had between herself and her mother and herself and Mr. Hooker where she was met with less than desired responses. Plaintiff speculates that defamatory statements must have been made by defendants to cause Marilyn and Mr. Hooker to respond to her in such a manner. The amended complaint is wholly comprised of these vague, general, and indirect allegations. While the court has given plaintiff the benefit of every possible favorable inference, the allegations in the amended complaint amount to mere conjecture and fail to provide sufficient specificity to meet the standard for a defamation action.

Moreover, the amended complaint fails to assert special damages. Plaintiff's assertions that the defendants are acting with the intent to disinherit her does not demonstrate special damages as she has not avowed currently being disinherited thus, the matter is not ripe. (*see Franklin v Daily Holdings, Inc.*, 135 AD3d 87 [1st Dept 2015] [wherein the court stated that special damages consist of the loss of something economic flowing directly from the injury to reputation caused by the defamation.] As such, the amended complaint fails to comport with the requirements of CPLR 3016(a). Accordingly, dismissal is warranted as to the causes of action for defamation and defamation *per se*.

As to defendant's argument regarding qualified privilege, said privilege is invoked where a communication is fairly made by a person in the discharge of some public or private duty, legal, or moral, or in the conduct of his own affairs, in a matter where his interest is concerned. (*see John W. Lovell Co. v Houghton*, 116 NY 520 [1889].) However, malice destroys qualified privilege and the burden of proof on the issue of malice is placed upon plaintiff. (*see Stega v NY Downtown Hosp.*, 31 NY3d 661 [2018]; *Andrews v Gardiner*, 224 NY 440 [1918].) Stacy, as the Knapp's eldest daughter and beneficiary, has a private, legal, and moral duty over the Knapp's financial affairs. It is uncontested that Stacy and plaintiff are equal beneficiaries of their parents' estate and it is further uncontested that plaintiff has already received \$3.8 million from the Knapps. Stacy undoubtedly has a vested interest in monies provided to plaintiff and how said monies will impact the ultimate distribution of the Knapp's estate. With Marilyn being of advanced years, the monies owed to the estate is of imminent concern. Thus, statements purportedly made regarding financial transactions to plaintiff and her husband would be entitled to qualified privilege and plaintiff's bald assertions that the alleged statements were made with malice or ill intent are insufficient to extinguish the privilege. As stated above, the complaint's lack of specificity is a substantial defect as to the causes of action asserted.

As to the cause of action for intentional infliction of emotional distress (IIED), “[c]ourt[s] ha[ve] enumerated 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.” (*Chanco v American Broadcasting Cos. Inc.*, 27 NY3d 46, 58 [2016] [internal quotation marks and citation omitted]). “Liability has been found only where the conduct has been 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.” (*Howell v New York Post Co.*, 81 NY2d 115, 121 [1993] [internal quotation marks and citations omitted]; accord *Chanco v American Broadcasting Cos. Inc.*, 27 NY3d at 58). “The Court of Appeals has found the foregoing requirements to be rigorous, and difficult to satisfy,” stating that “of the [IIED] claims [it has considered], every one has failed because the alleged conduct was not sufficiently outrageous.” (*Nogueira v B & H Foto & Elecs. Corp.*, 2018 NY Slip Op 30429[U], *3 [Sup Ct, NY County 2018] [internal quotation marks and citations omitted]). Considering that the allegations in the complaint have been found to be conclusory and nonspecific, they are insufficient to support a claim of intentional infliction of emotional distress. As such, this cause of action cannot lie.

Accordingly, it is hereby

ORDERED that plaintiff’s application for leave to file a second amended complaint is denied as it procedurally defective; and it is further

ORDERED that defendants’ motion to dismiss the complaint herein is granted and the complaint is dismissed in its entirety, with costs and disbursements to the defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; 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), within twenty (20) days of the date herein; 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).

March 31, 2021



 HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

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

APPLICATION:

CHECK IF APPROPRIATE: