

Bahar v Sanieoff

2021 NY Slip Op 31355(U)

April 23, 2021

Supreme Court, New York County

Docket Number: 150328/2018

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

-----X

INDEX NO. 150328/2018

ALICE BAHAR,

January 29,

Plaintiff,

MOTION DATE 2021

- v -

MOTION SEQ. NO. 012 013

CHARLET SANIEOFF and ELIZA SABETFARD,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 012) 154, 155, 160, 163, 165, 167, 168, 172

were read on this motion to/for

CONTEMPT

The following e-filed documents, listed by NYSCEF document number (Motion 013) 161, 162, 164, 166, 169, 170, 171

were read on this motion to/for

REARGUMENT/RECONSIDERATION

This case arises from the aftermath of an extramarital affair between Plaintiff Alice Bahar and Defendant Abraham Sanieoff. In motion sequence 012, Defendants seek an order holding Plaintiff in contempt for repeated violation of this court's June 14, 2018 Stipulation and Order and seek dismissal of the amended complaint with prejudice.

In motion sequence 013, Plaintiff seeks leave to reargue this court's decision granting motion sequence 007, Defendants' motion to dismiss certain claims against certain Defendants, which this court granted in its entirety by decision dated November 16, 2020. (NYSCEF Doc No. 150, the "Decision".) Specifically, Plaintiff seeks to reargue this court's decision to dismiss Count 1 (IIED) as against Abraham Sanieoff, Matthew Sabetfard, and Leor Sabetfard, and Count 5 (tortious interference with a prospective economic advantage) as against all Defendants, claiming that this court overlooked material facts concerning the nature and scope of Defendants Matthew and Leor Sabetfard's coordinated conduct, and misapprehended the law related to Plaintiff's IIED

claims and specifically, Plaintiff's civil conspiracy claims as alleged in the fourth amended complaint.

The motions have been fully submitted and are consolidated for disposition.

Background

Shortly after this case was commenced on January 11, 2018, but before Plaintiff had filed her first of four amended complaints, Defendants filed an order to show cause to temporarily restrain Plaintiff from making harassing communications to and about the Defendants (motion sequence 001). (NYSCEF Doc No. 3.) Defendants alleged that Plaintiff had disseminated several vulgar Facebook posts, some being screenshots of her private text message conversations with Defendant Abraham Sanieoff, intending to harass and embarrass the Defendants. (NYSCEF Doc No. 4 at ¶¶ 12-19.) In addition, Defendants alleged that Plaintiff had utilized various "fake Facebook accounts, fabricated cell phone numbers, and anonymous e-mail accounts" to share graphic photographs and suggestive messages to people associated with Defendants, including an email sent to one of their business associates. (*Id.* at ¶ 21-24.) Aside from causing severe distress and embarrassment, Defendants alleged that Plaintiff's then 15-month long campaign of harassment had affected their standing in the community, as well as causing distress to their children, noting that the principal of their children's school had instructed them to find a new school because the mere presence of their children had become a distraction to the learning environment due to continued bullying and gossip. (*Id.* at ¶ 28.)

Before seeking judicial intervention, Defendants' had initially sought to resolve the issues with Plaintiff through a Consent Order with Mutual Restraints, however, when Plaintiff refused Defendants alleged that she escalated her electronic campaign of harassment resulting in their children coming home from school crying because the other children's parents had told them not

to play with them anymore because of the photos and messages that Plaintiff had sent to them. (*Id.* at ¶¶ 24, 28.) On June 14, 2018, the parties appeared in court and resolved motion sequence 001 by entering into a stipulation (the “Stipulation”), agreeing to refrain from

(i) All oral, written, personal, electronic, social media, or other form of contact or communication with one another, unless such communication is in writing (electronic or otherwise), and relates solely to professional real estate business conducted by any of the parties

(ii) Making or causing anyone else to make oral, written, personal, electronic, social media, or other form of contact or communication with one another, their respective friends, family members, acquaintances, or business associates, that harasses, torments, annoys, embarrasses, alarms, or threatens the parties; and

(iii) Making or causing anyone else to make any form of traditional media or social media communication (including but not limited to Facebook, Instagram, Twitter, and SnapChat) intended to harass, torment, annoy, embarrass, alarm, or threaten any party.

(NYSCEF Doc No. 13.)

The Stipulation and Order further provides that it “shall not remain in effect after the case is [concluded]” and that counsel should consult with each other before seeking judicial relief for contempt regarding any alleged violation of the stipulation. (*Id.*)

In December 2018, Defendants sought an order from this court holding Plaintiff in civil contempt for violating the Stipulation and Order by posting text message conversations with Abraham Sanieoff on Facebook (motion sequence 003). (NYSCEF Doc Nos. 23-27.) On February 28, 2019, after Plaintiff failed to appear at the contempt hearing, this court granted Defendants’ motion for contempt, and later issued an amended decision and order, holding, in pertinent part, that if Plaintiff failed to purge her contempt by complying with the Stipulation, the court would enter an order dismissing the complaint. (NYSCEF Doc Nos. 46, 51, the “Contempt Order”.)

Thereafter, on July 30, 2020, Defendants filed motion sequence 011, again seeking to hold Plaintiff in contempt and seeking relief in the form of dismissal of the amended complaint arising from Plaintiff’s alleged violation of the June 14, 2018 Stipulation and Order, based on a Facebook

post disseminated by Plaintiff in July 2020. (NYSCEF Doc Nos. 125, 128.) That post displays a photograph of 25 Grove Street, a rental building central to the facts of this case, and initially bore the following caption:

This photo was taken by me on Sep 25th 2015. Not sure what made me took [sic] it. If I only knew the trauma and deep scars this Street/building (25 Grove) will leave inside of me for the rest of my life. I have chills every time I pass by, I feel sick and want to throw up when I need to walk there. I can't get rid of all the disgusting memories, the smell of the apartments and this monster I was working for.

(NYSCEF Doc No. 131, the "Facebook Post".)

Defendants also submitted the "edit" history of the Facebook post, which demonstrates that the post was edited three times in a span of 20 minutes; a tactic that Defendants allege was intended to bump the post up to the top of Facebook's timeline, so that more Facebook users would see the post. (NYSCEF Doc Nos. 131, 155 at ¶ 46.)

Plaintiff opposed the motion and filed a cross motion seeking to vacate the February 2019 Contempt Order, arguing for the first time that Defendants, when filing motion sequence 003, failed to include certain language required for contempt, in violation of Judiciary Law § 756. (NYSCEF Doc No. 135.) After oral argument was held on October 29, 2020 (NYSCEF Doc No. 149, Transcript), this court denied motion sequence 011 without prejudice to renew in the proper format. (NYSCEF Doc No. 153.) In motion sequence 012, Defendants seek an order pursuant to CPLR 5104, Judiciary Law §§ 753(A) and 756, holding Plaintiff in contempt for repeated violations of this court's June 14, 2018 Stipulation and Order and seek dismissal of the amended complaint with prejudice. (NYSCEF Doc No. 154.)¹

¹ Defendants have now filed a Notice of Motion that includes the notice and warning provisions of N.Y. Judiciary Law § 756. The court notes that Defendants are not seeking to imprison or fine Plaintiff but rather are seeking an order of civil contempt pursuant to Judiciary Law § 753(A) and dismissal of the amended complaint based on Plaintiff's repeated violations of the June 14, 2018 Stipulation and Order.

Discussion

“Any interlocutory or final judgment or order, or any part thereof ... may be enforced by serving a certified copy of the judgment or order upon the party or other person required thereby or by law to obey it and, if he refuses or willfully neglects to obey it, by punishing him for a contempt of the court.” (CPLR 5104.) “Judiciary Law § 753 contains a detailed list of offenses that invoke the contempt penalty and Judiciary Law § 753[A][3] can be read with CPLR 5104, as it, too, offers the remedy of contempt for ‘any ... disobedience to a lawful mandate of the court.’” (*South Park Assocs. v 230 Park S. Apartments, Inc.*, 3 Misc 3d 1111[A], at *2 [Sup Ct, NY County 2004].)

Further, “a so-ordered stipulation can serve as the basis for an ‘order’ that is enforceable by contempt.” (Richard C. Reilly, Practice Commentaries, McKinney’s Cons Laws of NY, CPLR C5104:1.) “The court always has the power to enforce in a summary way, by motion, the observance of an undisputed and proper stipulation entered into by the parties to an action or proceeding, except where the action or proceeding has definitely terminated.” (*Axin v Delibab Corp.*, 24 AD2d 974 [1st Dept 1965].) In the face of such noncompliance, “[c]ourts are justified and enjoy few alternative options in such circumstances except to exercise their ‘inherent power to enforce compliance with their lawful orders through civil contempt.’” (*McCain v Dinkins*, 84 NY2d 216, 227 [1994], quoting *Shillitani v United States*, 384 US 364, 370 [1966].)

“Civil contempt must be proved by clear and convincing evidence and its purpose is to compensate an injured private party or to ensure compliance with a court’s order.” (*Digital Warehouse USA Inc. v Hasan*, 2019 WL 6840407, at *2 [Sup Ct, NY County 2019], citing *Classe v Silverberg*, 168 AD3d 603, 604 [1st Dept 2019].) “To sustain a civil contempt, a lawful judicial order expressing an unequivocal mandate must have been in effect and disobeyed. Moreover, the

party to be held in contempt must have had knowledge of the order, although it is not necessary that the order actually have been served upon the party. In addition, prejudice to the rights of a party to the litigation must be demonstrated.” (*McCain*, 84 NY2d at 226.) “A motion to punish a party for civil contempt is addressed to the sound discretion of the motion court.” (*Only Properties, LLC v The Sylvia Wald & Po Kim Art Gallery*, 2019 WL 6997981, at *2 [Sup Ct, NY County 2019], quoting *Chambers v Old Stone Hill Rd. Assoc.*, 66 AD3d 944, 946 [2d Dept 2009].)

Here, the Stipulation was a valid judicial order expressing an unequivocal mandate that was disobeyed. Namely, Plaintiff was to refrain from making any form of social media communication, including on Facebook, “intended to harass, torment, annoy, embarrass, alarm, or threaten” the Defendants. (Stipulation at 2.) The Facebook Post is a clear violation of that mandate, as Plaintiff’s post described her emotional and physical reactions to events that allegedly occurred at the rental property central to the allegations in the amended complaint, indicating “I can’t get rid of all the disgusting memories, the smell of the apartments and this monster I was working for.” (NYSCEF Doc. No. 131.)

Contrary to Plaintiff’s argument, the Stipulation and Order plainly prohibits the conduct that is at the heart of Defendants’ request to hold Plaintiff in contempt; indeed, the Stipulation and Order does prohibit the Facebook Post “on its face[.]” (NYSCEF Doc No. 167, “Pl.’s Opp” at 4.) The Stipulation was entered into by the parties and so-ordered by the court to resolve motion sequence 001, Defendants’ order to show cause to prohibit Plaintiff from making further disparaging comments about the Defendants via Facebook, text message, and email. (NYSCEF Doc Nos. 3, 10.) Accordingly, it was the clear intent of the parties to prohibit Facebook posts such as this. (*See Stein v Stein*, 130 AD3d 604, 605 [2d Dept 2015] [“When a court enforces a stipulation of settlement, it must effectuate the parties’ intent. As with any contract, where the

terms of a stipulation of settlement are unambiguous, the Supreme Court must give effect to the parties' intent based upon the plain meaning of the words used by the parties".)

Further, Plaintiff's argument that the Facebook Post is not proscribed by the Stipulation and Order because the Facebook Post was not made with the requisite intent of causing emotional harm to the Defendants is without merit and specious. (Pl.'s Opp at 9.) Intent is not mentioned in the second subsection of the Stipulation nor is it required to hold a party in civil contempt. (See *McCain v Dinkins*, 84 NY2d 216, 226 [1994] ["Civil contempt has as its aim the vindication of a private party to litigation and any sanction imposed upon the contemnor is designed to compensate the injured private party for the loss of or interference with the benefits of the mandate"]; *Town of Southampton v R. K.B. Realty, LLC*, 91 AD3d 628, 630 [2d Dept 2012] ["While the same act may be punishable as both a civil and criminal contempt, the two types of contempt serve separate and distinct purposes. . . . [The purpose of an order of civil contempt is] vindication for individuals who have been injured or harmed by a contemnor's failure to obey a court order"].)

There are four elements for civil contempt:

- (1) "it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect";
 - (2) "it must appear, with reasonable certainty, that the order has been disobeyed";
 - (3) "the party to be held in contempt must have had knowledge of the court's order, although it is not necessary that the order actually have been served upon the party";
- and
- (4) "prejudice to the right of a party to the litigation must be demonstrated"
- (See *El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015].)

Contrary to Plaintiff's claims, there is no doubt that the Stipulation and Order plainly prohibits the parties from "[m]aking ... oral, written, personal, electronic, social media, or other form of contact or communication with one another, their respective friends, family members, acquaintances, or business associates; that harasses, torments, annoys, embarrasses, alarms, or threatens the parties[.]" (Stipulation at 2.)

Notably, in making this argument, almost every case cited by Plaintiff is criminal in nature, and thus discusses the requisite conduct for a criminal charge of aggravated harassment. (Pl.'s Opp at 10-14, citing *People v Torres*, 26 Misc 3d 1216[A] [Crim Ct, NY County 2010]; *People v Rodriguez*, 49 Misc 3d 867 [Crim Ct, Bronx County 2015]; *People v Kelley*, 42 Misc 3d 1221[A] [Crim Ct, NY County 2014]; *People v Miguez*, 147 Misc 2d 482 [Crim Ct, NY County 1990]; *People v Perez*, 51 Misc 3d 1215[A] [Crim Ct, NY County 2016]; *People v Couri*, 2002 WL 31748585 [Crim Ct, NY County 2002]; *People v Thompson*, 28 Misc 3d 483 [Crim Ct, Kings County 2010]; *People v Goldstein*, 196 Misc 2d 741 [App Term, 2d Dept 2003]; *People v Mitchell*, 24 Misc 3d 1249[A] [Crim Ct, Bronx County 2009]; *People v Evans*, 21 Misc 3d 260 [Crim Ct, Kings County 2008].)

Plaintiff is incorrect in suggesting that finding that the Post violates the Stipulation would result in an interpretation of the Stipulation "that Plaintiff could be found in civil contempt for making any statement of or concerning the Defendants or the facts and circumstances of this case." (Pl.'s Opp at 6.) The Stipulation is limited in scope and nature to apply only to a certain kind of offensive communication made during the pendency of this litigation, and it specifically excludes communication relating to professional real estate business. (Stipulation at 1.) On the contrary, to accept Plaintiff's interpretation and hold that the Facebook Post does not violate the terms of the Stipulation would render the Stipulation meaningless and deprive the Defendants of the benefit of the agreement.

Finally, Plaintiff's argument that the prior Contempt Order should be vacated because the December 10, 2018 motion papers failed to comply with the procedural requirements in Judiciary Law § 756 fails for multiple reasons. First, that argument has long since been waived. (*In re Kessiah A.*, 143 AD3d 526, 527 [1st Dept 2016] ["Respondent waived his objection as to the

sufficiency of the notice provisions of the petition by failing to raise it timely”]; *James W.D. v Sandra C.*, 44 AD3d 423, 424 [1st Dept 2007] [“Any alleged deficiencies in the notice and warning provisions (Judiciary Law § 756) on the face of petitioner’s contempt application did not cause any undue prejudice to respondent; in light of the long history in this case...”]; *Hensley v Demun*, 163 AD3d 1100, 1101 [3d Dept 2018] [any argument that a contempt petition contravened requirements of Judiciary Law § 756 was waived by failing to timely object on that basis]; *Matter of Laland v Edmond*, 13 AD3d 451 [2d Dept 2004] [“By contesting the father’s motions for contempt on the merits without timely objecting that they did not comply with the notice and warning requirements of Judiciary Law § 756, the mother waived any objections to the validity of the motions based on those requirements”].)

Second, Defendants submit evidence in the form of a December 7, 2018 email indicating that Plaintiff did have actual notice of the contempt hearing. Defendants’ counsel consulted with Plaintiff’s then-counsel prior to seeking judicial relief for contempt of the Stipulation. That email was then forwarded to Plaintiff herself, who responded via email, stating:

There is no violation, there is no case anymore. The agreement is not in effect. I said the the [sic] full detailed story it’s coming SOON so I didn’t say anything yet. That’s my free speech, it’s my personal story and I can tell it to anybody I want. I am writing a diary so don’t really understand what’s the problem. Let me know what day and time to meet you in front of judge Perry. Robert if you want you can join, if not that’s ok. Please see attached a dildo that the landlord gave me and let me know if I should bring that with me to the Judge. [Photo redacted]
(NYSCEF Doc No. 144.)

In addition, a March 11, 2019 letter from Defendants’ counsel confirms a December 18, 2018 conference call between the court, Plaintiff’s then-counsel, and Defendants. Defendants allege that this call also put Plaintiff on notice of the contempt proceeding. (NYSCEF Doc No. 49.) Lastly, Plaintiff’s failure to appear at the contempt hearing does not entitle her to violate and ignore the terms of the Stipulation when she had full knowledge of those terms and was actively

involved in negotiating them through her former counsel. (*See Rosado v Edmundo Castillo Inc.*, 54 AD3d 278, 278-79 [1st Dept 2008].)

Defendants have proven by clear and convincing evidence that Plaintiff's Facebook Post violated the unequivocal mandate set forth in the Stipulation and Order, that Plaintiff had knowledge of such Stipulation, and that Defendants suffered prejudice because of the violation. Based on the record before the court and in the exercise of its discretion, the motion for contempt is granted and the amended complaint is dismissed.

Given the court's decision, motion sequence 013 is rendered moot, nevertheless, the motion seeking to reargue this court's prior decision would also be denied on the merits.

A motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion but shall not include any matters of fact not offered on the prior motion. (CPLR 2221[d].) While the determination to grant leave to reargue lies within the sound discretion of the court, a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided. (*Kent v 534 E. 11th St.*, 80 AD3d 106, 116 [1st Dept 2010] ["Reargument is not a vehicle permitting a previously unsuccessful party to once again argue the very questions previously decided or to assert new, never, previously offered arguments"]; *Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979] [a motion to reargue does not properly serve as a "vehicle to permit the unsuccessful party to reargue once again the very questions previously decided."].)

Here, Plaintiff fails to establish that the court overlooked any material or relevant facts, or misapprehended established principles of law, in making its original determination, and thus, the motion is denied. Plaintiff relies heavily on *Dennis v Napoli*, 2015 WL 4885340 [Sup Ct, NY County 2015], claiming that this court overlooked the nature and scope of Defendants coordinated

and collective conduct, and particularly of Leor and Matthew Sabetfard's participation therein, and that this court misapprehended and misapplied controlling principles of law with respect to conspiracy theory liability and the pleading requirements thereof.

In its Decision, the court reasoned that it was dismissing Count 1 as against Abraham Sanicoff because the sole allegation against him in the fourth amended complaint related to the call he made to Plaintiff to end his relationship with her. (Decision at 4.) The court further reasoned that the only allegations against brothers Leor and Matthew Sabetfard, concerned Plaintiff's claim that they were following her on two occasions. Those allegations alone, however, do not give rise to a cause of action for IIED, whether it is alleged as a civil conspiracy or on a theory of liability of aiding and abetting. "The high standard that must be met to demonstrate extreme and outrageous conduct is conduct that is '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.'" (*Colazzo v Ponte*, 2019 WL 1877214, at *15 [Sup Ct, NY County 2019], quoting *Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 56 [2016].)

Further, the allegations against Abraham Sanieoff and the Sabetfards are factually and significantly distinguishable from the allegations in *Dennis v Napoli*, 2015 WL 4885340 [Sup Ct, NY County 2015], where the court denied the defendants' motion to dismiss. The court in *Dennis* denied defendant's motion to dismiss plaintiff's IIED claim on a theory of aiding and abetting finding that plaintiff's allegations that co-defendant "(1) instructed and authorized [co-defendant] to allow [defendant] access to plaintiff's email account; (2) allowed [defendant] access to plaintiff's personnel file; (3) provided [defendant] with the defamatory statements concerning plaintiff that she then republished to third parties; and (4) gave [defendant] access to his personal Napoli Bern email account and Facebook account"; sufficiently stated a cause of action for IIED. (*Id.* at *8.)

In this court's prior Decision, it found that Plaintiff did not plead facts to allege a claim for IIED against Leor and Matthew Sabetfard because the allegations in the complaint were insufficient to infer that the Sabetfard brothers possessed a shared intent with the alleged primary wrongdoers to inflict emotional harm against Plaintiff. Similarly, Plaintiff failed to allege any facts upon which the court could infer that the two instances where she claimed the Sabetfard brothers had followed her were acts consciously designed to assist the alleged primary wrongdoers in bringing the intended harm to Plaintiff.

There is no basis to disturb this court's November 16, 2020 decision, denying motion sequence 007 in its entirety. Plaintiff raises the same arguments she made in opposition or improperly raises new arguments on this motion, which the court finds unavailing. Accordingly, it is hereby

ORDERED that motion sequence 012, Defendants' motion to hold Plaintiff in civil contempt and dismiss the amended complaint, is granted; and it is further

ORDERED that the amended complaint is hereby dismissed in its entirety as against all Defendants with costs and disbursements as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that motion sequence 013, Plaintiff's motion to reargue, is denied.

04/23/2021

DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: